

**TEXAS NONPROFIT CORPORATIONS:
LEGAL SERVICE AND ATTORNEY BOARD SERVICE**

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Mr. Halliburton's upbringing and diverse experience allows him to apply a valuable perspective to many different business endeavors and legal challenges faced by those he serves. He has presented at tax, legal and business conferences throughout the country and on many legal and business topics affecting tax-exempt entities. He has written and published many professional articles. See <https://freemanlaw.com/wp-content/uploads/2021/12/Cory-Halliburton.pdf>.

Mr. Halliburton and his wife of 21 years, Dr. Jamie Halliburton, a principal in the Grapevine-Colleyville ISD, have three children, a large dog named Bear and three unnamed Red Sex Links chickens. Mr. Halliburton enjoys fly fishing and trekking the Llano River with his kids in a kayak or Old Town canoe. In 2013, he ran the Cowtown Marathon in cowboy boots and blue jeans, donning the ironical bib number 1099. In 2017, he "ran the year," logging 2,030 miles. In May 2021, he and a team of four finished 1st overall in a 50-mile weighted-carry event in Washington, D.C., and in November 2021, the team finished 10th in the GoRuck World Championship 50-mile weighted carry (30 lbs). He also achieved a 2,021-mile run/ruck (30 lbs) combo effort in 2021.



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TEXAS NONPROFIT CORPORATIONS: LEGAL SERVICE AND ATTORNEY BOARD SERVICE

I. INTRODUCTION.

This article provides a high-level review of a lawyer's representation of a Texas nonprofit corporation as well as ethical responsibilities of the lawyer who serves as an officer or director of a nonprofit organization. The presentation associated with this article is slotted for 30 minutes, with appropriate allocation of time to ensure participants' receipt of continuing legal education credit in ethics. This article is proportionately limited to select and key areas of consideration on these two broad and important topics.

This article does not address all legal and tax attributes or considerations that a lawyer must contemplate when representing a Texas nonprofit corporation.

II. NONPROFIT ORGANIZATIONS.

The scope of the "nonprofit" sector in the United States is vast.

While the total number of nonprofit organizations may vary according to source, most sources indicate that there are somewhere between 1.6 million and 1.9 million nonprofit organizations in the United States. *See* Statista, Statista Research Department, *Nonprofit organizations in the U.S. – Statistics & Facts* (June 28, 2021) < <https://www.statista.com/topics/1390/nonprofit-organizations-in-the-us/#dossierKeyfigures>>; Cause IQ, *How Many Nonprofits Are in the US?* < <https://www.causeiq.com/insights/how-many-nonprofits-in-the-us/>>; FinancesOnline, *46 Nonprofit Statistics You Should Know: 2022 Financial, Donor & Volunteer Data* < <https://financesonline.com/nonprofit-statistics/>> (noting that there are approximately 106,000 nonprofit organizations in Texas).

The near-two million organizations exist in many shapes and sizes and include religious organizations, churches, schools, health and human services organizations, arts societies, social organizations, trade associations, animal-focused organizations, environmental organizations, civil rights-focused groups, veterans organizations, and many others. And, these organizations are formed under various provisions of state law, and state and federal law might afford exemptions from certain state or federal taxes.

A nonprofit organization may be formed as a charitable trust, a nonprofit corporation, an unincorporated association, or a limited liability company, provided that, for the latter, the member (and all members) meet certain qualifications. *See* TEX. PROP. CODE §§ 111.001-.006 (Texas Trust Code); *id.* at § 123.001(1), (2) (defining "charitable entity" and "charitable trust" for purposes of attorney general oversight and enforcement of and within the charitable organizations industry); TEX. BUS. ORG. CODE §§ 22.001, *et. seq.* (core statutory regime for Texas nonprofit corporations); *id.* at §§ 101.001, *et. seq.* (core statutory regime for Texas limited liability companies); *id.* at §§ 252.001, *et. seq.* (statutory regime for unincorporated associations).

This article and presentation will focus on Texas nonprofit corporations.

