

PBPA Podcast Transcript
Episode 21 – Hosting an Online Fundraising Auction: A Win-Win Situation
(34:39 minutes)



Sireesha ([00:03](#)):

Online auctions, standalone or integrated with in-person fundraisers, have been slowly gaining in popularity over the past several years. During the pandemic, they have skyrocketed in popularity as a safe option for nonprofits to continue their fundraising efforts. In this episode of the PBPA Podcast, Mary Benton will talk to us about legal considerations around nonprofits fundraising through online auctions.

Sireesha ([00:37](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha ([01:49](#)):

Married Benton is a partner with the law firm of Alston and Bird, where she specializes in tax law. Mary is also the pro bono partner at Alston. She's been a wonderful partner with PBPA over the years. And once again, she's here to share her expertise with us. Thank you, Mary. Thank

Mary ([02:07](#)):

You so much for having me I'm looking forward to this.

Sireesha ([02:09](#)):

So Mary online auctions have been gaining in popularity over the years. A quick internet search will bring up several websites that offer to run the auction for a nonprofit. A nonprofit may be tempted to just sign up without reading the terms and conditions of the service, but what are some initial due diligence items a nonprofit should really consider when choosing a vendor?

Mary ([02:34](#)):

That is a great first question. Because a lot of these companies are out there. Some are really good and you know, some may be not so good. And so the very first thing that you should do is probably ask other nonprofits if they've used any of these companies and if they have any recommendations. You're really going to get, you know, the best references from folks who have used these third-party vendors to run their online auctions. So I would say that's the most important thing. Then when you have several that have been recommended to you, you might want to narrow that down and have two or three and then conduct interviews with them. And then here's some kind of like best practices that I would say that you would need to ask those vendors to make sure that your process is going to run smoothly.

Mary ([03:28](#)):

So first you want to know how much you're going to have to pay, right? And so you want to get their fee schedule and understand exactly what's included in that. And you want to know based on this contract that you're going to sign with them, what exactly is the third party vendor going to do? And then what are you still going to be responsible for? You want to understand the terms and conditions of the contract and make sure you can meet all of them. And also then determine whether there's anything else you want to try to negotiate. So for example, I think it is very important that there's a dedicated space on the auction site, where you can talk about your organization, so that you can remind people why they're bidding on the items and what the money is going to be used for. And this might not be included in the boiler plate contract terms, and it might not be included for all of the these types of third party vendors.

Mary ([04:28](#)):

So you might want to try to negotiate that another thing is to determine if you're having a hybrid events, you're going to have an in-person auction, as well as doing it online. And we'll talk about those a little bit later, I know in the podcast. But you want to determine if the vendor's going to require someone from their company to be on site during the partly in-person event. And if so, what is their role going to be? And if you don't think that that's necessary and it's going to cost additional money, then you might want to try to negotiate your way out of that. You also want to understand whether the third party vendor would be adding the items that are up for auction onto the site, or will your nonprofit organization also have access to the platform so that you can post items and be able to see everything in real time.

Mary ([05:19](#)):

You want to make sure what the situation is related to that. And then you should understand who is going to be responsible for picking up the auction items from the donors, and then at the end of the auction, delivering those to the winning bidders. And then here's another really important part, is, you want to test out your products. So, you know, the first thing you want to get references and recommendations, but then you also want to test out the software that's going to be used. And so you want to understand it as if you're the bidder. So set it up, you know, ask them to set it up for you so that you know, what the bidding experience is going to be like for the user. The site should be really simple and easy to use during the auction event. And you're going to want to test all the steps in the bidding and buying process.

Mary ([06:08](#)):

One of the things that when I'm an online bidder, I think is really important is when someone outbids you on an item and you get a direct text message, or you get some other alert, so you can go back in and then rebid on that. And you want to make sure that's available. Cause particularly if you know your events going on and someone may have like walked away to make dinner or something like that, when they come back to their phone, they can see that they've been outbid for that. So I think that's really important. And then you want to understand the payment and processing system and how that works and who at the end is going to be responsible for sending acknowledgements and donor receipts. And, really importantly, you want to make sure that there's technical support available at all times, once the site goes live, and you want to know who you can contact, if there's a glitch during the bidding process. So it's a lot of things to consider. These third-party vendors can be really good, but you want to make sure that you get a really good one.

