THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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THE LAW FIRM FOR ASSOCIATIONS®

A REALLY SAD COMMENTARY – What do the Roman Catholic Church, Penn State University and the Boy Scouts of America have in common of late in addition to being highly recognized across the country, nonprofit and exempt from federal taxation? Unfortunately, all stand accused of tolerating and covering up predatory sexual misconduct for years, thereby allowing sexual predation of vulnerable victims to continue. Why? Apparently in order to save their public reputations. In the end, rather than protect their organizations' reputations, the leaders who should have stepped in and reported violations have trashed their organizations' reputations and their own. *What a sad legacy! Where were the leaders who put the interests of the children ahead of self-interest? And as Watergate should have demonstrated, the cover-up does more damage to one's reputation than the underlying offense. The victims mount. The misconduct continues. Eventually comes the disclosure, the unraveling, the fall from grace, and soon thereafter the criminal charges, the lawsuits and damages. Another renowned college football coach recently put it this way in responding to a question of leadership ethics: "There is never a right time to do the wrong thing, or a wrong time to do the right thing."*

AAA PUSHES "DRIVE NOW. TEXT LATER" CAMPAIGN – The American Automobile Association in Illinois is promoting a campaign to deter texting while driving. AAA cites statistics for Illinois alone such as 1,300 crashes caused by drivers using cell phones in 2009; 7,800 drivers stopped by the Illinois State Police for cell phone and texting violations in 2010; and a starting fine of $75 for texting while driving. *We have urged associations before to have and enforce a policy banning cell phone use by staff while driving. It's the law here and in many other states. The accidents and lawsuits you avoid, the lives you save, make the inconvenience of not communicating 24/7 are worth it. Is any text or cell phone message worth a life?*

THAT SEEMS LIKE A PRETTY STRAIGHTFORWARD INVITATION – The descriptions of receptions at association meetings are often dressed up in various terminology such as "networking opportunities," or "greet and meet" or "attitude adjustment hour," but for descriptive accuracy a recent ad promoting an after-working-hours reception in the Chicago legal press should be right up there at the top of the list: "Brews & Schmooze - Partner Up" to mix business with pleasure. *Who says lawyers cannot talk plainly on occasion?*

GOOD READING … See you in December

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NOT-FOR-PROFIT LAW DEVELOPMENTS

NFP EMBEZZLEMENTS SO OFTEN SHARE ONE PRIMARY CHARACTERISTIC – A small community in Michigan illustrates the one primary characteristic that underpins all too many embezzlements from not-for-profit organizations. The local newspaper headlined five separate embezzlements that had occurred in local not-for-profit organizations such as the humane society, a youth league and an emergency services association in recent years. In each instance it was trust in the persons, volunteers or employees alike, handling the organizations' funds coupled with a lack of oversight by boards of directors or others. Some embezzlements went on for years. The amounts were usually not large, but certainly large enough to injure the small organizations whose funds were embezzled. *Rather than remain silent lest their reputations be hurt by public disclosure, some nonprofits are now going public with their losses and going after the persons who embezzled the funds. But it would be wiser to prevent the embezzlements in the first place with proper internal controls and oversight by others not handling the funds that should by now be commonplace. Most embezzlements are not very sophisticated, rather ordinary dipping into cash receipts or writing checks to personal accounts, billing personal expenses to the nonprofit, and so on. Embezzlements typically start small, but once underway the amounts can add up because it seems so easy. Too often it is.*

JUST WHAT AN ASSOCIATION GENERAL COUNSEL DOES NOT WANT TO FACE – The general counsel for the National Restaurant Association has had better months, you would think, than navigating through the thicket of allegations by four women claiming sexual harassment by Republican presidential candidate Herman Cain dating back to his tenure from 1994 to 1999 as a volunteer leader and subsequent three-year term as chief staff executive at the NRA. The thicket is compounded by the high profile of the alleged harasser, the refusal of two of the accusers to be identified, the refusal of a third accuser to speak publicly, the confidentiality provisions in the settlements with two of the accusers, and the changing versions of the facts by Mr. Cain. The NRA experience illustrates the need for associations and their counsel to be very careful in addressing sexual harassment and other alleged breaches of employment laws, and in drafting the terms of settlement agreements reached with complainants. You just never know when such a complaint becomes front-page news, and there is enormous pressure from the media for access to all the confidential details. Simply saying "no response" is a sure loser, but once the partial disclosure door is opened you can expect demands for more, more, more.

