

Tips on Forming and Operating a Nonprofit

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My Objectives For The Discussion

- Hope that you take something away.
- Learn that while there are differences with public charities and profit making enterprises, each are organisms and the people involved create the team that determines the success of the organization. You must approach a fundraising like a business when building it.
  - How many of you have an organizational chart of your fundraising team?
    - » Not only do you want to engage and/ or train the most qualified person to do the fundraising, but, you want to find people that share the same passion as of that of the mission of the organization.
    - » The team
      - The board
      - Paid staff
      - Volunteers
      - Paid consultants
    - » Attracting the right team members
      - Passion and organization; how you speak about your organization and the available position
  - How many organizations have a written strategic plan for fundraising?
- Provide you a sense of legal landscape
- Provide a context for the macro on the fundraising landscape as knowledge is power
- Start to create and maintain "best practices" for your organization to help continue your organization legacy.
- Take a peak at certain advantageous strategic planning objectives

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The Similarities/ Differences Between Public Charities and Profit Making Enterprises

– Some similarities

- Theoretically, profit making enterprises can engage in good just like charities
- Each type can try to instill a sense of philanthropy or good if part of the overall objectives of the entity
- Each can set up benchmarks to measure "success"
- The general rules of business law apply to each entity. [i.e. if you enter into a contract, its binding]

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The Similarities/ Differences Between Public Charities and Profit Making Enterprises

- Some differences
  - Specific set of rules apply to charities
  - Monies should benefit the public
  - There is NO owner of a private enterprises, whereas,
  - With public charities, salaries cannot be maximized whereas with privately held entities, this is not the case.
  - Tax benefits and privilege of assets accumulating in value with less tax burden; more money to help more people.
  - Incentivize giving; this country is founded upon giving and if people believe in foundations, then, the foundations will give. {Per Giving USA, giving is up by foundations by 1%, a modest increase, in inflation adjusted dollars)
  - The spirit of giving is "good"; it enhances the lives of those who not only receive but also those who give; the spiritual principle results of an ultimate effect if a family and its descendants are able to learn and enjoy giving.

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Landscape Of Statistics On Charities

- An Overview of Some General Statistics on Nonprofits in the US.
- There are 1,046,719 organizations with 501(c)(3) status in the US.
- Reported Value of the Assets of these Organizations in 2008 is $2.6 Trillion.
- From 1993 to present, the aggregate book value of assets has increased by more than 60%.
- IRS Revoked the 501(c)(3) status of 275,000 organizations.
- 26.3% of Americans over 16 volunteered. Total expenditures from 2008 were 1.34 trillion.
- There are 50,000 new 501(c)(3) nonprofits being formed every year.

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What Do These Statistics Mean?

- More people will be helped
- More jobs created
- More potential for abuse
  - Means more chance of tighter controls and scrutiny from our governing bodies.
    - » Changes in IRS Reporting Requirements and Forms
    - » More Audits; random in nature.
- More money given; more people wanting to set up due to a charity explosion

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The Government's Regulations of Nonprofit Organizations

- There are several governmental agencies with jurisdiction over your nonprofit organization: Each governmental agency does something different:
  - Attorney General of California ("AG")
    - http://caag.state.ca.us/ag/index.htm
  - Secretary of State of California ("SOS")
    - http://www.ss.ca.gov/business/business.htm
  - The Internal Revenue Service ("IRS")
    - http://www.irs.gov
  - California Franchise Tax Board ("FTB")
    - http://www.ftb.ca.gov
  - Los Angeles Police Commission
    - http://board.co.la.ca.us/blc/blc_home.htm
  - The "People" or the "Public"
- Much of our discussion will center on the activities of the AG and the IRS.

