

# 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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**ARE YOU READY FOR THIS DREADFUL IDEA?** – Twitter, the company responsible for the tweet revolution, is now testing an application that will let a user go back and take a second look at all the tweets the user has ever sent. Twitter is offering an archives tool to let users retrieve all their tweets, and review them all as a total zip file or by month. *Whatever idea you may have had about the privacy of your online life, this ought to dispel it. Your tweets, your Google searches, they are all being stored out there in that great cloud, or on some very large servers. And to further illustrate a bad idea whose time has come, the Library of Congress is also archiving all tweets by everyone, and a search there takes more than 24 hours. Subpoenas and litigation discovery requests won’t be far behind.*

**SOME GRIM TAX STATISTICS** – To the surprise of no one, National Taxpayer Advocate Nancy Olson, who issues an annual report to the Congress on problems with the federal tax code, called again for reform of the code, saying it is too long, too complicated, costs too much for compliance, and, all in all, is a mess. She again urged Congress to make it less complex, clearer and easier for taxpayers to comply with. *Among the statistics she cited were more than 5,000 changes to the tax code since 2001; 60% of U.S. taxpayers believe it necessary to get third party help to prepare their tax returns, and another 30% will use commercial software to do their returns; and individual and business taxpayers will spend about six billion hours doing their various returns. So how likely is reform? All those complexities did not get there by accident, and those benefiting from loopholes will fight to keep them. Way to go, Congress!*

**TRUNCATED ID NUMBERS PROPOSAL FROM THE IRS** – The Internal Revenue Service is proposing a Truncated Taxpayer Identification Number (“TTIN”) in place of whole Social Security or taxpayer identification numbers as one way to reduce identity theft. The number would appear as xxx xx 1234 in place of an entire number. The proposed regulation would affect certain filers of information returns, at least initially. *Identity theft and fraudulent refund claims are a major problem for the IRS and taxpayers. If merchants can utilize truncated credit card numbers on bills, it does not seem a great stretch for the IRS to do it too.*

GOOD READING ... See you in February 2013

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**CONDO ASSOCIATIONS FACING A LACK OF VOLUNTEER DIRECTORS** – A recent article in the *Chicago Daily Law Bulletin* commented on a growing problem in the condominium association field – an increasing unwillingness of condominium owners to step up and serve as directors of their condominium associations. The article cited several reasons, including owners unwilling to take on the responsibilities and time commitments; unwelcome problems if directors have to deal with foreclosures as owners default; owners not accepting that they bought into a community and thereby assumed some responsibilities for community participation (free-riding on others doing the work). *Condominium associations must comply with the Illinois Condominium Property Act and the Illinois General Not For Profit Corporation Act. Unless the association has board members who are lawyers or at least knowledgeable about the statutes, or professional management which many small associations cannot afford, they are at risk of not complying with those statutory requirements, opening the volunteers and the association to liability. No easy answers to this trend.*

**CONTRIBUTIONS WITH STOLEN MONEY PROMPT MORE CLAWBACKS** – A frequent contributor to charitable causes in El Cajon, California was recently sentenced to 30 months in jail for stealing over \$3.5 million from her employer, and the likelihood that much of the stolen money was donated to nonprofits has prompted calls for the recipient charities to repay donations to the company victimized by the thefts. Jillian Hanson-Cox, a former El Cajon councilwoman and recipient of the local Chamber of Commerce’s 2007 Citizen of the Year award, was popular enough locally that many of her supporters sent letters requesting that she be given a light sentence. The one she received is significantly below applicable government sentencing guidelines. *We have previously reported on other instances of criminals donating stolen money to charity, resulting in later court orders to the recipients requiring them to disgorge donated funds (“clawbacks”) for the benefit of theft victims, sometimes years after the nonprofits have spent the contributions and such clawback payments are much to their financial detriment. It may pay nonprofits to carefully consider the source of large contributions before accepting them, although, in this case and in many others, criminal activities may be well covered up until years after donations have been made. Sometimes it does pay to look a gift horse in the mouth.*

