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:

TAKING SOME OF THE RISKS OUT OF DRIVING – A recent article in *AAA Living* offers some useful advice on reducing driving risks. First, the most dangerous time to be on the road is after midnight on Saturdays. Think alcohol-fueled drivers. Morning rush hour driving tends to be safer than evening rush hour driving. Drivers are thought to be more alert and focused on getting to work whereas more drivers in the evening are running errands, shopping, picking up or dropping others off, plus commuter traffic and alcohol may also play a role. The longer a dry spell the more dangerous the first day or two of driving after rain or snow. People are out of practice. *In conclusion, err on the side of caution. Anticipate risks.*

USEFUL INSURANCE ADVICE FROM THE SBA – The Small Business Administration provides useful information to businesses on its website. One section provides advice on insurance, including what to buy and other tips. The SBA recommends small businesses do a careful review every year of their insurance, focusing on whether it matches their current and future needs, is the coverage adequate, pricing, and other tips. *Good advice! Most associations and other nonprofits are small to medium-size businesses. They need general commercial liability (GCL), property and casualty, and director and officer liability insurance coverage for starters. Policies vary widely, so get competent professional advice on what to look for, and review policies and needs at least annually.*

THE MOST DANGEROUS WORK JOB IS – Driving! According to statistics from the Centers for Disease Control in a recently issued report, more workers in the U.S. died in automotive-related accidents than any other cause over a five-year period this past decade. Workers age 54 and older were most at risk for such fatalities. *It's been said that for young and older drivers the most dangerous maneuver in a car is a left-hand turn across oncoming traffic. Some basic rules: wear your seatbelt. Don't drive distracted. Don't take chances – the few seconds or minutes you save aren't worth the risk!*

GOOD READING … See you in August

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NOT-FOR-PROFIT LAW DEVELOPMENTS

NONPROFIT CAN GIVE BLOOD AND TISSUE SAMPLES TO FOR-PROFITS – The Internal Revenue Service has ruled that a nonprofit medical research organization funded by tax-deductible contributions from pharmaceutical companies will not jeopardize its federal income tax exemption under Section 501(c)(3) of the Internal Revenue Code by giving for-profit, as well as nonprofit, entities "residual" blood and tissue samples not needed in its own operations. The samples would be acquired by the research organization from various medical centers and would be used by the nonprofit in creating a publicly accessible database that contains "clinical presentations and outcomes along with the patterns of gene expressions of tissue samples of a particular disease in different individuals." But the nonprofit has also proposed to give "residual" tissue and blood samples and related clinical information to both tax-exempt and for-profit organizations, based on the medical research organization's finding that for-profits have the expertise and funding necessary to conduct extensive clinical studies and produce significant additional information that can be added to the database. *This arrangement has some very interesting implications from a tax standpoint. The research organization says it will be giving "residual" samples to entities with the funding necessary to conduct the most extensive follow-up research (i.e., the wealthiest ones), and pharmaceutical companies that have funded the research organization are indicated as "likely to have an advantage" in applying for receipt of residual samples. Furthermore, while the results of a for-profit's research will be made publicly available, patents and other intellectual property resulting from research "discoveries" will belong to the for-profits, perhaps allowing pharmaceutical companies to add to their valuable patent portfolios at a time when existing patent protection for some of their most significant drugs is expiring. It's an ingenious scheme and, apparently, a tax-exempt one.*

EXCLUSIVITY RULE CHALLENGE SURVIVES MOTION TO DISMISS – A legal challenge to a rule prohibiting play outside of a league imposed by a local district of USA Hockey recently survived a motion to dismiss in the federal district court in Minnesota. A for-profit youth hockey program alleged that the rule, which prohibited players from participating in competing hockey leagues, constituted monopolization and/or attempted monopolization, claiming it had lost up to 40 players as a result of the rule. The complaint contained sufficient facts to state a facially plausible monopoly claim under either an actual exclusion or market power test, according to the court. The complaint alleged that the rationale for the rule was to prevent the competing league from taking players from the defendants. The defendants argued that the purpose for the rule was to avoid scheduling conflicts and to prevent player fatigue. However, certain organizations that also would have caused such conflict and player fatigue issues were exempted from the rule. The complaint's conspiracy claims were dismissed. *The court's ruling is not a finding on the merits, but it permits the plaintiff league to attempt to dig up evidence to prove its claim. The defense will have the same opportunity. Remember when adopting association bylaws, rules, regulations, standards, etc., that noncompetition requirements are inherently suspect and may lead to claims of attempted monopolization, monopolization, and/or conspiracy in restraint of trade in violation of federal and or state antitrust laws. Antitrust lawsuits are expensive in time and dollars even if you win.*