Sireesha ([07:08](#)):

Those were all some great practical considerations. And especially when using technology, it's always important to have tech support nearby. One question I have, you mentioned, you should make sure, you know, with your third-party vendor: who is responsible for uploading information to the website? If an organization is posting items on their website, that includes pictures, what should an organization keep in mind generally as they're uploading pictures or item descriptions?

Mary ([07:38](#)):

So yeah, that's a really important question because in online auctions, the bidder doesn't have the ability to see the actual item. So it's really important that the representation of the item and the description of the item on the online auction site is accurate. So of course the best way to do this, if you have an actual item in your possession, that's been donated is to take a picture of that item as it exists. And you can apply upload that if you can't do that, and you are relying on the internet in order to obtain a picture of the item that's been donated, then you want to make sure that you're not using someone else's photo, because they might be able then to sue you for infringement.

Mary ([08:25](#)):

So a couple of ways to get around this is one to use stock photography. If you're able to do that, and that's, you know, readily available on the internet, that's open. You know, there's no infringement for using those. And then the second situation is to seek permission from the owner of the photograph. So if you see a photo that you really want to use, then you can get permission to be able to use that. And this is important. I know that y'all had a situation where you were advising a nonprofit where there was a, a photo on an individual donor page. And you're really our IP trolls that are out there that are, you know, surfing the internet that are trying to find by certain algorithms whether or not there's been an infringement of photos that are lies to a particular entity or individual. And so you don't want to get in that situation. So you just want to be really cautious. Another thing that I'd mention is ,a lot of times we use logos and trademarks when they're being described on the auction site.

Mary ([09:39](#)):

And so you want to make sure that, that you're using an owner's trademark for descriptive purposes only. And so that it's not really a commercial endorsement, that's really the dichotomy. And there's something which I won't go into the IP nitty-gritty about, but there's something called the fair use doctrine. So if you think you're running into situations like that, you know, you can, you can look that up and see if it's going to help you out, but really you should just, you know, describe what the item is very simply and descriptively. When I was talking to one of my IP partners here about this, she said that you also want to stay away from their trademarked hashtags. So you want to make sure that, you know, you're not kind of replicating their exact hashtag but you can do something similar. And then with respect to logos, you want to make sure that you have either a release or just permission from the entity to use a logo. And this should be pretty easy because if someone is donating an item to your site, then you're pretty confident that you have permission to, to use that. But you just want to have an email trail and say, you know, can you send us your official logo and are we able to use it on our site? And that should be, that should be fine.

Sireesha ([11:02](#)):

Wow. I hadn't even thought about considerations around hashtags. And we do have more information about IP concerns, particularly related to using photography for any listeners who do want to get further

into that IP nitty gritty. But now Mary let's talk about what happens once we get to the point that we have a winning bidder for an item. And let's talk about collecting payment and sales tax. Nonprofits are supposed to collect sales tax from the winning bidder, right?

Mary ([11:34](#)):

Yes. Yes. This is very important in something that the Georgia Department of Revenue actually takes quite seriously. And so you are required to collect tax on the winning bids. So I want to first just do a very short primer on what is taxable and what does that mean? So in Georgia, all tangible personal property is subject to sales tax, unless there's a particular exemption in the statute. And there are something like, I don't know now probably over a hundred specific exemptions, but items that are one at an online or in-person auction is not one of those exemptions. So you should be under the assumption that this item is going to be subject to tax. Now services on the other hand are not subject to tax. So if you have a service that you're auctioning off, you probably won't have to collect tax on that. However, there are some specific ones that are taxable.

Mary ([12:37](#)):

So the best way to find this out is to ask whoever has donated the service to you "Do you collect tax on this?" Because if they're collecting tax on it, then you should collect the tax on it. So that's a good little way to, to not have to dig into the Georgia code. So the tax then is calculated by multiplying the sales tax rate. We'll talk about that a little bit by the fair market value of the item. So fair market value is generally the amount that a willing buyer would pay and a willing seller would accept at an arm's length sale. And a lot of these you're going to have whatever that retail value is, right? I mean, if you get a donated basket of spa products, you're going to know exactly how much each of those costs. And you're going to know that fair market value for that. And it's a very important than that on the bid sheet or on the online auction site, you list what the fair market value is of those items.

Mary ([13:37](#)):

Now, if you have something that was created for the event or something like that, then you're going to want to determine what the fair market value is. If it is a piece of artwork and it's from an artist that sells other pieces of artwork, then you can rely on them for determining what the fair market value is because they know in the market what their product, you know, what their art generates. But let's say it's like, you know, something where you are a nonprofit organization and as part of your services, you provide art therapy to your clients. So that's something. And so your clients have created artwork for that. And in that situation, there's no market for that artwork.