III. CHAPTER 22 OF THE TBOC.

Chapter 22 ("Chapter 22") of the Texas Business Organizations Code ("TBOC") is sometimes referred to as the Texas Nonprofit Corporations Act. Chapter 22 provides the general statutory provisions for nonprofit corporations incorporated under Texas law as well as certain requirements for foreign nonprofit corporations. *See id.* at § 22.001(3) (defining "corporation" as a "domestic nonprofit corporation subject to this chapter.>").

Multiple other chapters of the TBOC are woven into Chapter 22. For example, a nonprofit corporation may be formed for any lawful purpose not prohibited under Chapter 22 or Chapter 2. *Id.* at § 22.052; *see id.* at § 2.002 (setting forth permissible, non-exclusive purposes of a nonprofit entity). Chapter 22 also cross-references to statutes in other chapters of the TBOC, including Chapters 3, 6, 10, 11. *See, e.g., id.* at §§ 22.002 (cross-reference to Section 6.002, TBOC), 22.109(b) (cross-reference to Chapter 3), 22.164(a)(3) (cross-reference to Section 11.151, TBOC), and 22.251(a) (cross-reference to Chapter 10, TBOC).

The lawyer for a Texas nonprofit corporation should become familiar with Chapter 22 and its workings with other chapters of the TBOC as well as with the corporation's internal governance structure. In this regard, a Texas nonprofit corporation may be formed only by complying with the filing requirements of Chapter 3 of the TBOC, which requires the filing of a certificate of formation with the Texas Secretary of State in accordance with Chapter 4 of the TBOC. *See id.* at § 3.001(a), 4.001(a)(1).

And, a nonprofit corporation may have bylaws, being "the rules adopted to regulate or manage the corporation, regardless of the name used to designate the rules." *See id.* at § 22.001(2). In some instances, the certificate of formation or bylaws control a matter that may be covered by Chapter 22. In other instances, Chapter 22 may control, even if the

certificate of formation or bylaws provide a conflicting result. Chapter 22 has various statutory provisions that will not apply, if the particular matter is otherwise addressed in the corporation's certificate of formation or bylaws. *See, e.g., id.* at § 22.159(a) (addressing requirements for a quorum of members and providing “Unless otherwise provided by the certificate of formation or bylaws of a corporation, . . .”), 22.103(a) (providing, “[a] provision of a certificate of formation . . . that is inconsistent with a bylaw controls over the bylaw”, with one exception regarding a change in the number of directors, as provided in section 22.103(b)).

IV. NONPROFIT VERSUS TAX-EXEMPT.

“Nonprofit” and “tax exempt” are not synonymous in the world of law and tax.

“Tax exempt” generally means that the entity is, by some act of “legislative grace,” exempt from one or more categories of federal or state taxes. *See, e.g., Upjohn Co. v. Rylander*, 38 S.W.3d 600, 606 (Tex. App.—Austin 2000, pet. denied) (noting that “Deductions and [tax] exemptions . . . are matters of ‘legislative grace’”).

“Nonprofit,” in a literal sense, means not making or conducted primarily to make a profit. Despite the colloquial use of the word, most nonprofit organizations indeed desire to make a profit, that is, to receive and retain some amount of earnings for future use. Similarly, all nonprofit corporations are not necessarily qualified to receive the benefit of all, or even some tax exemption from a state or federal tax.

It is common for an organization to be formed as a nonprofit corporation and to not enjoy an exemption from, for example, federal income tax. In order to enjoy an exemption from a tax, a nonprofit organization must be organized and operated as required by the applicable statutes that afford an exemption from the applicable tax, and, with some exceptions, the nonprofit corporation must apply for and receive a determination of exemption from federal income tax. *See* 26 U.S.C. § 508(c) (excepting churches, integrated auxiliaries, and conventions or associations of churches from the requirement to file an application for exemption from federal income tax).

V. ORGANIZATIONAL DISTINCTIONS BETWEEN STATE AND FEDERAL LAW.

Chapter 2 of the TBOC provides that “[a] corporation formed for the purpose of operating a nonprofit institution, including an institution devoted to a charitable, benevolent, religious, patriotic, civic, cultural, missionary, educational, scientific, social, fraternal, athletic, or aesthetic purpose, may be formed and governed only as a nonprofit corporation under this code and not as a for-profit corporation under this code.” TEX. BUS. CODE § 2.008. Under Chapter 22, “nonprofit corporation” means “a corporation no part of the income of which is distributable to a member, director, or officer of the corporation, except as provided by Section 22.054[.]” TEX. BUS. CODE § 22.001(5).¹ That distribution-limitation requirement is, essentially, an operational matter, not necessarily an organizational matter.

