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:

IRS REVISES CHARITABLE SUBSTANTIATION AND DISCLOSURE GUIDANCE – The Internal Revenue Service has issued a revised Publication 1771, which contains much useful guidance concerning substantiation of charitable donations, as well as disclosures that must be made to donors by exempt organizations. No new substantiation or disclosures are required, but the revised Publication 1771 clarifies tax requirements, noting, for example, that disclosures required to be given to donors by exempt organizations can be provided electronically, such as an email addressed to the donor. *All organizations receiving charitable contributions should obtain and review Publication 1771, which is available for downloading on the IRS website at www.irs.gov.*

FEDERAL BENEFIT CHECKS TO GO COMPLETELY ELECTRONIC – The U.S. Treasury intends to get out of the paper check business, initially for anyone applying for federal benefits after 5/01/2011, and allowing those currently receiving paper checks until 3-01/2013 to switch over to direct deposit. The transition is expected to save about $1 billion over the next ten years For those without bank accounts into which direct deposits can be made, deposits will be made to a prepaid debit card for their use. This applies to Social Security recipients, veterans, federal pensioners and many others. *For those currently receiving deposits electronically, nothing will change. For all others, get with the program. "Ready or not, here I come" goes well beyond the challenge in kids' hide 'n seek games.*

THE "SIX DEGREES OF SEPARATION" HAS BEEN REDUCED TO 4.74 DEGREES – Some scientists at Facebook and an Italian university have recomputed the "six degrees of separation" between any two persons in the world from six to 4.74. The concept is that each of us has someone we know who knows someone else, and the links connect us to someone else in the world by six such connections. Using a much larger population of 721 million persons on Facebook rather than the original 1967 sample of 296 volunteers, the scientists have come up with what they regard as a more accurate assessment of how closely linked we all are. *The results of this are not inconsequential, as social scientists, marketers, politicians, even dictators and others are finding out. News can go viral in a hurry, as many are unhappily learning.*

GOOD READING … See you May

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THE BOY SCOUTS WIN ONE FOR A CHANGE – The City of Philadelphia has been ordered by a federal judge in Philadelphia, PA to pay a local chapter of the Boy Scouts $877,000 in legal fees and court costs for attempting to evict the scouts from a city property. The lawsuit pitted Philadelphia's antidiscrimination ordinance against the Boy Scouts' First Amendment free speech rights. The city had also argued any organization using its facilities for free could not discriminate against others, such as the Boy Scouts policy barring openly gay members. A jury found the city violated the Boy Scouts' First Amendment rights. *That all seems fairly straightforward on the surface, but of course it isn't. The local scout chapter was willing to comply until ordered by the national Boy Scouts of America to fight the city's policy. The chapter did, however, declare it is opposed to illegal discrimination. These fights seem likely to continue at the local level with differing results.*

LOCAL PARISH WINS PROPERTY BATTLE WITH CATHOLIC ARCHDIOCESE – After a decade-long dispute, a local parish has won a court battle with the Roman Catholic Archdiocese of St. Louis over the control of parish property. An alleged failure of the parish corporation to maintain a structure consistent with the Canon Law of the Roman Catholic Church resulted in excommunication of the corporation's board members and a priest, as well as suppression of the parish, in 2005, but the parish continues to operate outside the Archdiocese. The latest court decision was over the right to control property that had been deeded to the parish corporation by the then Archbishop of St. Louis in 1891. Now, a Missouri circuit court has essentially concluded that the parish corporation, which is a corporation in good standing under the state's nonprofit corporation law, still has the right to control the parish's property, notwithstanding the parish's ecclesiastical dispute with the Archdiocese. Said the court: "The Archbishop may own the souls of wayward St. Stanislaus parishioners, but the St. Stanislaus Parish Corporation owns its own property." *Chapters and other affiliates of nonprofits often try to break away from their parent entities, or, as appears to have been the case here, the parents boot them out the door. Bitter court battles sometimes erupt as a consequence, and interested parties should be sure of their legal positions before they sever ties.*

