

# Discussion on Nonprofits

## Featuring:

**Tameka Corlew (TMC)** is the Assistant Director and Legal Counsel with the Division of Charitable Solicitations and Gaming, Secretary of State's Office. She handles legal issues and statutory questions from the public regarding nonprofit regulatory compliance, charitable solicitation and charitable gaming. Corlew also resolves penalty and enforcement issues through administrative litigation and informal settlement.

**Marjorie Kaup Haines (MKH)** is a commercial real estate attorney with Kay B. Housch, P.C., Nashville, Tennessee, with an enthusiasm for philanthropic projects and charitable organizations.

**Kathleen Henderson (KGH)** is a partner with King & Ballou, which represents businesses, individuals and nonprofit entities. She is a member of the firm's litigation section, chair of its health care practice, and experienced in employment law and federal and state regulatory compliance issues.

**Leigh Ann Roberts (LAR)** is an attorney and mediator at Papa & Roberts, PLLC in Brentwood, Tennessee. In addition to civil and commercial litigation, Attorney Roberts provides formation, board management and charitable registration services for nonprofits across the country. Roberts serves frequently as mediator of nonprofit board disputes, large organizational conflicts and nonprofit merger disputes. Roberts also trains nonprofit executives in conflict resolution and consensus building processes.

Many nonprofits face financial and legal compliance challenges in the current economy. As legal entities, nonprofits depend upon counsel for advice in formation and compliance. Let's discuss the challenges and the ways counsel can help nonprofits succeed.

**KGH:** What are the most significant considerations before organizing as a nonprofit?

**MKH:** Values and the realization of a social mission are the driving force behind most nonprofits. Regardless of size, most nonprofits face challenges in planning, organizing, motivating, and guiding. Many do not have the funds for consultants so they utilize low-cost or volunteer based assistance. Obviously, finding the "right-fit" person to run the nonprofit is the key to overall success. Form a board of trustees/directors with diverse skill sets who take an active role to set the correct strategic direction and provide oversight and leadership. Also realize that being passionate about a cause is not enough. Changes in a community do not occur overnight. Results may take years.

**LAR:** Nonprofits have specific and relatively universal life cycles. For example, the leadership it takes to get a nonprofit off the ground is often different from the types of talents and resources that will be needed in 3 to 5 years. Leadership, programs, and supporter bases will need to grow and adapt. Long-term planning and support from experienced advisors is crucial, especially during a lean economy. Advisors can help clients understand if their mission is truly unique or if they

would be best served by lending their time, talents and resources to another established organization.

**KGH:** What are the advantages in organizing as a nonprofit?

**LAR:** Tax advantages, increased public support and access to resources such as the Center for Nonprofit Management here in Middle Tennessee.

**MKH:** Access to private grants. The National Center for Charitable Statistics reports there are 1,510 private foundations in Tennessee alone in 2010. The Community Foundation of Middle Tennessee serves as a resource for donors who want to make an impact through their grant making, distributing \$79,825,120.00 in 2008.

**KGH:** What are your recommendations for attorneys helping clients organize into a nonprofit?

**LAR:** Ask the right questions and establish a reasonable pace for formation. Nonprofits often start with a great deal of momentum and excitement, similar to new business ventures. Slow down the

process and ask difficult questions. What do success and failure look like for this organization? What does fulfillment of our mission or services look like? What is our culture around conflict? How will decisions be made? What are our attitudes about fund-raising, debt, political/social involvement, etc.? Asking these important questions greatly assists nonprofits in navigating the pitfalls.

**MKH:** Know how to properly file a 501(c)(3)! Get involved with the non-profit organization by attending a board meeting, getting your hands dirty with their projects, review its website; in other words – know exactly what this nonprofit is doing. This will assist them in establishing the right structure from the beginning, putting them in a strong position to carry out their mission.

**KGH:** What is the role of Tennessee Division of Charitable Solicitations and Gaming mission with respect to nonprofits?

