

Fundraising 201: An Update on Managing the Legal Risks of Nonprofit Fundraising

Tuesday, October 21, 2014, 12:30 p.m. – 2:00 p.m. ET

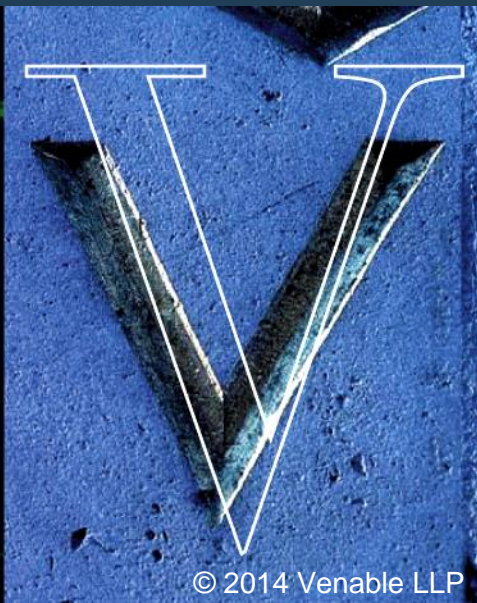
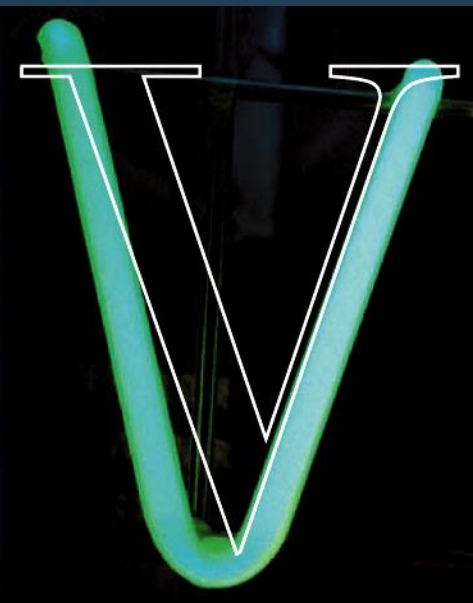
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Upcoming Venable Nonprofit Events

Register Now

November 19, 2014 – [Enhancing the Nonprofit Governance Model: Legal Pitfalls and Best Practices](#)

December 11, 2014 – [LGBT, Religion, and Diversity in the Nonprofit Workplace](#)





Agenda

- State Regulation of Fundraising
 - Charitable Organization
 - Professional Fundraiser / Solicitor / Fundraising Consultant
 - Commercial Co-Ventures
- Tax Considerations - UBIT Issues
- Sales of Merchandise
- Fundraising Events
- Online Fundraising Platforms
- Raffles / Sweepstakes
- Mobile Giving
- Gift Acknowledgment



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State Regulation of Fundraising



State Regulation of Fundraising

- A. Charity / nonprofit organization
- B. Professional solicitor
 - Professional fundraiser
 - Professional fundraising counsel / consultant
- C. Commercial co-venturer





State Regulation – Charitable Organization

- Currently 40 states require charities to register
- **Triggering definition** – Generally triggered by “solicitation” – affirmative act of asking for a gift (“contribution”) or selling goods/services that will benefit a charitable cause.
 - Broad definitions – “by any means”
 - May include grant and sponsorship solicitation
 - *E.g.*, Kentucky





State Regulation – Charitable Organization

- Typical exemptions
 - Religious organizations
 - Organizations that do not raise more than a specified amount from the public (all states) if fundraising is conducted by volunteers
 - Organizations soliciting only within membership
 - Hospitals
 - Named individual
- Some state definitions are broader than 501(c)(3) charities
 - *E.g.*, Arkansas Code Section 4-28-301: "Charitable purpose" means any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic, or eleemosynary objective





State Regulation – Charitable Organization

- Common requirements for charities
 - Registration and renewal
 - Unified Registration Statement
 - Disclosures when soliciting (e.g., identification of state office where financial reports are filed)
 - Annual financial reporting requirements
 - Notification of professional fundraiser, professional fundraising consultant, or commercial co-venture relationships





State Regulation – Charitable Organization

- Recent state updates
 - **Florida** – Chapter 2014-122 (July 1, 2014)
 - Requires conflict of interest policy for organizations registered to conduct solicitations
 - Requires disclosure with Department of Consumer Services contact information on all solicitations (including webpages)
 - Requires fingerprints for professional solicitors
 - **New York** – Nonprofit Revitalization Act (July 1, 2014)
 - New financial reporting thresholds
 - Designated audit committee
 - **Arizona** HB 2457 (Sep. 13, 2013) – Repealed reg.
 - **Nevada** AB 60 (Jan. 1, 2014) – Added reg.