REGUATORY LAW DEVELOPMENTS

GENETIC INFORMATION NONDISCRIMINATION ACT ("GINA") – In early 2011, the EEOC issued its final regulations implementing the employment-related provisions of the Genetic Information Nondiscrimination Act ("GINA") which makes it illegal to discriminate against employees or applicants because of genetic information. GINA applies to private and state and local government employers with 15 or more employees,

employment agencies, and labor organizations. "Genetic information" is defined as information about the genetic tests of an individual or his/her family members, and the appearance of a disease or disorder in the family members of that individual. GINA is intended to protect those who may be discriminated against because an employer thinks they are at increased risk of acquiring a condition in the future. Presently, over 30 states have laws that prohibit employment discrimination on the basis of genetic information. *Employers should take immediate steps to ensure compliance with the law. Revise employee handbooks and other policies to include "genetic information" as a prohibited basis for discrimination. Train managers and supervisors and revise employment forms to be GINA-compliant. Keep employees' genetic information and test results confidential and separate from employees' personnel files.*

CAN THE U.S. POSTAL SERVICE AS WE KNOW IT SURVIVE? – This is not simply a rhetorical question. The U.S. Postal Service will run out of cash to meet its obligations by the end of this fiscal year, September 30. As usual, service cuts are being strongly resisted by current USPS management, USPS unions, and Congress which also says that post offices cannot be closed just on economic grounds, among other mandates. One mandate was the USPS fund its health care costs for future retirees, and the USPS will default on this year's $5.5 Billion payment unless Congress comes to its rescue. Meanwhile the USPS just entered a four and a half year contract with its letter carriers and clerks union who comprise close to half its work force which provides for no layoffs, a 3.5% pay hike and seven cost-of-living increases. First class mail volume, which accounts for most revenue compared to junk mail, is declining and junk mail which provides much less per-piece revenue is not making up the difference. The recommendations of a Government Accountability Office expert brought in to review USPS operations, comparing them to both UPS and American Express, and more interestingly and realistically to postal operations in other countries, especially in Western Europe where similar problems of too many post offices, a transition to the Internet, and similar explanations for money-losing operations are being successfully and profitably addressed, have been politely received and promptly ignored. *Same old, same old. How many times do we hear this about closing or reducing some services, in government, or in business? Associations can be prone to this as well because some services are board or member or staff favorites, and change is resisted. It usually is not a story that ends well. The USPS is really courting disaster with the help of Congress.*

U.S. SUPREME COURT UPHOLDS ARIZONA E-VERIFY LAW USE – The U.S. Supreme Court in May upheld Arizona's use of the E-Verify process when hiring employees as a mandatory requirement to obtain or retain a business license in Arizona. The Court stated that the Legal Arizona Workers Act of 2007 did not violate the (federal) Immigration Reform and Control Act of 1986 ("IRCA"), and did not violate discrimination laws. *What distinguishes this decision from earlier court decisions which have successfully challenged mandatory use of E-Verify is that Arizona made this a condition of a business obtaining or retaining a business license. The Court said that was not a civil or criminal sanction. Arizona's law requires compliance with the IRCA, and the potential loss of a business license is for businesses that knowingly and repeatedly employ undocumented workers. It is anticipated that other states attempting to restrict employment of undocumented workers may follow the Arizona model to avoid discrimination lawsuits. President Obama recently commented that the E-Verify process, which matches data on a worker's I-9 form with information in Social Security Administration and Homeland Security databases, should be a valuable employment tool, as soon as the process eliminates all errors so no worker is erroneously denied employment due to incorrect information. In other words, about the time the deficit is brought under control and other perfect world solutions become the norm.*