Mary ([14:26](#)):

So the winning bid amount is going to be the fair market value of that. So whoever decided, you know, I think that's worth \$75. That's what I'm going to pay. And I'm the winning bidder. Then it would be \$75. So once you know, your fair market value, then you can determine how much tax is due. And there's basically three situations in this. So one is where the winning bid equals the fair market value. And there let's say that you have the spa basket and there's \$75 worth of product in that. Then you're going to have a winning bid of \$75 and there you're going to collect tax on \$75. And so you just multiply the tax rate by the fair market value. And that's the amount of tax due that you have to collect. If the winning bid is less than fair market value, then you just pay tax on the bid. So let's say that it's \$75 worth of spa products, but the winning bid is \$50. Then you would collect tax on that \$50. Now, if you have

something that's really awesome and there was a huge bidding war for it, and you've got above the fair market value, then this is how you would do that.

Mary ([15:47](#)):

So I'm going to use an example of an autograph football. So let's say there's a football, and it's been autographed by a couple of members of the team. And, you know there's a bidding war going back and forth, and the football is valued. The fair market value is \$200, but the winning bid is \$500. Then the way you would do that is collect tax on the fair market value of the football. And then the additional amount that's paid would be considered to be a donation. And so the way you would write up this ticket or the way you would charge it, you would on a winning bid of \$500. Let's just say the tax rate is 8%. You would be collecting \$516 because you would be collecting 8% tax on \$200 of the fair market value of the football. And then you would be, and that \$16, so \$216, and then the additional \$300 donation. So \$516. And I will say that, you know, particularly because this is a podcast and you're listening to this right now. If you need a visual of this, the Department of Revenue has just published a policy guide. I say just, but it was like July 2020. And so that's on the Department of Revenue website, and I think it's actually referenced on the PBPA website as well. So that exact example is in there. So you can, you can look at that.

Mary ([17:19](#)):

A couple of other things before we leave the sales tax situation about this is if you have a bundled transaction. So let's say with the spa products that you had product, and then you also were auctioning off a massage, and massages are not taxable. So you would, again, separate those out and you'd collect tax on the fair market value of the spa products. And then you would not collect tax on fair market value of the massage treatment. So that's how you would do that. So when I said this, I use the example of an 8% tax rate, but it's also kind of complex to figure out what tax rate you should be charging because the tax rate that applies is the tax rate where the item is received. Okay. And so this can be complicated if you are going to be shipping out items to the winning bidders, right? So let's say that you're not, let's say that you have an online auction and everything that is, you know, every winning bidder has to come pick up the auction at your site.

Mary ([18:36](#)):

Then you know, that you're just going to charge tax of the amount of where you are located. Right? So I just bid, uh, I was in an online auction a couple of weeks ago. I want a couple of things are sitting at the nonprofit's office right now. I've got to go pick them up. And so they just charged tax. It was city of Atlanta. So they charged the city of Atlanta Fulton county tax. Well, let's say that you have a bidder who's in Rome, Georgia, and you don't want to make them come pick it up. Then you would charge the tax that is applicable in Rome, Georgia, if you're going to be mailing that to them. And this is something that you should consider on the front end, because, you know, if you say, you're going to have to come pick up all of the items and you have, you know, winners who are, in the state, but they are not located within the Metro area or, something like that, then you just want to have that disclaimer on there.

Mary ([19:38](#)):

The other thing that I wanted to say about this is that you really need to keep good records, uh, around this. And if you are a nonprofit who is generally required to collect sales tax, let's say you have a gift store, let's say you regularly sell t-shirts or something like that. Then you would just collect the tax on your auction items and remit it with your next return. But if you're not, then there is a form that's just a

one-time remittance form. And so you can use that form and that's on the Department of Revenue website as well. So it, a lot of considerations around sales tax.

Sireesha ([20:19](#)):

Everything you mentioned was focused on Georgia. What's a nonprofit supposed to do if their bidder is in another state?