Under Texas law, there is, essentially, no purpose statement requirement in order to qualify as a nonprofit corporation, and a nonprofit corporation may be formed for any lawful purpose not prohibited under Chapter 22 or Chapter 2 of the TBOC. TEX. BUS. ORG. CODE § 22.052; *see id.* at § 2.002 (purposes of nonprofit entity). Chapter 2 of the TBOC provides that a domestic entity may not (1) engage in business that (A) is “expressly unlawful or prohibited by law of this state;” or (B) cannot lawfully be engaged in by the entity under state law; or (2) operate as a bank, trust company, savings association, insurance company, cemetery organization (except where otherwise authorized), or a title company. *See id.* at § 2.003-.003(2)(F).

On the federal law side, however, an organization described in subsection (c) or (d) of section 501 or section 401(a) of the Internal Revenue Code “shall be exempt from taxation” unless such exemption is denied under section 502 or 503 of the Code. *See* 26 U.S.C. § 501(a); *id.* at § 501(c)(1)-(29) (providing a 29-category list of organizations that are exempt from taxation pursuant to 26 U.S.C. § 501(a)); *id.* at § 501(d) (religious and apostolic organizations); *id.* at § 502 (feeder organizations); *id.* at § 503 (providing rules for denial of exemptions and for prohibited transactions).

Organizations formed pursuant to sections 501(c)(3) or 501(c)(6) of the Code are likely the most commonly recognized organizational forms under section 501(c) of the Code.

An entity that is tax-exempt pursuant to section 501(c)(3) of the Code (“Section 501(c)(3)”) is commonly referred to as a “public charity.” Entities that are tax-exempt pursuant to section 501(c)(6) of the Code (“Section 501(c)(6)”) include trade associations, chambers of commerce, professional football leagues, and other business leagues.

To enjoy tax-exemption as an organization described in Section 501(c)(3), the organization **must** be **organized and operated** exclusively for one or more of the purposes specified in Section 501(c)(3). *See* 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(3)-1(a)(1). An organization will be regarded as operated exclusively for one or more exempt purposes only if the organization engages primarily in activities that accomplish one or more of the exempt purposes specified in section 501(c)(3). *See* 26 C.F.R. § 1.501(c)(3)-1(c).

¹ Section 22.054 of the TBOC permits a nonprofit corporation to pay, for example, reasonable compensation for services rendered and authorizes a few other specific distribution activities. *See* TEX. BUS. CODE § 22.054(1)-(4)(B)(ii).

Section 1.501(c)(3)-(1) of the Treasury Regulations contains the organizational test, which has several distinct requirements:

Organizational test—(1) *In general.* (i) An organization is organized exclusively for one or more exempt purposes only if its **articles of organization** (referred to in this section as its *articles*) as defined in subparagraph (2) of this paragraph: (A) Limit the purposes of such organization to one or more exempt purposes; and (B) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.

26 C.F.R. § 1.501(c)(3)-1(b)(1) (emphasis added).

An organization is **organized** exclusively for one or more exempt purposes **only if its articles of organization**: (A) Limit the purposes of such organization to one or more exempt purposes; and (B) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.

Id. at § 1.501(c)(3)-1(b)(1)-(b)(1)(i)(B) (emphasis added).

In **no case** shall an organization be considered to be organized exclusively for one or more exempt purposes, **if, by the terms of its articles**, the purposes for which such organization is created **are broader** than the purposes specified in section 501(c)(3).

Id. at § 1.501(c)(3)-1(b)(1)(iv) (emphasis added).

The term “articles of organization” or “articles” includes the corporate charter or any other written instrument “by which an organization is created.” *See id.* at § 1.501(c)(3)-1(b)(2). The articles of organization do not include, for example, an organization’s bylaws.