TEXAS CAMPAIGN CONTRIBUTION REGULATION UPHELD – A Texas court has upheld the state's laws regulating corporate and individual political campaign contributions against a nonprofit's contentions that they infringe upon free speech and association rights under the First Amendment to the U.S. Constitution. The decision came after the Texas Democratic Party filed a private suit, as authorized by the Texas statutes, alleging the nonprofit King Street Patriots, Inc. made unlawful political contributions by (1) training poll watchers and subsequently offering their watching services only to the Texas Republican Party and its candidates; and (2) holding candidate forums only for Republican candidates. In its decision, the court did not reach the question of whether the nonprofit actually violated the Texas state laws, but only ruled on the laws' constitutionality. Among other arguments rejected by the court was the nonprofit's contention that Texas couldn't regulate corporate and individual campaign contributions because the U.S. Supreme Court precluded such regulation in its highly publicized *Citizens United* decision. Not so, said the state court, which interpreted the Supreme Court's *Citizens United* ruling as protecting from state regulation only independent political *expenditures* and not *contributions* to political parties, candidates and campaign committees. *King Street Patriots, Inc. says it will appeal this decision, which was made at the lowest level of the Texas court system, and this court still has to rule on whether the alleged actions of King Street Patriots constituted a prohibited political contribution, rather than an independent political expenditure. Stay tuned for further developments in this extremely heated local political and legal dispute, which could have far-reaching national implications as it wends its way up through the appellate courts.*

Intellectual Property & Computer Law Developments

WATCH OUT FOR ANOTHER TRADEMARK SCAM – Trademark owners around the nation are receiving notices that they need to update their trademark registrations and pay a processing fee of $375 to do so. The notices are coming from the United States Trademark Registration Office ("USTRO") with an address in Los Angeles, CA. Only it's a scam! The United States Patent and Trademark Office ("USTPO") which is responsible for trademark registrations is located in Alexandria, VA across the Potomac River from the capitol, and the USPTO filing fees for an initial filing and renewal filings vary, but none is for $375. *This is a more expensive variation on the old schemes of billings for office supplies you never ordered, and similar ways of bilking busy business owners out of money. This outfit has no official standing whatsoever. Just because a notice looks official doesn't mean it is, whether it comes in the mail or by email. Pay attention to the details to avoid being scammed.*

Employment Law Developments

SHOULD EMPLOYERS ASK FOR SOCIAL WEBSITE PASSWORDS? – A new hot-button issue has cropped up in employment and legislative circles. Should employers be asking job applicants (or even current employees) for their passwords to access their Facebook or other social websites? As you might imagine, privacy advocates unanimously thunder "NO!" Of course lawyers are also springing into action with dire warnings on what might transpire if employees or job applicants felt coerced to provide such information and then at least suspect if not know that such access led the employer to reject the applicant or take adverse action against the employee. Legislators are also jumping into the arena at the federal and state levels to propose laws banning employers from asking for such access. *Whoa! Slow down, folks. This is more complicated than it looks, and simple one-size-fits-all laws may not be the way to go. Before getting into this area of inquiry, think through what you would be interested in knowing, whether it would possibly provide grounds for a discrimination claim or otherwise breach federal or state employment or privacy laws, how you might avoid such consequences, whether you need consent, and whether the laws of your state permit such inquiries. Illinois and Maryland are already proceeding with legislation banning such access and other states are likely to follow soon so you will need to be very aware of what is and is not permitted under the laws of your state. In short, get good legal advice before proceeding.*

KEEP THIS IN MIND WHEN OFFERING TERMINATION SEVERANCE – A federal appellate court in Richmond, VA reversed a trial court and ruled that severance offered in connection with termination came within the scope of federal employment discrimination laws, in this case Title VII of the Civil Rights Act of 1964. A woman supervisor (the head of Human Resources!) declined the severance offered her when she was terminated and sued, alleging the package offered was less than the "sweetheart deals" previously offered to male employees who were terminated. The trial court dismissed her claim, saying she did not have a contractual basis for claiming severance and that the severance offer was after her termination, therefore not an adverse employment action. The appellate court emphatically disagreed, saying Tile VII protects against disparate treatment in severance benefits whether offered contractually, voluntarily or otherwise, and that the severance was an action in connection with her employment because Title VII applies to potential, current and past employees. *The lawsuit returns to the trial court for further proceedings. But this appellate ruling is expected to be a defining precedent across the country and not just in the Fourth Circuit. Keep it in mind when offering severance.*

