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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A BYLAWS PROVISION TO CONSIDER? — The Delaware Supreme Court recently upheld a corporate bylaw requiring the losing party in litigation against the corporation to pay the prevailing party's legal fees. While this is the norm in civil litigation in the UK, for example, in the U.S. the norm is for each civil litigation party to pay its own legal fees. This bylaws provision would not govern third parties but would apply to shareholders of a corporation, and may put a damper on derivative suits against the corporation, and its officers and directors. *It is relatively rare for associations, directors and CEOs to face litigation by disgruntled members, but such a bylaws provision may make such litigation even less likely. Such legal fee-shifting provisions are very common in contracts, especially meeting contracts, so be very wary of them.*

ONE OF THOSE HEADLINES THAT GRABS YOU — A recent Wall Street Journal article headline and inserted caption reminded us of an unpleasant reality. The headline: "When Justice Drowns In The Law." The article commented on the sheer number and variety of federal laws, never mind state and local laws in addition. The inserted caption: "The number of federal laws? Nobody knows." *Think of that the next time you face a proposed provision in a meeting contract requiring you to agree to abide by all federal, state and local laws. What are they? Nobody knows. Why would you agree to it if even the other party does not know what laws it demands you do not breach in some fashion? Will the party proposing it accept it as its obligation too?*

MEDICINE, THEN TWO STATES, NEXT A COUNTRY, NOW AN ASSOCIATION — First came medical marijuana in many states, then Washington and Colorado voters approved the sale of recreational marijuana (despite contrary federal laws), and next Uruguay legalized its sale. Now the Ganja Future Growers and Producers Association has formed in Kingston, Jamaica to push for marijuana's legalization and sale there. *The association touts marijuana sales as a tourism opportunity and economic benefit to the country. Other hospitality industry representatives disagree, saying there are other and better ways to promote tourism in Jamaica.*

GOOD READING … See you in July 2014

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 • E-Mail: hh@howehutton.com
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BANANA LADY LOSES CLAIM AGAINST NONPROFIT — A federal appellate court in Chicago has ruled that an entertainer billing herself as the "Banana Lady" could not sue a nonprofit for alleged violations of her intellectual property rights because attendees recorded her performance at a trade show while she was singing and dancing in a banana costume, and posted it to Facebook. The entertainer alleged that she had told the nonprofit she was granting the audience the right to record her performance only for personal use and that she specifically prohibited posting it to Facebook. However, the appellate court found that her suit should be dismissed because, while she could have alleged that members of the audience had violated provisions of the Copyright Act prohibiting unauthorized video or tape recording and public display of a musical performance, and that the nonprofit had induced such violations illegally, she didn't properly make those allegations. Furthermore, she "probably" couldn't allege inducement by the nonprofit because one of its representatives advised the audience, following her performance about the restrictions the "Banana Lady" had put on recording and posting it, and she did not contend that any posting to the Internet had occurred before the performance ended. *The announcement made by the nonprofit's representative was a useful strategy that other nonprofits in similar situations should consider copying (there being no copyright infringement in doing so). Making such an announcement before the performance would be even wiser. But it "probably" didn't help the "Banana Lady" that the appellate court was aware of numerous unsuccessful suits she had filed against other people for allegedly violating her rights, resulting in her being required by federal and state courts to pay the other defendants tens of thousands of dollars in attorney's fees and court costs, some of which remained unpaid. In fact, the appellate court indicated that she should be enjoined by a lower federal court from filing further suits until she paid her outstanding litigation debts.*