Internet Solicitations – Charleston Principles

- Set of voluntary principles (except in Tennessee and Colorado) drafted by the National Association of State Charity Officials (NASCO)
- Register when:
 - A. Charitable organization is domiciled in state
 - B. Charitable organization is not domiciled in state, but:
 - **Offline activities** would be enough to assert jurisdiction (e.g., send letter or make phone calls into state)
 - Solicits donations on Internet, and
 - Specifically targets those within that state; OR
 - Receives contributions from the state on a repeated and ongoing basis or a substantial basis through their website





Charleston Principles – Example

- **Example** - *Help A Veteran (“HAV”) is a charity that has been incorporated for three years in Virginia and also operates in the District of Columbia and Maryland. HAV wants to use a “Donate Now” button on its website to solicit donations. It will then add everyone who donates to its donor list and invite those persons to events in the District of Columbia, as well as California and New York.*





State Regulation – Professional Solicitor / Professional Fundraising Consultant

- **Professional Solicitor** – For a fee or other compensation, solicits on behalf of a charity, OR has custody and control of funds.

- **Professional Fundraising Counsel** – Manages, advises, plans, produces, or designs a solicitation. Does not directly solicit or hold funds.

- About 41 states require registration and other requirements
 - Registration
 - Bond
 - Filing of contracts
 - Disclosures





State Regulation – Professional Solicitor / Professional Fundraising Consultant

- Often **mandatory** requirements under state law for **inclusion in contracts**, such as:
 - Charity right to rescind
 - Gross collections delivered to charity
 - Donor list is intellectual property of charity
 - Listing of fee calculation
 - Signature of two charity officials

- **Commissions** – to pay or not to pay?





State Regulation – Commercial Co-Venture

- **Commercial Co-Venture (“CCV”)** – An arrangement between a charity and a commercial entity under which the commercial entity advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or charitable purpose
 - *“Every time you buy a bottle of Ethos[®] Water, you contribute 5 cents to the Ethos[®] Water Fund, part of the Starbucks Foundation.”*





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CCV Example





State Regulation – Commercial Co-Venture

■ Current registration states

- Alabama (**bond** and registration)
- California (unless certain requirements are met)
- Illinois (as a charitable trust)
- Massachusetts (**bond** and Form 10B)
- South Carolina (registration and Fundraising Disclosure forms)

■ Current notification states

- Arkansas (charity)
- Connecticut (charity)
- Hawaii (CCV)
- Mississippi (CCV)
- New Hampshire (charity)
- New Jersey (charity)
- Utah (charity)





State Regulation – Commercial Co-Venture

- Developments
 - **Maine** repealed all CCV requirements in 2013
 - **South Carolina** added a registration requirement in 2014
 - CCV Registration Application (CEO and CFO signatures)
 - Notice of Solicitation (registration numbers of CCV and charity)
 - Joint Financial Report with charity no more than 90 days after conclusion of the campaign





State Regulation – Commercial Co-Venture

- Mandatory contractual provisions
 - Dates of solicitation / dates of campaign
 - Amount to be donated (\$ or % of items)
 - Geographic scope
 - Schedule for donations to be transferred
 - Schedule for reporting
 - Charity ability to cancel





State Regulation – Commercial Co-Venture

- Types of required advertising disclosures
 - The name of the commercial co-venturer;
 - The name of the charity and contact information for the charity;
 - The percentage or dollar amount that will be donated per consumer action;
 - The purpose for which the donation will be used;
 - *Applicable dates of the promotion; and*
 - *Any minimum or maximum donation amount that the commercial co-venturer has pledged to donate*





State Regulation – Commercial Co-Venture

- Better Business Bureau Wise Giving Alliance, Standard 19
 - Disclose at a minimum:
 - a) Actual or anticipated portion of the purchase price that will benefit charity (\$ or %)
 - b) Duration of campaign
 - c) Any minimum or maximum contribution amount





State Regulation – Commercial Co-Venture

- New York best practices for transparent cause marketing
 - 1) Clearly describe the promotion
 - Name of charity
 - \$ per purchase
 - Caps on donations
 - Whether consumer action is required
 - 2) Allow consumers to easily determine donation amounts
 - 3) Be transparent about what is not apparent
 - Fixed amounts
 - Ribbons without donations





State Regulation – Commercial Co-Venture

- New York best practices for transparent cause marketing (continued)
 - 4) Ensure transparency in social media
 - 5) Tell the public how much was raised

DONATION INFORMATION	
Name of Charity	ABC Cancer
Donation Amount	10 cents Per Purchase
Limitations on Donation	\$500,000 Maximum Donation
Dates of Promotion	10/1/12 through 12/31/12
More Information	www.product.com





CCV Example



“Champion Warmer”

Help the next generation of Special Olympics athletes reach for the stars with Scentsy’s newest Charitable Cause Warmer. Through February 28, 2013, Scentsy will donate \$8 (USD) from the sale of each *Champion Warmer* to Special Olympics International.



