

**POLICY CHALLENGES FOR TEXAS
NONPROFITS IN THE PANDEMIC ERA**

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Richard W. Meyer is an attorney practicing in Austin, Texas, with 35 years' experience with nonprofit organizations, state and national associations and quasi-governmental entities. His background is in business ventures and investments, state government policy and public agency contracting, legislative analysis, administrative law and state and federal regulatory matters. He was course director for the 2015 State Bar Governance of Nonprofit Organizations Course and is a frequent speaker.

As the former public policy advisor and past board chair for the Texas Association of Nonprofit Organizations (TANO), he monitored pending legislation involving the interests of nonprofit entities in the Texas Legislature and U.S. Congress and was the Texas liaison to the National Council of Nonprofits (NCN) in Washington, D.C. Rick serves as counsel for a network of nonprofit enterprises that contract with government entities for goods and services, and he advises state association boards on regulatory, legislative and compliance matters. He represented state agencies in federal courts across the nation while with the Law Enforcement Division of the Texas Attorney General's Office (1981-85) and served as a special prosecutor and investigator of nonprofit organization misconduct. Always involved in cultural and heritage preservation efforts, he was counsel for the Texas Historical Commission (1981-85), was the first counsel for the State Preservation Board (which restored and enlarged the State Capitol), was the first counsel for the highly-successful Texas Main Street Program, was a founder of Preservation Texas (a statewide advocacy organization), and served as chair of the Austin City Historic Landmark Commission for six years and vice chair of the Austin Downtown Commission. He has founded and served on the boards of numerous nonprofit and faith-based organizations, has lectured and written articles for nonprofit managers and for legal and accounting continuing education seminars. He serves on the vestry board of Good Shepherd Episcopal Church in Austin.

Rick is a graduate of The University of Texas School of Architecture (1970) and the School of Law (1974), and is a lifelong supporter of UT Austin including active participation in the Texas Exes, Chancellor's Council, Friar Society, various fundraising initiatives, Friends of the University PAC and annual Orange/Maroon legislative lobbying day. He is licensed in Texas and California, is a commercial arbitrator, and a Texas registered lobbyist.

PRESENTATIONS (Partial List):

"Texas Legislative Update 2019", with Ross Ramsey, for The University of Texas School of Law Nonprofit Organizations Institute, January 24, 2020, Austin, Texas

"Issues and Bills Affecting the Nonprofit Sector in the 2019 Texas Legislative Session", for State Bar of Texas Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 22, 2019

"Advancing the Common Good in the Texas Legislative Process", with Ross Ramsey, for The University of Texas School of Law Nonprofit Organizations Institute, January 17, 2019, Austin, Texas

"Business Leagues and Trade Associations", with Darren Moore, for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 23, 2018, Austin, Texas

Legislative Action Day, presenter for Association of Fundraising Professionals, State Capitol, Austin, Texas, March 30, 2017

"Federal-State Regulatory Update", for State Use Programs Association, Savannah, Georgia, January 25, 2017

"Avoiding Violations of State Law Regulation of Lobbying, Campaign and Advocacy Activities", with Ross Fischer, for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 25-26, 2016

“Texas State Legislative and Regulatory Update”, for The University of Texas School of Law/Philanthropy Southwest Nonprofit Organizations Institute, January 14-15, 2016, Austin, Texas

“Developments Affecting Nonprofits in the Texas Legislature”, for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, August 13-14, 2015

“Expanding the Nonprofit Purpose”, for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 22, 2014

“Developments Affecting Nonprofits in the 2013 Texas Legislature”, for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 22, 2013

“Public Policy Update: Nonprofit Organizations”, for State Use Program Association, New York, N.Y., June 25, 2013, *one hour*

30th Annual Nonprofit Organizations Institute, for The University of Texas School of Law/Conference of Southwest Foundations, January 16, 2013, *seminar presiding officer, four hours; seminar planning committee*

“Public Policy, Regulatory and Legislative Issues on the Horizon”, for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 23, 2012, *50 minutes*

