

# 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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**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. *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 dispute and litigation.*

**SHOULD SARBANES-OXLEY ACT BE USED AGAINST A FISHERMAN?** — A commercial fisherman suspected of catching and keeping undersize Red Grouper fish was charged and convicted under a provision of the Sarbanes-Oxley Act prohibiting destruction or concealment of “a tangible object, with the intent to impede, obstruct, or influence...” a government investigation. After he became aware he was suspected, the fisherman instructed his crew to get rid of the undersized fish. He admitted to doing so, but defended against the federal anti-shredding charge on the basis he was completely unaware that he was violating the Sarbanes-Oxley Act. The U.S. Supreme Court will hear his appeal next term. *If you thought the reach of Sarbanes-Oxley was limited to white collar crimes and publicly held corporations except for the three provisions applicable to all businesses included associations, like most of us, you had better think again. One interesting side note: he was not charged under any federal or state fishing law.*

**SUPREME COURT STRIKES DOWN AGGREGATE LIMITS ON CONTRIBUTIONS** — In the recently decided case of *McCutcheon v. Federal Election Commission*, the U.S. Supreme Court held that federal laws and rules restricting the total amount of political contributions any person can make in a two-year federal election campaign cycle are invalid as violating free speech rights under the First Amendment to the U.S. Constitution. These laws have restricted total contributions to all federal candidates and political committees in an election cycle. Other laws and rules, which have limited the amount of contributions that can be made to a particular candidate or committee in an election cycle, have previously been upheld by the Supreme Court and were not at issue in this case. *Nonprofits that can legally become involved in political campaign activities, and do so, should be aware of currently valid government limitations on amounts of political contributions. The rules seem to be changing regularly, and we can expect more challenges to current rules in the 2014 and 2016 election cycles.*

GOOD READING ... See you in June 2014

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## NOT-FOR-PROFIT LAW DEVELOPMENTS

**A CENTENNIAL ANTITRUST REMINDER FROM THE FTC** — The Federal Trade Commission recently issued a news release aimed directly at associations. The FTC reminded associations that in its first annual report back in 1916 it had noted the practices of trade associations were of a varied character, many beneficial to their industries and the general public, but “[T]heir activities have sometimes involved them in practices which have been condemned by the courts as violations of the antitrust laws.” The FTC mentioned its 1918 action against the Association of Flag Manufacturers of America to end a price collusion effort to raise the prices of flags (during World War I). Once exposed, the association folded. The FTC also cited two recent settlements against an association of music teachers and an association of legal support professionals to end limitations on competition, reported here last month. *This is the FTC’s centennial year, and this warning seems to be intended to remind associations generally the FTC is still paying attention and ready to act, as the music teachers and legal support professionals groups discovered the hard way.*

**KENTUCKY COURT CONSIDERS MINISTERIAL EXCEPTION** — In recent cases involving two suits brought against a religious seminary by professors at the institution, the Supreme Court of Kentucky noted that a “ministerial exception” to labor laws generally bars suits against religious institutions by their ministerial employees. But the court ordered additional proceedings in both cases, holding that not all employees of institutions such as theological seminaries — and specifically not all professors — are “ministerial,” so that an analysis of an employee’s duties would be required to determine whether the exception applied in a specific case. Further, the court held that, in one of the two cases, a contract claim could be brought by a professor against the seminary, even if the professor was a ministerial employee. Finally, the court pointed out that if the resolution of an employment contract dispute required a court to determine or interpret church doctrine, the court should decline to hear the case under the doctrine of ecclesiastical abstention, though the court did not apply that doctrine in either of these two cases. *Federal and state courts in numerous jurisdictions have wrestled with the ministerial exception and the doctrine of ecclesiastical abstention. Not all of the decisions have been consistent.*