COURT TEMPORARILY HALTS PROBE OF NONPROFITS — A federal district court in Wisconsin recently ordered a group of Milwaukee County officials to cease a criminal investigation of conservative nonprofit organizations exempt from federal income tax under §501(c)(4), including, among other things, armed raids on homes to gather evidence. But on the following day, the federal appellate court in Chicago, which handles appeals in Wisconsin, Illinois and Indiana, put the Milwaukee decision on hold until the district court considered whether the officials' position was "frivolous." The district court could reinstate its ruling by making that determination, except for a portion of its order that required the Milwaukee County officials to return or destroy evidence they had gathered, which the appellate judges said that the district court had no power to order. The county officials alleged that the §501(c)(4) organizations, in supporting legislation proposed by Governor Scott Walker to restrict collective bargaining rights of public sector unions and force higher state employee payments for pension and health insurance benefits, had engaged in "illegal campaign coordination" with Friends of Scott Walker, a campaign committee. The groups said the investigation had severely and unconstitutionally compromised their lawful activities, and the district court agreed, finding the groups had engaged in nothing more than "issue advocacy" protected by the First Amendment to the U.S. Constitution, and if they coordinated that activity with the campaign committee, it would not involve a violation of law for which they could constitutionally be prosecuted. Citing U.S. Supreme Court cases as support, the district court indicated the groups' activity could only have been constitutionally prosecuted if it had involved "express advocacy" supporting the election or defeat of a clearly identified candidate, which the Milwaukee County officials had not alleged in this case. The officials had stated the kind of "coordination" allegedly engaged in by the groups was the type of activity that gives rise to political corruption appropriate for prosecution ("favors for cash"). But the district court said that when only "issue advocacy" and not "express advocacy" was involved, mere speculation that it could give rise to corruption was insufficient to justify the kinds

of infringement on free speech in which the Milwaukee County officials had engaged. *This case is far from finished, and there are many other ongoing legal and legislative efforts to restrict the political and legislative activities of §501(c)(4) groups, which draw ire because such groups are accumulating large sums of money from contributors whose identities can be kept secret under existing law. Many people contend this is not good for democracy. But we suspect that some people are also angry because their political opponents are believed to be benefiting more than they are from the activities of (c)(4) organizations.*

WISCONSIN ELECTION FINANCE LAWS STRUCK DOWN — A federal appellate court in Chicago declared that numerous provisions of Wisconsin's campaign finance laws are unconstitutional as applied to nonprofits and other groups that spend money for political speech independently of candidates and parties. Wisconsin Right to Life, Inc. and its state political action committee sued to block enforcement of those laws against them, arguing that the laws unjustifiably burden the First Amendment rights of independent political speakers. The appellate court has agreed, ordering the district court to enter an order enjoining enforcement of the following: a state ban on political spending by corporations; a cap on the amount of money a corporation may spend on fundraising for an affiliated political committee; a requirement of a lengthy disclaimer in political radio ads of 30 seconds or less; statutory and regulatory definitions of "political purposes" and "political committee" to the extent they might reach political speech other than by candidates, their campaign committees and political parties, except with respect to speech amounting to "express advocacy" of the election or defeat of a candidate or its functional equivalent; a law defining "express advocacy" as including "issue advocacy" in a pre-election period if it so much as mentions a political candidate; and a law imposing registration and reporting requirements on organizations making independent political disbursements, to the extent that it is applied to organizations not having "express advocacy" as their major purpose. *Both federal and state campaign finance laws have been struck down or seriously limited on First Amendment grounds in recent court decisions. Some restrictions on "express advocacy" seem to be surviving constitutional challenges to election spending laws, as are regulations targeting campaign fundraising rather than expenditures. But the rules seem to be changing continually. You must stay on top of the changes to avoid, or to support, litigation.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

FAMOUS LAST WORDS: "I DIDN'T THINK IT WOULD APPLY TO ME" — A woman seeking to promote her family restaurant-winery business in Minnesota was escorted from the show floor at the National Restaurant Association trade show at McCormick Place in Chicago. She was carrying her 10-day-old infant son in a chest-sling. She had two other young children at home. The Restaurant Show rules state no children under age 16 are allowed on the show floor for safety reasons. The woman said she was aware of the rule but did not think it would apply to her situation because the baby was strapped to her chest, and "I have brought my babies all sorts of places." Her husband stayed behind to man their booth at the show. *Of course this led to the usual bad publicity about how unfair and unreasonable it was for the Restaurant Show to enforce its long-standing rule to a breast-feeding mother, especially when Illinois law provides a woman can breastfeed her infant wherever she is authorized to be. But this wasn't about breastfeeding. There is an exception for safety, a consideration swept aside by critics, despite exhibits of sharp knives, cutting devices and open flames, among other things, at the show. Knowing of the show rule, did she consult with the NRA before leaving home? That might have saved her the trip and expense, and the Restaurant Show some unwarranted criticism. "Never Assume. It makes an Ass of U and Me."*

