THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

JUNE 2013 VOLUME 2013 ISSUE 6

THE LAW FIRM FOR ASSOCIATIONS®

IN THIS ISSUE:

ANOTHER DISASTER, ANOTHER REMINDER — As President Obama encourages us to contribute to the Red Cross or other charities providing aid to the people of Moore, OK in the wake of the Category 5 tornado that leveled a good part of the town, remember to consider with some caution the appeals and solicitations that will come by email, telephone and mail, or via social media. All too often, scam artists see such disasters as fresh opportunities to practice their wiles and divert charitable funds to their personal coffers. *It pays to be wary, as the FTC recently advised regarding the Moore disaster. Scammers mimic the IRS, FTC and all sorts of businesses and real charities, even creating charitable-appearing entities out of the blue. We have said it before: verify before you trust or entrust or contribute.*

CHECK THIS COMMENT OUT BEFORE YOU TAKE ACTION — Nationally recognized economist Ken Mayland, Ph.D. recently commented in his newsletter that before taking such steps as reducing a workforce below 50 workers or cutting employees' weekly work hours below 30 to avoid Patient Protection and Affordable Care Act health benefits mandates, employers should get legal advice on whether such steps might potentially run afoul of ERISA discrimination prohibitions addressing cutting benefits or terminating employees. *Dr. Mayland emphatically states he is not providing legal advice, but his point is well taken. Obamacare cuts across all sorts of legal boundaries, and it behooves employers to know the potential landmines. You can bet plaintiffs' attorneys and regulators will be looking.*

IS THIS THE START OF A TREND? — The management of the New York Hilton Midtown, New York City's largest hotel, has announced it is eliminating room service for meals. Too few guests use it, it is expensive, and guests should have no problem finding restaurants in the hotel or nearby, or at least that's the logic behind the move. *Hilton's management seems to think this will be a trend in urban hotels. One wonders. It is a convenience for some hotel guests, an expensive convenience but a convenience nonetheless for those by themselves, or late arrivals, or those facing an unfamiliar locale, or those just plain tired and not wanting to go out. What do you think? Do you like to have the availability of room service from time to time?*

GOOD READING … See you in July 2013

Howe & Hutton, Ltd.:
20 N. Wacker Dr., Suite 4200 • Chicago, IL 60606 • 312/263-3001 • Fax: 312/372-6685
Washington Office:
1901 Pennsylvania Ave., NW, Suite 1007 • Washington, D.C. 20006 • 202/466-7252 • Fax: 202/466-5829
St. Louis Office:
1421 Buckhurst Ct. • Ballwin, MO 63021 • 636/256-3351 • Fax: 636/256-3727
E-Mail: hh@howehutton.com

RELIGIOUS ORDER DENIED INSURANCE FOR PRIEST'S ABUSE — An Illinois appellate court has allowed multiple insurers to avoid paying claims for liability insurance coverage of a religious order that was sued because of alleged sexual abuse by one of its priests. Coverage was denied primarily on the ground that a policy provision excluding coverage for "expected" injury was applicable to the case, as the court concluded that previous allegations of abuse by the priest, of which the order had become aware, made subsequent alleged abuse something that the order should have "expected." *This ruling should encourage nonprofits to take very seriously all complaints filed against their employees and take appropriate action to prevent the recurrence of improper conduct. Note that the religious order lost insurance coverage in this case not because it had failed to deal with proven misconduct by an employee, but because it had received complaints of abuse by the priest that was then allegedly repeated on numerous occasions for years.*

APA'S LATEST DIAGNOSTIC STATISTICAL MANUAL GETS BAD REVIEWS — Some days it does not pay to be the provider of an industry standard. The recently published "Diagnostic Statistical Manual of Mental Disorders, Fifth Edition," ("DSM"), published by the American Psychiatric Association, is drawing numerous, very unflattering reviews. No matter. The DSM has become the global standard for defining psychiatric illnesses. It is used for all sorts of purposes, such as diagnostic purposes to determine if patients qualify for benefits or special treatment or access to special services, in civil and criminal litigation, and by insurance companies to determine coverages. Its intended purpose is to establish strict criteria for mental disorders. But the Fifth Edition has run into a buzzsaw of controversy, due in part to new developments in brain scanning, biology and genetics. The addition of many conditions now classified as mental disorders including forms of grief, overindulgent behavior, and stress-coping actions, are being questioned. One consequence is overdiagnosis, the turning of many behaviors into mental disorders, leading to the overuse of treatments including drugs for treatment purposes. *The widespread influence and use of the DSM editions since 1952 has been a blessing and a curse. Supposedly each new edition reflects improvements in diagnoses and advances in understanding mental disorders, but each edition also arouses new controversies. The striving for preciseness and objectivity when studying the brain is almost impossible, psychiatrists declare, but the DSMs wield enormous influence (and generate a lot of revenue for the APA at the current publication price of $199 a copy). The APA states "The DSM is purely a product of the state of our knowledge at this point in time… and is not complete," and will be continuously updated. Let's hope so.*

