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IF YOU CAN'T PERSUADE THEM, EMBARRASS THEM – Frustrated by rebuffs to her efforts to persuade the Massachusetts Secretary of State to remove links to state records containing individuals' Social Security numbers and other confidential information, a privacy advocate has threatened to publicly post information on her privacy website about well known individuals in Massachusetts whose Social Security number and other personal data are accessible from Secretary of State filings on the Internet. She threatens to post names and instructions on how to access Secretary of State records that contain Social Security numbers, etc. The response to her threat is that the Secretary of State has no intention to remove such information no matter what she does because "...these are business documents that are necessary for commerce." *It will be interesting to see if the privacy advocate, based in Virginia, follows up on her threats and whether the Secretary of State in Massachusetts (and presumably similar officials in other states) can be persuaded that just maybe there is a downside to having such information available on websites. Here is an idea: Start posting the names and leads to Social Security numbers of people in the Secretary of State offices or county clerks around the country. Then maybe they will understand why ordinary folks get concerned about privacy of their information.*

HE ADVISES MANAGEMENT BY PROCRASTINATION – A project manager in California suggests management by procrastination because he estimates 90% of projects added outside the normal scope of work are changed, dropped or done by someone else. But you need to determine whether proposed add-on projects fall in the 90% or 10% category. His solution for deciding whether the project is really intended by the person raising it is to find out who is really expected to do it, what really is to be done, and its priority vs. other pending assignments. Then find out if the necessary resources will be committed to ensure the project can be done. He says if you follow these steps, a lot of "wish list" projects will end up in the 90% category and you can concentrate on the 10% that require attention. A little procrastination winnows out the "wanna haves" from the "gotta haves." *Worth a try? And remember, nothing is impossible for the person who doesn't have to do it.*

**GOOD READING... See you in July
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NOT-FOR-PROFIT LAW DEVELOPMENTS

PRELIMINARY INJUNCTION GRANTED AGAINST NFP'S FORMER MANAGER

– The plaintiff, a not for profit cemetery, was managed by an Illinois corporation for thirty years under an oral contract that could be terminated at will. The management firm's employee served as manager and was responsible for maintaining all cemetery-related records, including where people were buried or were to be buried in the future. The management company resigned the account but refused to turn over any records including who was buried where, a map of the cemetery and other critical information for operating the cemetery. The former manager also destroyed some of the records, including her computer's hard drive. The cemetery sought money damages and injunctive relief. An Illinois appellate court reversed a trial court's denial of a preliminary injunction and said the cemetery's records were cemetery property. *The issue of who owns a not-for-profit corporation's records originally turned over to a third-party manager or developed in the course of the management relationship often comes up, but it should be clear by contract that such records are the property of the NFP and should be turned over at termination of the relationship. There may be an issue of who owns the software on which records are maintained, but the records themselves are the NFP's property and the NFP should not be held hostage.*

CHARITY LOSES ON STATUTE OF LIMITATION CLAIMS

– The Kidney Cancer Association (“KCA”) sued a bank in connection with embezzlement by its former executive director. The executive director opened a savings account at the bank without permission or knowledge of the KCA's board or officers and deposited checks totaling over \$300,000 donated to the KCA between 1997 and 2002. The KCA sued the bank for conversion because it had allowed the deposits to be made without ensuring the executive director was authorized to open the account. The bank defended on the basis of a three-year statute of limitations. The KCA argued this was a continuing series of conversions and three years should be calculated from the date of the last deposit. An Illinois appellate court said no, the conversion stemmed from the initial deposit's date in 1997 more than three years before the lawsuit was filed, and the KCA's reliance on the “when-discovered” rule for the beginning of the statute of limitations period did not apply. *An ongoing embezzlement scheme of five years' duration makes you wonder about the KCA's internal checks and balances for financials by its board of directors. Association boards should routinely ask about security measures when discussing checks and balances with their auditor. The appellate decision also said the discovery rule pleaded to avoid the Statute of Limitations, as in this case, does not apply unless there are allegations of fraudulent concealment. Association boards and their lawyers should keep that pleading requirement in mind should they run into an embezzlement case and seek to hold a bank liable.*