Mary ([20:27](#)):

Just like there are different rates within the state of Georgia, there are different rates for other states as well. But the first question that you need to ask is whether you have to collect tax, if you're mailing it out of state. Anyway. So if you have a winner from another state, and you've said that, you know, for out of state bidders "we will ship the product to you" or something like that. Then you're going to want to determine, do you have the requirement to collect the tax at all? And that determination is made on how many contacts you have with that state. So you have to have in tax lingo, what's called nexus. And so you have to have a physical presence in the state for most states. However, there are some states that have gone to an economic nexus standard. And so I will say this cause it sounding a little bit confusing.

Mary ([21:25](#)):

What you need to do is determine beforehand where you think you might have any physical presence or other contacts with the state that might determine nexus. And quite frankly, you should already know this because if you're making sales into other states, like you're shipping t-shirts or something like that, or you have donors and other vast amount of donors in a certain state, then you should be aware of that. So just on the front end, if you think you're going to have bidders from other states, you can just look and say, you know, I think we're clear, we're not going to have to collect tax from other states tax when we ship this out to them, or you can say, you know, yeah. You know, Texas, we've got a lot of folks there and we've shipped a lot of t-shirts there and maybe we're collecting tax there already. If that's the case, then you would definitely need to. But it's just really a matter of if you have sufficient contact with those states. And so you should know that on the, on the front end and then that way it can be built into the software, hopefully, you know, that the vendors using or when you're calculating it. So, that's really what you need to think about for an out of state bidder. Now, if an out-of-state bidder wins something that's located in Georgia, then you would collect the Georgia tax. So if they won a hotel, stay in, you know, the city of Atlanta and those hotel stays are taxable. Then you would collect the tax on that hotel state at the Georgia rate.

Sireesha ([23:05](#)):

Wow, that is, that is a lot. And hopefully there are online vendors who help with all of these calculations around tax rates and different counties and states. Now let's kind of switch angles and talk about online raffle fundraisers, which are commonly run in conjunction with online options. Are there specific legal considerations for Georgia nonprofits to be aware of regarding raffles?

Mary ([23:32](#)):

Yes, there definitely are. The main thing is you need to be registered with the county sheriff to obtain a license, to hold a raffle. And this is really important because the failure to do that can be a felony conviction for illegal commercial gambling and fines up to \$20,000. So you want to take this very seriously. There are a couple of types of licenses for which you can apply depending on how many

raffles you're holding annually. And again, I'll direct your attention to the PBPA publication on how to hold a legal raffle in Georgia. And so you want to just see, I think there's one that it's up to four [raffle events]. Just one or four or more or something like that. So there's a couple of different types of licenses, but you want to make sure that you have that license and it can take a while to get it. So if you're thinking about having a raffle involved, then you want to give yourself enough time to be able to get that license. And then secondly, I'll just go back to our, our favorite topic, which is sales tax, and talk briefly about sales tax on raffle tickets. If you're giving the raffle tickets away and you're not charging separately for those, then you don't have any obligation to collect the sales tax on those raffle tickets. But if you are charging separately for the raffle ticket, so you're selling raffle tickets for a hundred dollars, then you will need to compute and collect the sales tax on the charge for that ticket.

Sireesha ([25:11](#)):

And what about charitable solicitation? Are there considerations around charitable solicitation if you suddenly have a bidder in the next day?

Mary ([25:22](#)):

So yes. So hopefully everyone who's listening now who is soliciting donations within the state of Georgia is registered with the state of Georgia for charitable solicitations. And so if you are requesting money or anything else of value to be used for the charitable purpose, this is when this kicks in. So Georgia has this requirement, but 40 other states also have this requirement. And so if you are going to be soliciting donations from other states, or you're going to be targeting donors in another state, then you may be required to register for charitable solicitation purposes in those states as well. And there are certain tests that you can apply just like the sales tax test. It does determine on how many contacts you have with the state, if you're, you know, intending to target donors in those states and things like that. But without going into the weeds on that, there is also a really great guide on registering for charitable solicitation on the PBPA website. So right now just say that you need to make it a consideration. And then in thinking about it, you should pull that guide and see whether or not you need to register in any other states besides Georgia.

Sireesha ([26:43](#)):

And we will include a link to that guide in the episode page, along with some of the other resources that Mary has mentioned. Now, I would like to talk a little bit about hybrid auctions as more and more organizations are running some combination of in-person and online auctions, and sometimes at the same time, sometimes it said different times. Do you have your online auction up for a couple of weeks before the live event sometimes after the live event, what are some considerations that nonprofits should keep in mind around that scenario?