BOY SCOUTS FINALLY ALLOW GAY SCOUTS, BUT NOT GAY LEADERS — The Boy Scouts of America National Council of Delegates voted at the BSA annual meeting the last week of May to change its controversial policy of not permitting gay boys to join or continue as scouts, a policy which survived U.S. Supreme Court scrutiny in 2000 on First Amendment "expressive association" grounds. The BSA delegates approved reversing its policy by a 61-39% margin, declaring that "No youth may be denied membership in the Boy Scouts of America on the basis of sexual orientation or preference alone," effective January 1, 2014. This change of policy applies only to boy scouts; the current policy barring gay or lesbian scout leaders was not changed. When a gay scout turns age 18, he will not be eligible to continue BSA membership in any capacity. The debate over this policy has raged for years, and reflects in part that nearly 75% of BSA troops are affiliated with and supported by local church groups. *The Mormon church, which supports the most scouts, has publicly stated it does not have a problem with the policy change. The Southern Baptists and Assemblies of God do. Catholic church authorities are still thinking about it. Many local church groups, troops and/or parents have taken stands against the revised policy, and will end their participation with the BSA which has announced it will work with such local groups to find suitable partners to continue their activities outside the*

BSA if they are interested in such BSA help. The Girl Scouts do not have such a policy and have not had to deal with this controversy. Of course this doesn't end the controversy. It will continue to boil at local levels, and at many of the national church groups, in addition to the continuing controversy over barring gay adult leaders. Hang on; it remains a bumpy ride for BSA.

Intellectual Property & Computer Law Developments

HOW MUCH SHOULD A "REASONABLE ROYALTY" BE? — Picture this scenario. A company patents a process or device which is later deemed essential for use in a complex technical standard, a standard-essential patent ("SEP"). Now other companies which want to or have to use that standard for their devices or in their process are faced with dealing with the patent-holder of the SEP who may well be a competitor. What should a license cost to utilize the SEP imbedded in the standard? More and more companies face such a conundrum where all the negotiating power seems to be on the side of the patent-holder. Standard-setters expect patent-holders to provide their patents on reasonable and nondiscriminatory ("RAND") terms. That's all well and good, but who decides what is fair and reasonable and nondiscriminatory? The unhappy licensee-wannabe may resort to the courts, arguing the patent should be tossed out or the patent-holder is violating the antitrust laws. That puts courts in an unenviable position of deciding what a patented technology should cost for its use. What criteria? What precedents? *U.S. courts are beginning to make such decisions, and you should expect more as SEPs become more common, and especially if patent trolls control them. European Union antitrust authorities are much readier, it appears, to make such decisions or to fine patent-holders in very impressive amounts and impose access requirements under EU antitrust laws, which are quite different from U.S. laws. Ask Microsoft, Google, and others about EU enforcement. If your association is in the standards arena, be aware of these trends and think through solutions if utilizing SEPs or work around them.*

Employment Law Developments

WHAT CONSTITUTES "IMPAIRED" FROM MARIJUANA USE? — That is not an idle question, and is very much on the radars of traffic law enforcement authorities and courts, and should be for employers too. With the spread of "medical marijuana" laws in 18 states and D.C., and others such as Illinois considering it, and now recreational marijuana laws in Colorado and Washington State, the lack of consensus as to what constitutes "impaired" is becoming an issue. A recent Michigan Supreme Court decision stated that the use of marijuana did not mean the driver was impaired (the defendant was clocked at 30 MPH over the limit, and admitted using medical marijuana earlier). A recent survey of California drivers on Friday or Saturday nights concluded that at least seven percent of them would test positively for marijuana use, about the same percent as those testing positive for alcohol use. This does not of itself mean they are driving impaired. Another factor is that marijuana stays in a person's system longer than alcohol so the detection period is longer. *Alcohol is considered to impair driving at the .05 blood alcohol concentration ("BAC") level, and becomes a traffic offense at the .08 BAC level. There is not a consensus for marijuana levels so far. Washington State has decided on a level of five nanograms per milliliter of saliva for THC, the main psychoactive ingredient in marijuana, as its impairment standard. Employers are wrestling with medical marijuana use by employees despite their employers' no drug use policies. Court decisions have gone both ways so far. Check the laws of your state, and whatever legal precedents your HR or legal advisors can find to support your policies, especially if you invoke an impairment standard.*