USAe-MAIL REPORTS AUSTIN CONVENTION CENTER EXEC FIRED FOR CAUSE

– USAe-Mail recently reported that Austin, TX city officials say the Director of the Austin Convention Center was fired for manipulating customer surveys for the purpose of improving the center's performance results, thus earning higher bonuses for himself and other staff members. *Bonuses are frequently an issue in NFP circles because “satisfactory” and similar criteria are more often subjective than objective. Can you recommend better performance criteria?*

REGULATORY LAW DEVELOPMENTS

ORGANIZATION'S PATENT DISCLOSURE POLICY PASSES ANTITRUST MUSTER

– The Antitrust Division of the Department of Justice recently informed a nonprofit standard-setting organization that it will not challenge a proposed policy on the disclosure and licensing of patents. The proposed policy would give a holder of a patent essential to the association's standards various disclosure options, including: (1) stating that it did not believe its patent was essential to the standard; (2) stating that it would not assert its essential patent claims against implementers of the standard; and (3) committing to license its essential patent claims on reasonable and nondiscriminatory terms. Any assurances about future patent licenses would be irrevocable and binding. The proposed policy prohibits discussion of specific licensing terms and certain pricing for standardized products during standards-development meetings. *The policy is intended to permit standards development organization members to make more informed decisions when setting standards because they will be able to compare alternative technologies based on differences in cost and technical merit.*

EMPLOYMENT LAW DEVELOPMENTS

GENERAL CONTRACTOR NOT LIABLE TO SUBCONTRACTOR'S EMPLOYEE –

An Illinois appellate court has affirmed dismissal of a personal injury lawsuit brought by an employee of a subcontractor who was injured on a construction site. The injured employee sued the general contractor, alleging the general contractor had sufficiently controlled the subcontractor's performance and alleging an exception to the general rule that one who uses an independent contractor is not responsible to an employee of an independent contractor. The appellate court noted that the general contractor on this construction site did not supervise the entire job or methods of the subcontractor's work or prevent the subcontractor from working in its own way, and was not consistently present on the job site directing the subcontractor's work or safety program. The court also said a defendant does not retain control simply by having the overall right to stop work or inspect work or receive progress reports. *Injured plaintiffs sometimes go after their subcontractor's principal to avoid limitations of workers' compensation law, or to collect damages in addition to workers' compensation benefits. But the trial and appellate courts here focused on control of the work being done by the injured employee, and it was the subcontractor, not the general contractor, who controlled the work. No control, no liability.*

SOME LEGAL TIPS TO AVOID EMPLOYMENT DISCRIMINATION CLAIMS –

The Equal Employment Opportunity Commission received 75,768 employment discrimination claims in 2006. Filing such charges is the first step in eventually filing a federal or state court employment discrimination claim. Employment lawyers suggest some basic steps to avoid such claims. Have your employment handbook checked by a knowledgeable lawyer. Use employment offer letters so the terms of an offer are clear and complete. Don't make promises, written or oral, that you can't or won't keep. Do meaningful performance reviews and document them. Consider generous severance packages in return for releases. *While these steps won't guarantee that your association will not be sued, they will deter some lawsuits and provide defenses when lawsuits are threatened or filed.*

MEETING & TRAVEL LAW DEVELOPMENTS

PASSPORT RULES FOR TRAVELING ABROAD CHANGE ONCE AGAIN – H&H

Report Update: Due to irate travelers having to change their travel plans as they scramble to acquire a passport to fly to Canada, Mexico, the Caribbean or Bermuda this summer, the Bush administration has decided to temporarily suspend the requirement for passports needed to fly to those locations from the U.S. The State Department has a huge backlog of passport applications that it could not process in time for many Americans' vacation and business travel plans. Until the end of September 2007, people will be allowed to travel to those countries with a government-issued ID card and a receipt showing they have applied for a passport. *This slight reprieve will help travelers this summer, but it is still advisable that you apply for a passport as soon as possible, even if you aren't traveling to those countries until after October 1, 2007. The State Department can only work so fast at processing the passport requests. We will keep you updated in case any more changes occur regarding the passport requirements.*