MORE INFORMATION REGARDING THE "NEW" D.C. NONPROFIT ACT – *H&H Report Update* – As part of our ongoing follow-up regarding the recently overhauled District of Columbia Nonprofit Corporation Act ("NPCA"), we offer the following additional comments. The "new" NPCA is effective January 1, 2012 and will automatically apply to all NFP corporations incorporated under D.C. law. No forms will need to be filed, nor fees paid, for a transition to cover under this latest version of the NPCA. It appears that an "election of coverage" may be available for associations wishing to accomplish an earlier transition to coverage by the amended NPCA, but that is not part of the automatic transition process. *Right now this transition is a work-in-process. As more information becomes available, or further clarification is provided by D.C. authorities, we will bring it to your attention. IN the meantime, if you have questions or concerns, our lawyers in D.C., Chicago and St. Louis are there for you.*

REGULATORY LAW DEVELOPMENTS

ASSOCIATIONS LEAD FIGHT ON EXPANDING ROBOCALLS – If a number of associations and their members have their way, efforts by the Federal Communications Commission ("FCC") to clarify and promulgate a stricter rule defining consumers "consent" to accept robocalls (automated calls) on cell phones will be set aside in favor of a much less restrictive rule. Recall that currently telemarketers and others are not supposed to call you on your cell phone without your consent under federal "do not call" laws and regulations. The American Bankers Association, the Association of Credit and Collection Professions and other associations want to expand what constitutes consent to accept calls. They argue the reason calls to cellphones without the phone owners' consent were barred was because phone plans charged per call or per minute while plans today do not. Associations such as the Consumer Federation of America, the U.S. Public Interest Research Group and other groups argue to the contrary, especially with costly new data plans coming to the fore as cell phones are used more for viewing than talking. *But isn't the basic point that people simply do not want intrusions by telemarketers and others at home, in their cars, at work or play, and even less so from bill collectors and fund-raisers, etc., or politicians and their minions. That is what led to the passage of Do-Not-Call legislation and regulations in the first place. If this prospect disturbs you, let the FCC, FTC and Congress know.*

UNIVERSITY MEDICAL CENTER SUCCESSFULLY RESISTS EEOC SUBPOENA – A federal court judge in Chicago refused to enforce a subpoena issued by the U.S. Equal Employment Opportunity Commission seeking information from the Loyola University Medical Center about tests required of employees. A former employee of Loyola had filed a charge with the EEOC, alleging that she was discriminated against in violation of the Americans with Disabilities Act in that the Center required her to undergo certain physical and psychiatric "fitness for duty examinations" ("FDE") based on a disability. Investigating the charge, the EEOC issued a subpoena to the Center, seeking the names of all employees required to submit to FDEs since January 2008, as well as the reasons for ordering all such FDEs, the types of tests performed and the results of the tests. But the judge refused to enforce the subpoena, ruling that it was overly broad because the EEOC had not shown the "highly sensitive" information sought about other employees was relevant to the complaining former employee's charge or might reveal related evidence of discrimination. The judge said the information sought would "shed no light whatsoever" on the question of whether the tests required of the complaining former employee were related to the performance of her professional obligations or whether she had been singled out based on a disability. On the other hand, if the subpoena had been "sufficiently tailored to the particular circumstances," seeking only information about employees with the same position or similar duties as the complainant, the judge indicated that it might have been enforceable. *The EEOC has broad investigative and subpoena power, but apparently stepped over a boundary in this case. The judge didn't even find it necessary to rule on one of the Medical Center's arguments, namely that federal and state statutes protecting the confidentiality of individuals' medical information prevented the Center from revealing the information sought. So sometimes employers can successfully resist EEOC information demands.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

