

# THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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## THE LAW FIRM FOR ASSOCIATIONS®

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**CHUTZPAH DEFENSE FAILS** — A federal judge in Chicago rejected a defense offered on behalf of two Cook County, IL officials in a federal bribery case. The officials were convicted on charges of taking bribes in return for offering taxpayers reductions on their property taxes. The defense: we never intended to nor did we take any actions to actually do anything to lower the taxpayers' taxes. In other words, all talk and no action, so no quid pro quo for the payments. The judge said you knew the payment was a bribe and that was enough for the offense. *Let's see, now. I offer to do something we both know is improper for a bribe, you pay the bribe, but I never intended to actually do it. April Fool, Illinois style. Apparently the judge did not see the humor.*

**SOME USEFUL ADVICE FROM AARP** — AARP provides a useful checklist when a family member, colleague or friend has died, with some things to do and not do. Among the recommendations: notify the major credit bureaus to prevent identity thieves from opening credit cards or accounts in the name of the deceased. Don't be stoic. Accept help when offered. Shred personal papers and bank statements to deter identity thieves. Do not put home addresses in the obituary notice. Thieves target homes at times of wakes and funeral services and burials. *This latter recommendation has come up at military funerals, among others. Ask someone to mind the house. It's too easy to find home addresses online. Another piece of advice: keep track of passwords so access to important information is not delayed or lost. The AARP pamphlet is entitled "ABA/AARP Checklist for Family Survivors," and can be ordered online at [aarp.org/Checklist For Family](http://aarp.org/Checklist For Family).*

**FAMOUS LAST WORDS...** — An Illinois legislator was arguing on behalf of a bill to expand rights of pregnant women at work which would require employers to grant them "reasonable accommodations" in the workplace. When a colleague expressed fears of litigation over what that entails, he was assured the employer could simply say "I'm sorry, I can't do that," and would not have to worry about being sued. *Whether one supports the bill or not, surely, you jest. If there is any certainty on earth, it's that what constitutes a "reasonable accommodation" or any other requirement based on what's "reasonable" is wide open to litigation.*

GOOD READING ... See you in May 2014

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**NOW THINGS START TO GET REALLY COMPLICATED** — *H&H Report Update* — A National Labor Relations Board Regional Administrator has ruled in favor of some Northwestern University football players who petitioned to be recognized as employees of the university and therefore entitled to hold an election to be recognized as a union. The administrator found the players' relationship with the university was primarily based on their athletic skills, which was why they were recruited and received athletic scholarships worth approximately \$76,000 a year to the players and in return they performed in games generating very substantial revenues to the university. The university is expected to appeal the ruling to the full NLRB, and from there the matter is likely to end up in the courts on further appeals. *This is the first time college players have been declared university employees. Where this will go and the ultimate consequences are difficult to predict, but the decision is a stunner on numerous fronts. While this decision immediately affects only Northwestern, implications abound for other private universities and colleges. (The NLRB does not have jurisdiction over governmental entities, therefore the ruling does not have the same immediate potential impact on state universities.) First, even if permitted to do so, will Northwestern's football players vote in favor of a union? The university and coaches are likely to try to dissuade them. If players can organize and form unions, what are the issues on which they might bargain? Medical care during and after playing careers are over is one likely issue. Scholarship revocations due to injury, quality of performance or coach's decision (whim?) is another. Compensation beyond currently allowed room, board, tuition and certain fees is another. Will players be allowed to benefit commercially, endorsements perhaps, or accept payments to sign autographs? If football and basketball are the big revenue-generating sports, what about the consequences for players of non-revenue sports? How does Title IX applicable to women's sports apply? How will this affect college conferences and the NCAA, when some schools are public and others private? Hang on. This is about to get really complicated on numerous fronts. For example, see the next article.*