SHOULD DEFIBRILLATORS BE REQUIRED FOR MEETINGS? — One of those back-burner issues that may move up for meeting planners (and venues hosting meetings, conventions and trade shows) is whether defibrillators should be readily available for use in sudden cardiac arrest ("SCA") situations. All states and even the federal government already mandate that defibrillators be available in various venues ranging from airports to schools, casinos, fitness centers, amusement parks and other public places. But what about venues where they are not mandated? The California Supreme Court has been asked by a federal appellate court to in California for an advisory opinion to determine if California's common law of negligence should require large retailers to have defibrillators on hand and employees trained in their use in anticipation of SCA situations that might occur in their stores. A plaintiff whose mother suffered a SCA event and died while shopping at a Target store has sued Target, contending Target is obliged to render first aid to people in its stores, and Target was negligent not to have such equipment and trained staff available for SCA situations. A federal district court dismissed the lawsuit, but the appellate court said this is unsettled law and asked the California Supreme Court to interpret California law on the question. *The underlying argument is that recovery rates for persons suffering SCA are about three times higher if defibrillators are used within ten minutes, SCA events are known to occur, and large retailers should anticipate and prepare for them. Well, not quite so fast there. Large retailers are only one set of public venues where SCAs occur. Store personnel would have to correctly interpret what was happening to a person having a SCA, run and find defibrillator and know how to use it. How many pieces of equipment would be sufficient and located where in a large store? How many employees would be required to be trained and available at all times (think of leaves, vacations, sick days, bathroom breaks, etc.)? The answers are unclear, and where does a court draw a line? What about Good Samaritan liability? Nonprofits such as the American Heart Association, the Sudden Cardiac Arrest Foundation, the U.S. Chamber of Commerce and others are weighing in on both sides of the question. But back to basics: should associations hosting meetings, conventions, trade shows and similar events be looking at the availability of defibrillators at venues as part of their planning process?*

Employment Law Developments

"I QUIT!" AND SELLER'S REMORSE — A situation many association executives have experienced is the employee who emotionally declares "I quit!" and heads for the door. And not infrequently a day or two or three later the employee sheepishly decides that was a bad decision and asks for his or her job back. Is the employer required to take the employee back? If the employer says no, the resignation was accepted and we regard it as final, does the employee have a claim of retaliation or some other ground for damages? That situation came up recently in New Jersey and a federal court there determined the employee did not have a valid claim of retaliation or any other basis for alleging discrimination. Other than not being reinstated the employee could not show the court any evidence of adverse action by the employer, a necessary predicate for retaliation. *So no, an employer is not obliged to reinstate an employee who quits, and it is not retaliatory to decline to reinstate the employee. Quit in haste, repent at leisure.*

Tax Law Developments

PROPERTY TAX EXEMPTION FOR CONSERVATION RECOGNIZED — The Massachusetts Supreme Judicial Court has reversed a decision by the Appellate Tax Board to refuse a property tax exemption for a nonprofit that was holding property for forest conservation and management purposes. The Appellate Tax Board found that the nonprofit did not "occupy" its land for charitable purposes, as required for a property tax exemption. But the state's supreme court held that conservation organizations

could meet that requirement if they held land "less like a private landowner and more like an entity seeking to further the public good," and even if they restricted public access to their property, provided such restrictions were necessary to achieving their charitable purposes. The organization in this case actually didn't take active steps to exclude the public from its land, and, in fact, informed the public that it was available for recreation, such as hiking, hunting and snowmobiling. However, the nonprofit also had placed the land under a forest management plan, hired a forestry consulting firm to implement it, and carried out sustainable forestry practices there, which was enough to convince the court that the property was being "occupied" for a charitable purpose. *Nonprofit conservation organizations across the country may find this decision helpful in advancing their own arguments for property tax exemptions.*

