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501(c)(3) Nonprofits

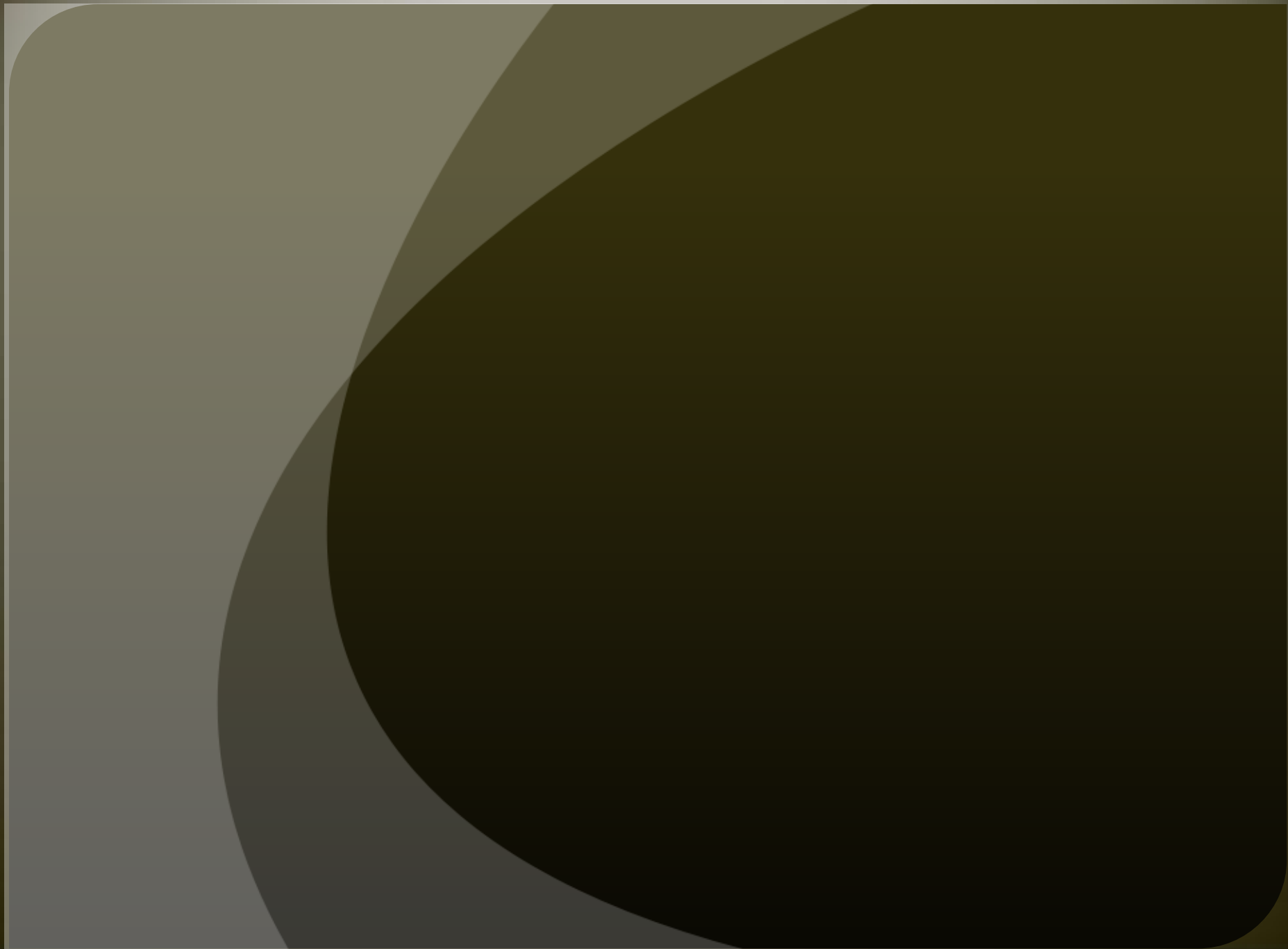
Restrictions on Lobbying
and other Political Activity

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Today's Presentation:

- Brief overview of the 501(c)(3) status
- First Amendment Protections
- Lobbying and Grassroots Lobbying
- Candidates and Political Parties
- Do's and Don'ts
- Questions and Discussion

501(c)(3) status:

- Non-profit corporate status defined by state law, based on incorporation under Colorado's Nonprofit Corporation Act or Unincorporated Nonprofit Association Act.
- Tax exempt and charitable status is defined by IRC 501(a) and (c).