Thus, if a Texas nonprofit corporation fails to meet either the organizational test or the operational test, the organization does not meet the qualifications for tax exemption under Section 501(c)(3). If a Texas nonprofit corporation desires to enjoy tax exemption pursuant to Section 501(c)(3), the nonprofit corporation’s articles of organization must contain, and be limited to a proper and qualified purpose, which is far more limited than the purposes permitted by Chapters 22 and 2 of the TBOC. *See and compare* 26 C.F.R. § 1.501(c)(3)-1(b)(1)(iv) (quoted above), *with* TEX. BUS. ORG. CODE § 2.002 (allowing a Texas nonprofit corporation to be formed for practically any lawful purpose); *see also* 26 C.F.R. § 1.501(c)(3)-1(d)(2)-1(d)(5) (defining “charitable”, “religious”, “educational”, and “scientific” as those terms are used in Section 501(c)(3)).

The organizational test prescribed by Section 501(c)(3) requires that the assets of the organization be dedicated for exempt purposes even upon dissolution or termination of the organization.

Distribution of assets on dissolution. An organization is not organized exclusively for one or more exempt purposes unless its assets are dedicated to an exempt purpose. An organization's assets will be considered dedicated to an exempt purpose, **for example**, if, upon dissolution, such assets would, by reason of a provision in the **organization’s articles** or by operation of law, be distributed for one or more exempt purposes, or to the Federal Government, or to a State or local government, for a public purpose, or would be distributed by a court to another organization to be used in such manner as in the judgment of the court will best accomplish the general purposes for which the dissolved organization was organized. However, an organization does not meet the organizational test if its articles or the law of the State in which it was created provide that its assets would, upon dissolution, be distributed to its members or shareholders.

26 C.F.R. § 1.501(c)(3)-1(b)(4) (emphasis added).

Similarly, for a Texas nonprofit corporation to enjoy tax-exemption under Section 501(c)(6), the organization must not be organized for, or engage in a regular business of a kind ordinarily carried on for profit, and, similar to the definition of “nonprofit corporation” under Chapter 22, no part of the net earnings of the organization may inure to the benefit of any private shareholder or individual. *See and compare* 26 U.S.C. § 501(c)(6) and 26 C.F.R. § 1.501(c)(6), *with* TEX. BUS. CODE § 22.001(5) (defining “nonprofit corporation” as a corporation no part of the income of which is distributable to a member, director, or officer of the corporation, except as provided by Section 22.054[.]”).

The above are but two examples of the organizational requirement distinctions between federal and state law with respect to nonprofit and tax-exemption matters.

VI. COMMON AREAS (NON-EXCLUSIVE) FOR LEGAL COUNSEL OF TEXAS NONPROFIT CORPORATIONS.

A. Internal Affairs Doctrine.

Under the internal affairs doctrine, the laws of the state of incorporation apply to the internal affairs of the entity. “Internal corporate affairs” are those matters which are peculiar to the relationships among or between the corporation and its current officers, directors, shareholders and members. The internal affairs doctrine is a conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation’s internal affairs. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) (citing Restatement (Second) of Conflict of Laws § 302 cmt. b. (1971)). External affairs include subjects such as employment law, third party tort liability and third party contractual matters and tax liability, which are typically governed by the state in which the entity does business, where the incidents in issue occurred or by choice of law contractual commitments.

Under Texas law, if the formation of an entity occurs when a certificate of formation or similar instrument (such as articles of incorporation) filed with a “foreign governmental authority” takes effect, the law of the state or other jurisdiction in which that foreign governmental authority is located governs the formation and internal affairs of the entity. TEX. BUS. ORG. CODE § 1.102. “Foreign governmental authority” includes an instrumentality of a jurisdiction other than Texas. *Id.* at § 1.002(30). “Foreign” means, with respect to an entity, that the entity is formed under, and the entity’s internal affairs are governed by, the laws of a jurisdiction other than Texas. *Id.* at § 1.002(27). Texas law defines “internal affairs” for these purposes to “include” “(1) the rights, powers, and duties of its governing authority, governing persons, officers, owners, and members; and (2) matters relating to its membership or ownership interests.” *Id.* at § 1.105.

The lawyer for a nonprofit corporation should be mindful of the internal affairs doctrine so that the counsel provided to the corporation on a particular subject is founded upon the applicable and controlling law.

