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:

WHAT MOVES AS FAST AS A TSUNAMI? – Internet scams! From appeals by phony donation sites to downloads of virus-laden messages, the attack artists and fraudsters took immediate advantage of the international outpouring of sympathy and efforts to send monetary and other help to Japan following the devastating earthquake and tsunami which hit northern Japan on February 11. *Be forewarned. Stick with charities you know in your efforts to send help to Japan. Frauds are out there in huge numbers! Beware domains with "Japanese earthquake," "Japanese Tsunami" or "relief" or "donations" which are flooding the Internet.*

ANOTHER SIGN THE TIMES THEY ARE A'CHANGING – The Girl Scouts of America are now accepting credit card payments for their annual girl scouts cookies drive at selected sites. *Is your association or nonprofit organization organized to do this? If not, why not? Scout troops are not usually at the leading edge of electronic commerce.*

CHARITY RECEIVES ZERO RATING FOR 6TH STRAIGHT YEAR – Charity Navigator, which rates charities on their performance including revenues actually expended on their target cause, gave a zero rating for the sixth straight year to Wishing Well Foundation USA in Metairie, LA. The group's stated purpose is to fulfill wishes of terminally ill children. The watchdog group reviewed IRS returns showing the Wishing Well Foundation USA expended only $36,000 of $1.3 million raised in 2008 on program activities. The rest went to telemarketing firms and administrative costs. *That is a pretty sad performance but by no means unusual. Check out charities' performance before sending a nickel, unless you prefer funding telemarketers rather than those for whom they ostensibly raise funds.*

WE GET TIRED OF THESE – The president of a tiny Chicago area suburban water district which is nearly bankrupt reportedly paid himself, his girlfriend and her daughter in excess of $111,000 per year to do jobs normally done by volunteers. The feds foreclosed on it. *Once again, where was the board oversight, the auditor, the lawyer, assuming there were any? It also is an example of Illinois having more government units than any other state. WHY!?*

GOOD READING … See you in April

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NOT-FOR-PROFIT LAW DEVELOPMENTS

NONPROFITS FAIL TO ANTICIPATE POSSIBLE NEW REGULATIONS – A group of nonprofits in New Jersey has sought to legally sell marijuana for medicinal purposes under a new law that required them to register with the state, publicly disclose details of their plans, and pay a $20,000 fee. But after they registered, it became clear to the organizations that the Governor's administration was in the process of developing regulations that would seriously impair their ability to raise and/or sell their new cash crop. The legislature declared the proposed new regulations to be against the legislature's intent in providing for the legal sale of marijuana under the new law, and the organizations took the administration to court, objecting to the fairness of changing the rules after they had registered. Showing them no sympathy, though, state courts in recent rulings have effectively said, "Too bad." *Unfortunately, nonprofits sometimes suffer because they have failed to anticipate the possible impact on their operations of changes in the law. Farsighted planning can help, but only so much. To paraphrase an old saying, "Nonprofits are never completely safe while there is anyone at work in the state capitol."*

ADA REQUIREMENTS IMPACT NONPROFIT TESTING – The recent settlement of a suit by the U.S. Department of Justice against a nonprofit administering medical licensing exams shows how the Americans with Disabilities Act can require nonprofits that offer courses and/or licensing, certification or credentialing examinations or programs to make accommodations for individuals with disabilities. In the medical exam case, the nonprofit entered into a settlement agreement allowing a complaining individual with dyslexia double the standard testing time and a separate testing area in taking certain exam components. *The ADA provides that private entities administering professional licensing examinations must offer exams in a place and manner accessible to persons with disabilities. That may include making reasonable modifications to exams, offering appropriate auxiliary aids and services to disabled persons, and, as in this case, making changes in the length of time permitted for completion of an exam. But a testing entity can choose among various effective means of providing access for individuals with disabilities and is not necessarily required to use the most advanced technology in administering tests.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