**JUST WHAT THE NCAA NEEDS — ANOTHER ANTITRUST LAWSUIT** — Welcome to recently concluded March Madness and another antitrust lawsuit against the NCAA in New Jersey, this time filed on behalf of several football and basketball players alleging the rules of the NCAA and five of the nation's leading college conferences capping student athletic scholarship aid to tuition, books, some fees, room and board amount to a horizontal price-fixing conspiracy. The lawsuit seeks injunctive relief barring the NCAA and conferences from enforcing the caps on scholarship aid and opening the doors to colleges offering compensation to athletes as part of the recruiting process. The plaintiffs seek to represent a class of all Football Bowl Subdivision players and Division I basketball players. The plaintiffs do not seek to end athletic scholarships nor guarantee payments to players. And for the so-called nonrevenue sports, which at most universities and colleges is everything else, those athletes might be able to attract endorsements, e.g., men's and women's Olympic-caliber swimmers and gymnasts, college baseball, track and golf stars, etc. *But wait, there's more. Another antitrust class action lawsuit has been filed in California on behalf of a former football player to recover damages which are alleged to be the difference between what his and other players' scholarships paid for and the actual out-of-pocket costs of attending college. These lawsuits are similar to a lawsuit previously filed and settled by the NCAA for \$10 million back in 2008 over miscellaneous educational expenses to Division I-A football and 16 Division I men's basketball conferences. But what's at stake here is much more comprehensive, expensive and controversial relief. The lead attorney in the New Jersey lawsuit is an old hand at successfully suing major sports leagues including landmark wins against the NFL and NBA, and the lead attorney in California is also involved in two other lawsuits against the NCAA. If successful, these lawsuits could significantly change college sports as we know them, including recruiting, compensating players, and further divide the college haves from the have-nots. All these lawsuits further blur the line between amateur and professional sports.*

## EMPLOYMENT LAW DEVELOPMENTS

**U.S. SUPREME COURT SAYS SEVERANCE PAY IS TAXABLE INCOME** — The U.S. Supreme Court has ruled that severance pay in connection with an involuntary separation from employment is taxable income to the recipient. The decision reversed a contrary opinion by a federal appellate and trial court and resolved a split among appellate courts on the question. The Internal Revenue Service has sought for years to tax severance compensation, and numerous cases are pending before the IRS on this very question. *Employers and employees will need to factor this decision into their negotiations on severance compensation. Employees may seek to “gross up” the severance to include the projected income and FICA taxes reducing the payout, and employers must anticipate the FICA due on the severance in addition to the payout. One way parties have tried in the past to get around these taxes was to claim the payment was for alleged damages on some sort of discrimination or other personal injury claim. We advise against such shenanigans.*

## TAX LAW DEVELOPMENTS

**IRS BARS APPRAISER GROUP FROM TAX VALUATIONS** — The Internal Revenue Service has barred an appraisal firm from participating in valuation of real estate building façade easements for federal income tax purposes over the next five years. The firm admitted to aiding the understatement of client tax liabilities by overvaluing façade easements for charitable donations. Failure to abide by the IRS restriction could result in a total prohibition on appraiser presentation of evidence or testimony in administrative proceedings before the U.S. Department of the Treasury. *This case serves as a useful reminder that there are limits on what an appraiser, attorney or other professional can do to assist a client in many situations, and brings into question the firm’s adherence to expected business ethics of appraisal industry associations.*

**COURT WON’T COMPEL RULEMAKING ON SOCIAL WELFARE EXEMPTION** — A federal district court in the District of Columbia has refused to compel the Internal Revenue Service to issue regulations in response to a nonprofit’s complaint that the IRS is recognizing organizations as exempt from tax under §501(c)(4) of the Internal Revenue Code even though they do not meet Code requirements. The nonprofit Citizens for Responsibility and Ethics in Washington, a §501(c)(3) exempt entity, sued the IRS, contending that its rule allowing §501(c)(4) exemptions for organizations that *primarily* promote social welfare is at odds with a Code requirement that §501(c)(4) organizations be *exclusively* devoted to such activities. The district court dismissed the suit because the court found the nonprofit had no “standing” to bring it in view of the group’s failure to demonstrate that it had suffered any harm that would be remedied if the court ordered the IRS to engage in rulemaking as proposed by the nonprofit. The complaining organization in this case is interested in limiting or eliminating political campaign activity by (c)(4) organizations, and it said that it was damaged because it could not obtain information on contributors to §501(c)(4) groups, since they are not legally required to disclose such information. But the court noted that even if the IRS issued rules requiring §501(c)(4) organizations to be exclusively devoted to social welfare, and even if that caused many such organizations to lose their tax-exempt status, that would not necessarily give the plaintiff organization the information it was seeking. Those groups, it pointed out, could avoid disclosing donor information by, among other things, remaining taxable or obtaining an exemption under some other Code provision that does not require donor disclosure and permits some political campaign activity, such as by §501(c)(5) and §501(c)(6) entities. *This case demonstrates how “standing” requirements can prevent nonprofits from obtaining things they want by resorting to litigation. Courts provide relief to people who have been injured in some way if their injury can be alleviated by the courts. But the relief sought from a court must actually address the injury complained of, rather than providing some other benefit that the complaining party wants to obtain.*