501(c)(3) status:

- “Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literacy, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided for in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”

26 U.S.C. 501(c)(3)

501(c)(3) status: exclusive purposes

• “Corporations, and any community chest, fund, or foundation, ***organized and operated exclusively*** for:

- religious
- charitable
- scientific
- testing for public safety
- literacy, or
- educational purposes, or
- to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or
- for the prevention of cruelty to children or animals”

501(c)(3) status: private benefit

- “no part of the net earnings of which *inures to the benefit of* any private shareholder or individual,”
26 U.S.C. 501(c)(3)

501(c)(3) status: lobbying restrictions

- “***no substantial part*** of the activities of which is carrying on propaganda, or otherwise attempting, **to influence legislation** (except as otherwise provided for in subsection (h)),”

26 U.S.C. 501(c)(3)

501(c)(3) status: political activity

- “and *which does not* participate in, or intervene in (including the publishing or distributing of statements), *any political campaign on behalf of (or in opposition to) any candidate for public office.*”

26 U.S.C. 501(c)(3)

First Amendment Protections:

- Despite restrictions, nonprofit organizations play an important role in public policy development, and enjoy First Amendment protections.

Restrictions on Advocacy & Lobbying:

- Restrictions are predominantly based on IRS Code and other Federal Law
- Generally, nonprofits in Colorado are not further regulated as long as they otherwise comply with federal law.

Restrictions on Advocacy & Lobbying:

- IRC 501 (c)(3) expressly prohibits any involvement with political campaigns for candidate for partisan and non-partisan public office.
- Prohibitions include distribution or publication of statements, even if no funds or resources of the nonprofit organization are expended.

Restrictions on Advocacy & Lobbying:

- Independent Expenditures
 - “Independent Expenditures” are defined as express advocacy for or against a candidate for public office, and not in the context of ballot measures.
 - Because 501(c)(3) organizations are prohibited from advocating for candidates, nonprofits should not need to file any independent expenditure reports, under Article XXVIII or the FCPA.

Restrictions on Advocacy & Lobbying:

- Lobbying
- “Lobbying” is defined as attempting to influence the outcome of specific legislation through contact with members of the legislature, or “grassroots lobbying” to change public opinion or urge members of the public to contact lawmakers.
- If nonprofits or their agents lobby members of the General Assembly, they will have to comply with paid or volunteer lobbyist registration requirements.

Restrictions on Advocacy & Lobbying:

- Lobbying versus other forms of advocacy
- “Lobbying” is a term of art, tied to both legislative action by both lawmakers and regulatory regimes, and includes ballot measures (including citizen-initiated ballot measures and referred questions)
- All other forms of expression and public policy involvement are generally acceptable, assuming such expressions are consistent with the nonprofit and charitable mission of the organization.

Lobbying Defined:

- The term “lobbying expense” is defined in federal law as “expenditures made for the purpose of influencing legislation.” 26 USC 4911(c)(1).
- The term “legislation” also includes not only action by Congress, any state legislature, any local council, or similar governing body, with respect to acts, bills, resolutions, or similar items (such as legislative confirmation of appointive office), but also includes legislation by the public in referendum, ballot initiative, constitutional amendment, or similar procedure. 26 U.S.C. 4911(e)(2).
- The term “legislation” as defined in the US Code *does not* include actions by executive, judicial, or administrative bodies.