29th Annual Nonprofit Organizations Institute, for The University of Texas School of Law / Conference of Southwest Foundations, January 19, 2012, *seminar moderator/presiding officer*

“What Policies Does My Organization Need?”, for State Bar of Texas, Governance of Nonprofit Organizations CLE Course, Austin, Texas, August 18, 2011, *50 minutes*

“Legislative Update 2011”, for Nonprofit Texas 2011 Seminar, Texas Association of Nonprofit Organizations - Constant Contact, Houston, Texas, June 22, 2011, *45 minutes*

“Legislative and Regulatory Surprises Coming Our Way”, for Planned Giving Council of Texas, Austin, Texas, August 23, 2010, *75 minutes*

“Public Policy, Legal and Regulatory Issues Facing Nonprofit Organizations”, for the Texas Association of Museums annual conference, College Station, Texas, March 18, 2010, *90 minutes*

“Public Policy and Nonprofits: Emerging Issues”, for the Governor’s Nonprofit Leadership Conference, Dallas, Texas, December 9, 2009, *90 minutes*

“Federal and State Public Policy, Legislative and Regulatory Issues Affecting Nonprofit Organizations”, for the Texas Society of Certified Public Accountants conference, Dallas, Texas, May 18, 2009, *one hour*

26th Annual Nonprofit Organizations Institute, “Public Policy, Legislative and Regulatory Issues Affecting Nonprofit Organizations”, for The University of Texas School of Law/Conference of Southwest Foundations, Austin, Texas, January 16, 2009, *one hour*

“Public Policy and Legislative Issues Affecting Nonprofit Organizations”, for State Use Programs Association Conference, Las Vegas, Nevada, February 12, 2009, *two hours*

“Transforming a Nonprofit to Social Enterprise: Legal and Public Policy Issues”, for OneStar Foundation and Nonprofit Resource Center Workshop, San Antonio, Texas, August 22, 2008, *one hour*

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POLICY CHALLENGES FOR TEXAS NONPROFITS IN THE PANDEMIC ERA

I. INTRODUCTION

The first half of year 2020 brought unprecedented societal challenges to the public health system, economy, and interpersonal social relations that affected every person, community, institution, government agency, business or nonprofit organization. The realities and restrictions generated in response to the unique coronavirus (COVID-19) required every person, leader, manager or government official to focus on one's strengths and role in responding to these challenges and, for some, simply to survive through it all.

Nonprofit organizations of all varieties and sizes found that these crisis conditions could be the judge of whether their perceived role in the larger social and economic fabric of society was realistic and sustainable. Good intentions are no guarantee of continued service, operations and success. Organizations that had in place sound governance, seasoned leadership and prudent asset and financial management were ahead of others. As an array of federal and state response and assistance programs, funding and policies unfolded in spring 2020, nonprofit organizations found themselves on equal footing with individuals, businesses, local governments and religious organizations as eligible recipients of relief programs and funding.

Following are some current government and public policy programs, initiatives and unfolding developments that present opportunities for addressing the challenging times ahead.

II. FEDERAL FUNDS AND PROGRAMS BLANKET THE LANDSCAPE

The 116th U.S. Congress, White House, federal agencies and Federal Reserve Bank responded early in 2020 to the prospect of a pandemic catastrophe with an array of unprecedented—if hasty and confusing—federal funding and crisis-response programs that affected virtually every U.S. citizen. State and local governments became recipients or conduits for these funds and programs, as did thousands of nonprofit organizations. Some are considerably more experienced in complex or large-scale operations than others.