Mary ([27:19](#)):

So, well, this sounds kind of complicated. I think there really aren't any legal considerations that you should be that concerned about if you're doing it this way, in a hybrid model. I would say really the important thing to think about is what the user experience is going to be like and what the expectations are for individuals who are going to be in person and then individuals who are going to be bidding on your auction online or remotely. And so you want to make sure that you're setting the expectations for those individuals properly at the outset. And, you know, one of the things that I think could cause, you know, not really a legal problem, but just maybe some bad will with your donors is if you have kind of special perks for in-person people that the online people aren't receiving or something like that, if

they're not aware of it. Right? And so you don't want to have an auction that closes online earlier than it would close in person, if people are bidding for the same thing individually. And you don't want to have in-person bid sheets, like paper bid sheets, where you aren't aware of what's going on online and things like that. So just be really sure that the user experience is a good one and that you're meeting expectations that you're in control of. And you can set prior to doing that. So you can set this up, however, however you want, but you don't want someone at one venue to do think they're not appreciated as much as someone at another venue. I would also have really clear instructions about how to collect or receive the auction items for the winning bidders for both the online folks and in-person

Sireesha ([29:17](#)):

And what about auctioning off specialty items like a car or a boat, any thoughts around that?

Mary ([29:25](#)):

So well that actually doesn't sound complex and it actually is complex. So, um, the irony of those two questions. So if you're auctioning off like a specialty item that you know of great worth, like a car or a boat, you want to probably reach out to pro bono partnership and talk about that. There's also a guide online about vehicle donations that you can consult, but there are a number of reporting requirements for the sale or raffling of a car or a boat. There could be income tax withholding obligations. There are certain reporting requirements that you have to do both giving to the company or the individual who donated the vehicle or the boat and to the winning bidder. There could be registration requirements and things like that. So you just want to know, if this is something you're going to do, you're going to want to look a little bit further into it instead of just, you know, start advertising that you're going to be, you know, raffling off or auctioning off a car.

Mary ([30:36](#)):

Another thing that I've seen done as well, when we're talking about specialty items is sometimes you might be auctioning off a pet or something like that. So I was at an art show several years ago and they had donation of this like cute little puppy and it went for a lot of money. And so it was great for the organization, but you do want to make sure that you're doing everything right by both the organization that is donating that and the winning bidder and that probably you're putting those two folks together. And as part of the, the winning bid I would have some contractual terms about what you have to do with that new puppy or something like that. So you're making sure that that's all taken care of.

Sireesha ([31:31](#)):

Wow, now that's some creative fundraising right there.

Mary ([31:31](#)):

Exactly.

Sireesha ([31:33](#)):

Finally, Mary, once the bidding process is complete and all the winners are notified, you've already shared a lot of great practical tips with us, but do you have any final tips on what to do once the auction is over and the bidding is complete?

Mary ([31:51](#)):

So I would say really the most important thing is to follow the guidelines and the expectations that you set out before the auction. So if you are saying that the bidding will close at 9:00 PM and there's a 10 minute notice or something like that, then you need to be sure that you follow that when you're closing the auction. So people have the chance to bid very last minute. If you're using electronic platform, a lot of that might already be built in. So that would be good and something to check when you're signing that contract, you also want to make sure that the bidders have agreed to have their car charge for winning bids. If you're doing that automatically at the end of the auction. And again, this is usually taken care of with the third party vendor, the online platform. A best practice I think, is to contact the winning bidders by email the next or so, and congratulate them for winning and coordinate the logistics then of receiving the items that they've won, whether it's going to be mailed to them or whether they should pick it up. And if it's a vacation or rental home or an experience like going to a Hawks game or something like that, then you want to set expectations about when they should hear from the donor and when they'll need to select the time that they're going to utilize that package that they won.

Mary ([33:06](#)):

And then finally, and this is really important. You want to ensure that you send the proper donation receipt that complies with the rules for charitable donations, detailing the amount that they paid, the fair market value of the item and the amount, if any that's deductible. And once again, I will say that Pro Bono Partnership has a wonderful guide about sending acknowledgements for donations. And if you have any questions about that, then you should, you should reference that as well.

Sireesha ([33:37](#)):

Now,. Mary, every time I talked to you or every time you do a webcast or a podcast or help us out, I always learn so much from your presentations. Thank you so much for joining us today and for sharing this information and your expertise with us.

Mary ([33:53](#)):

Absolutely. It's my pleasure. Thank you.

Sireesha ([33:57](#)):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.