**TMC:** The Division assists charitable organizations in meeting the legal requirements for charitable fundraising. This includes registration requirements



for charitable organizations that solicit contributions and for professional fundraisers. We review applications of qualifying 501(c)(3) charitable organizations that apply to hold a gaming fundraising event. People who raise money for medical or related expenses of an individual with a catastrophic illness must establish a trust and file written notice. The Division informs Tennesseans about charities seeking contributions, provides information to assist with charitable giving decisions, and enforces statutes and regulations relating to charitable fundraising and charitable gaming.

**KGH:** What traps or mistakes jeopardize nonprofit status and how can attorneys protect clients?

**LAR:** Nonprofits are often reluctant to contact attorneys due to cost. Failure to obtain crucial guidance during mergers, fundraising campaigns or transitions of many types can generate problems. Encourage nonprofit clients to contact you whenever they contemplate a big event or change. This may save them time and money should there be an issue of noncompliance.

**MKH:** Once the organization has that golden 501(c)(3) status, make sure they don't lose it! The big three no-no's are: understand that profits are not to be paid to individuals but channeled back into the organization's activities; nonprofits cannot endorse or oppose any candidate for public office through contributions or public statements; and while some lobbying may be permitted – this gets tricky – it might be best not to support, propose or oppose any legislation.

**KGH:** Financial issues are a challenge in the current economic environment, what can counsel do to help nonprofits in particular?

**LAR:** Many organizations are merging out of necessity. Mergers can save an organization and create opportunities for greater impact and efficiency but the process must be handled with great care.

Cultures of nonprofit organizations vary widely. Pay attention to the merging of decision-making, leadership and other aspects of the organization's cultures. Failure to fully merge cultures can result in a worse position than before the merger. Problems with coordination of volunteers, inability to sustain programs, staff turn-over, failure to communicate with a broader funder base, and rampant conflict at the director level are just a few symptoms. Attorneys provide a very valuable service when we help nonprofits explore these issues at the time of the "marriage" when there is trust, patience and positivity, versus at the time of the divorce. As a mediator of nonprofit merger and board disputes, I have seen organizations suffer conflict from the failure to merge cultures.

**MKH:** Formerly, nonprofits typically received approximately 30% of their revenues from federal sources. While public demand for services continues to rise, devolution has resulted in drastically reduced federal and state funding. This challenges nonprofits to operate more efficiently and look toward grants, fundraising and solicitation of donations. I concur with Leigh Ann. You will see more strategic alliances and restructuring.

**KGH:** What common trends with respect to nonprofits have you observed in the past three years?

**TMC:** As Leigh Ann noted, there is an increase in nonprofit mergers to address decreasing revenues and provide more effective services. Many are reorganizing as a way to survive and continue their essential services or dissolving and contributing their resources to other nonprofits. Large nonprofits are scaling back or finding ways to collaborate with other nonprofits. Rather than incur overhead expenses, it is easier to collaborate with a nonprofit that already has human resources, facilities, and technology support. Another trend is more oversight and governance of nonprofits. In response to increased reports of fraud, governmental agencies are making more

inquiries into nonprofit governance and solicitation activities. The Division has greatly increased investigations and enforcement of charitable solicitation regulations.

**KGH:** Tell us about your experiences in dealing with government entities while representing nonprofits – do you handle it any differently?

**LAR:** In the interest of full disclosure, I previously served as a nonprofit "regulator" while working at the Tennessee Attorney General's Office. The regulatory representatives in Tennessee are, in my opinion, extremely reasonable and easy to work with, especially when compared with other states. The involvement and approaches of regulators in other states can vary greatly. In some states, nonprofits must navigate not only state regulatory hurdles but also county and local requirements. This generates more fees for that state and more hoops for a nonprofit.

**KGH:** Other than issues in organizing a nonprofit, what are the most common legal concerns that affect your nonprofit clients?

**LAR:** Employment law issues. Just like businesses, nonprofits must frequently navigate the same issues regarding termination, harassment and discrimination that my other for profit clients experience; however, very few nonprofit leaders and managers receive the level of training, resources and support necessary to handle complex employment law issues.

**MKH:** Some other concerns include the potential liability for volunteers getting injured during work projects and using social networking sites (such as posting volunteer's pictures without their permission); as well as accounting and tax issues; some nonprofits simply "didn't know" that they would have to file a tax return.