**DIRECTORS TO PAY MILLIONS TO SETTLE NEW YORK ATTORNEY GENERAL CHARGES** – If you are a director of a nonprofit, can you be held personally liable for approving contracts with insiders that cost the organization millions of dollars? You bet your life – or at least your bankroll – as the recent settlement of New York Attorney General charges against directors of the nonprofit Educational Housing Services demonstrates. All of the directors of that organization have agreed to pay \$1 million each in order to settle charges that the board members breached their duties of loyalty and care to the organization by approving a contract between the nonprofit and a corporation controlled by the nonprofit’s founder and his wife, which allegedly invoiced the nonprofit millions of dollars for providing intermediating cable, phone and Internet services at a large mark-up. The founder will pay \$2.5 million, and all of the individual parties will be banned from sitting on the board of any New York charity. Interestingly, the Attorney General found that the board had been partially misled by the founder. But the Attorney General charged that the board knew this was a “related party transaction” and failed in its responsibility to ensure that the transaction was fair to the nonprofit, instead delegating to the founder the job of getting competitive bids and legal advice concerning the transaction, permitting him to control information about the deal that was flowing to the board. *All nonprofit directors would be wise to heed the lesson this case provides and give careful, objective consideration to all “related party transactions” before approving them, if at all. This case, in fact, illustrates only some of the possible adverse legal consequences that may arise from failing to do so.*

**NONPROFITS REACT TO RUSSIAN “FOREIGN AGENT” LAW** – Nonprofits advocating for human rights in Russia are debating whether to comply with a new law requiring that some organizations operating in that country register as “foreign agents.” The new law applies to nonprofits receiving foreign funding and participating in “political activities,” such as trying to influence public opinion or change government policy. Failure to register may be penalized through fines, a forced shutdown, or prison sentences for responsible individuals. Nonprofit compliance is complicated by what some Russians consider “foreign agents” to be, namely, traitors. Critics of the new registration law say that complying organizations will be “outcasts” with whom many Russians will refuse to associate. *Since the demonstrations in Russia in 2012 protesting the election campaign and outcome, the Russian government has become more repressive and less tolerant of dissenting voices. We have previously pointed out that nonprofits operating outside the United States may be subject to a variety of local laws that could have serious adverse consequences for their employees, officers, directors and other volunteers, as well as the organizations themselves. Before engaging in such activities, our readers should carefully investigate local laws and local attitudes toward nonprofits, and they should be prepared for changes in the legal or political climate that may impact their involvement abroad.*

## INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

**A NEW YEAR’S RESOLUTION TO REVIEW YOUR IP PROTECTIONS** – Here is a New Year’s resolution worth keeping: review your intellectual property protections and see if they are sufficient or need some improvements. Are your domain name registrations up to date and current? Do you routinely put copyright notices on materials your association creates? What materials should you or do you file with the U.S. Copyright Office for greater protection? Do you have appropriate copyright assignments or licenses from presenters, contributors to your publications, contributors to standards or similar works? Are your trademarks and service marks up to date, and do you use them correctly? Do you have appropriate licenses in place to allow your members or others to use your marks? *In this age of intellectual property piracy, it is necessary to ensure protections are in place and to occasionally scout for violations. Your intellectual property is too valuable an asset to take for granted.*

## EMPLOYMENT LAW DEVELOPMENTS

**SOCIAL MEDIA LAWS GO INTO EFFECT JANUARY 1<sup>ST</sup>** – On January 1st, Illinois and California joined several other states, including Michigan, Maryland, New Jersey and Delaware, in making it illegal for employers to either require or request access to social-media password-protected accounts or nonpublic online account information from their employees or job applicants. The Michigan law also penalizes educational institutions for dismissing or failing to admit a student who refuses to provide passwords and other account information used to access private Internet and email accounts, including social networks such as Facebook and Twitter. The legislation protects privacy by preventing employers and institutions from intruding into an individual’s legal off-duty conduct. *BUT – Employers may continue to use publicly available social networking information. Employees and job applicants should continue to be very cautious as to what they post online. Inappropriate photos, language, tweets, and other social media indiscretions can still come back to haunt them. These new laws could potentially be the new model for how other states deal with social media and the workplace.*