Although it may be too soon to gain perspective regarding the effectiveness of these government programs, following are issues that should be familiar to nonprofit leaders and the professionals who advise them:

- **Trillions of dollars for multiple federal stimulus programs** amounts to a lot of cash, so handle with care! More government dollars moved through the U.S. economy during the first six months of 2020 than ever before. The major pandemic-response federal programs one should be familiar with are the CARES Act (Coronavirus Aid, Relief and Economic Security Act, S. 3548, 116th Congress, 2nd Sess. 2020); followed by the HEROES Act; the Payroll Protection Program (Title I of the CARES Act), followed by the PPP Flexibility Act; Families First Coronavirus Relief Act (FFCRA, P.L. 116-127); Economic Disaster Loans; Main Street Lending Program administered by the Federal Reserve; deferral of payroll tax withholding legislation; and others now being considered. A significant point in all this federal activity to boost the economy and assist ordinary citizens is that nonprofit entities were included as eligible participants in pass-through projects and also as eligible recipients of direct funding or federal tax benefits. This is important in that nonprofits have traditionally been ineligible for SBA-sourced funding programs. Also, religious organizations and churches became eligible for funding or program participation, inviting constitutional challenges in the courts. Countless advocates and lobbyists for nonprofit sector interests were on duty early in 2020 in the Congress to ensure that nonprofit organizations would have an equal role in implementing these federal and state relief programs. These advocates deserve recognition for their efforts.
- **Accountability** for the huge amount of federal money that has been passed around since March 2020 must surely be just around the corner. Expect media and watchdog scrutiny of organizations of people who were not vigilant in use of these funds or misused them. Expect follow-up inquiries and audits by federal agencies along with eventual noisy congressional committee review hearings. The CARES Act established a special inspector general for the act and for monitoring pandemic recovery funds and complaints regarding irregularities. Nonprofit organizations administering federal program pass-through funds or receiving them as a beneficiary should inquire whether their internal accounting systems properly track the use of such funds if later reviewed or questioned. See “When Loans Can be Grants Eludes Some” and “Companies Unclear on How to Account for Virus Aid”, *The Wall Street Journal*, June 16, 2020.
- **PPP funding that was hurriedly obtained** through a bank, even though potentially “forgivable”, is a new debt obligation for the

borrower organization. A PPP loan is unsecured, but since it is not expressly subordinated, it might conflict with the terms of existing senior debt and may have an equal right of repayment. Ideally, the PPP loan should be in compliance with the organization's existing loan and lender subordination arrangements. The PPP loan applicant also made a number of specific representations regarding the necessity for the loan, size and eligibility of the organization, and an acknowledgement of the proper use of the funds—all of which must be free of material misrepresentations.

- **Internal management of organizations has changed significantly.** Employees have new leave rights and protections under FFCRA; employer payroll withholding remittances can be deferred; and a risk review of workplace conditions and return-to-work procedures will challenge all managers. Federal agency regulations, emergency regulations, the latest guidances and website Q&A postings should be followed. Watching changing developments announced by the Center for Disease Control, Department of Labor/OSHA, IRS and Department of Health, Education and Welfare is important for legal compliance.

Other than crisis response legislation, following are related issues pending in the 116th U.S. Congress, Second Session 2020, affecting nonprofit organizations:

- To incentivize continued charitable giving, bipartisan bills by Senators Lankford and Coons (S.4032 and H.R.7324) would extend the **temporary “above the line” charitable deduction** that was included in the March CARES Act. These proposals would benefit non-itemizers with a charitable deduction above the personal standard deduction. These are the taxpayers who might then give deductible additional contributions to focused charities that interest them.
- Nonprofits that **self-insured their employee unemployment claims** would get relief in reimbursing their state governments for benefits paid under S. 4001.
- Several tax bills since 2017 have carried provisions relating to the **repeal of the so-called Johnson Amendment**, which is the compromise reached by Congress in the 1960s whereby charitable entities forfeited certain lobbying and campaigning privileges in return for their Section 501(c)(3) tax-exemption status. The provision has

frequently been quietly inserted into longer, complex bills.