TAX LAW DEVELOPMENTS

275,000 NONPROFITS LOSE TAX EXEMPTION – *H&H Report Update* – The Internal Revenue Service has released a list of approximately 275,000 nonprofits whose federal income tax exemptions have just been automatically revoked because they failed to file annual reports with the IRS for 2007, 2008 and 2009. The good news is that the IRS also said smaller organizations can reclaim exemptions retroactive to the date they were revoked by filing an application and paying a reduced fee of $100 to the government. This reduced fee is only available for organizations with annual gross receipts of $50,000 or less, and, as they say, it's "for a limited time only." Normally, the government fee for reinstating a revoked exemption is from $400 to $850. *Congress and the IRS provided for this mass revocation of exemptions long ago in cases where organizations fail to file annual reports for three years in a row. We warned readers it was coming. The reduced filing fee is nice, of course. But there will also be expenditures in legal fees and lost volunteer and staff time for preparation of the exemption reapplication. Furthermore, if a reapplication indicates that an organization no longer qualifies for exempt status for reasons other than its failure to file annual reports, the IRS doesn't have to allow a retroactive exemption. It's far better for an organization to make its annual report filings promptly, rather than relying on a retroactive "fix" like this one.*

IRS ISSUES GUIDANCE ON FUNDRAISING AND PRIVATE BENEFIT – The Internal Revenue Service has issued advice regarding the tax consequences when an organization issues various credits to volunteer fundraisers based on amounts they raise. In discussing booster clubs, the IRS noted that if a club credits amounts raised by a participant toward any dues owed by the fundraiser to the organization, or credits amounts raised against the cost of anything else the organization might provide the fundraiser, such as a trip, that could be a "private benefit" of the sort that might cost the organization its tax exemption. Moreover, the IRS warned that amounts credited to an individual for fundraising could constitute income paid for services provided to the organization, which could result in the levying of employment taxes. *Though addressed to booster clubs, the IRS's advice could apply just as easily to other exempt organizations. Nonprofits sorely pressed to raise revenue in this difficult economic climate need to obtain the advice of experienced tax counsel regarding the possible adverse tax consequences of some fundraising efforts.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

NEW TOP LEVEL DOMAINS AUTHORIZED – *H&H Report Update* – The Internet Corporation for Assigned Names and Numbers ("ICANN"), the international body that regulates Internet domain names, has given final approval for the creation of an unlimited number of new top level domains that will join the existing .org, .com, .net, etc., top level domains on your computer. These new domains can be owned by anyone who wants to pay an application fee of $185,000 per domain for the privilege of creating one, and the owners have the chance to get their money back (and lots more) by selling rights to names on their domains. *Trademark owners, and many others who own an existing domain name, might have reason to doubt the wisdom of this move. Owners of existing domain names may find the value of their property diminished as similar domain names multiply in the new domains. Trademark owners will have means of protecting their marks in the new domains, as they have had in the existing domains, either by pursuing legal remedies for infringement or registering their marks in the new domains to preclude others from doing so. Either way, they will have to spend more time and money to protect their property than they did in the past. Why is ICANN doing this? It's not just about the money that will be made by the Internet regulators and registrars, although that's a big part of it. The answer is also right there in the name, "I CAN(N)." When it comes to creating havoc, all too often it seems those who have the power to do it will usually do it with insufficient regard for potential consequences. Be proactive in protecting your organization's registered domain name(s) and other intellectual property.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

AIRLINES HIT WITH MORE MANDATED PASSENGER PROTECTIONS – The U.S. Department of Transportation has imposed additional passenger protection requirements on airlines, including extending the year-old tarmac delay rule to international carriers (but allowing four hours instead of three hours for domestic flights). Airlines will be required to provide more detailed fee information on their websites, and include all fees such as baggage, food, cancelling or changing flights, and taxes on advertised prices. Amounts paid for involuntary bumping will be doubled. Airlines will have to reimburse passengers for baggage fees if their bags are lost in addition to the current payments for lost bags. *These new mandates should become effective four months after their April publication in the Federal Register so shortly before Labor Day 2011, just in time for the fall travel season for association staff and members. But the airlines are asking for six months' delay because they say their fare systems are too complicated to meet the new requirements in so little time. (Formerly airlines denied their fare systems were too complicated for the flying public.)*

