THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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THE LAW FIRM FOR ASSOCIATIONS®

IN THIS ISSUE:

ANOTHER REALLY BIG TRADE SHOW RETURNS – *H&H Report Update* **–** The American Society of Nephrology will bring its annual meeting back to McCormick Place in 2016, the Society announced, and said labor practices reforms at McCormick Place were a key to its decision to return after a decades-long absence. The Society's event attracts close to 14,000 attendees and generates over $300 million. *The unions currently suing to overturn the reforms might want to ask themselves whether they would rather lose such shows than change their labor practices.*

TWO MORE NEW WORDS FROM THE INTERNET – Add two more terms to the lexicon – "hacktivists" and "cyberanarchists" – which were recently used in connection with the anonymous hacker denial-of-service attacks on Visa, Mastercard, PayPal, Amazon and other sites that have terminated use by WikiLeaks of their services and against websites connected to the criminal charges lodged against WikiLeaks founder Julian Assange. *These attackers can cause temporary shutdowns of Internet services but can do little that is positive. Of course from their perspective, causing injury is a positive step. Nihilism is still a potent force attracting many. Those attacks potentially affect any of us using those websites.*

SOME INTERESTING APPROACHES TO AIR TRAVEL – Two recent examples may indicate some new approaches to old problems in air travel, reservation changes and overbooking. As other airlines have ratcheted up fees for checking baggage, making changes in reservations, etc., Southwest has taken the approach "We love our customers," and is advertising it does not charge fees for baggage or to make flight reservation changes. Delta has started an online auction approach to address overbooking on flights. When travelers book a flight online they are asked to bid on how much money they would want to be voluntarily bumped from a flight if it were overbooked and move to the next available flight. The advantage to Delta is that it has a volunteer list in hand and can speed up boarding because it knows if it has volunteers and at what cost in overbooking situations. *It will be interesting to see how these approaches work out. Will Southwest gain passengers who resist the add-on fees its competitors charge? Will other airlines follow Delta or wait and see how it works out? Some differentiation efforts are welcome.*

GOOD READING … See you in February

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NOT-FOR-PROFIT LAW DEVELOPMENTS

PUBLICIZING ETHICS INVESTIGATIONS CAN INVITE LEGAL ACTION – If a religious organization can't launch an ethics investigation of its minister without running into legal trouble, is nothing sacred? An Illinois appellate court recently demonstrated that courts can chastise a religious group in its investigation and termination of ministers on ethics grounds. The court ruled in an invasion of privacy suit brought by a pastor whose ordination was rescinded after church elders began investigating charges by his ex-wife that he had been unfaithful, misused church funds, and abused alcohol. A lower court said that the "ecclesiastical abstention" doctrine prevented judges from even considering such a suit. But the appellate court disagreed, finding the pastor's right to privacy could have been violated when a senior minister at the pastor's church circulated correspondence including falsehoods and uninvestigated allegations against the pastor to leaders and members of the church as well as (big mistake coming up!) people who didn't even belong to the church. There was no "ecclesiastical abstention" or even First Amendment protection for such statements, said the appellate court. *Normally, courts are somewhat reluctant to become involved in governance and ecclesiastical disputes involving nonprofit organizations, and especially religious entities (the "ecclesiastical abstention" doctrine). But there are boundaries beyond which even religious organizations should dare not to tread in keeping their flocks from straying, as this case clearly showed. And with the ease of disseminating information today, the possibilities of getting into legal trouble for doing so have greatly increased. Get good advice before proceeding in such matters.*

BATTLE BETWEEN CORPORATE PARENTS AND CHILDREN RAGES ON – The Missouri Baptist Convention, a state arm of the largest Protestant church denomination in the U.S., recently won a court battle with the Missouri Baptist Foundation, one of several affiliates trying to gain independence from the church's leaders. A county judge has handed control of the Foundation and its $140 million in assets to the Convention, ruling that Foundation board efforts to amend the organization's charter to prevent church leaders from controlling the Foundation had failed because such amendments, by the terms of the Foundation's charter, required the Convention's approval to take effect. The court also ordered Foundation board members to resign their seats within 30 days if they were not approved by the Convention per the Foundation's charter. *This decision may very well be appealed, and, since other affiliates are fighting legal battles with the Convention over control issues, we probably haven't heard the last of this Missouri family feud. Other nonprofit corporate parents should take heed. If they don't want their offspring to fly off on their own, affiliate organizational documents must contain appropriate restraints on independent affiliate board and member action.*