- **H.R. 3323** would cure earlier tax reform legislation that requires nonprofits to “silos” each income stream that generates the unrelated business income tax (UBIT), unlike for-profit entities which can spread profits and losses across all operations or lines of business. On April 23, the IRS issued proposed regulations on this subject (85 F.R. 23171).
- In the current heated election environment, veteran observers don't expect a lot of activity from the remaining months of this congressional session on non-critical or routine legislation.
- **Results of the 2020 U.S. Census** will reverberate through governments at all levels, including the subsequent **redistricting of election districts**. Census statistics will determine *how* vast levels of public funds and programs can be allocated, and the outcome of redistricting will determine *who* gets to do that.

III. ROLE OF TEXAS NONPROFITS IN AN UNPRECEDENTED CRISIS

A. Prospects for the 2021 Texas Legislative Session

State Budget for 2021-22: Texas legislators gathering in January 2021 for the 140-day 87th Regular Legislative Session will face the usual needs of a growing state but with the prospect of diminished state revenues due to the economic lull caused by the coronavirus period, the decline in oil prices and limitations on property tax increases. By mid-summer, the Senate and House committees have already locked in the outlines of the 2021-22 two-year state budget. Although finance committee meetings early in 2020 have been interrupted by circumstances, the Legislative Budget Board carries most of the budgetary work. See www.lbb.state.tx.us for detailed information, analyses and resources.

Interim committees appointed on adjournment of the 86th Legislative Session in May 2019 continue their hearings and work, and scores of these committee studies, reports and recommendations will be released before January and are worth watching. Committee activity can be accessed at www.capitol.state.tx.us.

Capitol access and direct in-person advocacy will be very different in the 2021 session. Expect to see restrictions for entering all capitol complex buildings and facilities. Committee hearings with limited seating may become online virtual events. Appointments with elected representatives and staffs may also be limited, so learn to schedule and execute beneficial “digital appointments”. (An alternative: meet them in their local district office.) Constituent “fly-in” days during the session are probably history, as are big-crowd events on the Capitol grounds or at

nearby hotels and venues. Luckily, today's legislative staffers have grown up in the digital culture and are comfortable with online relationships and communications. Social media remains an essential advocacy tool. It's possible that the old-fashioned telephone call will be rediscovered as a useful skill. Watch for periodic updates on bills affecting the nonprofit sector at www.nonprofitlawandpolicy.com.

The Texas State Comptroller is charged with estimating state revenues and presents the newly-seated legislature with a dollar revenues number that it must use in adopting the two-year budget beginning September 2021. However, an immediate concern will be revenue estimates for the second year of the current budget (September 2020 through August 2021), what adjustments can be made by the legislature in January 2021, and whether the state's reserves ("rainy day fund") will be tapped for these purposes. Federal CARES Act funding granted to the state may ease this process, but local governments and school districts will likely be sounding their distress and requesting state aid. To understand the state's budget process, see the current *Budget Process Primer* available at www.comptroller.texas.gov/transparency/budget.

The governor has already directed state agencies to implement an **immediate five-percent reduction** in their approved appropriations, and additional cutback directives are expected. This will impact state agency services and particularly social service organizations under contract to provide for direct needs.

The 2021 legislature may need to address **legal uncertainties generated by coronavirus circumstances** in the areas of worker compensation coverage of coronavirus claims, liability of employers and program managers for workplace exposure, employee leave policies, business interruption insurance coverage, and force majeure clauses in contracts. The U.S. Congress attempted to address some of these issues in the CARES Act and other legislation but to date has not significantly pre-empted state laws on these subjects.

Carry-over **items affecting the nonprofit sector** from the 2019 session deserving attention include the following:

- **HB 2305 / SB 6:** These bills provide for studies regarding additional formal training or possible credentialing or licensing for disaster-relief organizations and volunteers. Scenarios from recent hurricane and flooding disaster-relief efforts by voluntary groups demonstrated the need for formalized public-private-nonprofit-volunteer coordination and proper identification and admission of *ad hoc* volunteer groups seeking admittance to a restricted disaster zone. The Emergency Management Work Group will report

to the 2021 legislature regarding proposals for formalizing disaster relief training.