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The Government's Regulations of Nonprofit Organizations

- Why So Much Oversight?
  - Past Abuse
    - The "Old" family member sham. Ma and Pa Joad are all on salary; doing nothing.
    - More sophisticated rings.
      - » Use of Celebrity; money going into their pockets as kick-backs.
      - » Telemarketers; calling on behalf of "The Firefighters Association of _____"
      - » Unusual "Benefit Transactions".
  - Tax Exemption Is Not A "Natural Right"; It Must Be Deserved
  - Insure The Needs Of The Public Are Met-Forward Looking

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Solicitation and Fundraising Rules

- The California Legislature has divided "solicitations" into two (2) main categories:
  - Solicitation
    - A request for money or Property
    - For "Charitable Purposes"
    - Or used in connection with the name of any charity,
    - Or that said gift will be used in part of whole for a charitable purpose or organization
    - Or the name of any organization of law enforcement personnel is used.
  - Sales Solicitation
    - Any offer to sell
    - An ad, coupon, ticket, membership, magazine subscription, etc.
    - In connection with
      - » An appeal for charitable purposes
      - » Used in connection wit the name of any charity.
      - » Or that proceeds from said sale will go to or be used for any charitable purpose or organization
      - » Or the name of any organization of law enforcement personnel will benefit. California State Fundraising Rules

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Solicitation and Fundraising Rules

- Government Code
  - Pursuant to Section 12581.2, if you do any of the following, you have engaged in an act of solicitation and, must, comply, with all rules and obligations as set forth commencing with Section 12580 of the Government Code otherwise known as the Supervision of Trustees and Fundraisers for Charitable Purposes Act:
    - Any plea, invitation or request for money or any thing of value:
      - » Which is made for "charitable purposes"
      - » The name of any charity, philanthropic or charitable organization is mentioned or referred to in ANY way for the making of such gift.
      - » Any statement that implies in any way that any part of the gift will be used for a charitable purpose.
      - » You use the name of any organization of law enforcement personnel, or who protect public safety, i.e. firefighters.
    - The rules of solicitation that I am about to discuss do NOT apply to:
      - » Government agencies, instrumentalities of any kind
      - » Religious organizations of any kind
      - » Cemetery corporations
      - » Any type of educational institution
      - » Hospitals
      - » Healthcare service providers

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Solicitation and Fundraising Rules

- Reporting Rules
  - » The charity must file with the Attorney General (AG) the organizing document within 30 days of receiving its first charitable property. [This requirement is satisfied by the Secretary of State of California (SOS) who will do this for the organization when the Articles of Incorporation are filed.]
  - » You must file periodic reports with AG.
    - The first such report is known as CT-1, newly revised form and downloadable via the AG's website at http://ag.ca.gov/charities/index.php which must be filed no more than 4 months and 15 days from the first date that the first property is received by the charity.
    - The subsequent report is referred to us as the RRF-1 and must be filed annually no more than 4 months and 15 days from the ending month of the accounting year of the organization.

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Solicitation and Fundraising Rules

- The Nonprofit Integrity Act (2006): Special Rules For Organizations Receiving or Accruing $2,000,000.00 or more in Gross Revenue in any Fiscal Year
  - Gross revenue includes ALL forms of revenue for the purposes of this requirement EXCEPT for:
    - » Grant monies received as a result of governmental contracts
    - » Monies received as a result of governmental contracts for services.
    - » WHICH the governmental entity requires an audit
  - Examples of gross revenue include (except for the above)
    - » All forms of gifts, grants and contributions
    - » Monies received in connection with providing your program to the public
    - » UBIT
    - » Investment returns
    - » Royalties
    - » Rent

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Solicitation and Fundraising Rules

- The Nonprofit Integrity Act (2006): Special Rules For Organizations Receiving or Accruing $2,000,000.00 or more in Gross Revenue in any Fiscal Year

  - You MUST conduct an audit:
    - » That confirms to generally accepted accounting principles (GAAP)
    - » That is prepared by an Independent Certified Public Accountant
    - » Per Government Auditing Standards (The Yellow Book)
    - » Must be available for inspection by AG and general public no later than 9 months after the close of the fiscal year.
    - » You MUST:
      - Have your Board appoint an audit committee ("Audit Committee")
      - The Audit Committee
        - cannot be members of the staff of the charity
        - cannot be the President, CEO
        - Treasurer or CFO
    - » If you have a Finance Committee, Audit Committee cannot have chairperson of the Finance Committee serve.
    - » Members of the Audit Committee cannot receive compensation
      - in Excess Of Compensation for serving on Board
      - Any material financial in any entity doing business with the Corporation.