## EMPLOYMENT LAW DEVELOPMENTS

**WHAT IF THE NORTHWESTERN PLAYERS VOTE NO ON UNION?** — *H&H Report Update* — There have been numerous news reports that some of the Northwestern University football players who voted for union representation and convinced a National Labor Relations Board Regional Director they are university employees eligible to form a union have changed their minds and no longer support seeking union representation. The players did not anticipate the nationwide publicity and attention. Many just want to play football and escape the focus on their precedent-creating union aspirations and all that comes with national publicity for their actions off the field. Their spokesman, senior quarterback Kain Colter, was the only player who testified at the NLRB hearing and is no longer part of the team after completing his eligibility. *So even if the NLRB commissioners uphold the players’ right to organize and bargain collectively, will they? The players have voted but their votes will not be revealed until after the NLRB rules on the underlying issue (Are the players employees or not?). If they are, and voted no on forming a union, will the precedent stand that the football players on scholarship are employees of Northwestern? What consequences will flow from that at Northwestern and at other private Division I football powers such as Notre Dame, Duke, Boston College and Southern California? Stay tuned. There is more to come. And as we were all told repeatedly when younger, be careful what you ask for. You may get it. Association leaders should keep this in mind as well.*

**WILL EMAIL BANS AFTER NORMAL WORKING HOURS CATCH ON?** — The German Labor Ministry has instructed its supervisors to not send work-related emails after normal working hours to workers except for emergencies. Volkswagen has done the same. A pact was recently entered into between some French technology workers and their employers banning work-related emails after a 13-hour maximum workday under French law. A few large American banks are requiring junior staffers to take off some weekends. Will this trend expand in the U.S. as tablets and smartphones proliferate and work and private life become ever more entwined? *One thing employers need to keep in mind is that requiring or even allowing workers to respond to work-related emails and telephone calls outside of normal work hours may constitute work for overtime pay purposes for nonexempt workers. Employers may want to establish policies regarding what is and is not expected in this regard. Start at the top and work down. Always being available may not be a badge of honor after all.*

## TAX LAW DEVELOPMENTS

**LET'S TRY THIS ONE MORE TIME, SAYS IRS BOSS** — *H&H Report Update* — The new commissioner of the Internal Revenue service has indicated the IRS will backpedal a bit on the IRS's initial stab at preparing new rules for political activities of tax-exempt nonprofit groups. The draft rules for §501(c)(4) groups, the social welfare category which has seen an explosive growth of politically oriented groups amid concerns from liberal partisans that the new (c)(4)s were focused on conservative partisan messaging, and conservatives claiming the IRS singled out conservative groups for more intensive and dilatory reviews, drew some 120,000 public comments, delaying final revisions and publication of new rules for this category. The commissioner believes developing a revised draft rule ready for additional public comments will probably take the rest of the year. *That's conveniently past the November 2014 midterm elections, and the likelihood of another political firestorm, whatever is in the next draft. So anticipate more political fireworks about and from a myriad of §501(c)(4) groups.*

## MEETINGS & TRAVEL LAW DEVELOPMENTS

**RELEASE PROVISION IN CONTRACT DEFEATS NEGLIGENCE CLAIM** — A recent Illinois appellate decision reminds us to pay attention to all the provisions of a contract, but especially anything in large boldface letters saying Release. A trial court awarded a health club summary judgment on a member's claim alleging the club had been negligent in a number of respects which resulted in the plaintiff breaking her wrist when she fell during an exercise. The member had signed a contract with a provision immunizing the club from any personal injury claims based on the club's equipment, exercises, classes or use of facilities. The member signed the contract with the release without reading it or asking any questions about it. The appellate court affirmed the trial court's summary judgment in favor of the club, noting the release was in large boldface letters, clearly stated it covered exercises at the club, was not against Illinois public policy, and was not unconscionable. *Meeting planners frequently run into such release provisions, or use them themselves for activities, including but not limited to sporting activities, participation in many kinds of events, or just for using a venue for a meeting or event. Whether being asked to sign such a provision, or using such a provision in your own contracts, check the law in the jurisdiction where the event will take place to ensure the provision you sign or expect others to sign is enforceable. Make sure your release provisions are clear, conspicuous (e.g., boldface or all-caps with a caption), and sufficiently broad to cover the field of potential claims.*