- **HB 3616** established a task force managed by the Texas Department of Emergency Management (TDEM, see below) to conduct interim studies in anticipation of legislation in 2021. Members will be representatives of faith-based organizations with the duty to develop a plan to improve data collection regarding faith-based disaster response activities, develop best practices for communicating and collaborating in disaster scenarios, and identify inefficiencies and opportunities to address gaps in the state's disaster response capacity. See new §418.251, Tex.Gov.Code.
- The nonprofit sector should consider and support legislation in 2021 for additional legal immunity for disaster-response organizations and their volunteers under Chapter 84, Civ. Prac. & Rem.Code. There were a number of bills left from the last session that deserve another look.

B. Nonprofits should look for funding and collaboration opportunities in new places:

- **Millions in federal coronavirus-response funds** passed through state, county and city governments to the nonprofits that were quick to act. It is possible that these federal and state funding streams may continue after the current coronavirus conditions subside.
- Become familiar with the Texas Department of Emergency Management (TDEM), www.tdem.texas.gov. This revamped state agency saw its traditional disaster-relief role (tornadoes, hurricanes, and floods) turned upside down in responding to a pandemic crisis. Huge sums of federal CARES Act funding passed through TDEM, and it offers organizations training, partnerships and funding opportunities. TDEM manages the State Emergency Management Council composed of 29 state agencies, the American Red Cross and the Salvation Army. The council welcomes guest attendees at its meetings. The agency has an excellent resource for nonprofits with its publication, *Liability Information for Texas Volunteers*.
- **United Ways of Texas** is the statewide organization of local United Ways throughout the state (www.uwtexas.org). It emphasizes building local UW organizational capacity and enhancing and supporting local UW impact. In 2019 it commissioned an in-depth research project and then issued a useful publication that documents the economic impact of the nonprofit sector in

Texas: *Built for Texas-The Impact and Opportunity of Our Nonprofit Sector*.

- **Texas 2-1-1** has been pushed to the limit with coronavirus requests for assistance. All social service nonprofits should be connected to the 2-1-1 network in some form.
- **Texas VOAD** (Voluntary Organizations Active in Disaster) is a statewide membership organization that brings together scores of voluntary organizations that respond to disasters as part of their programs and overall mission (www.txvoad.org). It emphasizes the four Cs: cooperation, communication, coordination and collaboration.
- **OneStar Foundation** brings together key stakeholders from nonprofits, business, government, academia and philanthropy to advance collaborative initiatives that build strong and resilient communities. It is connected to state government through several programs and has a statewide focus on developing local volunteer initiatives (www.onestarfoundation.org).
- **Texas Attorney General Opinion KP-0303 (2020)** demonstrates that nonprofits can look for funding in unexpected places. The opinion affirmed that a sentencing judge can direct seized criminal forfeiture funds to a nonprofit entity providing mental health or drug counseling services to the community. See Code.Crim.Proc., Art. 59.06(d-2). This ruling mirrors 2017 legislation (SB 1488) that permits a sentencing judge to allow a probationer to pay a fee to certain charitable organizations in lieu of community service or fines under Code.Crim.Proc., Art. 42A.304(f). Seizure and forfeiture funds and related personal property can be sizeable in some counties and are usually awarded to participating law enforcement agencies.

IV. REALITY CHECK DURING TOUGH TIMES

Although 2020 may become the banner year in which most nonprofit organizations stepped up to meet the challenges and community needs caused by the pandemic, it draws into relief realities of managing a going enterprise in good times and bad. Time-tested building blocks of a successful organization should be revisited:

- **Sustainability:** Someone has to say it: A lot of small and medium-size organizations will not survive 2020 if they had no substantial operating reserve funds, grants from only one source or restricted funding, dependence on one annual fundraising event, no bank line of credit or “angel” supporter, a personnel-heavy budget, an employer self-funded

unemployment withholding plan, an escalating lease or mortgage payment, or a looming one-time financial obligation. Program and event revenues declined. The current lifeboat of federal grants, loans, forbearances and tax concessions is not permanent. Don’t plan on grantor foundations to loosen or undo conventional grant restrictions. Restricted charitable funds remain restricted and cannot be a temptation when facing a deficit budget. Any combination of factors could be the tipping point for a vulnerable operation.

