THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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THE LAW FIRM FOR ASSOCIATIONS®

IN THIS ISSUE:

SOME PEOPLE JUST DON'T GET IT – A recent news story in Chicago told about a woman acknowledging she was scrolling through her cell phone contact numbers in order to respond to an incoming text message when she swerved around some debris on a divided highway, then bounced off an 18-wheeler, lost control of her car and managed to run into a pickup on the left shoulder where she hit and badly injured its driver who was changing a flat tire. But she said her accident was not related to her cell phone use because she was only reaching for it after dropping it and was not actually on the phone when she lost control. *Trying to respond to a text message while driving on a divided highway constitutes cell phone use to most of us. Perhaps she will be able to explain to a traffic court judge, and presumably a judge or jury in a likely personal injury lawsuit, why attempting to respond to a text message does not constitute use of her cell phone while driving, which inconveniently for her is prohibited by state law in Illinois. Some folks just don't get it. Don't be one of them.*

HURRICANE IRENE DISRUPTS CELL PHONE, CABLE COMMUNICATIONS – Hurricane Irene wiped out a lot of roads and further complicated life along the eastern seaboard by disrupting telephone and cable communications. Cell phone towers were particularly hard hit in several states, disrupting cell phone use. Landlines were not immune to Irene's disruption of phone service due to downed power and phone lines. *With so many phone users opting to abandon landlines for cell phones, the potential for disruptions due to storms, and overloads as many people in small areas try to call, should be taken into account before deciding to abandon that "old" technology. Landlines may seem redundant, but depending on the nature of the outage sometimes it's nice to have a backup choice. Each technology has its vulnerabilities.*

WILL THOSE SMALL PLASTIC TOILETRY BOTTLES SOON BE GONE? – More hotels are starting to switch from the small plastic bottles for shampoo and other toiletries to much larger bottles which can be refilled as needed. The larger bottles reduce waste but otherwise cost hotels about the same. *But some travelers express concerns about using toiletries that previous guests may have "contaminated" somehow and say they will not use the larger bottles. For others this is not a concern. How about you?*

GOOD READING … See you in October

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LENGTHY SERVICE TO STATE DOES NOT PROVIDE CONTRACT RIGHTS – A county court recently ruled that a nonprofit's providing adoption and foster care services for the State of Illinois under renewable annual contracts for over 40 years did not give the group a right to file a legal challenge to the state's decision not to renew those contracts. Catholic Charities is considering an appeal of the ruling by a Sangamon County court that the nonprofit had no property rights permitting it to contest the state's decision not to renew contracts with the organization. The state decided not to renew the contracts because Catholic Charities does not place children with unmarried, cohabiting couples, including those of the same sex, but instead refers such couples to other organizations for adoption and foster care opportunities. The state's decision came after a determination by the Illinois Department of Children and Family Services that Catholic Charities did not intend to comply with the state's civil union law for same-sex couples, which took effect in June. Catholic Charities contends that the civil union law does not apply to religious organizations, and the state's decision puts a substantial burden on the group's exercise of religious freedoms, thereby violating the Illinois Religious Freedom Restoration Act. *Courts exist to resolve knotty legal problems, such as who has the right to sue whom over what. But what is legal and what is wise are not always the same thing, and wise policy decisions when rights conflict often depend on one's view. How will this court decision affect the children who are supposed to be getting adoption and foster care services? Will they be removed from their present homes? Will they receive more care or less care in the future? Better care or worse care? And is or should the issue be the quality of care the children are receiving, or are too many other considerations getting in the way?*

GOVERNMENT CONNECTIONS MAY REQUIRE OPEN NONPROFIT RECORDS – The Supreme Court of New Jersey recently ruled that the New Jersey State League of Municipalities, an unincorporated nonprofit, was a "public agency" subject to the state open records law because it was created by a combination of political subdivisions and controlled by member municipal officials, even though it performed no governmental function. On the other hand, the court said the organization was not subject to state open meetings requirements because it was not a "public body" under those laws, the definition of which required either performance of a governmental function or authorization to expend public funds. *Open records and open meetings requirements vary from state to state and from one statute to another within the same state. Obligations imposed on nonprofits by these laws because of their governmental connections can be onerous. Nonprofits with links to government must be sure they comply with any such laws that may be applicable to them.*