B. Members versus Non-Member Corporations.

As legal counsel of a Texas nonprofit corporation, it is important to know the governance structure of the entity. For example, under Chapter 22, a Texas nonprofit corporation may have one or more classes of members or may have no members. TEX. BUS. ORG. CODE § 22.151(a). If the corporation has members, the articles of organization or bylaws must include (1) a designation of each class; (2) the manner of appointment of the members of each class; and (3) the qualifications and rights of the members of each class. *Id.* at § 22.151(b)-(b)(3). And, if a nonprofit corporation has members with voting rights, those members have a statutory right to vote on “fundamental action” proposed to be taken by the corporation, such as a winding up, a plan of merger, and even for amending the certificate of formation. *See id.* at § 22.164(a)-(c)(3) (listing ten fundamental actions and member rights regarding same).

Conversely, a Texas nonprofit corporation may be governed solely by a board of directors, *id.* at § 22.201, or the management of the corporation may be vested, in whole or in part, in a particular class of members. *See id.* at § 22.202(a)-(b).

The rights and responsibilities of those within a particular governing body—whether as a board or in a particular membership class—will play a role in molding legal counsel that is provided for the nonprofit corporation’s use and benefit. Chapter 22 and the corporation’s governing documents are the primary sources for understanding the governance requirements for the particular corporation.

C. Related Party Transactions.

Transactions that involve a conflict of interest are common in the world of Texas nonprofit corporations.

For example, if a director serving on a nonprofit corporations board of directors is a horse trader, and if the corporation needs a horse, it may be expected for that board member to offer a horse for trade under favorable terms. However, in order to ensure that the contract between the interested director and the nonprofit corporation is not subject to challenge or scrutiny because of the conflict of interest, the corporation must approve the transaction in accordance with section 22.230 of the TBOC and any internal policy governing related-party transactions.

Section 22.230 applies to a contract or transaction between a nonprofit corporation and (1) one or more directors, officers, or members, or affiliates of any of the former; or (2) any entity in which a director, officer, or member has a managerial or financial interest. *See* TEX. BUS. ORG. CODE § 22.230(a)-(a)(2)(B). Essentially, the statute provides the procedural framework that a nonprofit corporation must undertake to protect the corporation, its governing or approving body, and, in the example above, the horse-trader director.

An otherwise valid and enforceable contract or transaction is valid and enforceable, and is not void or voidable, notwithstanding any relationship or interest described by Subsection (a) [noted above], if any one of the following conditions is satisfied:

- (1) the material facts as to the relationship or interest and as to the contract or transaction are disclosed to or known by:
 - (A) the corporation's board of directors, a committee of the board of directors, or the members, and the board, the committee, or the members in good faith and with ordinary care authorize the contract or transaction by the affirmative vote of the majority of the disinterested directors, committee members or members, regardless of whether the disinterested directors, committee members or members constitute a quorum; or
 - (B) the members entitled to vote on the authorization of the contract or transaction, and the contract or transaction is specifically approved in good faith and with ordinary care by a vote of the members; or
- (2) the contract or transaction is fair to the corporation when the contract or transaction is authorized, approved, or ratified by the board of directors, a committee of the board of directors, or the members.

Id. at § 22.230(b)-(b)(2). Transactions as such, and approval of same, should be properly and documented in minutes or other official records of the corporation and applicable approving body.

Every nonprofit corporation should have (and use) a policy that addresses and provides the internal framework for handling transactions that involve a conflict of interest or a related party to the corporation, including for documenting the process undertaken in accordance with the policy and applicable law.

D. Other Governance Considerations.

Under Chapter 22, the “board of directors” of a Texas nonprofit corporation “means the group of persons vested with the management of the affairs of the corporation, regardless of the name used to designate the group.” *Id.* at § 22.001(1). An attorney for a Texas nonprofit corporation should understand the fiduciary duties owed by the decision-makers of the corporation, mainly, that they must discharge their duties in good faith, with ordinary care, and in a manner the director reasonably believes is in the best interest of the corporation. *See id.* at § 22.221 (setting forth the general standards for directors to discharge their duties); *id.* at § 22.235 (setting forth similar standards for officer liability and conduct). Sections 22.221 and 22.235 in Chapter 22 capture, but do not necessarily wholly supplant, common law concepts of the duty of care, the duty of loyalty, or the duty of obedience, each of which have similar but differing qualities.