EMPLOYMENT LAW DEVELOPMENTS

THIS REPORT SHOULD MAKE EMPLOYERS SIT UP AND TAKE NOTICE — An Ohio State University professor led a study on the added costs to employers of employees who smoke, and concluded such employees cost their employers on average approximately $5,800 more than nonsmokers per year. They looked at such added costs as higher out of pocket expenses for health care, higher incidence of cancer and heart attacks, more time away from the job for sick days, more time spent on smoke breaks and reduced efficiency, only offset in part by lower pension costs for smokers who died prematurely. Many employers have responded by banning smoking in the workplace, and many landlords prohibit smoking in their buildings. *Before deciding to terminate or refuse to hire workers who smoke, check your state's laws on the subject. A majority of U.S. states bar companies from taking action against employees who smoke away from the job. Employers may require smokers to pay higher health insurance premiums, however.*

COURT DISCUSSES LEGAL LIMITS ON USE OF UNPAID INTERNS — A recent decision by a federal district court in New York discussed the legal limits on an employer's use of unpaid "interns." Two such individuals who had worked on the set of the movie *Black Swan* sued the producers of the show, seeking money they allegedly should have been paid despite the fact that they had agreed to work without pay. The court found the interns were employees under the (federal) Fair Labor Standards Act ("FLSA") which governs employment classifications and overtime, as well as the New York Labor Law; they did not fall under an exception to those laws for "trainees;" and they were not precluded from suing the producers because they had agreed to work without pay, since they could not waive their rights under the statutory laws. The court said the workers were not "trainees," considering the "totality of the circumstances," because the producers did not show the workers received education beyond on-the-job training specific to a particular job for that particular employer; the internship experience was primarily for the benefit of the workers, not the employer; the work would not have been performed by paid employees if the interns had not been hired; and the producers received no immediate advantage from the work performed by the interns. *Businesses and nonprofits are increasingly seeking to use unpaid interns, and young workers are increasingly looking for such work opportunities because of their inability to find a paying job and their hope that unpaid work will lead to paid employment. However, this case shows that workers are not "trainees" simply because they learn something in performing services. They may be employees entitled to pay. This is an area of employment law where an employer really needs to know the rules.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

MORE EVIDENCE THOSE AIRLINE ADD-ON FEES ARE NOT GOING AWAY — A recent report on airline revenues in 2012 derived from add-on fees for 53 airlines reporting such data illustrates how lucrative they have become both in gross numbers and as a percentage of airline revenues. United is the industry leader in collecting such revenues at $5.3 billion, almost twice what runner-up Delta collected, while Spirit Airlines is the percentage leader at 38.5%. The overall total is estimated to be $27 billion in 2012, but other reports go as high as $36 billion. *Whatever the correct total is, one thing is clear: airlines are now addicted to such fees, and we can all expect to see more of them. Hotels, car rental companies, cruise lines and others in the travel industry have seen these revenues add up for the airlines and are quickly coming up with their own add-on fees for formerly free products and services.*

Regulatory Law Developments

TSA BACKS DOWN ON RULE CHANGE — *H&H Report Update* — The Transportation Security Administration has backed down on its proposed rule change allowing airline passengers to carry small knives, toy baseball bats, golf clubs, pool cues and other such items on their person or in their carry-on luggage, responding to fierce opposition from pilot and flight attendant unions, law enforcement personnel, legislators and others. *Such items can be carried in checked luggage. TSA's current list of permitted and prohibited items is available online at www.TSA.gov. In sum, nothing changed.*