GOOD INTENTIONS MAYBE BUT BAD RESULTS ALL TOO OFTEN – In the wake of Hurricane Irene, Homeland Security administration officials are warning about charitable scams promising help, and issuing warnings about scams related to the 10th anniversary of 9/11. These warnings follow on reports of 9/11 charities that failed badly in living up to their promises, and all too often ended up with their founders spending large sums to enrich themselves, or at least paying themselves outsized salaries and expenses while doing little or nothing in furtherance of their charitable undertakings. One report described "… schemes beset with shady dealings, questionable expenses and dubious intentions." Some of these "charities" have already had their tax exemptions revoked. *Good intentions gone awry or scams from the start? It is hard to know in many instances. But this illustrates the need to be better informed regarding those seeking scarce dollars for charity, to thoroughly check out their bona fides, to follow up to determine if these charities are legitimate and actually doing what they claim on their Form 1023s and solicitations.*

REGULATORY LAW DEVELOPMENTS

NLRB MANDATES POSTING NOTICE OF EMPLOYEES' RIGHTS TO ORGANIZE – The National Labor Relations Board ("NLRB") published a proposed rule in the August 30th Federal Register mandating employers covered by the National Labor Relations Act ("NLRA") must post a 11 by 17 inch poster that spells out employees' rights to organize and bargain collectively over workplace pay and benefits. This notice will be placed with other workplace notices covering wages, overtime, health, safety, and other such mandatory notices. The new rule is effective November 14, 2011, 75 days after its Federal Register publication. The NLRA covers most employers whose workers are not government workers, agricultural employees, independent contractors, supervisors and managers, and meet minimum jurisdictional criteria for amount of business affecting interstate commerce. At this juncture, employers will not be required to notify their employees electronically of their rights to organize, including voicemail, email or text messages, but if that is how an employer usually sends notices to employees, the employer is expected to circulate notices of employees' rights electronically. The NLRB will provide the posters electronically or they can be obtained in other fashion. More detailed information is available on the NLRB website. *Small businesses in particular are up in arms over this new mandate. The National Federation of Independent Businesses is on record opposing the mandate. New development: the U. S. Chamber of Commerce filed suit September 20, 2011 challenging the NLRB's authority to require this. And yes, associations are employers covered by this new mandate. We will be providing more information next month.*

TAX LAW DEVELOPMENTS

HOSPITAL EXEMPTIONS DENIED FOR LACK OF CHARITY CARE – The Illinois Department of Revenue has denied property tax exemptions for three nonprofit hospitals based on insufficient charity care, following the rationale of the ruling in the heavily publicized *Provena Covenant Medical Center* decision by the Illinois Supreme Court in 2010. Exempt status was denied for Northwestern Memorial Hospital's Prentice Women's Hospital unit, Edward Hospital in Naperville, and Decatur Memorial Hospital in Decatur. Reported charity care amounts for the three hospitals ranged from 1.85% of patient revenues in the case of Prentice Women's Hospital to 0.96% of patient revenues in the case of Decatur Memorial. No bright line test for exemption has emerged from these cases. All three hospitals had charity care in excess of the .07% figure reported for Provena Covenant. The Illinois Hospital Association took exception to the ruling, saying a third of Illinois hospitals are losing money. *The sufficiency of a hospital's charity care may be considered in light of many factors. Notably, all three of these hospitals had substantial net patient revenue, ranging from $1.18 billion in the case of Northwestern's overall healthcare system to $252 million for Decatur Memorial. Would an exemption be denied for a small hospital with a similar percentage of charity care, just getting started, barely in the black, and not part of a system generating huge amounts of net patient income? Maybe future cases will give us answers to such questions.*

THREE-YEAR REVIEWS OF HOSPITALS' COMMUNITY BENEFITS – The 2010 (federal) Patient Protection and Affordable Care Act requires the Internal Revenue Service to review each nonprofit hospital every three years, especially on their financial and other community benefits. IRS plans to do so in a non-audit, internal data-summary manner. The Act provides for annual reporting concerning charity care, unreimbursed expenses, treatment of bad debts and other hospital practices, on Schedule H of Form 990. Beginning in 2015 and every 5 years thereafter, the IRS must report on trends shown in these annual reports. Beginning in 2011, hospitals must conduct community health needs assessments and report on a facility-by-facility basis,

rather than a system-by-system basis. *While most charity benefits are reported as "financial assistance," including reports on financial assistance, billing and collections, emergency services and charges for care, the IRS is working with the U.S. Department of Health and Human Services and Centers for Disease Control to provide written guidance to assist nonprofit hospitals. Such financial summaries will play a continuing role in state real estate tax exemptions based on charity care and other community benefits, currently a hot item in Illinois property tax circles.*