SO WHAT WERE THE AIRLINES SUPPOSED TO DO? – In the aftermath of the seven-hour ordeals faced by passengers on a number of flights diverted to Hartford, CT Bradley International Airport during the sudden winter snowstorm along the east coast the first weekend of November, numerous demands have been made that the airlines be fined for violating the three-hour tarmac delay regulations imposed a year ago. JetBlue was singled out for criticism but it was not the only airline affected. What was it supposed to do; what were they all supposed to do, in the circumstances? Some 26 flights including international flights from Europe were unexpectedly diverted from New York and Boston to Bradley where the airport authorities were already reducing operational staff in anticipation of the storm, and closing down concessions. Many highways in the Bradley area were impassable. Intermittent power losses due to the storm were affecting air traffic control operations along the east coast and specifically at Bradley which was quickly overwhelmed by the unexpected additional flights. The international flights required the presence of U.S. Customs and Border Protection ("CBP") personnel at the airport before those passengers could be deplaned, tying up airport gates. JetBlue's one available portable staircase was taken by airport authorities for use in deplaning the international passengers. So, yes, the passengers on the various aircraft were trapped for seven hours with all the usual horror stories, and demands for compensation, fines, etc., followed immediately. *But before demanding fines up to $27,500 per passenger, keep in mind the fines go to the government, not the passengers, and government authorities shared responsibility for the rules violations. The tarmac delay rules apply to the airlines, not the FAA, CBP or airports; the international airlines were unable to persuade CPB to let their passengers deplane before CBP personnel arrived; and equipment was lacking or simply diverted by airport personnel. Airlines are supposed to work out coordination plans for diverted flights with airports, but that clearly had not happened before this occurred at Bradley, and with which airports, and who gets priority in these situations? After all the shouting dies down, one anticipates that fines are unlikely in the circumstances, and if imposed would be litigated ad nauseum by the airlines. Not every travel mess has a readymade solution.*

NEW SMOKE DETECTOR REQUIREMENTS FOR HOTELS IN ILLINOIS – Starting on January 1 ,2012 hotels in Illinois will be subject to stricter rules regarding fire detector and alarm systems. The Smoke Detector Act (425 ILCS 60/3) has been amended to require hotels to install at least one approved smoke detector within 15 feet of every guestroom. Under the amendment, hotels are responsible for the installation and maintenance of the smoke detectors. *Meeting planners should ensure that any hotels located in Illinois comply with the Smoke Detector Act if they don't already. And similar safety considerations should be part of their due diligence inspections in meeting properties elsewhere.*

EMPLOYMENT LAW DEVELOPMENTS

ECONOMIC RECOVERY NOT MATCHED BY EMPLOYMENT GAINS – It is a hard sell to convince many Americans the U.S. economy is in a recovery mode and a double-dip recession is unlikely when they are relentlessly hammered with stagnant unemployment numbers that resist going below 9%. Many corporations are generating profits and lots of cash on their books but not hiring. Why? Experts blame supply and demand. There is an over-supply of low and semi-skilled workers and a demand for more skilled workers across the board. Employers are also reacting to the demand side by investing capital instead of hiring less skilled workers. Consumption demand is increasingly filled by imports. Another factor is the often-cited mobility of American workers is undermined by their inability to sell their homes in order to move. *As economists forecast a slow recovery with relatively low employment gains in the next year or two, the unhappy reality is that without an increase in skills many workers will continue to see a bleak unemployment picture. This is the message being heard at numerous association meetings.*

Intellectual Property & Computer Law Developments

IS A TRADEMARK LICENSE ASSIGNABLE IN BANKRUPTCY? – It all depends, as a recent federal appellate court decision in Chicago illustrates. When a company in bankruptcy proceedings attempted to assign a trademark license as one of it s assets for sale, the trademark holder objected. The Bankruptcy Court approved the assignment. The federal appellate court affirmed but with the following caveat. The trademark holder's consent is required for a trademark assignment to proceed; otherwise the trademark holder loses control over its mark, its brand. So far so good. But the court said the trademark license in question had expired by the terms of the license contract, and the licensee was simply performing marketing and distribution services for the trademark owner. The court rejected an alternate claim of an implied trademark license after the original license term expired years earlier. *The basic takeaway here is that a trademark license may not be assigned by the licensee without the licensor's consent, even by a Bankruptcy Court, but first there has to be a valid license in effect to require such consent. Associations are both licensors and licensees from time to time. Know your contract rights.*