“Ordinary care” basically means that the person exercise the degree of care that a person of ordinary prudence would exercise in the same or similar circumstances. If a director or an officer, for example, has special expertise in a particular matter, the ordinary care standard means that degree of care that a person with similar expertise would exercise in the same or similar circumstances. In executing the duty of care, the board of directors of a Texas nonprofit corporation may contract with and rely on experts, such as attorneys. *See id.* at § 22.228.

Common examples of breach (or potential breach) of these duties and standards of conduct include transactions that involve a conflict of interest and not properly presented and approved, usurpation of opportunity of the nonprofit corporation, and unauthorized disclosure of confidential information of the corporation. The lawyer for the nonprofit corporation should regularly remind decision-makers of these important and real fiduciary duties.

E. Nuances of Texas Corporations that are Churches or Religious Organizations.

The lawyer for a Texas nonprofit corporation that is organized and operated as a church or religious organization must be keenly aware of the unique attributes of these entities. For example, most employment laws do not apply to an employee who is a “minister” for employment law purposes. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) (adopting and applying the “ministerial exception” doctrine which provides, essentially, that secular courts lack subject matter jurisdiction to hear claims asserted by employees who are classified as ministers for employment law purposes). Also, a religious corporation may also enjoy statutory exemptions from certain secular employment laws. *See and compare* 42 U.S.C. § 2000e-2(a)(1) (prohibiting employment discrimination based on, among other things, religion), *with* 42 U.S.C. § 2000e-1(a) *and* 42 U.S.C. § 2000e-2(e) (providing certain exemptions from federal religious discrimination prohibitions for employers that are, for example, religious corporations and with respect to certain classifications of employees).

And, a “minister” under applicable employment laws, may not be a “minister” for tax law purposes. *See, generally*, 26 C.F.R. § 1.1402(c)-5 (addressing tax matters for employees who may be ministers for tax law purposes).

These are just a few unique (but substantial) legal nuances that exist in representation of religious corporations. The lawyer for a nonprofit corporation that is organized and operated as a church or religious organization should be keenly aware of these unique legal and tax-related attributes.

F. Records Inspection Matters.

Under Chapter 22, a member of a corporation has a right to inspect certain books and records of a nonprofit corporation related to the member's interest in the corporation. *See id.* at § 22.351. In addition, the nonprofit corporation must maintain and make available for the requesting public, certain financial information as set forth in section 22.353 of Chapter 22. A Texas nonprofit corporation commits a Class B misdemeanor if the corporation fails to maintain a financial record, prepare an annual report, or make the record or report available to the public in the manner required by section 22.353.

A nonprofit corporation is wise to comply with these record requirements and to have a records inspection policy in place to allow for the objective management of requests to inspect that may be received from officers, directors, members, or the public at large. The lawyer for the nonprofit corporation can play a key role in the corporation's compliance with these rules.

G. Property Tax and Exemptions.

The Texas Constitution provides that the "legislature may, by general laws, exempt from taxation . . . all buildings used exclusively and owned by . . . institutions of purely public charity; and all laws exempting property from taxation other than the property mentioned in this Section shall be null and void." TEX. CONST. art. VIII, § 2(a). All real and tangible personal property that the State of Texas has jurisdiction is taxable unless exempt by law. TEX. TAX CODE § 11.01(a).

A Texas nonprofit corporation *may* be entitled to exemption from Texas property. However, not all nonprofit corporations—even those that enjoy exemption from federal income tax under Section 501(c)(3)—are entitled to an exemption from state property taxes. For example, section 11.18 of the Texas Tax Code provides for a property tax exemption for "charitable organizations," as that term is defined in subsections 11.18(d)(1) through (d)(25). "An organization that qualifies as a charitable organization **as provided by this section [11.18]** is entitled to an exemption from taxation of: (1) the buildings and tangible personal property that: (A) are owned by the charitable organization; **and** (B) except as permitted by Subsection (b), are **used exclusively by qualified charitable organizations[.] . . .**" TEX. TAX CODE §§ 11.18(a)-(a)(1)(B) (emphasis added).