**EMPLOYER'S POLICY EFFECTIVE AGAINST RETALIATION CLAIM** – An employer's clearly stated policy about calling in when sick was successfully invoked against a former worker's claim of retaliatory discharge. A worker claimed he injured his back on the job. The employer sent him to his doctor, who told him to take a week off and rest. He did but continued to stay at home for another five weeks without notifying the company despite the employer's clear policy of requiring a sick or injured worker to call in daily. When the employer finally noticed the worker's extended absence, he was terminated. The employer later settled a worker's compensation claim, and the worker sued, alleging retaliatory discharge in anticipation of his filing a worker's compensation claim. Not so, said the employer. He was fired for his unexcused absences. A federal district court judge in Chicago granted summary judgment to the employer. *A federal appellate court affirmed the summary judgment, finding no evidence that the individual who ordered the termination was aware of the worker's medical status so he could not have retaliated against the worker on the grounds of a potential worker's compensation claim. A clearly stated policy will help make an employer's defense in such lawsuits.*

## MEETINGS & TRAVEL LAW DEVELOPMENTS

**AVOIDING AN UNNECESSARY BAD EXPERIENCE** – A recent article in *NPQ Newswire* illustrated an unfortunate experience that should be and can be avoided with some advance planning. The article noted that winners of silent auction items at fundraiser events are very disappointed with their experiences when the "small print" limitations of the auctioned item, such as a service or trip or hotel or resort stay, are not apparent until the winner tries to utilize the prize. *Sponsors of such events should ensure that winners are given detailed information on any limitations or restrictions of a prize, such as blocked out dates, use or lose dates, or other restrictions. In the excitement of winning, such restrictions may be overlooked or ignored, so a follow-up in calmer moments afterward may avoid an unhappy experience and even threat of a lawsuit.*

## REGULATORY LAW DEVELOPMENTS

**FTC WARNS THAT EMAIL IS NOT FROM US** – The Federal Trade Commission has issued a public warning to small business that an email with a subject line "NOTIFICATION OF CONSUMER COMPLAINT" is not from the FTC. The email purports to be a notification of a consumer complaint against the small business to the FTC. Recipients are warned to simply delete it. Do not open the email or click on any of the attachments with it. Clicking on them could lead to a virus, or spyware being installed on the recipient's computer system. *Clever, these bandits who attempt to convince us they are a government agency that one ignores at one's peril. The IRS has also warned against such spurious emails.*

## TAX LAW DEVELOPMENTS

**THE IRS PREDICTS MOST TAX REFUNDS WITHIN 21 DAYS** – Despite a late start on processing 2012 tax returns because the Congress delayed enactment of numerous provisions to the tax code all the way to January 1, 2013, thereby preventing the Internal Revenue Service from printing final forms and instructions, the IRS is predicting a swift return to its target of processing most tax refunds within 21 days. *Last year the IRS frequently missed that target, especially early in 2012 as it coped with new software intended to reduce fraudulent refund claims. We shall see how it goes this year.*

**TEA PARTY GROUP DECLARED EXEMPT** – The November elections weren't kind to the Tea Party, but it won a significant victory recently when the Internal Revenue Service ruled that a Tea Party affiliate was entitled to recognition of tax-exempt status. The IRS recognized the Ohio Liberty Council was exempt from federal income tax as a social welfare organization under Internal Revenue Code §501 (c)(4), apparently despite the Council's refusal to give the IRS certain information the IRS had requested in reviewing the Council's exemption application. According to the Council, the nonprofit American Center for Law and Justice, which had volunteered to provide the Council with assistance in dealing with the IRS, was able to show the IRS that it was requesting some information the Council was not required to provide under the Internal Revenue Code. The Council's president has predicted that the ruling may pave the way for other Tea Party affiliates to gain an exemption. *The IRS does it all the time, requesting information that appears to have little or no relevance to an organization's eligibility for an exemption or to comply with other requirements of the Code. Few organizations are willing to fight such demands as long as it appears they can obtain a favorable IRS ruling or otherwise avoid a hassle with the IRS by complying.*