Tax Law Developments

SOCIETY FOR PROFESSIONAL DEVELOPMENT DENIED EXEMPTION – In a recent Private Letter Ruling, the Internal Revenue Service denied a federal income tax exemption under Section 501(c)(3) of the Internal Revenue Code for a society dedicated to advancing its members' careers and professional development through social events, business and social networking, mentoring and scholarships. Membership in the group was open to all persons residing or working in a particular geographic area, and the activities of the organization consisted of social and community events, such as tennis and dodge ball tournaments, wine tasting, business mixers, picnics, mock networking and weekly indoor volleyball. Although members did volunteer to help clean up after local floods and proposed to issue scholarships, the IRS found that more than an insubstantial amount of the organization's activities were not in furtherance of any educational, charitable or other purpose exempt under Section 501(c)(3), or even intended to raise money to fund activities that would further purposes exempt under Section 501(c)(3). Moreover, the IRS found that the organization provided a private benefit to its members, by advancing their career and social interests, in a way that was not incidental to furthering an exempt purpose and was prohibited for 501(c)(3) organizations. *This organization might have qualified for a tax exemption, though perhaps under a different and less beneficial section of the Code, if it had defined its membership differently so as to serve a particular trade or profession, if it had been less focused on the social needs of its members, or if it had better demonstrated that it was achieving some more public purpose. Membership organizations want to keep their members happy for funding and other reasons. But organizations aren't even required to have a membership to obtain a Section 501(c)(3) exemption, and sometimes too much of a focus on member needs can be detrimental to obtaining or maintaining exempt status.*

Other Issues, Trends & Developments

FEDERAL JUDGES AFFIRM NONPROFIT'S RIGHT TO PICKET FUNERALS – A three-judge panel of the federal appellate court in St. Louis has overturned a lower court ruling that allowed the State of Nebraska to prohibit picketing within 300 feet of a funeral or memorial service. Members of the Westboro Baptist Church challenged Nebraska's picketing restrictions on the basis of their right to free expression under the First Amendment to the U.S. Constitution. That church has provoked legislative actions and court decisions

like this one by picketing the funerals of military servicemen and women, among others. Members of this church claim to believe that God is allowing American soldiers to be killed in foreign wars because of the country's tolerance for homosexual behavior, which they consider sinful. Illinois has a law much like the Nebraska statute, as do a number of other states. In this case, the Nebraska Attorney General has said the state will ask for review of the three-judge panel's decision by the full appellate court sitting *en banc*. *We normally applaud court decisions upholding the First Amendment rights of nonprofit organization members, and even despicable hate groups and one-church sects have such rights. However, the courts have often indicated that First Amendment rights have limits – libel, slander, and in one famous case shouting "fire" in a crowded theater. We'll see if the Westboro Baptist Church doesn't eventually push the courts just a little too far. Up to now its picketing at military funerals has been a very successful way to garner national publicity for their views.*

U.S. SUPREME COURT AGREES TO DECIDE THE 2010 AFFORDABLE CARE ACT – *H&H Report Update* - The U.S. Supreme Court has agreed to hear challenges by 26 states to the Affordable Care Act, the Obama administration's principal legislative achievement during the past three years. Oral argument is scheduled for late March, 2012. The Court is allowing 5.5 hours of oral argument on whether Congress has overstepped its constitutional authority in mandating people have to buy health insurance or be fined for refusing to do so; whether that mandate can be separated from the rest of the Act if it is found unconstitutional; and whether the Act's participation requirement on the states as a condition of receiving federal funds for Medicaid is constitutional; and finally whether the (federal) Anti-Injunction Act that bars suits for the purpose of restraining the assessment or collection of taxes applies to this litigation, making challenges premature until the mandate and penalties are effective in April 2015. *The issues before the Court affect an industry that constitutes roughly one-sixth of the American economy and is growing steadily, an industry that directly affects all of us personally. The Act, which was passed in one of the most partisan legislative battles in our lifetime, is up for decision by the nation's highest court in the middle of a bitter national election. This is history in the making, whatever the Court decides next June. The stakes are enormous for the nation.*

H & H Developments

In November…

Jonathan T. Howe presented "Legal Considerations for Meeting Planners" and "Road Maps To Successful Contacts" at a convention of meeting professionals in San Jose, California, He presented "Negotiating Contracts – Survive and Even Thrive In Today's Environment" in the Bahamas for a group of meeting planners.

Samuel J. Erkonen presented "Is That Legal?" to a group of hotel sales professionals.

Gerard P. Panaro presented "Recent Changes in Nonprofit Association Employment Law" at a nonprofit symposium in Washington D.C.

Joshua W. Peterson was accepted to Northwestern University for a masters degree in Public Policy and Administration and will begin school in January on a part time basis.

Contributors to this issue…

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