ANOTHER REASON EMPLOYEES ARE SINGING THE BLUES – According to U.S. Census Bureau data, the median income for U.S. *households* has declined from about $55,000 to $50,000 since 1999, after adjusting for inflation. The two principal reasons were the intervening economic crises (especially since 2008) that have battered the economy and employment, and the rising cost of healthcare paid by employees. Employers were hit hard by rising health care costs, approximately 160% in that period, cutting heavily into income that might have gone in part for pay increases and serving as a disincentive to add workers. *If current trends are any indication, unless the U.S. economy really takes off, employers are going to continue with low pay increases, very conservative hiring and they may well see health costs jump dramatically regardless of the U.S. Supreme Court's decision on the Affordable Care Act of 2010. And many economists continue to warn that all that money sloshing around since the Federal Reserve opened the spigots will lead to real inflationary pressures if and when the economy does take off.*

REGULATORY LAW DEVELOPMENTS

DOJ ANTITRUST OFFICIALS EMPHASIZE BROAD ENFORCEMENT ACTIVITIES – Senior U.S. Department of Justice Antitrust Division leaders spoke at the recently concluded spring antitrust meeting of the American Bar Association in Washington, D.C. They emphasized the broad range of antitrust enforcement activities of the division, including civil and criminal litigation, intervening in more than a dozen merger and acquisition situations leading to their abandonment or restructuring, and other enforcement actions in the past year. Of more than passing interest to associations was the warning that antitrust officials will be looking very closely at the use of "essential patents" when consortiums of companies acquire patent portfolios. Access to such technology could be used to "… unfairly disadvantage competitors," officials said. *Similar concerns have been expressed by antitrust authorities when essential patents are incorporated in industry standards and are not disclosed as patented technology until after their inclusion or are not made available on a reasonably commercial and open basis. The diversity of their enforcement targets is another factor to keep in mind, particularly in the criminal field.*

TAX LAW DEVELOPMENTS

SCHOOL ASSOCIATION PROVIDING INSURANCE DENIED TAX EXEMPTION – A federal district court for the District of Columbia has ruled that an association of tax-exempt secondary schools and universities in Florida, which was organized to pool risk and obtain insurance for its members pursuant to a Florida law providing for such entities, did not qualify for a federal income tax exemption under Internal Revenue Code §501(c)(3). The court denied an exemption for the group because it was found to be a "commercial-type insurance company" generally disqualified from §501(c)(3) status under Code §501(m)(1). Furthermore, the court found that the association did not avoid the impact of §501(m)(1) on its exemption claim by meeting all of the requirements for treatment as a tax-exempt "qualified charitable risk pool" under Code §501(n), having failed to obtain at least $1 million in startup capital from non-member charitable organizations. *Organizations seeking tax-exempt status must be sure that they carefully review with qualified legal counsel, as early in their existence as possible, all of the requirements they must meet in order to obtain an exemption. In this case, the court noted that the association had met "most, if not all, of the requirements" for an exemption as a "qualified charitable risk pool" except for the startup capital provision.*

IRS EXPANDS PUBLIC INSPECTION OF MATERIALS – The Internal Revenue Service has issued final regulations expanding public inspection of materials relating to exempt organizations, as well as organizations that have been denied exempt status by the IRS and organizations that have lost their exempt status for various reasons. Among other things, the final regulations clarify that the IRS is changing its policies to comply with a decision by the federal appellate court for the District of Columbia in the *Tax Analysts* case, finding that the previous IRS policy of withholding letter rulings denying or revoking recognition of exempt status from public inspection was contrary to the Internal Revenue Code. Generally, the IRS now says it will provide for public inspection all rulings, letters and documents issued by the IRS with respect to exempt organizations, organizations that have been denied recognition of exempt status, and organizations that have lost their exempt status for various reasons, as well as applications for IRS rulings and supporting documents. However, the IRS does note that, in the past, some applications for exemption have been destroyed by the IRS and are no longer available for public inspection. *Has the IRS become a convert to full disclosure? Well, there's nothing in the final regulations about internal IRS documents or any other IRS materials that the IRS hasn't "issued." Maybe that was an inadvertent omission, right?*