Grassroots Lobbying Defined:

- In the context of influencing any legislation through an attempt to affect the opinions of the general public, defined as “grass roots lobbying,” federal law recognizes that communication will be treated as grass roots lobbying if the communication:
 - Refers to specific legislation;
 - Reflects a view on such legislation; AND
 - Encourages the recipient of the communication to take action with respect to such legislation.

26 C.F.R. 56.4911–2(b)(2)(i) and (ii).

First Amendment Protections:

- Contours defined in federal constitutional spending cases:
- *Alliance for Open Society v. USAID* (2006)
 - New York federal district court case found that the government can impose limitation on the use of federal funds but cannot prevent an organization from exercising First Amendment rights using non-federal program funds.

First Amendment Protections:

- *Community Options* case
- 2006 ALJ Opinion involving challenge to an organization taking part in Ref. C debate
- **C.R.S. 1-45-117**. *State and political subdivisions - limitations on contributions.*
 - ALJ held that a private nonprofit organization that contracts with the State (and thus is paid State funds) is NOT covered by the state regulation prohibiting public entities from expending public funds to influence ballot issue campaigns.

Restrictions on Advocacy & Lobbying:

- 501(h) election vs. “substantial part” test
- If non-electing under IRC 501(h), governed by IRC 501(c)(3) “substantial part” test.
- The IRS has refused to create a bright-line rule to define what constitutes a “substantial part” of an organizations activities; it remains a “balancing test,” and often relies on not just an analysis of proportional expenditures, but also time, activity, and nature of public communications.

Restrictions on Advocacy & Lobbying:

- 501(h) election vs. “substantial part” test
- If electing under IRC 501(h) (IRS Form 5768):
 - Based on percentage of expenditures, determined by annual calculation and reporting.
 - “Grass roots lobbying” activity – no more than 5%
 - Non-grass roots lobbying activity may be up to 20%
 - *Subject to taxation on amounts over limits, and IRS may revoke 501(c)(3) status if lobbying expenditures exceed 150% over a four-year average*

Lobbying Exceptions:

- When is it not lobbying?
- **non-partisan analysis, study, or research** is not lobbying. However, a mere presentation of unsupported opinion does not qualify as non-partisan analysis, study, or research.
- so long as any discussion does not address itself to the merits of a specific legislative proposal, engaging in **generalized public discussion or communications** with members of legislative bodies or government employees is not a lobbying expense

Lobbying Exceptions:

- When is it not lobbying?
 - **providing technical advice or assistance** to a government body or committee, or a subdivision of either, in response to a written request, not lobbying. But the request must come from the government body or committee, but not solely from any individual member or lawmaker.
 - **offering opinions or recommendations** regarding the advisability or wisdom of enacting or rejecting a particular legislative proposal will ordinarily qualify under this exception, **BUT ONLY** if the opinions or recommendations are specifically requested by the governmental body or committee, or are directly related to the materials requested.

Restrictions on Advocacy & Lobbying:

- Issue Committee status?
 - Because 501(c)(3) nonprofits cannot engage in political activities involving candidates for elective office, only state law restrictions regarding ballot measures may be applicable.
 - “Issue Committees” are formed for the principal or major purpose of supporting or opposing ballot measures (major purpose + \$200 in expenditures).

Restrictions on Political Activity:

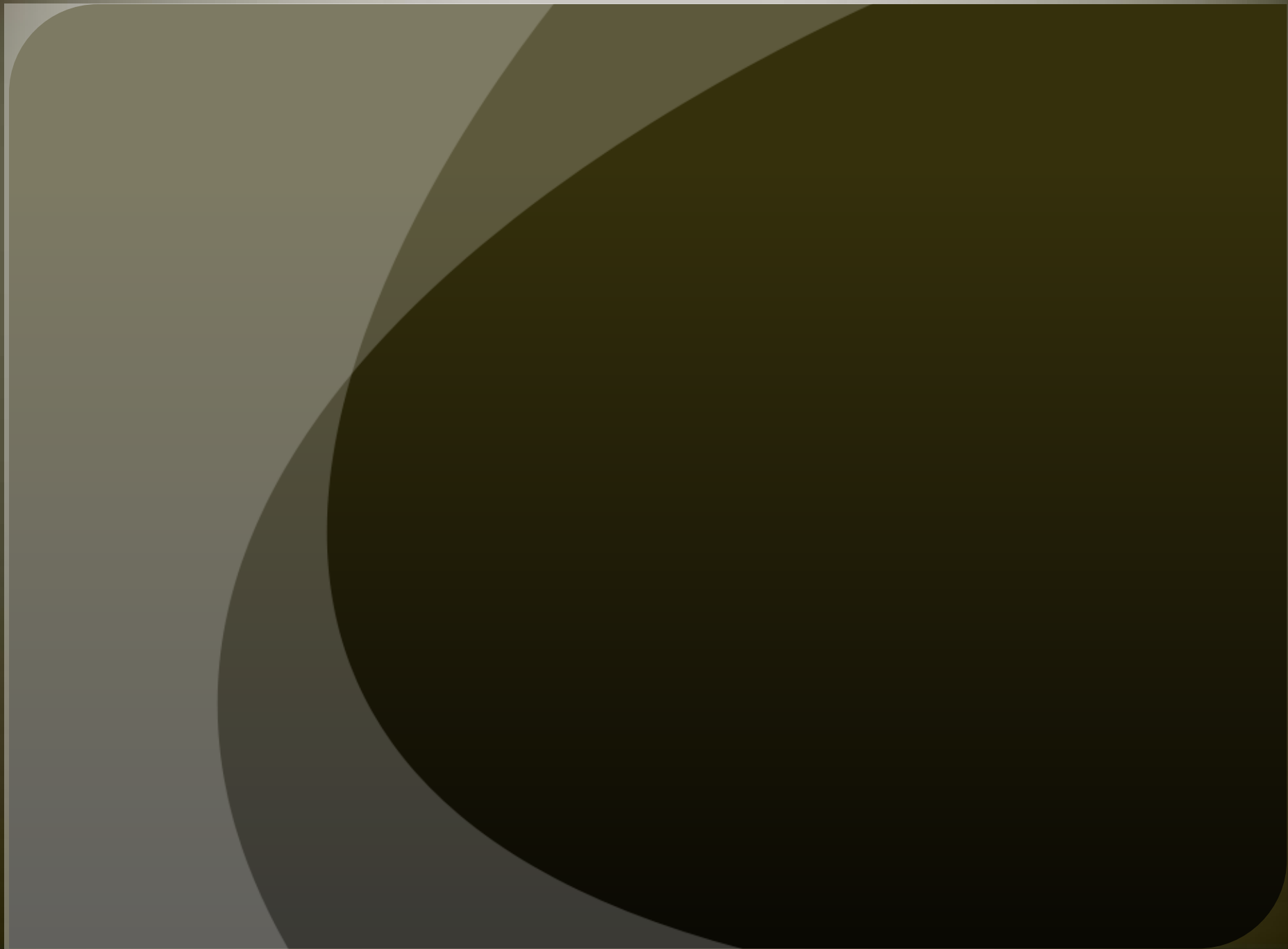
- Support or opposition to political candidates by 501(c)(3) nonprofits is not allowed, but officers, board members, and employees of nonprofit organizations are not prohibited from supporting and volunteering for the candidates of their choice in their capacity as private citizens. *As examples, you may:*
 - Make financial contributions to political candidates, political party committees, or other political organizations;
 - Volunteer your time for candidates and party committees;
 - Serve in leadership roles, such as precinct committeeperson, as a county party or allied group officer, or as a campaign treasurer;
 - Speak at campaign events or issue endorsements in your capacity as a private citizen, but not in your capacity as an officer or agent of the 501(c)(3)

Questions and Discussion

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