EMPLOYMENT LAW DEVELOPMENTS

SOME HIRING TIPS TO CONSIDER – A recent commentary on hiring tips provides some useful ideas to consider when looking for a new employee. First, don't just rely on a paper resume and face to face interviews. Also use behavioral descriptive interviews that have been tested for validity. Second, use skills-based or job-knowledge tests related to the position. Third, be sure to do a comprehensive background check and including references. *Pretty basic stuff, except that nearly two out of three hires disappoint their employers, according to the Bureau of Labor Statistics. So most of us can stand some improvement in our hiring practices. Personal chemistry is helpful, but hiring based on pertinent job skills is more relevant and predictive.*

STRICTER APPLICATION OF "CAT'S PAW" LIABILITY THEORY – ***H&H Report Update*** – A federal appellate court in Philadelphia recently interpreted the U.S. Supreme Court's 2011 decision (reported in our June edition) on an employer's "cat's paw" liability for employment discrimination, holding an internal and supposedly independent review by the employers of information leading to an employee's dismissal may not be enough of itself to eliminate such potential liability. Here a Philadelphia policeman brought numerous complaints to his superiors about alleged discrimination against other minority officers, was transferred to worse assignments, and threatened if he went to the Equal Employment Opportunity Commission with a complaint. He was later charged with insubordination, neglect of duty, and conduct unbecoming an officer by his allegedly biased supervisor. The charges were heard by a Police Board of Inquiry and he was then discharged by the Commissioner of Police. The officer filed a complaint with the EEOC, and ultimately his case went to a jury and he was awarded significant damages. Of particular note is the appellate court's ruling that once there is some evidence of bias by a supervisor, the employer has the burden of showing the ultimate decision-maker's disciplinary action was unrelated to the allegedly discriminatory or retaliatory action of the biased supervisor and justified by legitimate and documented reasons. *In other words, simply having a separate review of information regarding an employee's actions may not be enough. If there is any claim of discrimination or retaliation, proceed very warily, examine all the information with a fresh eye, and make a comprehensive and well-documented record to support whatever action is taken.*

HOW BEST TO INDUCE EMPLOYEES TO TRY BETTER HEALTH HABITS? – Employers' biggest impediment to reducing health benefit costs is persuading employees to change unhealthy behaviors. Some employers try incentives, others try penalties, most try neither. But one thing is becoming clear as health care costs go up, and that is the need to try something. And if incentives don't work, employers are more likely to resort to penalties. *With no end in sight to the steady rise in health care costs and more federal mandates to provide health care, employers have little choice but to try to persuade employees to share the burden one way or another. What is your approach?*

MEETINGS & TRAVEL LAW DEVELOPMENTS

MEETING CANCELLATION PROVISIONS NEED TO PROTECT BOTH PARTIES – From time to time we are reminded why the cancellation provisions in meeting contracts need to protect both parties. A group recently received a cancellation notice from its conference hotel at a first class property because the hotel needed the group's rooms and function space for a corporate event. The cancellation notice was delivered just a few months before the group's conference. *Hotels are very specific in their contracts about damages if a group cancels on them three years or less before a meeting, with damages escalating as the meeting date comes closer. So groups need to also be specific in terms of damages if their hotel cancels on them. It is not sufficient protection to say the group can sue. Of course the group can sue. Be specific as to what it is the hotel is contractually bound to pay if it cancels. A more specific recitation of damages may even deter cancellation. A knowledgeable attorney can help with such provisions.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