IS A UNIVERSITY DONORS LIST A TRADE SECRET? – That is a question posed to a Connecticut appellate court. The University of Connecticut says its donors list is a valuable trade secret that should not be subject to disclosure in response to a Freedom of Information ("FOI") request. The Connecticut Freedom of Information Commission disagrees, saying the list does not come within the exceptions to Connecticut's FOI statute. The statute has a trade secrets exception for private entities' trade secrets that are disclosed to state regulators or agencies in some circumstances. The university says its list is valuable because its donors would be sought after by competitors including other charities, even casinos and the like. *Is a trade secret of a public entity theoretically "owned" by the public exempt from disclosure to the public? One argument is that corporate trade secrets are not subject to disclosure to shareholders. Of course corporations, including nonprofit, tax-exempt organizations, are not subject to FOI statutes.*

REGULATORY LAW DEVELOPMENTS

STATE DENTAL BOARD NOT IMMUNE FROM FTC SUIT – The state action antitrust immunity doctrine did not shield the North Carolina State Dental Board from a Federal Trade Commission unanimous ruling that the board's prohibition on non-dentists providing teeth whitening services restrained competition in the market for such services. In order to qualify for state action immunity protection, the board's conduct had to meet both requirements of the two-part test set forth in the U.S. Supreme Court's 1980 decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, according to the FTC's opinion. First, the challenged restraint had to be clearly articulated and affirmatively expressed as state policy, and second, the policy had to be actively supervised by the state. The board was dominated by licensed dentists, who during their tenure were permitted to continue to provide dental services, including teeth whitening. Given the board members' obvious self-interest in the challenged restraint, the FTC ruled that the state had to actively supervise the board in order for the board to benefit from state action immunity from the antitrust laws, and the FTC found a lack of evidence of state supervision. *Competitors should not act jointly to restrain competition, whether as members of a state board, as members of an association or association board, or as members of a golf foursome. If you have any doubt concerning the legality of a proposed association activity, consult a knowledgeable association law attorney.*

TAX LAW DEVELOPMENTS

FOR-PROFIT CHANGE TO EXEMPT ENTITY DOESN'T ALWAYS WORK – A nonprofit successor to a for-profit entity recently learned that converting a business corporation to a tax-exempt organization can be a difficult undertaking. The U.S. Tax Court refused a Section 501(c)(3) charitable organization exemption for a nonprofit successor to a business that assisted companies in complying with certain governmental operations. What the nonprofit did mostly, like its predecessor, was provide its assistance for a fee. It had no other income, and in trying to show that its activities were charitable the only material and allegedly charitable activities it could point to were providing testimony to Congress and distributing materials that advertised the services it sold for a fee. The fact that the organization didn't charge the government for the testimony and didn't charge anyone for the advertising didn't impress the Tax Court. *Whoever decided that they should go through the expense and trouble of reorganizing this for-profit as a nonprofit provided a wonderful example of how much money people can waste when trying to escape taxation if they apparently don't understand tax exemption law. Following the advice of experienced legal counsel can help prevent such disasters.*

IRS PROHIBITS HOSPITAL ORGANIZATIONS FROM FILING 990 FORMS EARLY – The Internal Revenue Service has announced that it is "delaying the start of the 2010 filing season" for tax-exempt hospital organizations required to file Form 990 with a Schedule H, since the IRS needs time to implement changes to IRS forms and systems reflecting additional requirements for the operators of one or more exempt hospitals. Organizations that would normally file a Form 990 with a Schedule H are now prohibited from doing so before July 1, 2011. But the IRS is also granting an automatic 3-month extension of time to file Form 990 for hospital organizations with filing due dates before August 15. *At least they aren't "delaying the start" of the baseball season, which would cause some of us a great hardship. With this ban on early Form 990 filings, though, one has to wonder if we are getting to the point with our government where everything not required is prohibited.*