CONSIDER THESE OPTIONS IF YOU LOSE YOUR TRAVEL ID – One of the more dismaying discoveries while traveling is the loss of your personal travel identification, passport, travel documents, credit cards and cash. It can happen to any one of us. How do seasoned travelers cope? Here are some of the tricks. For identification, stash a spare government-issued picture identification in your carryon bag or briefcase as a supplement to and separate from your driver's license. State governments will provide one to you. Have an electronic record of your flight information, including boarding pass, on your smart phone or iPad or your gadget of choice. Carry a copy of your passport (and other ID) somewhere in your luggage separate from your passport. You can quickly find 800 numbers to credit card issuers to report lost cards even if you do not know your number, and have new cards issued and sent to you, even when travelling internationally. *Don't panic. You can recover from the loss of your travel documents and ID, albeit with some inconvenience. Work with your hotel, airline, credit card issuer, even government and police agencies to recover. But it is easier if you plan in advance for this possibility and take some steps to prepare before it occurs.*

EMPLOYMENT LAW DEVELOPMENTS

THINK ABOUT IT – AND TELL YOUR EMPLOYEES! – An attorney speaking on the need to educate employees about the potential consequences of errant emails recently stated that "[T]he 'e' in email stands for eternal evidence…". *Most managers and other employees do not think of emails in that light but they should, and employers should remind them of that from time to time. Defendants' emails are one of the first places plaintiffs' counsel look for information.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

HERE IS A CONTRACT PROVISION TO USE OR AVOID – An Illinois appellate court recently dismissed an insurance company's subrogated claim against the contractor responsible for causing a fire which made the home of an insured homeowner uninhabitable. The homeowner's insurance company paid the homeowner and then sued the contractor. The contractor argued the subrogated claim was barred by a one-year limit on claims in its contract with the homeowner. The appellate court rejected the insurance company's arguments that the one-year limitation was not properly disclosed to the homeowner; the limitation was unconscionable; the language was ambiguous; and it was a contract of adhesion and should be narrowly construed against the drafter. *Sword or shield? Be wary of such contractual limitations in contracts you enter into if they might limit your potential claims, and consider their use to limit your potential liability.*

COURT OFFERS WEBSITE OPERATOR BROAD DEFAMATION PROTECTION – The Court of Appeals of New York, highest court in the state, has interpreted the federal Communications Decency Act as protecting a website operator from liability under state law for publishing allegedly defamatory comments about a business rival on its website, because the comments were made by others on a portion of the website that was a "virtual bulletin board" and the website operator, therefore, wasn't legally responsible for them. The court said that the Act excepted such Internet publishing activities from the general law that publishing a defamatory statement can make one just as liable as the originator of the defamation in lawsuits filed by injured parties. *This case could have broad implications for nonprofits and others that administer "virtual bulletin boards," and it shows how slippery the law is in this area. It is unquestioned that mere publication of another's defamatory statements on a "virtual bulletin board" would fall within protections afforded by the Act. But, in this case, the defendant had taken commentary submitted to it by a reader and, in the defendant's own words, "promoted it to a post" on which other readers could comment. The publisher also introduced the post with an editor's note, adding a headline, subheads, and an illustration that was described by the court as "offensive" and was clearly intended to draw attention to the post. Then the publisher even reposted certain portions of the commentary. Significantly, the court said that the publisher's conduct amounted to nothing more than engaging in "a publisher's traditional editorial functions" and did not amount to "developing" or "contributing to the illegality of" comments received by the publisher, which other courts had found might remove a publisher's conduct from the protection of the Act. Somewhere there was a line that this publisher did not cross, at least according to this state court, but which other publishers, "developing" or "contributing to" defamation, might cross only at their peril. Maybe future cases will clarify exactly where that line is*.

H & H DEVELOPMENTS

In July…

Jonathan Howe presented "Ask The Lawyers Your Most Pressing Questions," "What's Happening From A Legal/Business Viewpoint?" and "Legal Issues Impacting Association Management Companies and Their Clients" at the regional convention of a national association of association executives in St. Louis, MO. He co-presented "140 Characters: The Legal Implications of Social Media" and, "I'll See You in Court: Navigating Dispute Resolution at the regional meeting of an international association for meeting professionals in Orlando, FL, and "Association Law — What You need To Be Paying Attention To" and "Contract Negotiations—Part 2" for a Florida association meeting in Miami, FL. In the Bahamas, he presented "Negotiating Contracts — Survive and Even Thrive In Today's Environment."

Naomi Angel gave a Report on Legal Trends and Developments to Engineering Society in Denver, CO.

Contributors to this issue…

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