FEDERAL APPELLATE COURT AFFIRMS FTC CEASE AND DESIST ORDER — A federal appellate court in Richmond, VA upheld a unanimous Federal Trade Commission order to the North Carolina State Board of Dental Examiners to cease engaging in anticompetitive conduct to prevent non-dentists from providing teeth whitening services to consumers in North Carolina. The FTC's administrative complaint under FTC Act Section 5 alleged that the Board had sent dozens of cease and desist orders to non-dentists providing teeth whitening services stating they were illegally engaged in dentistry, and ordering them to stop. The Board also attempted to dissuade others from entering the market for teeth whitening services, and to persuade mall owners and landlords not to rent facilities where non-dentists might provide such services. The FTC said the Board's actions were clearly anticompetitive and lacked "any countervailing procompetitve virtue." The Board appealed the FTC's decision and order, but the appellate court affirmed, finding the Board's actions were the product of "a combination or conspiracy" under Section 1 of the Sherman Anti-Trust Act and an unreasonable restraint of trade. Neither the FTC nor the court of appeals accepted the Board's defense that its actions were protected from federal regulatory oversight under the state-action doctrine, which exempts some conduct by states from federal antitrust review. *In a tough competitive environment, boards comprised of professionals competing against others who may have different qualifications or training but provide similar services in some respects must be careful to avoid overstepping antitrust bars and thereby invite federal antitrust regulators scrutiny. Litigation along similar lines is pending in Alabama.*

Tax Law Developments

BAR ASSOCIATION RETIREMENT PLAN AFFILIATE NOT EXEMPT — A federal district court in Chicago has ruled that ABA Retirement Funds, an affiliate of the American Bar Association, is not entitled to an exemption from federal income taxes. The association created the affiliate for the sole purpose of promoting and facilitating the operation and use of tax-qualified retirement plans by association members and their employees. Addressing the affiliate's claims for a tax refund applying to the years 2000 to 2002, the court held that the affiliate does not qualify as an exempt "business league" under Section 501 (c)(6) of the Internal Revenue Code, primarily because, unlike an exempt "business league," the affiliate performs services for individuals rather than promoting the well being of an industry or profession. Key to the court's decision were its findings that the affiliate provided benefits only to those who participated in and contributed to retirement plans promoted by the affiliate; the affiliate provided information to individual prospective investors in the plans; the affiliate received fees from those investing in the plans based on the amount or percentage of assets they invested; and the affiliate sought to win customers away from its competitors in the retirement planning industry rather than promoting retirement planning generally. *The affiliate unsuccessfully argued that it should be considered exempt because "retirement planning promotes better lawyering." Maybe so, but how to establish it to the court's satisfaction? The basic point is these are services to individuals, not to lawyers in general.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

A RECENT HEADLINE SPELLS IT OUT ALL TOO WELL — A recent headline in the *Chicago Tribune* spelled it out all too clearly: "Traditional pensions on last legs." A small company in Indianapolis was freezing its traditional pension plan in effect since 1947 and turning to a 401(k) plan in its place. Why now? With great reluctance, the company said it could no longer afford to fund the plan as required by federal law which says pension funding determinations must be based on the future value of money using current corporate bond rates, and funded on a pay-as-you-go basis. Bond rates have been at record lows for years since the "great recession" took hold five years ago, and Fed Chairman Bernanke determined to stimulate the economy with rock-bottom interest rates. *A couple of things stand out here. One is that an employer with a great record of providing retirement security to its employees can no longer afford to do so because of accounting assumptions and funding requirements imposed by federal law. But those same accounting assumptions and funding requirements are not imposed on federal, state and local governments which continue to provide defined benefit "traditional" pensions to current and retired employees. Those promised benefits are not being curtailed even in the wake of declarations across the nation that governments are going broke and essential services cut because of unfunded and unaffordable pension obligations. Associations and their members would be looking at serious penalties if they operated their pension plans as governments do.*

H & H DEVELOPMENTS

In June . . .

Jonathan Howe presented "Contract Law and Events" as part of an online conference for a national society of association executives. He also presented "Executive Legal Issues – What You Should Know" at a retreat for fellows of this society at the Rancho Bernardo Inn Golf Resort & Spa in San Diego, California.

Barbara Dunn presented "Advanced Contract Legal Issues and Negotiation Strategies" for the local chapter of an international organization for meeting professionals In New York, NY. She also co-presented a session on business skills, personal branding and professional certifications entitled: "The Business of You: How Strong Is Your Core?" for a group of corporate meeting professionals conference in Denver, Colorado.

Samuel Erkonen presented two session: "Contract Negotiations" and "Negotiation Strategies" for an educational forum for financial and insurance conference planners in Park City, Utah.

PLEASE VISIT OUR LINKEDIN AND FACEBOOK PAGES

Contributors to this issue…
Terrence Hutton, James F. Gossett and John M. Peterson