Tis the Season for Nonprofit Fundraising Risk: Part 2

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Topic: General

The holiday season abounds with fundraisers for charitable organizations and many people are happy to give, perhaps more than they would in other seasons. However, the flip side of the charitable coin is that a pledge to donate in the future can sometimes wind up being a costly risk, instead of a priceless reward for a nonprofit.

One particularly difficult issue for many nonprofits is what to do about a donor that has pledged a particular sum of money, but for some reason or another, has failed to follow through on their promise. Read on to explore the legal and risk implications of an unfulfilled pledge.

Fleeting Promises: Unfulfilled Pledges

The enforceability of a pledge to donate money to a nonprofit is governed by contract law and applicable state law. A pledge to a nonprofit is generally enforceable if it is a legally binding contract. The first two required elements of a valid, enforceable contract–an offer and acceptance–are relatively easy hurdles to cross when it comes to pledges. A donor makes a pledge and your nonprofit quickly acknowledges the donor's generosity. The tricky part arises with the third contract element: *consideration*.

If your donor never comes through and your nonprofit brings a legal claim to enforce a pledge, the trier of fact will review whether the promise to donate included *consideration*, or an exchange made in return for the gift. For example, if your nonprofit promised to plant a tree in the name of the donor and did, in fact, plant the tree after confirming the pledge, your actions could be viewed as consideration, an essential component of an enforceable contract.

Alternatively, a pledge to donate may also be seen as a binding contract even without consideration if there is *detrimental* reliance by your nonprofit on the donor's pledge. For example, imagine that a donor pledges $100,000 to support a campaign to fund the purchase of a new bus to be used to transport clients. With the pledge confirmed, your nonprofit is able to obtain a bank loan and purchase the new bus. In this case, you take the loan out in reliance that the donor's money will enable your nonprofit to pay off the loan. Although you did not offer a return promise, your nonprofit relied on the pledge to make a purchase that it may not otherwise have made.

Some state courts are much more likely to enforce a pledge if traditional contract requirements, such as consideration or reliance, are met. However, there is a modern trend toward enforcing charitable pledges in any case, and to disregard the traditional formula necessitating consideration or detrimental reliance.

Enforcing a Pledge

Generally, a nonprofit can bring a lawsuit to enforce any contractual obligation, including a pledge to donate. However, making the decision to sue a donor requires careful consideration, and many nonprofit leadership teams prefer to walk away from unfulfilled pledges.

Before filing a legal claim to enforce a pledge, consider:

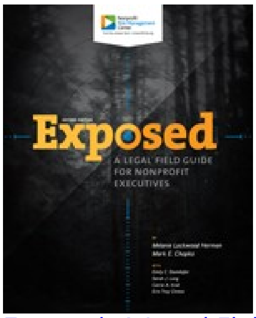
- Was the promise to make a gift in writing?
- Did your nonprofit make a promise in return?
- Did your nonprofit change its financial position-or detrimentally rely on the pledge?
- Is the donor financially able to fulfill the pledge?

- Are the potential costs of bringing a legal claim justified by the amount of the pledge?
- Can your organization afford the cost of litigation with a donor?
- What is the potential fallout from a public battle with a donor?
- Is there a serious risk of other donors and stakeholders viewing the nonprofit in a negative light when they learn of the lawsuit?
- Are there any reputational concerns that could jeopardize the health and wellbeing of your nonprofit?

Carefully drafting donor agreements and ensuring that your nonprofit and the donor agree on the terms of the pledge and timetable for payment are important steps in fundraising risk management. As you finish up your holiday fundraising campaigns, recommit to taking care when you solicit and confirm pledges. Before considering litigation as a strategy for enforcing pledges, review the checklist of key questions above. And most importantly, resolve to use written donor agreements that clearly spell out the expectations and commitments of both the donor and your nonprofit.

Emily Stumhofer is a former Staff Attorney and Project Manager at the Nonprofit Risk Management Center. We welcome your feedback or questions about fundraising risk and reward, enforcing pledges, or other top of mind risks facing your nonprofit, at 703.777.3504.

Risk Resources



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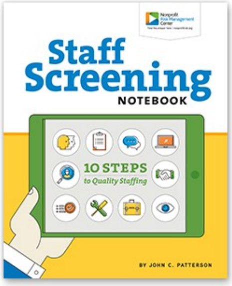

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