**STILL-PENDING EXEMPTION APPLICATION REVEALED BY IRS** – The Internal Revenue Service provided a campaign financing watchdog group with a still-pending application for recognition of tax-exempt status filed by the nonprofit Crossroads GPS, resulting in publication of information, allegedly from the application, showing that Crossroads may not have reported the full extent of its planned political campaign activity in seeking exempt status. Watchdog group ProPublica says Crossroads, created by Republican partisan Karl Rove, spent millions of dollars for advertising intended to influence voting in the 2010 federal elections shortly after telling the IRS that it would engage in "public education," "activity to influence legislation and policymaking" and "research," including a "limited" amount of political campaign activity. ProPublica sought information on Crossroads through a federal Freedom of Information Act ("FOIA") request directed to the IRS. The IRS responded by providing the application for recognition of exempt status and then notified ProPublica that the application was still pending at the IRS, and publication of any information from the application was a felony. ProPublica says it redacted certain financial information from the application, but published other information, believing it was acting lawfully. Crossroads applied for exempt status as a social welfare nonprofit, and such organizations are allowed to engage in political campaign activity as long as it is not their primary purpose. *This development should encourage nonprofits to be completely truthful in submitting applications for recognition of exempt status to the IRS. The IRS isn't required to provide anyone with information about pending applications, and normally doesn't. But approved or denied applications become a public record and, apparently, even pending applications may gain a wider audience if the IRS, despite issuing cautions regarding disclosure of revealed information, distributes it to others. And isn't it comforting to know that, so long as you think you are acting lawfully, you can ignore pointed instructions from the IRS?*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**COURT ALLOWS SUBPOENA TO LEARN EMAIL RECIPIENT'S IDENTITY** – A California federal district court recently allowed a subpoena to Google to disclose the owner of an email account because valuable property was accidentally sent to that account by someone who was contracting with the property owner. There had been no response to communications sent to the email address on behalf of the property owner in order to retrieve the property. So, of course, in this litigious age, the property owner sued the account owner as a "John Doe" and asked the court for permission to serve a subpoena on Google, which the court granted. The court further ordered Google to notify the account owner about the

subpoena and then disclose the account owner's identity if neither the account owner nor Google could show good cause why identifying information should not be provided to the property owner. *Interesting that this account owner may have done nothing worse than deleting a series of unsolicited emails, at least one of which had an attachment that could have included a virus. But the account owner's identity may now have to be disclosed to a court and to some stranger, all because someone else accidentally sent an email to the wrong address. Something to think about when you are dumping the email garbage we all receive.*

**EMAILS A TRAP FOR THE UNWARY AND THEIR EMPLOYERS** – You might assume by now that most adults sending and receiving emails would be cognizant of the difficulty of ever really getting rid of them, of how they are now commonly sought in litigation, very revealing in their content, and how damaging they can be to sender, recipient and their employer(s). But it ain't necessarily so, as the Gershwins pointed out in different circumstances many decades ago. Emails, versions, attachments, who sent and received them, the computer used, drafts, etc., can all be recovered even after the messages are deleted. *Emails are very difficult to get rid of. They remain embedded on a computer system but out of sight and memory long after they were originally sent, read and deleted (which is simply moving them to different storage on the computer or server). Employers are well advised to have workplace policies addressing emails, and warning employees that comments, jokes, and other statements look very different in a courtroom PowerPoint presentation to a jury. That joke may be on you.*

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## H & H DEVELOPMENTS

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### In January...

**Jonathan Howe** presented, "The Lawyer Is Here:" at the Abaco Beach Resort, Bahamas for a group of meeting and incentive planners.

**Naomi Angel** presented, "Social Media, Your Employees, and Legal Concerns" for a national manufacturing association meeting in Orlando, Florida. She also co-presented "*Your Hotel Contract – On Trial*" and "*The Lawyers Are In*" at an annual meeting for a major convention management association. In Scottsdale, Arizona, she spoke to attendees of the annual meeting of the leading trade association of door manufacturers presenting, "Safeguarding Your Personal and Corporate Identity."

**Samuel Erkonen** presented "Advanced Negotiation Techniques for Meeting Planners and Suppliers" to the local chapter of an international association of meeting professionals in Cincinnati, Ohio.

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### Contributors to this issue...

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