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Solicitation and Fundraising Rules

- The Nonprofit Integrity Act (2006): Special Rules For Organizations Receiving or Accruing $2,000,000.00 or more in Gross Revenue in any Fiscal Year

  - The Audit Committee shall
    - » Make recommendations to Board on who to hire as auditor
    - » Shall coordinate with Auditor
    - » Shall review and determine whether to accept audit
  - You must either have the Board or, an authorized Committee approve:
    - » Salaries of President, CEO, Treasurer or CFO

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Solicitation and Fundraising Rules

- The AG has power:
  - Pursuant to Section 12586 of the Government Code, the AG has broad powers to MAKE and ENFORCE rules concerning charities and the parties involved in fundraising and soliciting.
  - It may investigate transactions
  - Subpoena documents from all citizens and legal entities
  - Require attendance of persons for hearings and proceedings
  - Institute legal action [up to 10 years after the cause of action accrued]
  - To be a party to ALL actions affecting charitable property
  - Receive copies of all legal instruments that are offered by any person attempting to probate an instrument that was created a testamentary trust for charitable purposes.
  - Receive an application list of all entities from the Franchise Tax Board that are attempting to secure exempt status from taxation
  - AG can apply common law principles
  - Per Section 17510.9 of the Business and Professions Code, receive reports from the organization who received more than 50% of its annual income and more than one million dollars in charitable contributions from donors in the state of California.

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Solicitation and Fundraising Rules

- Penalties and Punishment For Noncompliance with Fundraising Rules
  - Every charity, commercial fundraiser, fundraising counsel or commercial coventurer MAY be penalized a fee of $25.00 for each month in which that individual or entity failed to file a report as required.
  - The AG has the power to also assess "costs and attorneys fees" for noncompliance in enforcing these rules. (This must be per Court Order)
  - Potential liability for violating any fundraising rule of a civil penalty up to $10,000.00. This does NOT apply to offenses relating to failing to file an initial or subsequent RRF-1 with the AG.

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Solicitation and Fundraising Rules

- Commercial Fundraisers (CF)
  - Who is a Commercial Fundraiser:
    - » Per Section 12599 of the Government Code, a commercial fundraiser is
      - Any person, or entity or unincorporated entity who:
        - For compensation
        - Solicits funds, assets or property
        - In California
        - For charitable purposes
      - Or, as a result of solicitation of funds for charitable purposes,
        - Receives, or
        - Controls the funds, assets or property.
      - Or, employs, procures, or engages any compensated person to solicit, receive, or control funds

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Solicitation and Fundraising Rules

- Commercial Fundraisers (CF)
  - Who is NOT a commercial fundraiser
    - » The charitable corporation itself
    - » An employee of the charitable corporation
    - » An employee of a corporation registered as a Commercial Fundraiser
    - » A trustee of a charitable trust

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Solicitation and Fundraising Rules

- Commercial Fundraisers (CF)
  - Rules Regulating Commercial Fundraisers
    - » Must register with AG "PRIOR" to solicitation
    - » Must file renewal registration by Jan 15 of each calendar year
    - » Filing fee is $200.00
    - » Must file an annual financial report accounting for all funds solicited, no later than 30 days from close of preceding calendar year.
    - » You CANNOT solicit unless the Commercial Fundraiser (CF) has complied with the registration or annual renewal and financial
    - » Commercial Fundraiser is a constructive trustee of collected funds; thereby a fiduciary responsibility exists and can be sued under these concepts.
    - » For EACH engagement with a charity, the CF shall:
      - File on a form of AG not less than 10 working days before starting, the description of the engagement and other relevant items.
      - Must have a WRITTEN contract
        - This agreement is available for inspection
        - Must contain the specific provisions which are enumerated in Section 12599 (i)
  - If asked, a CF MUST disclose the total percentage of fundraising expenses versus the amount total amount. CF must disclose within 5 working days of the request.
  - Penalties
    - » Injunction on soliciting can be obtained by AG for noncompliance with any of the above