Section 11.18 is one example of a state law nuance for property tax exemption matters.

The Texas Tax Code sets forth various statutory regimes for exemption that may be available for a Texas nonprofit corporation, depending on the purposes for which the corporation is formed and the manner in which it is operated. However, the corporation must apply for and receive an exemption. That process is usually performed by use of forms promulgated by the Texas Comptroller or local tax appraisal district.

There are numerous categories and subcategories of organizational and operational types that may qualify for an exemption, and these statutes are contained, primarily, in Chapter 11 of the Texas Tax Code. Some set forth complex, yet precise frameworks for determining whether or not a tax exemption may be available. *See, e.g.,* TEX. TAX CODE § 11.18 (charitable organizations); *id.* at § 11.19 (youth spiritual, mental, and physical development associations); *id.* at § 11.20 (religious organizations); *id.* at § 11.21 (schools).

H. Select General Business Matters of the Texas Nonprofit Corporation.

Texas nonprofit corporations engage an array of transactions, including grant contracts, employment contracts, venue contracts, exhibitor contracts, leases, real property transactions, intellectual property agreements, joint ventures, software licenses, and many, many others. The lawyer for the nonprofit corporation should be well-versed in contract law and in the nuances applicable to the nonprofit corporation client. The lawyer should understand the nonprofit corporation client's risk tolerance and sophistication to understand and manage contract matters such as insurance requirements, indemnification, renewals, choice of law, choice of venue, and other so-called "standard" contract terms and conditions.

In addition, the nonprofit corporation endures human resource legal issues much the same as the for-profit sector. The Fair Labor Standards Act, the Family Medical Leave Act, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, and state law counterparts (to name a few) applicable to employment matters should be considered for general application to the Texas nonprofit corporation, subject to statutory requirements for applicability, of course.

As noted above, corporations that are organized and operated as churches or religious organizations may enjoy an exception to some employment laws, either generally or as to certain categories of employees. But, secular employment laws are, as a general rule, applicable to virtually every Texas nonprofit corporation; exceptions to those laws are, well,

the exception (or sometimes referred to as an “exemption”). The nuances that exist for exemptions or exceptions within the nonprofit corporations sector should be carefully reviewed and understood so that those who represent the nonprofit corporation do not place employment law burdens that do not, under law, apply to the particular client.

VII. ETHICAL CONSIDERATIONS FOR THE LAWYER ON THE NONPROFIT BOARD.

Many Texas nonprofit corporations operate and succeed from the monetary and non-monetary contributions of community leaders and businesses. Within that scope of contributors, lawyers are commonly asked to serve as volunteer officers or directors on boards of directors for nonprofit corporations. By such service, there is a form of non-fungible *quid pro quo* between the lawyer and the corporation—the corporation benefits from an individual that is (presumably) educated, thoughtful, ethical, and strategic, and the lawyer benefits by gaining a sense of community and access to a potential network of referral sources.

The lawyer who serves as an officer or director of a Texas nonprofit corporation must remain vigilant of circumstances that implicate the Texas Disciplinary Rules of Professional Conduct. Below is a non-exclusive list of those Rules that may be implicated in a lawyer’s volunteer service as an officer or director of a nonprofit.