Tax Considerations – UBIT



Tax Considerations – UBIT

- Generally, organizations will be exempt from income received that is related to the tax-exempt mission

- BUT, subject to tax on unrelated business income
 - Trade or business
 - Regularly carried on
 - Not substantially related to organization's exempt purpose





Tax Considerations – UBIT

- Common exceptions to UBIT
 - **Qualified sponsorships** – “Payment...with no arrangement or expectation that such person will receive any substantial return benefit other than the use or acknowledgement of the name or logo” – Code 513(i)
 - **Royalty income** – Passive license of intellectual property – Code 512(b)(2)
 - **Sale of donated goods** – Code 513(a)(1)
 - **Work performed by unpaid volunteers** – Code 513(a)(1)





Tax Considerations – UBIT

- **Take-away** – Consider tax consequences of charity’s activities
 - Use of name and logo v. services / active promotion





Tax Considerations – UBIT

- Examples of UBIT concerns
 - Charity advertising
 - More than acknowledgement
 - Endorsements
 - Exclusive provider arrangements
 - Event tickets or other privileges provided by the charity to the sponsor
 - Contingency / bonus payments
 - Charity sale of goods



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Sale of Merchandise



Sale of Merchandise



Be a fan[®]

Special Olympics is a global movement for people with intellectual disabilities that ties us together through the power of sport. By wearing the laces you show that you are a fan of unity.

www.specialolympics.org/wearthelaces



Sale of Merchandise

- **Hypothetical** – Your marketing department is convinced that the best way to generate new dollars for the organization is through the sale of mugs. Your organization in general tries to avoid any UBIT liability. How do you structure the mug sales campaign?





Sale of Merchandise



- **Example – Selling mugs**
 - **Option #1** – License to vendor
 - Royalty exception to UBIT; no promotion
 - **Option #2** – Charity directly sells
 - Is it substantially related to mission?
 - Is it regularly carried on?
 - **Option #3** – Given as an appreciation gift
 - Does it meet IRS requirements for insubstantial value?
 - 2% of donation or \$104, whichever is less
 - Logo item for donation of at least \$52 (adjusted for inflation) and within “low cost articles” amount (total cost does not exceed \$10.40)





Sale of Merchandise



- **Other legal considerations**
 - **Contracts**
 - Manufacturers
 - Distributors
 - Online distributors
 - Accounting
 - **Sales tax**
 - **Protection of brand**
 - **Jeopardizing tax-exempt status**



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Fundraising Events



Fundraising Events

- Depending on how structured, could trigger professional fundraiser or commercial co-venture concerns – or charity could be passive recipient
- ***Hypothetical*** – The development department at Awesome Charity wants to participate in an obstacle course run to raise funds for the organization. What are the legal implications to keep in mind?





Fundraising Events – Obstacle Run Example

- **Option 1** – Promoter puts on obstacle course run and charity is a recipient of a flat corporate donation. “Come to XYZ Obstacle Course Run. Promoter is donating \$10,000 to Awesome Charity.”
 - Charity is a passive recipient (should give written permission for use of name)
- **Option 2** – Promoter puts on an obstacle course run and advertises a portion of registration fee will benefit charity. “Come to XYZ Obstacle Course Run. 10% of your registration fee will benefit Awesome Charity.”
 - Commercial co-venture considerations
- **Option 3** – Charity puts on an obstacle course run itself and hires a promoter to assist in increasing registrations. “Come to Awesome Charity Obstacle Course Run” (invited by person paid to manage registrations and increase donations)
 - Could trigger professional fundraiser registration



Fundraising Events – Obstacle Run Example (continued)

- Other legal considerations
 - Health and safety concerns
 - Waivers
 - Medical
 - Crisis communications
 - Participant information / privacy concerns
 - Permits
 - Insurance
 - Reputational issues
 - Contract
 - Are contractual obligations consistent with verbal agreement?