EXECUTIVE ORDER REGULATES FAITH-BASED NONPROFITS – President Obama has signed an Executive Order imposing certain regulations on faith-based organizations receiving federal funding for providing community services. The Executive Order requires that such organizations engaging in explicitly religious activities (including worship, religious instruction and proselytization) must separate such activities in time or location from any federally supported programs. Further, if anyone receiving services from such an organization objects to its religious character, the organization must, within a reasonable time, refer that person to an alternative service provider. *The Executive Order implements recommendations made by the President's Advisory Council on Faith-Based and Neighborhood Partnerships. It does not include one controversial regulation proposed to, but not recommended by, the Council, namely requiring that faith-based organizations create separate tax-exempt entities to receive federal funding. If your organization seeks or receives such funding, become very familiar with and abide by the Executive Order's directions.*

Intellectual Property & Computer Law Developments

WEBSITE'S AIM INSUFFICIENT FOR PERSONAL JURISDICTION – A Texas-based website's use of a similar domain name was an insufficient basis to establish the minimum contacts necessary for personal jurisdiction over a Texas company in a suit filed in federal district court in Illinois, according to a recent ruling by a federal appellate court in Chicago. Mobile Anesthesiologists Chicago, LLC sued Anesthesia Associates of Houston Metroplex, P.A. for using a website – www.mobileanesthesia.com – that allegedly infringed on its trademark and for allegedly violating the anti-cybersquating law by using a website with a similar domain name. The court said that "[A] defendant's intentional tort creates the requisite minimum contacts with a state only when the defendant expressly aims its actions at the state with the knowledge that they would cause harm to the plaintiff there." *In this case, the defendant operated only in the Houston area, and thus the fact that its website was accessible to residents in Illinois was an insufficient basis to satisfy the "express aiming" requirement established by the U.S. Supreme Court in Calder v. Jones, 465 U.S. 783 (1984). When sued or deciding whether to sue, don't forget that jurisdiction or lack thereof can make or break your case, especially in situations involving electronic contacts and websites.*

Regulatory Law Developments

SUIT AGAINST HORSE RACING ORGANIZATIONS MAY PROCEED – A federal district court has rejected a motion to dismiss an antitrust suit brought against various Maryland nonprofits involved with horse racing in that state, finding the defendants could have violated the federal antitrust laws if, as was alleged, they conspired with out-of-state racetracks to monopolize off-track betting in Maryland. The defendants included associations for horse owners, trainers and breeders, among others, and the plaintiffs operated a racetrack that made by far the largest portion of its income from betting on television "simulcasts" of races held at other tracks. According to the plaintiffs, the defendants and some out-of-state race tracks had agreed to deny "simulcasting" rights to the plaintiffs' track. The defendants moved to dismiss the complaint, saying even if that were the case, they had acted pursuant to federal and state laws that give a considerable amount of power to state racing commissions and horsemen's groups in the regulation of simulcasting. For now, the district court has ruled the antitrust laws could have been violated through such an alleged agreement, and the plaintiffs will be given a chance to prove at trial that the defendants engaged in anticompetitive activities. *We'll watch this case carefully. It could lead to greater or, at least, better defined limitations on the power of nonprofits to regulate businesses when acting under a federal or state statutory scheme.*

Tax Law Developments

IRS MANDATES TAX DEPOSITS BE MADE ELECTRONICALLY NOW – The Internal Revenue Service now requires as of January 1, 2011 that federal tax depositors make their payments by electronic funds transfer. The paper coupons formerly used by many depositors to make tax deposits are eliminated. The IRS has designated 2011 as a transition year to better enable smaller businesses to comply with the abrupt transition to electronic deposits in place of the former paper document deposits. The former terminology of "banking days" is replaced by "business days," meaning any day Monday to Friday except statewide holidays that are also holidays in the District of Columbia. Businesses without computers or the ability to make electronic deposits are directed to use a telephone call to the IRS to schedule an electronic federal tax payment system ("EFTPS") payment instead. *This change has been in the works for about six months but it may come as a surprise to many small businesses including nonprofits. Download IRS Notice 2010-87 and IRS T.D. 9507 for more detailed instructions. Just "Google it."*