IS IT BUILT INTO THE TICKET PRICE OR AN ADD-ON-FEE? –

Once upon a time, you ordered an airline ticket through a travel agent. No longer. On longer flights you were served a meal. No longer or it costs extra or you are advised to bring your own. Preassigned seats are now in play as some airlines charge extra for preassigned seats, especially preferred seats, e.g., those with an inch or two more room in front of you, aisle seats, bulkhead seats, etc. Curbside luggage checking used to cost you a tip but now there's a fee and a tip is still expected. Fuel surcharges are charged by some airlines and others are waiting to see how that goes over. Meanwhile planes are more crowded, there are fewer flights, airlines' frontline employees are stressed, and air travel becomes even more of a hassle. *On many flights the add-on fees and taxes exceed 20% of the base ticket price. Coupled with the hassle, the frequent delays and unrealistic schedules, one has to ask when travel associated with association meetings and shows becomes more of a burden than members are willing to accept. Think about alternative ways for members to meet, greet, learn, work together and do business.*

TAX LAW DEVELOPMENTS

NFP'S INTERNATIONAL ACTIVITIES MAY HAVE U.S. TAX CONSEQUENCES –

International accounting firm Grant Thornton recently noted some tax considerations to keep in mind for not-for-profit entities operating outside the United States or considering doing so. If generating revenues through a foreign entity, U.S. tax consequences may vary depending on the form of the entity and type of revenue-generating activity. Offshore lobbying or other restricted activities may have U.S. tax consequences and even potentially affect the U.S. NFP's tax-exempt status. If U.S. citizens are working abroad part or full-time for the U.S. NFP, their personal income taxes may be affected. Both the NFP and its offshore employees are likely to face additional reporting requirements. *In addition to business and regulatory considerations for operating outside the U.S., association and other NFPs should take into account the various tax consequences and available options when structuring transactions or setting up entities.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

HOW SECURE ARE YOUR INTELLECTUAL PROPERTY AND OTHER DATA? –

According to a survey reported in *Information Week* which was commissioned by a company, almost half of IT professionals departing one job for another have admitted taking data with them including documents, sales proposals, contracts and other listings. The methods used vary from simply photocopying documents and taking them out in anticipation of their job change to downloading information to computer peripheral storage devices including flash drives, CDs, MP3 players, thumb drives and other storage devices. It's that easy. *What about safeguards? There don't seem to be any according to IT professionals. While this survey only included IT professionals, there is no reason to think that other workers are not doing the same, and companies rightly fear that their intellectual property and other confidential data is going out the door with the departing employees. Workers are generally smart enough not to e-mail the data to themselves or third parties because that leaves an electronic trail.*

COURT ORDER COULD LEAD TO SEARCH DISCLOSURES –

A federal magistrate judge has ordered an online file sharing service to preserve random access memory (“RAM”) data which could contain information as to which works users are searching for on the service. Six movie studios are suing file sharing network TorrentSpy for copyright infringement. The studios claim that the RAM data would show that the file sharing service was used primarily for infringing purposes. Privacy and technology watchdogs are up in arms over the ruling and predict it could have a chilling impact on e-commerce as businesses struggle to maintain accurate privacy policies and adjust their data retention policies. *This situation bears watching as it may affect both businesses and users alike. What is the obligation to preserve search data? What are the possible repercussions as to users who may not realize that this data is being preserved and produced in litigation? Stay tuned.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

