

**PERSPECTIVES FROM
A FORMER
STATE CHARITY REGULATOR**

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Profile

My desire to positively impact the nonprofit sector in my role as legal consultant and educator is fueled by my prior experience safeguarding and regulating charitable organizations and their assets for the people of Texas. Areas of specialty include: guidance in attorney general review, inquiry, and intervention; best practices in governance and operations; legal duties of directors/officers; management and modification of restricted trust funds; charitable aspects of nonprofit healthcare transactions; grant compliance; and negotiation/consultation on varied nonprofit issues and disputes.

Education

The University of Texas School of Law - Juris Doctorate with honors

University of Wisconsin-Madison - Bachelor of Arts with honors, Communication Arts

Trained Mediator - 40 hour compliance course completed in 1993 and repeated in 2005

Work Experience

Attorney and Nonprofit Consultant
Staricka Law, PLLC

September 2018-Present

Adjunct Faculty-Nonprofit Law
The University of Texas School of Law

January 2019-Present

Assistant Attorney General, Texas Attorney General's Office

July 1994-July 2018

- Section Chief, Charitable Trusts, Consumer Protection Division April 2001-Sept. 2012
- Senior Atty., Charitable Trusts, Financial Lit. and Charitable Trusts Div. Sept. 2012-July 2018

- Managed and directed team of attorneys and investigators in executing duty of attorney general to protect public interest in charity, including litigation and investigation oversight and review of noticed proceedings involving charities.
- Reviewed legislation/provided resource witness testimony before legislature regarding impact of proposed legislation on charitable sector.
- Collaborated on projects and advisory panels nationwide that focused on facilitating communication across sector, improving regulatory oversight and identifying sector trends.
- Presented frequently on topics of interest to nonprofit and trusts and estates attorneys, charitable sector boards/managers/advisors and regulator community.
- Originated and oversaw implementation of electronic filing system for 990 PF tax returns.

Associate Attorney, Brown Maroney and Oaks Hartline
(now Husch Blackwell)

May 1985 – July 1994

Speeches and Faculty Presentations

- Guest Lecturer at The University of Texas/LBJ School of Public Affairs' Nonprofit Management Course and The University of Texas/School of Law's Nonprofit Law Course
- Annual presenter at State Bar's Governance of Nonprofit Organizations Conference
- Frequent presenter at The University of Texas School of Law's Annual Nonprofit Organizations Institute and The University of Texas/School of Law's Advanced Estate Planning and Probate Course
- Presenter at numerous community colleges, and regional associations of nonprofit practitioners, managers, accountants, development officers and estate planners
- Frequent presenter at National Association of State Charity Officials Annual Conference

Boards/Councils and Civic Engagement

- Board Member, National Association of State Charity Officials, October 2007-October 2014
- Advisory Council, Columbia University's Attorneys General –Charities Law Project, 2009-2016
- Meals on Wheels and More – Lead volunteer team and deliver meals since 1985
- Heartsong Choir - nonprofit *a cappella* ladies' choir- perform monthly for care communities and annually for the public

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PERSPECTIVES FROM A FORMER STATE CHARITY REGULATOR

Please note that the opinions expressed herein are not provided as legal advice. Additionally, the author is a private practitioner and not a representative of the Attorney General of Texas or his office. Past service to the Office of the Texas Attorney General, spanning 24 years and the terms of four attorneys general, contributes to the opinions expressed in these materials.

I. INTRODUCTION.

The Attorney General of the State of Texas is charged with the duty to protect the public interest in charity. Most, though not all, nonprofit corporations are charitable organizations. Nonprofit organizations with a charitable purpose are defined by Chapter 123 of the Texas Property Code as charitable trusts. Charitable trusts also include express trusts, testamentary bequests to charity, lifetime gifts to charitable entities, and funds given in response to a solicitation from a charitable organization or for a charitable purpose, even in the absence of a formal structure. The Office of the Attorney General (“OAG”) discharges the attorney general’s duty through various means and under the authority of the constitution, common law and legislative enactment. A detailed summary of this authority is contained in these materials.

The charge of the Texas Attorney General to protect the public interest in charity is currently housed in two distinct divisions of the OAG—the Financial Litigation and Charitable Trusts Division and the Consumer Protection Division. In September of 2012, the Charitable Trusts Section of the OAG was transferred from the Consumer Protection Division (“CPD”), where it had been housed for decades, to the Financial Litigation Division, which was renamed as Financial Litigation and Charitable Trusts Division (“FLD”). CPD has remained active in the enforcement of charity matters involving the Deceptive Trade Practices-Consumer Protection Act and works in conjunction with FLD in executing the duty to protect the public interest in charity.

II. PERSPECTIVES OF A FORMER REGULATOR.

A. Overview of Investigatory Process.

The OAG receives, logs and reviews complaints related to charitable activity within the State of Texas. There are approximately 100,000 active nonprofit, charitable organizations operating within this state, and countless unincorporated trust entities over which the attorney general has oversight authority. Like most government agencies, the OAG has only limited time and resources

available to assist in its varied enforcement efforts and ongoing duties. Consequently, the OAG is unlikely to conduct full and formal investigations of every complaint received by it. Typically, the OAG will consider the likelihood of substantial harm to the public and/or the charitable interest at stake and research all publicly available information to aid in its determination whether to proceed with a formal investigation,

Under the statutory authority specific to the Texas Attorney General, the OAG may investigate all corporations defined as filing entities in the state. See Texas Business Organizations Code (“TBOC”) §§12.151-156. Further, CPD only (not the OAG generally) may issue investigative demands to any person (including individuals) under the authority of the Texas Deceptive Trade Practices-Consumer Protection Act. §§17.61 *et. seq.* of the Texas Business and Commerce Code (“DTPA”).