FORM 990 FILING THRESHOLD AMOUNTS CHANGE – Effective for 2010 tax year filings, which will be made in 2011 and later, there will be new threshold amounts determining which Form 990 must be filed by exempt organizations that are not private foundations. Private foundations will still file Form 990-PF, but some other nonprofits will be able to file simpler forms under the new thresholds. Organizations with annual gross receipts of $200,000 or more and total assets of $500,000 or more will be required to file the "long" Form 990. Organizations with annual gross receipts of more than $50,000, but less than $200,000, and with total assets less than $500,000, may choose to file the long form, but can choose to file the shorter Form 990-EZ instead. Organizations with annual gross receipts normally equal to or less than $50,000 can choose to file either Form 990 or Form 990-EZ, but they can also choose to file a Form 990-N "postcard" return electronically instead. Previously, only nonprofits with annual gross receipts normally equal to or less than $25,000 could file the "e-postcard" Form 990-N. *Anything that simplifies nonprofit annual filing requirements is applauded here. Now, perhaps the new Congress will relax some of the recent filing mandates in other areas, like the new Form 1099 requirements imposed as part of the President's healthcare legislation, which even the IRS isn't crazy about or prepared to handle!*

NEW TAX LAW PROTECTS PAYMENTS FROM CONTROLLED ENTITIES – One provision of the federal tax and unemployment compensation compromise legislation recently enacted (with much fanfare and disregard of how to pay for it) extends the life of a tax break for exempt organizations that receive payments from controlled entities. The new law extends until December 31, 2011 a provision that essentially forbids the IRS from taxing payments, such as interest, rent and royalties, made by a controlled entity to a tax-exempt "parent," except to the extent they involve arbitrary shifting of income and deductions purely for the purpose of tax avoidance. *Without the extension, payments made in 2010 and 2011 by a controlled entity would have been taxable as unrelated business income to the exempt parent to the extent they would reduce the taxable income of the controlled entity or increase its net loss, regardless of the purpose behind the payments.*

EMPLOYMENT LAW DEVELOPMENTS

FEDERAL APPELLATE COURT AFFIRMS ADEA CLAIM DENIAL – A federal appellate court in Chicago recently affirmed summary judgment on behalf of an employer sued for age discrimination by a 55-year-old employee let go in a reduction-in-force by his employer a year after he was hired. The court said there was no proof of age discrimination using the direct method or indirect method of proof under the 1973 U.S. Supreme Court decision *McDonnell Douglas Corp. v. Green*, the controlling federal precedent for the burden of proof in age discrimination lawsuits. The employer had reduced its workforce by 35 employees following a merger, and said this employee was let go because he had limited ability to sell, was not a team player, was frequently inaccessible, and his sales numbers were low. The employee was unable to counter this with anything the trial or appellate courts regarded as evidence of discrimination. The court also relied on a 2009 U.S. Supreme Court decision, *Gross v. FBL Financial Services, Inc.*, in which the Supreme Court set up a "but for" test, which states that in an Age Discrimination in Employment Act ("ADEA") lawsuit the plaintiff must show *but for* age, the adverse employment act (termination, demotion, etc.) would not have occurred. *It is no longer enough to show that age was a motivating factor among others. This "but for" test is a much more difficult hurdle for ADEA plaintiffs.*

WHY DID THIS EMPLOYER EVEN CONTEST THIS CLAIM? – An employer terminated a janitor after 12 years. He sued for overtime. The employer then contended he was an independent contractor. A federal magistrate in Chicago had no difficulty in finding the janitor was an employee and entitled to overtime as a matter of law. The magistrate relied on the standard six-factor test to determine the economic relationship between the janitor and employer: nature and control of the work; the janitor's opportunity for profit and loss; the janitor's investment in equipment or materials or employment of others; the degree of training or skills needed to do the work; the degree of permanence and duration of their working relationship; and the extent to which the services were integral to the employer's business (here, maintaining office spaces in several buildings). All six factors indicated he was an employee. He was listed on the employer's payroll records for 12 years as an employee; issued a W-2, not a Form 1099; provided benefits; had Social Security, Medicare and unemployment taxes withheld biweekly; belonged to a union; had a letter from the employer stating he was an employee; and the employer had never received an invoice from the janitor nor was there a contract. *Sometimes you wonder what was their thinking. Why did the employer waste its time, the court's time and put the employee to the expense of suing on such a clear-cut matter? It hardly bothered to defend the overtime hours claimed by the janitor. One can only speculate the employer intended its superior economic power would wear down the employee. Wrong and unfair*!