BEWARE OF THE NEW .XXX TOP LEVEL DOMAIN CATEGORY – As if protecting against top level domain ("TLD") category infringement was not complicated enough, the ICANN has authorized a new .xxx TLD category and registry for "adult entertainment" purposes. Those who apply are supposed to be in the "adult entertainment" business, *i.e.,* pornography and related business activities. The company currently running the registry for the .xxx TLD has announced it will accept notices from trademark owners to permanently block .xxx registrations using their trademarks. The "Sunrise B" period is from September 7 to October 28, 2011, and is offered at no cost to those who can establish their trademark or brand rights in a name. *If you don't want to find your brand or trademark used in an .xxx listing, you are well advised to take action now to prevent it. We can help you with this. Don't wait until it's too late and you are in a potentially expensive intellectual property ownership fight.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

INDEPENDENT CONTRACTOR OR AGENT FOR LIABILITY PURPOSES? – From *Porgy and Bess* you will recall the lyrics "It Ain't Necessarily So," as illustrated in a recent Illinois appellate court decision affirming liability of a trucking company for the actions of its third party, "independent contactor" carrier's driver. The trucking company's contract with the independent contractor to deliver a truckload of potatoes specifically identified the carrier and its drivers as independent contractors. The driver was alleged to have caused an accident in which two persons were killed. A jury awarded $24 million in damages. The trucking company argued it was not liable for the actions of the carrier and driver delivering the load based on its contract with them. The trial and appellate courts rejected that defense, finding agency and vicarious liability applied despite the contract based on the degree of contractual control the trucking company exercised over the carrier and its driver. The contract provided the sort of refrigerated container needed for the load, where and when the load was to be picked up and delivered, checking refrigeration requirements for the load throughout the run, daily check-in requirements, and other control factors. To comply with the delivery schedule the driver had to violate the federal maximum 10-hours-per-day driving limit or be fined by the trucking company for a late delivery. *The courts found enough indicia of control by the trucking company over the performance of the contract by the carrier's driver to move it to the agency side of the control equation. That is always the rub in agent versus independent contractor determinations. How much control is exercised over the contractor's performance? One additional point: the appellate court said it is enough if the contract provides for such control whether it is exercised or not.*

WHO'S A "WELFARE QUEEN"? YOU MAY BE SURPRISED – Former Republican Senator John Sununu recently wrote a commentary reminding us that more of us receive federal money than we might imagine He says as much as 47%. Consider Social Security, Medicare, Medicaid, veterans' benefits, farm support payments, food stamps, various housing subsides; the list goes on. If you add in tax preferences such as deducting mortgage interest, tax-deferred retirement accounts and health benefits, some 75% of us receive direct or indirect outlays. Then think how many of us depend on employment financed by taxpayer dollars for defense, highways and health, and that list goes on too. *His point: if so many of us are at the federal trough, maybe we should consider how much of our own dependence is too much, especially as we yell that spending is out of control.*

H & H DEVELOPMENTS

In September…

Jonathan Howe and two other association attorneys presented a "Lightning Round – Ask The Experts," and Jonathan presented "Is Your Association Doing All it Can to Protect its Intellectual Property (IP) in the Electronic Age?" for a major association annual meeting in Washington, D.C. Traveling on to Hawaii, he will present "Risk Management: How to Limit Your Exposure To Risk or Not To Risk – That Is The Question!" for Successful Meetings Destination Hawaii.

John Peterson gave a presentation to a trade association entitled "Social Media: Legal Issues and Organization Liability," and presentations to two trade associations entitled "Business, Legal and Regulatory Developments."

Naomi Angel presented a program at a Meetings Industry Summit in Seattle [held by two major meeting professionals groups] on "Web 2.0: Legal Issues Affecting Emerging Technology." She also gave a Report on Legal Trends and Developments to the Trade Association Technology Conference in Baltimore, MD.

Nathan Breen presented a contract negotiations session for the Northeastern New York Chapter of an international meeting professionals group. Nathan is also speaking at an Engineering Technical Forum and presenting a legislative update on the EPA Renovation, Repair, and Paint (RRP) Regulations regarding lead paint exposure and clean-up.

Samuel Erkonen is presenting "Legal and Legislative Update" to a graphic and product identification manufacturers association at its semiannual meeting. Sam also spoke to the Chicago Bar Association on hotel contracts, and will be speaking in Nassau, leading a roundtable discussion on hospitality industry issues.

Joshua Peterson did a bicycle ride from Wrigley Field to Miller Park in Milwaukee – 100 miles – to benefit the World Bicycle Relief Foundation, whose mission is to provide bicycles to people in Africa.

Contributors to this issue…

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