**HEADS-UP FOR ASSOCIATIONS WITH CANADIAN MEMBERS OR INTERESTS** — The Canadian Radio-Television and Telecommunications Commission (“CRTC”) has published final regulations related to implementation of Canada’s anti-spam legislation, most of which take effect July 1, 2014. The legislation and regulations are intended “[T]o protect Canadians while ensuring businesses can continue to compete in the global marketplace.” Furthermore, “On January 15, 2015, sections of the Act related to the unsolicited installation of computer programs or software come into force.” *If your association has Canadian members or business interests in Canada, you should bring this legislation and these regulations to their attention in a timely manner to ensure they are aware of these developments. The Act and regulations address “commercial electronic messages” or “CEMs” so they apply to text, email, telephone and other electronic communications. And be sure to not run afoul of these regulations in your own communications with Canadian members and nonmembers you may be inviting to join or to attend an event, or promote a product or service. The Act, regulations and regulatory impact analysis statement are readily available on the CRTC website, at [www.CRTC.ca](http://www.CRTC.ca).*

**DOJ, FTC SAY IT’S 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 should help 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 information-sharing, so proceed carefully in exchanging such information.*

**EBAY LATEST TECH COMPANY TO SETTLE NO-POACHING CHARGES** — EBay is the latest tech company to settle charges filed by the Justice Department’s Antitrust Division alleging an anti-competitive agreement with one of more competitors, in this case with Intuit, that neither company would “poach” employees from the other. EBay also agreed to a separate payout of \$3.75 million to some 40 employees. EBay joins Intuit, Apple, Intel, Google, Adobe Systems, and even Pixar Animation of Walt Disney Studios, which have already entered into similar settlements. The object of the various alleged agreements was to avoid bidding wars for talented employees, reducing their mobility and keeping a lid on compensation. A previous class action settlement involving Google, Apple, Intel and Adobe Systems netted about \$325 million last month. *From time to time associations and professional societies are pressured by members to enter into some variation of a no-poaching scheme, and these schemes almost always end up with antitrust settlements, injunctions, fines and civil litigation. Just say no. These schemes are too easily detected and too difficult to justify or defend.*

**MAYBE NOT SO FAST AFTER ALL WITH ICANN OVERSIGHT TRANSFER** — After outcries from various U.S. parties and Congress opposing the recent Commerce Department announcement that it would relinquish administrative oversight of the Internet Corporation for Assigned Names and Numbers, better known as ICANN, by September 2015, an assistant secretary from the Commerce Department told Congress that this was by no means a done deal, there was no deadline, that it might take years, if ever. ICANN was supposed to come up with a new governance structure while still keeping the Internet open, but many governments around the world, some friendly to us, many unfriendly, have decidedly different views on how free from government control, open and accessible the Internet should be. ICANN currently blocks nations' efforts to restrict or censor access to the Internet outside their own borders. Many would, if they could, as seen in demands that communications seen as unfriendly to their chosen religions, political systems and leaders be barred internationally. One way to accomplish this is change from consensus voting on issues to majority rule, allowing governments a much greater say not only in what those within their borders may see or hear but what the rest of the world might see or hear as well. *Do we really want to be limited to what is acceptable to such governments as China, Russia, Saudi Arabia, Iran, even France or Germany? Our First Amendment is anathema to many other countries where governments overtly or not too covertly control news media and regularly block or censor Internet access. Try Argentina, Venezuela, Russia, China, Saudi Arabia, Cuba, and North Korea for starters. It's not just news media. We are talking two-way communications here using the myriad of electronic devices currently in use and development.*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**MORE IS BETTER, MORE IS WORSE** — There seems to be a split of opinion between auto manufacturers and auto safety experts when it comes to devices contributing to distracted driving. We progressed from cup holders encouraging snacking and sipping while driving to hand-held and hands-free cell phones for calls, GPS systems for travel directions, and small screens for watching videos and now we can receive and send oral hands-free texts and emails. Auto manufacturers insist the driving public wants more of this. Safety experts warn over and over that all of these devices lead to distracted driving, whether hand-held or hands-free devices are utilized. The real safety issue is not whether one's hands are occupied with a device but whether your mind is occupied with a message leading to slower responses while driving. *Safety experts compare distracted driving due to phone calls, texts and emails unfavorably to drunk driving. How often do you pull alongside someone driving erratically and find them with phone in hand? And the change to dashboard touchscreens for operating controls is another distraction. Multitasking has its uses, but multitasking while driving is an invitation to an accident. What is your association's policy? What is your insurer's position?*