- **Capacity:** The work and programs conducted by a nonprofit should mirror its stated organizational purposes, mission statement and current strategic or business plan. Was the organization able to adapt quickly to changed circumstances in 2020, increased stakeholder needs or expectations, and able to fulfill suddenly-rich grant, funding or contractual opportunities? Did personnel adjustments advance operations? Were innovative fundraising initiatives pursued through social media?
- **Leadership and governance:** A board and key supporters who commit to weather the storm are golden. Were the organization’s managers adequately backed by a board of directors willing to engage new opportunities and face hard decisions regarding funding, operations expenses and personnel? Was an adopted strategic plan really useful in a crisis environment? Was a crisis operations plan in place for remote or off-site work? Going forward, should an entirely different business model be considered?
- **Risk management:** Scores of questions arose regarding all sorts of coronavirus risks and anxieties regarding operations, workplace safety and personnel; adequacy of insurance coverage; force majeure clauses in contracts; abatement of lease or rental payments; and lender forbearance policies.
- **Compliance and accountability:** Beginning in March, the federal government initiated a bewildering array of emergency declarations and orders; federal agency emergency regulations, guidances and Q&As from labor, homeland security, health and welfare departments; OSHA rule changes; and a generous funding stream of relief funds that promise federal review, audits and investigations once things settle down. State and local government emergency declarations added to the thicket, and all will

require serious review and compliance by affected organizations and businesses.

- **Alliances:** With so many actors operating in the coronavirus-relief space, were alliances, joint ventures, partnerships, MOUs or other cooperative relationships available and implemented? Community foundations, nonprofit management centers and statewide networks provided a steadying force for many small, local nonprofits and affiliates of national organizations. On the other side of the coin, some national organizations announced closing or consolidation of local affiliate offices or chapters.
- **Transitions and endings:** The scale of bankruptcies and dissolutions in the nonprofit sector will tell a lot about the stresses encountered in year 2020. Were earlier warning signs of organizational weaknesses ignored? Could a merger or consolidation with a sister group benefit all? A “tough love” approach to counseling an organization in distress is the right thing to do in most circumstances.

LOOKING AHEAD: After the 9/11 slowdown in 2001, many organizations fell into distress and never recovered; others learned and prospered. That period could be considered fire drill 1.0. The 2020 pandemic period is fire drill 2.0. (Our friends and colleagues in the Houston area can claim that Hurricane Harvey was their 1.5.) It’s time to think about preparedness for a future 3.0 event.

Astute nonprofit organizations with services that are in demand, with financial stability, sound governance and management may have prospered in the first half of 2020. Others welcomed simple survival through unpredictable circumstances. Some groups remain in distress and may disappear. As professional attorneys, accountants and consultants, did we maximize our skills and resources in advising them along the way and say and do the right things? Certainly, there is no better engine for effective service and sustainable prosperity than the charitable mission and vision of citizens in every community who are the leaders, volunteers and supporters who drive good works for the common good. Having a role in sustaining that spirit can be our reward from a troubled and memorable year 2020.

APPENDIX 1

Resources and Information

Texas Legislature Online

www.capitol.state.tx.us

Legislative Budget Board

www.lbb.state.tx.us

Nonprofit Law and Policy Blog

www.nonprofitlawandpolicy.com

United Ways of Texas

www.uwtexas.org

Texas Association of Nonprofit Organizations

www.tano.org

Texas Department of Emergency Management

www.tdem.texas.gov

Texas Impact

www.texasimpact.org

National Council of Nonprofits

www.councilofnonprofits.org

Nonprofit Risk Management Center

www.nonprofitrisk.org

Internal Revenue Service

www.irs.gov