MEETINGS & TRAVEL LAW DEVELOPMENTS

ASSOCIATION'S HOUSE OF DELEGATES REJECTS HOTEL BOYCOTT IDEA – The House of Delegates of the Association of American Law Schools voted down a proposal to boycott hotel venues involved in labor disputes. The association's 2011 annual meeting is spread among three San Francisco hotels including the Hilton San Francisco Union Square. That hotel is engaged in a long-standing labor dispute with the Unite Here! Local 2 representing workers at the hotel. Opponents of the boycott proposal, including the association's executive committee, argued this would make it very difficult to contract with hotel properties many years in advance in accordance with the association's current meeting planning processes, and yanking events and people out of the hotel at this meeting would make it difficult for attendees to find convenient alternative rooms. *Union pressure on major convention properties in San Francisco is an ongoing struggle. Few topics arouse more heated passions among some members attending conventions there. Professional associations seem to be more inclined to entertain boycott proposals than trade associations. Before heading down that path, association negotiators and their hotel counterparts are well advised to consider their options and develop plans to address labor disputes. Contracts should be reviewed to see if they reflect these issues.*

THE IRS NEEDS A GEOGRAPHY LESSON – What do the following locations have in common other than their obscurity and how difficult it would be for most of us to find them on a world globe? Federated States of Micronesia; Johnston Island; Baker Island; Northern Mariana Islands; Republic of the Marshall Islands; Kingman Reef; Palmyra; Republic of Palau; Wake Island and Midway Islands. [World War II Pacific Theater buffs do not respond.] Give up? They are among the locations the Internal Revenue Service considers part of the North American area for purposes of determining whether attendance at a meeting in one of these locations is business-related. *These are only some of the locations considered to be part of the "North American area" when determining whether a meeting site is considered to be presumptively OK for a tax-deductible business meeting location. The IRS periodically updates the list. Before considering some exotic offshore location, it would be wise to see if it is on the IRS list even if its list would confound geography teachers.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

CELL PHONE SEARCHES WITHOUT A WARRANT UPHELD IN CALIFORNIA – The California Supreme Court in a 5-2 decision upheld a warrantless search of a suspect's cell phone on his person when he was arrested. The court followed U.S. Supreme Court decisions which state personal property immediately associated with a person at the time of arrest is subject to a police search at the time of arrest. In this particular situation, information found on the phone was used in the suspect's interrogation and eventual confession. *If cell phones can be searched without a warrant, are computers also subject to search in such circumstances? That remains to be seen, but persons coming into the U.S. are finding their computers and other electronic devices are subject to search and even seizure without warrants by border authorities, and such warrantless searches have been upheld in the face of legal challenges. The line between cell phones and computers is increasingly blurred. If you wish to protect confidential information, plan accordingly.*

APPELLATE COURT PROTECTS ASSOCIATION GADFLIES – Many associations and other nonprofits have them. They're "gadflies," people who have real or imagined grievances about the operation of the organization and who just won't go away. The law places limits on what a nonprofit can do about them, though, as was made clear by an Illinois appellate court recently in deciding that a condominium association owed $36,840 to a unit owner under the Illinois Citizen Participation Act. The unit owner had sued the association in federal court for alleged religious discrimination, and then after losing in that proceeding had continued to complain about the association's conduct to various government officials, a local newspaper, and the association's employees, prompting the association to sue her in state court for defamation, interference with its operations, violation of its civil rights and malicious prosecution. But now that state suit has been dismissed, and the appellate court says the association owes the unit owner money for her attorney's fees incurred in protecting her rights under the Act because the association brought a lawsuit against her that was based on, related to or was in response to her exercise of her rights of "petition, speech, association and to otherwise participate in government." *Herein lies a warning for all nonprofits. Even a dispute over the affairs of a private condominium association, and hence, presumably, any dispute over the affairs of any nonprofit, may be covered by the Act, so that any attempt through legal action to "silence" an irritating gadfly calling for any sort of governmental action against an organization may make the organization financially liable, at least in Illinois. Note, further, that was true here even though the unit owner's complaint of religious discrimination by the association had already been rejected by a federal court.*

H & H DEVELOPMENTS

In January ...

Jonathan Howe presented "Who, What, When, Where to Plan Legally" and "How to Successfully Negotiate Anything" to an association annual conference in Florida; conducted a governance training session, "The Things You Need to Know" for the council members of a nonprofit organization in Texas; and gave the session "'New Year's Resolutions You Should Have Made" as a webinar. *Naomi R. Angel* presented a leadership training program on "Good Board Governance" to a professional society and a program to a trade association of manufacturers on"E-Discovery and Preparation for Business Case Deposition." *Barbara Dunn* presented "Advanced Contract Legal Issues and Negotiation Strategies" for the Arizona chapter of an international nonprofit organization in Phoenix, Arizona.

Contributors to this issue…

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