**THREATS ARE NOT PROTECTED BY THE FIRST AMENDMENT** — A federal judge in Chicago recently ruled that threats, especially when accompanied by actions, are not speech protected by the First Amendment to the U.S. Constitution. The judge denied motions seeking to dismiss some 28 counts filed by a defendant in a criminal case which dates back to 2009. The defendant claimed his (alleged, of course) threats of physical violence contained in packages and mailings, often with shotgun shells, unidentified powder or liquids enclosed, sent to a variety of public figures, mostly in Chicago but some out of state as well, were constitutionally protected speech, or alternatively, mere political hyperbole. The judge said the federal statutes under which the defendant is charged “[P]rohibit only true threats as opposed to political

hyperbole.” The test was whether a reasonable person would consider the statements as threats, not whether the maker of the statements had a different intent. *The defense argument was not likely to go over well in a federal court in Chicago where another judge’s husband was assassinated in his doorway by a disgruntled litigant a few years ago. Too many public (and briefly publicized) figures receive anonymous threats which must be taken seriously. Persons making threats to TSA or airline personnel, as one example, quickly find threats even in jest can get them in hot water. We are not that far removed from “Them’s fightin’ words,” with resulting repercussions.*

**HEALTH INSURER WELLPOINT FORECASTS PREMIUM RAISES NEXT YEAR** — It was not the announcement many were hoping to hear, but health insurer WellPoint recently predicted it will likely raise insurance premiums for policies sold on Obamacare exchanges by double-digit plus amounts next year. WellPoint was among the first to announce what it expects to happen. This contrasts with an estimate by the Congressional Budget Office that expects premium increases will only rise slightly in 2015 and be about 6% in years thereafter to 2020. Insurers are required to submit raise proposals for 2015 to regulators, and are issuing their proposals following first quarter earnings reports for 2014. But insurers are having a hard time assessing their markets because of the late sign-ups as of the March 31, 2014 deadline (which was extended for many until mid-April), not knowing the mix of the new sign-ups and lacking a history on them, and the numerous changes the Obama administration has made in interpreting its rules to date, including exemptions and mandate extensions. *It’s going to be interesting to see how this plays out over the next few months. Will those who signed up late in the enrollment process follow up with premium payments? What will the mix of additional business be, and will there be sufficient healthy younger people to offset less healthy older people previously unable to obtain health insurance? Lots of questions and few certainties for now.*

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## H & H DEVELOPMENTS

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**In May . . .**

**Jonathan T. Howe** presented “Crafting Hotel Contracts in a Seller’s Market” in Monterey, CA for a Destination California event for meeting professionals; “Best Practices in Negotiating Meetings & Events Contracts” in New York for NYSAE; and “Hospitality Contract Law” in the Wisconsin Dells for a Sales Skills Symposium.

**Naomi R. Angel** presented two programs on “Safeguarding Your Corporate and Personal Identity” at the National Education Conference of Society of Government Meeting Planners in Portland, OR.

**Samuel J. Erkonen** is doing a Board Training and Orientation session for an association of nutrition professionals.

**Gerard P. Panaro** is doing a webinar for the American Public Power Association May 29 on the topic of “Dealing with the Triple Threat of the ADA, FMLA and workers compensation.”

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### Contributors to this issue...

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