If a “formal” investigation is opened by the OAG, the first step may be the issuance of a request to examine documents pursuant to the TBOC and/or a civil investigative demand under the authority of the DTPA. Pursuant to the relevant statutory authority, all documents produced in response to an investigative request are protected by confidentiality, subject to certain exceptions. See TBOC, §12.154 and DTPA §17.61(f). The request, itself, however, is generally open to the public in response to a proper request under the Texas Public Information Act. Chapter 552, Tex. Gov’t Code. Statements under oath may also be pursued as a matter of right under the authority of the DTPA, or with court authorization pursuant to TRCP 202.

The detailed anatomy of an attorney general investigation is beyond the focus of these materials. Factors which “may” lead to attorney general review of the management and operations of nonprofit organizations and other charitable trusts follow.

B. Common Mistakes

The starting point of an analysis of a charitable nonprofit organization’s rights as relates to requests from an attorney general is to understand the purpose of the organization. Nonprofit charitable organizations may not pay dividends to private purposes. Unlike for profit entities, the assets of a charitable organization belong to the public and the nonprofit through its directors and officers manages the assets of the nonprofit entity for the benefit of the public. As there are no shareholders to protect the public’s assets, the right and duty to do so falls to the attorney general of the state in which the entity is incorporated/doing business.

Directors and officers of charitable organizations have a

duty to serve the purpose or “mission” of their organization. At the same time, directors and officers must address the corresponding operational challenges surrounding the execution of that mission. Of course, all charitable entities share the commonality of their nonprofit, mission-based structure and all operate under similar laws and principles of good governance. The result of holding too steadfastly to a belief that somehow your organization is unique and exceptionally challenged in comparison to other charities, however, may lead organizations to bend, or knowingly break, the rules.

The present reality of the nonprofit sector is that accountability is not solely the interest of the attorney general of the state in which the organization is incorporated. Increasingly, attorneys general are bringing actions against foreign nonprofit corporations doing business in their state. Charitable entities and trusts are subject to heightened scrutiny by individual donors and grantmaking organizations, umbrella groups, nonprofit and trust counsel, watchdog organizations, bloggers, investigative reporters and mainstream press, and members of the general public. All hold certain expectations and judgments which have grown in sophistication and have increased a demand for accountability of the nonprofit sector. Regardless of enforcement statistics suggesting that the individual charity is at low risk of IRS, charitable organizations are never free from the possibility of IRS audit and enforcement measures.

From my current perspective, utilizing my experience as a guide, I offer the following observations for consideration. Common mistakes in nonprofit management and operations may lead to a complaint and serious attention on the part of the OAG. Recognize that merely attracting the attention of the OAG may bring negative consequences to your organization, even if the result of the OAG’s review is resolution short of litigation. More importantly, recognize that the OAG has an absolute right to review and harm to the organization is not a defense.

1. Let the tail wag the dog – Executive director in control of the board.

The board of directors is responsible for managing the affairs of an organization under §22.201 TBOC.

In a “founder’s syndrome” scenario, board members cede control of the organization to the individual responsible for its formation. This lack of control leads to problems which are easily identified through a review of organizational records and often clear violations of the duties of the directors of the organization surface. Directors are responsible for knowing the mission and

overseeing its execution. It is common for an individual who founded the organization to think of it as “my” organization. Without proper board oversight, actions are often taken which violate the duties of care, loyalty and obedience to mission. See §22.221 of the TBOC which specifies the “General Standards for Directors.” Common violations may include the payment of excess compensation, provision of benefit to friends and family to the detriment of mission, technical violation of formation and operational requirements (both state and federal); failure to maintain and produce financial information, overall mismanagement and others.

Even if the executive director isn’t a founder, realize that too much reliance on an executive director is, in effect, allowing control of the affairs to pass to someone other than the board of directors. Although an officer may also be held accountable under the law, the board remains responsible for its own failure to properly safeguard the organization from harm.

2. Fail to adopt and follow policies and procedures/maintain minutes and bylaws.

Clear policies and procedures which are read and accessible for directors and officers alleviate the likelihood that the entity will be operating in the danger zone of operational and financial mismanagement, such as improper or after-the fact-reimbursements without receipts, unauthorized use of credit cards for personal purposes, engaging in conflict of interest transactions, etc. Conflicts of interest and other policies are necessary to avoid breaches of the duty of loyalty and violations of the numerous federal laws focused on maintaining an organization’s tax-exempt status. IRS Form 990 for charitable tax-exempt filers inquires specifically about whether the organization has implemented policies. Although it is true that the IRS does not directly enforce governance standards, the IRS links good governance practices to effective execution of charitable purpose identifies concerns in analyzing whether the organization meets the “operational” test to maintain recognition as a §501(c)(3) tax-exempt entity. From a governance focused enforcement perspective, state charity regulators use the Form 990 as one of the means of reviewing organizations prior to and during a formal investigation.

Bylaws and minutes are required TBOC §§22.102, 3.151. These documents will be among the first documents the OAG will wish to review. Well-constructed bylaws may head off many internal disputes. A state’s attorney general is unlikely to take on a “fix” of a board dispute, but a complaint about a dispute will enter your organization’s name into the OAG database.

Don’t minimize the importance of minutes. Complaints

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Title search: Perspectives from a Former State Charity Regulator

Also available as part of the eCourse

[2020 Nonprofit Organizations Fundamentals eConference](#)

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