MEETINGS & TRAVEL LAW DEVELOPMENTS

ALLEGIANT JOINS SPIRIT IN CHARGING FOR CARRY-ON BAGS – You suspected it would come sooner or later, and you were right. Allegiant, a low-fare carrier which focuses on tourist destinations, has announced it will charge $35 for carry-on luggage checked at the airport, less when ordered at the time of ticketing. Fees may vary depending on the route flown. Passengers may bring a purse or briefcase without charge, but that's it. Allegiant joins Spirit in charging for carry-on bags. *Allegiant makes no bones about it, it adds fees whenever and wherever it can. It made a profit last year, and usually is less expensive. But these fees will bring it closer to other airlines' pricing and then we'll see if the Allegiant add-on fees pricing model continues to work. And will women passengers who carry a purse be content with having to pay for their carry-on computer/briefcase if men can bring a briefcase on for free?*

OTHER ISSUES, TRENDS & DEVELOPMENTS

KODAK BANKRUPTCY ILLUSTRATES WRONG BETS – Kodak filed for bankruptcy last January in New York. While the company continues to operate under Bankruptcy Court protections, it seems very unlikely to regain the cachet and technical importance it possessed for nearly a century. Today its principal asset seems to be its portfolio of patents which it is trying to sell or somehow leverage in today's highly competitive and diverse imaging world. In trying to protect its predominant position in film, it bet on the wrong long-term technology, and numerous rivals leapfrogged past Kodak's technology, leaving Kodak in the dust as the marketplace changed to digital imaging. *Complacency or comfort in thinking your world-class technology or market dominance will protect you from encroachments by others is all too often a delusion. Associations face similar problems in demonstrating their value to their members in the face of inroads from other associations, for-profit competitors and new technologies undercutting the very strength associations think they bring to the market. Every year ask yourselves what is our strength, our core value to members, what could displace us, what do we need to do to stay relevant. Don't get comfortable or locked in to old habits.*

HEALTH CARE COST REDUCTIONS: THREE CURRENT FALLACIES – As the U.S. Supreme Court wrestles with one of the most contentious and momentous decisions in recent Court history, three underlying fallacies should not be overlooked. One is that the health care reforms enacted in 2010 will reduce overall health spending, even with the addition of millions of Americans newly covered by health care. Another is that the switch to electronic records in place of paper records will reduce overall health cost spending. The third is that better health outcomes will reduce overall health care spending. These claims were widely disputed when made back in 2010, and recent estimates of future health costs are dramatically higher. The real costs of the health reforms enacted in 2010 were deferred for four years by making the most expensive changes effective in 2014 and later, so the ten-year forecasts for federally mandated spending are now beginning to reflect those projected costs well in excess of a trillion dollars, about 75% higher than predicted in 2010. Electronic medical records may be more efficient and less expensive going forward after the initial investments to change over, but that cost reduction will not be sufficient to offset higher costs for more treatments for more medical consumers. Better health outcomes may be eagerly sought, but they will not come cheaply or reduce overall spending. And an aging population living longer will require more, not less health care for more years. *This is not an argument for or against the changes legislated in 2010, but in favor of realistic assessments of the likely costs. How much are we willing to pay individually and collectively? Should we focus on microcare (i.e., you and me) or macrocare (care at the national level) when addressing costs and availability? Are these questions the U.S. Supreme Court is equipped to address rather than Congress? The political, social and economic impact of the Court's decision expected by the end of June is difficult to estimate now, but it will affect us all.*

H & H DEVELOPMENTS

In April,

Jonathan Howe presented "The Lawyer Is In – The Legal Side – Hang It Out To Dry" to attendees at the chapter of a national organization of meeting professionals. Jon also presented, "The Legal Risks And Rewards of International Meetings" at a global meeting promoted by a publishing company for meeting professionals in Cancun, Mexico and a webinar "Can You Face FaceBook? Don't Get Buried by Social Media," which was offered to recruitment specialists serving the meetings industry worldwide.

Naomi Angel presented, "A Primer On Sexual Harassment" for a manufacturing institute's meeting in Phoenix, Arizona. Naomi also presented "Top 10 Legal Issues In International Business" for an event planned by the trade and professional association committee of a regional bar association.

Gerard Panaro presented "2012 Employment Law Update Nonprofit HR Solutions" in Washington, D.C.

Contributors to this issue…

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