**HMO DENIED CHARITABLE ORGANIZATION TAX EXEMPTION** — In a recently released private letter ruling, the Internal Revenue Service followed its long-established policy of denying a tax exemption under Section §501(c)(3) of the Internal Revenue Code for a health maintenance organization (“HMO”). Although providing healthcare services can be a tax-exempt charitable activity, the IRS, as in the past, denied an exemption because it found the HMO in question was controlled by and operated primarily for the benefit of its member-enrollees, rather than having the primary purpose of providing healthcare services for the benefit of the community as a whole. *This IRS ruling should be instructive for all §501(c)(3) organizations and would-be (c)(3)s. An organization seeking to obtain and maintain an exemption under that section of the Internal Revenue Code, which allows receipt of deductible charitable donations, must confer a benefit on the public or a significant segment of it, rather than benefiting just a dues-paying membership.*

## REGULATORY LAW DEVELOPMENTS

**FTC AND ASSOCIATIONS SETTLE ANTITRUST CHARGES** — *H&H Report Update* — The Federal Trade Commission has approved final consent orders settling antitrust charges brought separately by the FTC against a national music teachers association and a state association for legal support professionals. The music teachers association was charged with illegally using a code of ethics provision to restrict members from soliciting other teachers’ clients, while the legal professionals organization was charged with illegally using ethics rules to restrain members from competing with each other on price, disparaging each other through advertising, and soliciting other professionals for employment. Under the terms of the consent orders, the associations have agreed to remove anticompetitive provisions from their codes of ethics. *Some may think such consent orders are a fairly minor punishment for violation of federal laws, but there is a fair amount of negative publicity surrounding such orders, and that alone can sink an association. Unfortunately, some association members expect to benefit financially in their businesses from instigating ethics codes which amount to antitrust conspiracies within their organizations, escape direct punishment for it, and may not appreciate the potential consequences for their association.*

**DOJ, FTC SAY OK FOR COMPANIES TO SHARE CYBER THREAT INFO** — The U.S. Department of Justice and the Federal Trade Commission have issued a joint policy statement on the sharing of cyber-security information that makes clear that properly designated cyber threat information sharing is not likely to raise antitrust concerns and helps make information networks more secure. They say, “Private parties play a critical role in mitigating and responding to cyber threats, and this policy statement should encourage them to share cyber security information. With proper safeguards in place, cyber threat information sharing can occur without posing competitive concerns.” The recent announcement updates an earlier antitrust analysis dating back to 2000. The earlier legal analysis remains current, say the antitrust regulators. *For more detailed information, see the “Antitrust Guidelines for Collaborations Among Competitors,” April 2000, jointly published by the Department of Justice and Federal Trade Commission. However, the general discussion in the 14-year-old guidelines does not address cyber threat-sharing, so proceed carefully in exchanging such information.*

## MEETINGS & TRAVEL LAW DEVELOPMENTS

**AIRLINES ANNOUNCE POLICY CHANGES** — American Airlines and US Airways have announced changes to their checked baggage and mile redemption policies. American is changing the number of miles needed for unrestricted free flights and international trips, with fewer miles being required for unrestricted free flights on some less-busy travel days and more miles required on some more popular days. US Airways is ending blackout days to redeem miles for free flights, but both airlines are reducing

the number of free bags they allow certain passengers. *Announced changes are intended to bring the policies of the two airlines closer together. The carriers merged last December to form American Airlines Group Inc. American did not follow Delta's new model of basing miles awarded on the price of the ticket instead of the distance of the flight, but said it would look at what its competitors do. United is also revising its plan. Stand by for more such "tweaking" of frequent flyer rewards plans.*

## INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

**SOME U.S. COPYRIGHT FEES ARE GOING UP ON MAY 1** — The U.S. Copyright Office has announced it will adopt new fees as of May 1, 2014 for the registration of claims, recordation of documents, special services, Licensing Division services and FOIA requests. The Copyright Office is funded by appropriations and fees for services. The Copyright Office is required to attempt to recover the cost of a substantial portion of the services it provides. The new fee schedule is based on a study begun in 2012, including a public comment period, and submission to Congress providing Congress an opportunity to disapprove the new schedule. Congress did not intervene. *The fee for a standard registration claim for a single-author, single work which is not a work for hire was lowered to \$35, while others are increased to \$55, including standard electronic registration fees. For a complete schedule of fees after May 1, 2014 go to [www.copyright.gov](http://www.copyright.gov). Associations need to be familiar with the new fee schedule as it will affect their costs in registering their many publications and works with the Copyright Office.*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**DO YOU WANT TO REDUCE YOUR CREDIT CARD FRAUD EXPOSURE?** — One significant way is to ask your credit card company to provide you with a chip-and-pin credit card to replace your current card which most likely comes with a magnetic strip. The U.S. lags most of the world by continuing to use credit cards with magnetic strips instead of the chip-and-pin cards used elsewhere around the world. Chip-and-pin cards are more secure. So why don't we change? Because the credit card companies and banks want retailers to pay for the necessary equipment upgrades and the retailers think the card companies and banks should. So nothing gets done. *The Target credit card debacle was made easier because Target still uses magnetic strip technology. Target's CEO claimed Target tried to lead the way to switching to chip-and-pin technology but other U.S. retailers declined to do so, in part because it takes longer to complete a chip-and-pin transaction. Processing time is money. Well, do your part and ask your card issuer for a chip-and-pin card. It's one way to force adoption of the technology and perhaps reduce your exposure to card fraud. It certainly has in other countries including Canada and the UK. If you travel internationally, you will find chip-and-pin technology the norm.*