Select Texas Disciplinary Rules of Professional Conduct		
Rule	Excerpts or Summary	Consideration for the Lawyer “on the Board”
Rule 1.01 Competent and Diligent Representation	<p>(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:</p> <p>(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or</p> <p>(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.</p>	<p>A lawyer who serves as an officer or director of a nonprofit corporation is often presumed to know everything about the legal and tax matters that the corporation may face.</p> <p>A lawyer should be careful not to knowingly or unknowingly turn the officer or director “hat” to that of legal advisor, especially in areas for which the lawyer has no or little experience. The laws on topics such as tax-exemption, tax, and nonprofit corporations can be complex and riddled with nuances that not every lawyer may be aware.</p> <p>Bottom Line: The lawyer should stay in his or her lane and avoid stepping into the shoes of the nonprofit corporation’s lawyer when, in reality, the corporation’s best interest dictate that the lawyer should not be there.</p>
Rule 1.06 Conflict of Interest: General Rule	<p>(a) A lawyer is prohibited from representing opposing parties in the same litigation.</p> <p>(b) Except where proper disclosure is made to and consent is received from a client pursuant to Rule 1.06(c), a lawyer shall not represent a person if the representation of that person:</p> <p>(1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s law firm; or</p> <p>(2) reasonably appears to be adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person</p>	<p>Rule 1.06 contains the general rule for conflicts of interest and prohibits or limits a lawyer from engaging in a representation that results in certain conflicts of interest.</p> <p>When serving as a decision-maker for a nonprofit corporation, the lawyer must evaluate all interests that may be implicated by that service, including those of the organization, the clients of the lawyer, the lawyer’s law firm, and the lawyer.</p> <p>The lawyer’s duty of loyalty can become conflicted.</p> <p>As a director or officer of a nonprofit corporation, the lawyer must act in a manner that is in the best interest of the corporation. If those interests are adverse</p>

	<p>or by the lawyer’s or law firm’s own interests.</p>	<p>to the interests of the lawyer’s client or to a client of the law firm, the lawyer is in a conflicted situation and must manage the situation so as to not violate sections 22.221 or 22.235 of the TBOC or Rule 1.06 of the Tex. Disciplinary R. Prof’l Conduct.</p>
<p>Rule 1.08 Conflict of Interest: Prohibited Transactions</p>	<p>(a) A lawyer shall not enter into a business transaction with a client unless:</p> <ol style="list-style-type: none"> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto. 	<p>At a high level, Rule 1.08 prohibits a lawyer from taking advantage of a client. Rule 1.08 provides ethical guardrails and restrictions for certain transactions between a lawyer and a client. If the lawyer serves on a board of a nonprofit corporation, and if the lawyer proposes that the lawyer or the lawyer’s law firm represent that corporation, then the processes required by Rule 1.08 should be followed.</p>
<p>Rule 1.12 Organization as a Client</p>	<p>(a) A lawyer employed or retained by an organization represents the entity. While the lawyer . . . may report to . . . an entity’s . . . authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.</p> <p>(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:</p> <ol style="list-style-type: none"> (1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization; (2) the violation is likely to result in substantial injury to the organization; and (3) the violation is related to a matter within the scope of the lawyers representation of the organization. 	<p>If a lawyer of the nonprofit corporation also serves as an officer or director of the corporation, the lawyer will need to carefully and clearly communicate which “hat” the lawyer is wearing when taking any action. Appropriate and timely disclosure should be made to all within the corporation with whom the lawyer interacts. This can be a difficult web to navigage, and if a lawyer or the lawyer’s law firm represents the nonprofit corporation, a recommended course of action is to resign from decision-making positions for the corporation and to remain solely in the capacity of lawyer for the corporation.</p>

<p>Rule 1.13 Conflicts: Public Interests Activities</p>	<p>“A lawyer serving as a director, officer or member of a legal services, civic, charitable or law reform organization, apart from the law firm in which the lawyer practices, shall not knowingly participate in a decision or action of the organization: (a) if participating in the decision would violate the lawyers obligations to a client under Rule 1.06; or (b) where the decision could have a material adverse effect on the representation of any client of the organization whose interests are adverse to a client of the lawyer.”</p>	<p>Comment 1 to this Rule provides that lawyers are encouraged to engage in community service, and, with two exceptions, they may do so, even if the organization has interests adverse to a client of the lawyer or else serves persons having such adverse interests. However, if the lawyer is asked to participate in a decision that is adverse to the interests of the lawyer’s client, the lawyer should abstain from the decision and recuse himself or herself from obtaining confidential information of the organization about the matter.</p>
<p>Rule 2.01 Advisor</p>	<p>“In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”</p>	<p>Independence—a key attribute of any lawyer and of any officer or director of a Texas nonprofit corporation. A lawyer’s service as an officer or director for a nonprofit may impact the lawyer’s ability to provide candid advice to clients, and the lawyer should remain vigilant of his or her independence and ability to provide candid advice given the duties also owed to the nonprofit corporation.</p>