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Solicitation and Fundraising Rules

- Fundraising Counsel (FC)
  - Who is a FC?
    - » Any individual, or entity:
      - Who for compensation plans, manages or advises OR
      - PREPARES materials for or with respect to solicitation in this state of funds, assets, or property for charitable purposes
      - Does NOT receive or controls any funds
      - Does NOT employ or engage any compensated person to solicit funds.

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Solicitation and Fundraising Rules

- Fundraising Counsel (FC)
  - Who is not a FC
    - » An attorney, investment counsel or banker who
      - in the conduct of that profession
      - advises the client in giving of legal, investment or financial advice.
    - » Charitable trustee
    - » Charitable corporations
    - » A person employed by or under control of a registered FC
    - » Graphic artists
    - » A person whose total annual gross income from these activities does not exceed $25,000.00 in any one year.

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Solicitation and Fundraising Rules

- Fundraising Counsel (FC)
  - Rules for FC's
    - » Must register with AG
    - » Must file annual renewals by Jan 15 every year. $200 filing fee.
    - » Must include the filing a list of all charities performed services for.
    - » Not less than 10 days working day before commence, a form with AG concerning details of engagement.
    - » Must have a WRITTEN agreements per Section 12599.1(e)

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Solicitation and Fundraising Rules

- Commercial Coventurers (CC)
  - Who is a CC?
    - » Any person or entity who
      - Engaged in a business
      - But is not engaged a business of fundraising
      - Represents to the public
      - That the purchase of any goods, services of anything of value
      - Will benefit a charity or charitable act.
  - Rules for CC
    - » A CC does not need to register if:
      - CC has a written contract per Section 12599.2
      - And within 90 days and each successive 90 day period, transfers the funds collected to the target charity AND
      - Provides an accounting to the Charity of the funds.
    - » If does not meet above, then CC must register.

**There are more rules not to be covered at this workshop.

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Solicitation and Fundraising Rules

- Business and Professions Code
  - The Code breaks up solicitation into two categories:
    - Solicitations
    - Sales solicitations
  - The California government requires certain disclosures be made to prospective donors or contributors.
    - Per Section 17510.3, whether a sales solicitation or a "regular" solicitation, the person who is doing the solicitation, if not a CF, must disclose:
    - For different types of person doing the solicitations there are differences.
      - » For volunteers of the organization,
      - » For volunteers under 18,
      - » For CF's
      - » For paid employees
      - » For solicitation by television, letter, phone or not involving direct personal contact, then, different rules.
    - California state rules do not trump city and county ordinances. In other words, if you comply with these then you are complying with state law

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Solicitation and Fundraising Rules

- Business and Professions Code
  - Per Section 17510.87, a CF may not earn fees that are more than 50% of the net proceeds collected.
    - Prior to any solicitation, you must exhibit a card which says "Solicitation or Sales Solicitation Purposes Card"
    - What should this card have:
      - » Name and Address of the soliciting organization
      - » Or name and address of person doing soliciting
      - » All material should be 10 point type
      - » The name and address of each organization benefited by the campaign
      - » The amount stated as a percentage of the total gift that will be used for charitable purposes.
      - » If the solicitation is being conducted by "paid fundraisers" who get a set fee, the estimated amount must be disclosed
      - » If this is not a sale solicitation, the card may state that "audited financials may be by contacting the organization at the address shown".
      - » The tax exempt status of the organization.
      - » The percentage of the total gift deductible under state and federal law
    - Any substitutes for the card?
      - » Yes, a brochure or other similar pre-printed materials with same information on it as above will suffice.
    - Any exemptions from this disclosure law?
      - » Yes, unpaid volunteers who conduct these "sales solicitation" or "solicitations" on behalf of any recognized 501(c)(3) organization