**ONCE AGAIN, PROFIT CONSIDERATIONS TRUMP SAFETY** — It seems like a no-brainer to install a kill switch on smartphones that would allow phones that are lost or stolen to be disabled and their contents made inaccessible. That would make phones less of a hot theft item, especially of the grab-and-run variety. The technology exists. So why not use it? Well, in the U.S. the wireless carriers have declared they won't use phones with that feature. It would require increased service at dealerships to troubleshoot any such kill action, or to reactivate a phone that was deactivated. That could be costly. Carriers also profit by selling insurance on lost or stolen phones and sell replacement phones, both profit centers. *Police and consumer groups favor such kill switches, and state attorneys general are beginning to push for them. The wireless carriers' trade association CTIA says kill switches are unnecessary and the carriers are doing other things to make their phones more secure. Undisclosed things: Employers providing smartphones might want to press their carriers to adopt such technology because so many users have employer as well as personal data on their phones, including all those company emails, for starters.*

**THE IRS WARNS OF ANOTHER EXPENSIVE SCAM** — The Internal Revenue Service has issued warnings about another all-too-successful scam, this one involving threatening telephone calls to taxpayers stating they owe unpaid income taxes and demanding immediate payment using wire transfers or prepaid credit cards. The calls threaten loss of the recipient’s driver’s or business license, or deportation, or similar dire consequence. The initial call may be followed up by a call purporting to be from the state department of motor vehicles or local police, or by an official looking email. Do these threats work? Apparently so! The IRS says about 20,000 have been scammed of about a million dollars. One of the reasons the scam appears to be so successful is the caller recites the last four numbers of the person’s Social Security number, theoretically confidential. *Think of all the creditors, medical service providers and others who have demanded your Social Security number over the years. How often are you asked for those last four numbers as proof of your identity over the phone or even in person? Unfortunately those numbers are too readily made public. A few things to keep in mind: the IRS does not call taxpayers to demand taxes in arrears, or send emails. The IRS uses the U.S. Mail. And it does not demand payment by wire transfer or prepaid debit cards. Don’t fall for this scam or others demanding payments for supplies you never ordered, or for your nephew allegedly trapped far from home or hospitalized and in dire need of funds to get home.*

## H & H DEVELOPMENTS

### In April . . .

**Naomi Angel** was recently awarded the American Fence Association's President's Award, one of the association's highest honors. She also traveled to three states in March and presented, “Safeguarding Your Personal and Corporate Identity” to a trade association of manufacturers and contractors in Las Vegas, “Hope for the Best, Plan for the Worst – Manage Risk – Develop an Emergency Continuity Plan” at an annual trade association meeting of manufacturers in Nashville, and delivered a program to the MPI Southern California Chapter on “Risk Management in Uncertain Times.” This month Naomi will provide an antitrust update and report on legal trends in Napa, California to a trade association of manufacturers at its annual meeting, and will present a program to the MPI Ohio Chapter in Cincinnati, “Meetings and Events Can Be a Risky Business – How to Keep Your Organization Out of Trouble” followed by a Q and A session, “The Lawyer Is In.”

**Jonathan Howe** presented “Liability Concerns for Independent Meeting Professionals” at a Small Independent Planners Education Conference in San Antonio Texas. At a meeting of a local chapter of a meeting professional organization in Orlando, FL, he and a group of volunteers presented a Mock Trial where both the hotel and the contracting association were claimed to have breached the agreement. The Academy of Hospitality Industry Attorneys will meet in Chicago April 24-26; and Jonathan and three member attorneys will present the program, “Group Sales Agreements: New Challenges for Booking.” **Terry Hutton** will present an update on legal trends and developments to an international association of manufacturers. **John Peterson** moderated the Annual ASAE Chicago Association Law Symposium and also served on a panel of experts that responded to questions. **Sam Erkonen** gave a talk to attendees at an ASAE Legal Symposium about amicus briefs.

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### Contributors to this issue...

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