Continued on Page 16 ➔

At the end game, it is easy to demonstrate the wisdom of a compromise. Positions that began a hundred thousand dollars apart may toward the end of the session have yielded a difference of only ten thousand dollars. If you subtract an attorneys fee of a third and show the difference of approximately sixty-seven hundred dollars, the Plaintiff can figure his odds of achieving more or less at trial, and the cost of doing so. How much will you risk for \$6,700?

Any case in which the parties are reasonable, someone with authority to pay is available for discussion and emotions are held in check with interests being fully explored can be settled.

And once that has been reached, always reduce it to writing. ■



*W. Gary Blackburn is a 1972 graduate of Vanderbilt Law School and past president of the Tennessee chapter of the American Board of Trial Advocates. A former defense attorney, he practices today mostly in civil rights, employment and business litigation and is a Rule 31 certified mediator.*

ful that she did not have to spend her final days uncared for, left to die in urine-soaked clothes. Mary's experience further illustrated to Gary the urgency of the Legal Aid Society's work, where each day is an opportunity to help people move from "surviving" to "living," even at the age of 85.

Outside of the office, Gary enjoys playing basketball and softball. His wife, Carla, is trained as a psychiatric nurse and a Certified Dementia Practitioner. They have four daughters, the youngest of whom is a college sophomore at the University of Chicago.

As Gary looks to the future, he hopes that through his stewardship, the Legal Aid Society will continue to be a beacon of hope for low-income people across Middle Tennessee. Although challenges lie ahead, Gary takes heart in the humorous words of Walt Kelly, creator of the Pogo comic strip: "We are confronted with insurmountable opportunities." But surmounting them is exactly what Gary intends to do. ■

CLE

DECEMBER 16, 2010  
Representing your Clients in Mediation  
• Part of CLE-BY-THE-HOUR  
See CLE Section for more details

**KGH:** What are the most common legal compliance problems or mistakes?

**TMC:** Very basic mistakes such as failing to meet reporting deadlines and submitting incomplete information. These forms are available on the website for online application. Another mistake is not completing a registration application or exemption before beginning fundraising activities. All organizations are required to register with the division if they intend to solicit funds from the public for a charitable purpose, assist an organization in raising funds for a fee, raise money for a catastrophic illness, or hold a charitable gaming event.

**KGH:** How can counsel better represent nonprofits?

**TMC:** Stay in communication with clients regarding all compliance issues. A majority of the attorneys that I talk to are often involved on a pro bono or informal basis. I encourage counsel to treat their nonprofit involvement like any other client and become familiar with

the issues of state and federal compliance. Most counsel representing nonprofits are very good about communicating with the state, but many nonprofits are not represented by counsel except for serving on their board. Counsel can provide ongoing advice during board meetings by advising about regulations and compliance.

**KGH:** Any tips to help attorneys and clients simplify and make the nonprofit organization process easier?

**LAR:** Ask your client to paint you a picture of what the organization will look like in a year or two or three. Get a grasp of their supporter base, their mission, their leadership, their services, etc. Getting this kind of 360° grasp on the vision of the organization will help attorneys anticipate the kinds of issues the organization will face.

**MKH:** Advise the client to get well-informed on the basics of nonprofit formation and management; before filing that charter, the client should have, at a

minimum, a mission statement, a strategic plan, a website ready to launch, and a board of trustees.

**KGH:** Do you treat nonprofits any differently than "for profit" clients?

**LAR:** Unlike closely held businesses, nonprofits generally make decisions through their Board of Directors highlighting the need for consensus building and group facilitation tools for organization leaders. As a mediator of large group disputes such as homeowners association disputes, school board disputes and disputes among boards and community groups, I essentially "coach" new executive directors or chairs that may find themselves in need for such facilitation skills. Assist nonprofit organizations with stream-lining and fortifying their record-keeping procedures. You can help nonprofits build "tickler" systems for remembering regulatory deadlines or administrative filings. These tools can save the organization time, money and headaches down the road. ■