DON'T CLOSE DOOR ON INDIGENT HOSPITAL CARE, SAYS COURT – The Ohio Supreme Court recently dealt with the issue of how much charity care a hospital must provide in order to receive a charitable use property tax exemption under Ohio law. Unlike the Illinois court in the well-publicized Provena Covenant case, the Ohio court said there is no minimum amount of charity care required as long as a hospital has an "open door" policy and treats any indigent patients that show up. According to the Ohio court, if no indigent patients seek care at a hospital, that would not bar an exemption. Unfortunately for the clinic involved in the case, it didn't even meet the Ohio court's relaxed standard for a charitable property tax exemption, since it had a published "indigency policy" that specifically reserved the clinic's right to refuse admission for patients with no ability to pay. *The moral here: if hospitals don't provide a lot of charity care, they should at least have a policy of treating those indigent patients that come to them if they want a property tax exemption. Because the Ohio clinic could shut its "open door" at any time, it was denied an exemption.*

EMPLOYMENT LAW DEVELOPMENTS

ALCOHOLIC'S ADA AND FMLA CLAIMS DISMISSED – A federal appellate court in Chicago affirmed dismissal of a terminated employee's Family Medical Leave Act ("FMLA") and Americans With Disabilities Act ("ADA") claims. She was terminated for failing a blood alcohol test her employer required as a condition of continuing employment after she sought help under the employer's Employee Assistance Program. She was off her job for a month with pay while undergoing treatment. After a supervisor thought she smelled of alcohol at work she was required to take another blood test. Following the test but before she received the results she checked herself into a hospital, and was discharged a day later with directions to enter an outpatient substance-abuse program. A few days later she was terminated for failing the test. The appellate court said her claims failed under both statutes because she was not suffering from a serious health problem or unable to perform her duties at work. *One may argue whether alcoholism is a serious health problem, but in interpreting the statutory requirements of the ADA and FMLA her ability to perform her job duties undercut the basis for claims under either statute. Keep this result in mind if dealing with an alcoholism problem on your staff.*

DOES YOUR ASSOCIATION HAVE A SOCIAL MEDIA POLICY? – Most associations and their members have basic policies informing their employees that computers and other electronic devices provided by the employer are to be used for the employer's business, the employer may monitor their usage, and any information on the devices is subject to review by the employer at any time. And from time to time employers do have occasion to inspect employees' computers, cell phones and the like. But how many employers have policies specifically addressing employees' use of social media such as Twitter, Facebook, Google, LinkedIn, and the multitude of other sites, while using employer-provided devices or while at the employer's place of employment or during working hours or even talking about their employers? One example: how much time do your employees spend on Twitter, Facebook and the like during their workday? Is it related to their work? *What employment-related issues might arise from the use of social media? Other than a basic electronic device policy and confidentiality agreement, most employers have not addressed social media issues, and many are unaware of the need for a social media policy or lack the knowledge of what such a policy should cover. This is an area where expert advice would be helpful, both as to the need for such a policy, and what a policy should address.*

MORE DISCRIMINATION OR A STRUGGLING JOB MARKET? – The Equal Employment Opportunity Commission reported nearly 100,000 claims of job discrimination in FY2010, up 7% from 2009. But what that indicated was subject to debate. The EEOC says it may reflect not only a bigger budget and staff to address claims but also there is still too much workplace discrimination which remains a substantial problem. Business representatives including association staff and employment lawyers respond that it reflects the struggling economic picture, and that claims usually increase when the job market turns down. *Whichever view is correct, and there is support for both, one statistic stands out. Retaliation claims surpassed race discrimination claims for the first time. Retaliation claims are thought easier to plead and win by employment lawyers. So be very careful not to give the appearance of retaliation in workplace discipline and termination situations.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

MORE ADD-ON FEES FOR AIRLINE TRAVEL AHEAD? – As oil prices head up again after the recession lull, airlines are predictably looking at add-on fees to augment ticket revenues. Among the possibilities are fees for carry-on bags such as Spirit introduced a year ago; charging for checked luggage based on weight; a fee to lock in airline fares a day or two or three before buying a ticket; fees for assigned seats; a fee for wi-fi access; and fees for checking bags on international flights. *The airlines are in boom or bust mode, and fuel costs are among the major factors. They have learned the traveling public may grumble but will pay the add-on fees. So expect more until their customers say no or Congress does.*