FEDERAL COURT UPHOLDS LIQUIDATED DAMAGES PROVISION IN CONTRACT

– A federal district court in California has upheld a liquidated damages provision in a hospitality franchise agreement under California law. The case involved franchisor Radisson Hotels International, Inc., against one of its franchisees whose contract the franchisor had terminated for cause. Radisson then attempted to collect two years' worth of royalties from the terminated franchisee based on the franchise contract's liquidated damages provision. Radisson claimed the two-year provision was necessary because it took almost that long on average to replace a franchisee and the liquidated damages provision was a reasonable estimate of lost revenue. The franchisee claimed that the two-year royalty provision was unreasonable; constituted an unenforceable penalty; and because Radisson had terminated the contract it was to blame for the loss of royalties. The federal court found conflicting precedents in California law and upheld the liquidated damages provision, saying the franchisee was obliged to show the two-year royalty provision was unreasonable and had not done so, and then dismissed the other arguments of penalty or termination by Radisson. *Parties contracting in California or under California law should be aware of this recent California precedent. Liquidated damages provisions will be upheld, and this case is likely to be cited by California state courts as well as federal courts. Many hotel and intellectual property contracts feature liquidated damage provisions.*

ARBITRATORS BOUND BY TERMS OF A WRITTEN CONTRACT – An Illinois appellate court has vacated an arbitration award of \$1 million for breach of contract. The court said the three-member arbitration panel had exceeded its authority by apparently concluding that testimony of the plaintiff and defendant established an oral contract which amended the parties’ written contract. The court said the arbitrators did not have such authority under the written contract which was the basis for arbitration. The court also noted the arbitrators had not given the basis for their decision. *This decision illustrates a couple of problems with arbitration. It is common to insert an arbitration clause which merely says the parties agree to follow the rules of the American Arbitration Association. Most parties do not know what those rules are. One common failing is the rules do not require the arbitrators to explain the basis for their decision, merely who wins and loses. Second, arbitrators are supposed to base their decision on the written contract and not on a reformed contract or a contract different from the written contract. Consider using a more customized arbitration provision, including requiring the arbitrators to explain the basis for their decision.*

FEDERAL COURT IN CHICAGO FINDS INSURANCE POLICY APPLIES TO JUNK FAXES

– A federal court in Chicago has ruled that an insurance company was required to defend claims brought under the Telephone Consumer Protection Act for the policyholder’s sending unsolicited fax ads. The court distinguished a 2004 federal appellate court decision which was previously controlling and which held there was no insurance coverage and no duty to defend such cases because this claim was brought as a diversity action which applied Illinois law, and the Illinois Supreme Court ruled in 2006 that general liability policies required the insurer to defend lawsuits seeking damages resulting from an “advertising injury” which includes violating a recipient’s right of privacy. In this case privacy means seclusion, not secrecy. *Plaintiffs routinely file class action claims against senders of unwanted junk faxes which quickly aggregate damages on a grand scale. Now that the federal courts in Illinois are following the 2006 Illinois Supreme Court decision, insurers are likely to revise what sort of “advertising injury” they are willing to cover. Underlying all of this is the ban on junk faxes, bad legislation to overcome a relatively minor problem. But as long as the rules are in place, don’t send junk faxes. Know what the rules are. We can help you.*

H & H DEVELOPMENTS

H&H DEVELOPMENTS – H&H attorneys have made presentations to clients and others in June.

Barbara F. Dunn discussed hotel contracts and compliance with key laws with a group of corporate and association planners. She also presented hotel contract issues and risk management techniques to a group of meeting professionals, and she gave a presentation on association legal issues to a professional society.

Samuel J. Erkonen presented not-for-profit law to two Chambers of Commerce, and tax law and other assorted topics to meeting industry professionals.

Naomi R. Angel spoke on antitrust guidelines to trade association chapter presidents at a leadership training session, and gave a presentation to a trade association about controlling “careless” e-mails sent by employees.

Contributors to this issue...

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