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Online Fundraising Promotions



Online Promotions – General

- As a general matter, same concepts apply online
 - If charity is soliciting online, consider **Charleston Principles**
 - If advertising online that the purchase or use of a good or service will benefit a charity, this is a **commercial co-venture promotion**
 - If charity gives consideration for a person, company, or platform to solicit or plan solicitations, could be **professional fundraiser or professional fundraising consultant**
 - Consider **UBIT** concerns

 Breast Cancer Care retweeted



Interflora Flowers @InterfloraUK · Oct 15

Support @BCCare this October by sending a gift that keeps on giving. We'll donate 20% from every sale > ow.ly/CmCl3





Online Promotions – No Purchase

- Question of whether a donation for a Facebook like or tweet, without the requirement that a consumer purchase something, qualifies as a commercial co-venture as there is no “purchase or use of a product or service.”
- Even if not technically a commercial co-venture, continue to recommend:
 - Disclosures
 - Contract between charity and for-profit





Continuous, Multi-Charity CCVs

- *E.g.*, AmazonSmile
- Donations through use of AmazonSmile Foundation; commercial co-venture registered between Amazon and AmazonSmile Foundation
- Tips for participating charities
 - Register if soliciting or promoting participation
 - Consider UBIT (and participation agreement) if promoting
 - Provision of donor list






Crowd-Sourced Fundraising

- **Crowd-sourced fundraising** – Websites allow individuals to make small donations toward a common goal or initiative of an individual or organization

Lava Mae - Mobile Showers for the Homeless

[Story](#) | [Updates 7](#) | [Comments 24](#) | [Fundors 389](#) | [Gallery 4](#)



\$46,614 USD
RAISED OF \$75,000 GOAL

62% ⌚ 11 days left

This campaign started on Sep 15 and will close on October 30, 2014 (11:59pm PT).





Crowd-Sourced Fundraising

- Considerations for charity
 - Charitable solicitation registration
 - Terms and conditions
 - Is there a tipping point structure?
 - When will the donations be transferred?
 - Provision of charitable solicitation acknowledgment?
 - Restriction on funds received
 - Donor list
 - Provision of goods/services to donors
 - WA State Kickstarter suit



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Charitable Raffles / Sweepstakes



Charitable Raffles / Sweepstakes

- Most states govern charitable raffles as an exception to the prohibition on lotteries
 - Qualified organizations and registration requirements vary on a state-by-state basis
- Some states govern sweepstakes, depending on prize value
- Federal tax issues
 - May be considered UBIT – exclusion for income and gaming events staffed by volunteers and bingo – Code sections 513(a)(1) / 513(f)
 - File Schedule G with IRS Form 990 if more than \$15,000 raised in gaming events
 - Private benefit concerns





Charitable Raffles / Sweepstakes

- New developments
 - **Florida** Charitable Gaming Promotion Prohibition
 - HB 155
 - Prohibits nonprofit entities from operating **gaming promotions**
 - Gaming promotion – “a contest, game of chance, sweepstakes, or gift enterprise, conducted by an operator within or throughout the state or other *states in connection with and incidental to the sale of consumer products or services*, and in which the elements of chance and prize are present” (emphasis added)





Charitable Promotions on Social Media

- Social networking sites – Facebook, Twitter, LinkedIn – have their own rules for promotions that apply to nonprofits
 - **Facebook:**
 - Include release of Facebook by each participant
 - Acknowledge promotion is not sponsored, endorsed, or administered by Facebook
 - Cannot use personal timeline to administer promotion
 - **Twitter:** Cannot structure a sweepstakes so it requires or encourages “retweeting”
 - **Pinterest:** Cannot run a contest in which each pin, board, like, or follow constitutes an entry
 - Cole Haan FTC Closing Letter – disclose material connection
 - **Instagram:** Don’t encourage inaccurate tagging; include release of Instagram



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Mobile Giving



Mobile Giving

- Area where the technology is ahead of the law
- **Telephone Consumer Protection Act** – Prohibits using automatic dialing systems to make informational, non-telemarketing calls to wireless devices without express prior consent
 - Text messages included in “calls”
 - *Satterfield v. Simon & Schuster* – Must have prior consent from the consumer to receive messages from that specific entity (not affiliate)
 - If the call was for a commercial purpose, such as advertising a commercial co-venture, then need express prior written consent
- **New Canadian Anti-Spam Law**
 - Need prior express consent before sending electronic messages (including text messages or emails) for commercial purposes to someone in Canada



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Gift Acknowledgement



Gift Acknowledgment

- **General rule** – Charitable contributions to 501(c)(3) organizations can be taken as deductions on donor's federal income taxes if (1) donative intent and (2) exceed fair market value of benefits in return
- Requirements
 - **Recordkeeping** – any amount
 - Donor responsibility
 - **Substantiation** – more than \$250
 - Donor responsibility
 - **Quid Pro Quo Disclosure Statement** – goods or services provided and donor contribution more than \$75
 - Charity responsibility
- For more information, see **IRS Publication 1771**





Questions?

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