COURT LETS NONPROFIT CHALLENGE IRS "ISRAEL SPECIAL POLICY" — A federal district court in the District of Columbia has refused to dismiss a lawsuit seeking to prevent the Internal Revenue Service from following an alleged "Israel Special Policy" by subjecting Israel-related organizations to more rigorous internal review procedures than other organizations applying for recognition of exempt status under §501(c)(3) of the Internal Revenue Code. The suit was brought by Z Street, Inc., a nonprofit dedicated to educating the public about various issues related to Israel and the Middle East. It charged the IRS was violating the First Amendment to the U.S. Constitution in following a policy based on "viewpoint discrimination." The IRS sought to dismiss the suit without a hearing on the merits of Z Street's claims, alleging numerous procedural grounds for dismissal. But the district court concluded that all of the procedural objections raised by the IRS were based on the incorrect assumption that in filing the suit Z Street was basically seeking a determination of whether it was entitled to §501(c)(3) status, which the court found was not the case. As the IRS's motion has been denied, the suit will proceed to a consideration of the merits of A Street's claim by the district court. Z Street will have to prove, among other things, that an IRS "Israel Special Policy" exists. *Maybe there is, and maybe there isn't, such a policy, and it will be interesting to see if Z Street can prove its claims, now that it will be given a chance to do so. This case is just one of several recent legal disputes in which the IRS has been charged with improperly targeting some nonprofits for higher scrutiny than others when applications for recognition of exemption are reviewed, recalling especially certain highly publicized complaints about targeting of conservative groups.*

Regulatory Law Developments

THE NLRB'S EXTREME STANCE — The National Labor Relations Board is issuing numerous decisions which are really drawing consternation in management circles, including requiring reinstatement of an employee fired after a profanity-laced tirade at his employer. Another involved a NLRB administrative judge reinstating an employee, terminated for being rude and offensive to customers, who claimed the employee handbook prohibiting such behavior was "too broad and encompassing." In another recent case, the NLRB overrode an opinion of its own general counsel in issuing an order reversing a precedent. So what is going on? It appears to numerous experienced labor lawyers that the NLRB is in a hurry to expand workers' rights on the job, and just about any action an employee may take that is alleged to also involve "protected concerted activity" will draw NLRB protection. *The profane tirade case is illustrative. An administrative law judge's decision upholding the termination was overridden by the NLRB commissioners in a 2-1 decision. A federal appellate court sent the case back to the NLRB with orders to look at the decision again on numerous grounds, including ignoring the NLRB's own precedents. The NLRB again ruled 2-1 in favor of the employee, with the dissenting commissioner castigating the majority for flouting the remand order from the appellate court. This may end up in court again. But one thing seems clear, almost any case that ends up before the NLRB's commissioners seems likely to be decided against the employer. And that means any workplace under federal jurisdiction, not just union shops.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

SOME PRACTICAL ADVICE FROM THE IRS REGARDING RECORDS — The Internal Revenue Service recently provided some practical tips for protecting and backing up records. One tip was backing up records electronically, e.g., by receiving records from financial institutions in electronic form, or scanning records as they are received and transferring them to CDs and other electronic devices, and then storing them where they will be accessible when needed. Another tip: take videos or photographs of valuables. Update emergency plans and lists. The IRS reminded that backup tax records are available from the IRS. *Remember if all the backup records are at your home and your home is destroyed, e.g., fire, flood, tornado or hurricane, the records may not be accessible so think of where else they might be better stored offsite. Experts also advise stocking some basic emergency supplies, e.g., bottled water; batteries for phones, electronic devices and flashlights; a hand-cranked radio; canned food; etc. Many of us talk about doing this but how many of us walk the talk?*

H & H DEVELOPMENTS

In June . . .

Jonathan Howe presented "Legal Issues In Association Management" to the Fellows Retreat for a major association management program in Halifax, Nova Scotia; "Violence In the Association Workplace — A Critical Dialogue (A Lawyer's Point of View — Legal Risks and Concealed Carry)" for an association Finance, HR, & Business Operations Conference in Washington D.C.; "Contract Law and Events" for an Association Law Online Conference; and "Risk Management in Uncertain Times," the first in a series of presentations in the Bahamas for CMP Credit.

Sam Erkonen presented a risk management and board governance course and a general survey of not-for-profit law to a large group of high level executives in the not-for-profit industry for the U.S. Chamber of Commerce in Athens, Georgia.

Naomi Angel provided an antitrust review in Los Angeles, California to the Board of Directors of a trade association of manufacturers; presented a report on legal trends at the mid-year meeting of a trade association of manufacturers in Chicago, Illinois; and discussed and legal developments with the Board of Directors of a trade association of contractors and manufacturers in Dallas, Texas.

On June 23, **C. Michael Deese** will be speaking in Mt. Laurel, New Jersey to association management company executives at an event sponsored by the Philadelphia Convention & Visitors Bureau. The topics to be addressed are intellectual property basics and hotel and convention center contracts.

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Contributors to this issue…

Terrence Hutton, John M. Peterson and James F. Gossett

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