ANOTHER TWIST ON AIR FARES – Leave it to Allegiant to come up with a new twist on air fares. Instead of a passenger locking in an air fare, Allegiant is proposing to the U.S. Department of Transportation that air fares would or could vary depending on the price of fuel. A passenger would be offered the option of a specified but higher price for a ticket or a lower-priced ticket whose price might vary up or down (read ”up”) with changes in the price of fuel for the airline. In other words, Allegiant would pass the risk of airline fuel cost changes to its passengers willing to take the risk of oil market price fluctuations. *Whom do you think is better positioned to take the risk of hedging future fuel costs, Allegiant or its passengers? The further out one books, the greater the risk. And just how would a passenger know what to expect and when? What sort of fuel cost and ticket price transparency would the passenger have? If add-on fees are not enough of a deterrent, this one might convince passengers to try another carrier or mode of transportation, or at least say no to this option.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

FROM PGA TO DGA – Golf and associations are like peanut butter and jelly – hard to separate. Most of us are familiar with the Professional Golfers Association, but how many know about the Disc Golf Association (“DGA”)? A trip through a public or private park might be your introduction. Disc golf is played using Frisbees tossed into vertical nets designed to catch and hold them. (It’s “disc golf” because “Frisbee®” was trademarked.) It takes skill to navigate around, over or through trees, bushes and other obstacles on a course, and offers fun and opportunities for competition up to and including professional tournaments. The inventor of the frisbee came up with the idea, started a company to develop equipment for a course, established the DGA (which led to the Professional DGA and the Recreational DGA), and naturally rules and standards had to be developed. Now it is played all over. *We say there is an association for nearly everything, and this is one more illustration. Less expensive than that other kind of golf and even more frustrating. Just the thing for a new fun event at a meeting.*

SOME PREDICTED CHANGES THAT SEEM TO BE ON THE MARK – Do these changes seem realistic to you? A prognosticator in Colorado says the following changes are probable. The U.S. Post Office will go out of business. Paper checks will disappear. Newspapers as we know them are headed for the scrap pile. Landline telephones are obsolete and unnecessary. Much of network TV as we know it will soon be gone. Privacy is already gone. *You can quibble about these but he is probably right on most of these. Great Britain is already phasing out paper checks as of 2018, and how long has it been since you received your paper checks back in your monthly statement instead of photocopies? The USPS is already trying to end Saturday deliveries, and will either raise prices again, receive more subsidies from Congress or eliminate more services. Its current business model is unsustainable but Congress won't let it change. Newspapers cost more and provide less. The Chicago Tribune is a sad example of a declining paper, less content, fewer subscribers, less ad revenues, etc. Many others are in even worse shape. Go online and get your news that way. Cell phones already outnumber landlines. Why have one? Privacy? You must be joking. It's long gone, especially if you do anything online. Google, Amazon, Facebook, Twitter – they are all based on invasion of privacy. So maybe we should ask how soon. Very soon for most of them.*

H & H DEVELOPMENTS

In March ...

Jonathan T. Howe presented "The New Normal – Negotiating Venue Contracts in the Current Economy" during a virtual webinar hosted by the New England chapter of a major association. He was joined by hospitality industry/ meeting professionals who also spoke on this topic followed by Q&A. He also presented "Negotiation – While An Art, Is Also A Science – It's More Than Hotel Contracts" for the Chicago chapter of the same organization, held on March 17th at the Irish American Heritage Center in Chicago.

Barbara Dunn presented "The Lawyers' Debate: Today's Hottest Topics in Hotel Contracts" to meeting professionals attending a chapter meeting in Long Beach, California.

Samuel J. Erkonen spoke to Roosevelt University students on hospitality law and contracts.

Naomi R. Angel gave a Healthcare Reform Update to a trade association meeting of manufacturers entitled, "Patient Protection and Affordable Car Act (PPACA) or Obamacare."

Gerard P. Panaro co-presented "Two-Faced-Book" Facebook Policy Can Serve You Well" for a Bankers on Line Webinar. He also did that presentation to the DC Chapter of a meeting professionals group on strategies for contract negotiation at Westin Tysons Corner, Va .

Contributors to this issue…

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