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Solicitation and Fundraising Rules

- 17510.8 Solicitations
  - Tighter requirements of Disclosure for Volunteers vs. Paid solicitor per 17510-17510.95
    - Volunteers under 18 can simply ask for money. No disclosures required.
    - Volunteers 18 or over must state the following disclosures:
      - » Name and address of charity
      - » Charitable purpose
      - » Information on revenue and expenses can be obtained by contracting organization.
        - Upon request, the organization *must* provide revenue and expenses, per GAAP, to the prospective donor.
    - A paid solicitor is:
      - » An outside party or independent contractor – "commercial fundraiser"
      - » Inside staff; an employee – must provide the above in writing.

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Solicitation and Fundraising Rules

- Out of State Solicitations
  - 39 Jurisdictions (States) require some sort of registration of a nonprofit intending on making sales solicitations in their JDX.
  - Unified Registration Statement Version 3.00 and requires supplemental forms from 7 states. (www.multistatefiling.org) has been accepted by 35 out of the 39 JDX's.
  - The JDX's that accept this filing are:
    - Alabama, Arkansas, California, Connecticut, D.C., Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, and Washington
  - The JDX's that DO NOT accept it are:
    - Alaska, Colorado, Florida, District of Columbia, Oklahoma

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Some Rules Concerning Board Governance

- Why is the first topic of conversation when it comes to rules, the rules affecting the Board?
- Today, I am going to be shifting gears between, state law, some federal governance rules, some general common law principles and some big picture concepts in running an efficient board. Please bear with me.

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Some Rules Concerning Board Governance

- Board Power & Responsibilities
  - Per Section 5210, Board has ULTIMATE authority over all activities of the organization.
  - Fiduciaries
  - Board Committees
    - Per Section 5212, the Board may create one or more committees.
      - » A committee
        - Must consist of least two or more board members.
    - Per Section 5231(b), the Board may rely upon information, opinions, reports or statements, by
      - » Officers and Employees
      - » Counsel and independent accountants
      - » Committees of the board
      - » Common examples include:
        - Fund Raising Committee

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Some Rules Concerning Board Governance

- Transparency: A Recurring Theme
  - Remember, I Said "The People" Are A Governmental Agency
  - The Right Of Public Inspection Per Section 6104 of the IRC
  - Who May Inspect?
    - The People: Anybody Who Makes A Request In Writing
    - What does that mean for you?
      - » You can see others activities and operations to learn how to do things better.
  - What May They Inspect?
    - Organizational Documents: Articles, Bylaws, Minutes, etc.
    - All Tax Exempt Applications (i.e. Form 1023, FTB 3500) and related documentation (includes response letters, etc)
    - All tax returns (i.e. Form 990-PF
  - Why A Right Of Public Inspection?
    - Protect Against Fraud
    - The People Are Strong and Will Help Government "Sniff" out abuse.
  - Any Exceptions?
    - Yes, if part of a harassment campaign.
  - Recommendations
    - Maintain A Corporate Kit
    - Upload Documents To Internet
    - Be Transparent

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Some Great Websites

- Board Source (www.boardsource.com)
- Foundation Center (www.foundationcenter.org)
- Chronicle of Philanthropy (www.chronicleofphilanthropy.com)
- Guidestar (www.guidestar.org)
- Nonprofit Times (www.nptimes.com)

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Contact Us

Seton & Associates, A Law Corporation
8730 Wilshire Blvd., Suite 400
Beverly Hills, CA 90211
(310) 557-1923
kseton@setonlawgroup.com

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