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Leadership Message

It is an honor for me to assume the chair of the Nonprofit Organizations Committee, taking on a task so ably performed by many distinguished predecessors. Thanks so much to Bill Boyd for maintaining and setting up systems that work so well for our Committee's administrative structure. And thanks to all the past Committee Chairs who remain active contributors to the development of nonprofit law and to the work of our Committee. And thank you to all of our active Committee volunteers who contribute their time so generously to ensure that our Committee provides some of the best, and most interesting, CLE in the ABA.

In this message, I'll briefly introduce myself to Committee members who may not know me. For 20 years, I have been working in the substantive areas of affordable housing and land use, in both the public and nonprofit sectors. My work with nonprofits in these areas stimulated a keen interest in nonprofit governance, which I was able to draw on to improve performance and accountability of nonprofit service providers in my work with government agencies. I then spent a decade in the nonprofit sector as in-house counsel, developing my expertise internally as I built a governance consulting practice and acquired credentials as a professional parliamentarian to enhance my work with member-governed nonprofits.

Two years ago, I was privileged to be invited to serve as principal counsel to the Massachusetts state individual and family homelessness programs, then being reorganized to pursue a "housing first" policy. I have been fortunate to be able to maintain my nonprofit governance consulting practice at the same time, working primarily with membership nonprofits such as amateur sports groups, Twelve-Step fellowships, professional education organizations, neighborhood and community development groups, unions, pet breed clubs, and social service providers.

This background is an example of the tremendous diversity that enlivens the world of nonprofit law. Whether we come to nonprofits through tax law, business transactions, or substantive work in the nonprofit sector, we have so much to learn from each other's experience in this Committee. I look forward to getting to know you and working with you as we continue to build this amazing and accomplished community of nonprofit lawyers.

Michael E. Malamut
Chair, Nonprofit Organizations Committee

Featured Article

The Newsletter Editorial Board is seeking articles on nonprofit law subject matter to include in future newsletters. There is no length requirement. We plan to have a series of "Advising the Board" articles intended to assist our members when advising board of

By William Klimon, Washington, DC

The ABA Business Law Section's Nonprofit Organizations Committee was actively involved in the ABA's 2011 Annual Meeting held in Toronto, Canada. The Committee held its main program on August 6, 2011 on Multi-Level (International, National, Regional & Local) Non-profit Organizations: How to Structure Them Plus Unexpected Issues. It featured four speakers who addressed corporate structuring, regulatory, tax, and Canadian issues for nonprofit organizations that operate on "multiple levels"- across organizational, state, and even international boundaries.

Photos from the Annual Meeting

Canoeing adventure on Thursday night.
Committee members were invited to make their own pizzas at the committee dinner in Toronto.

Diana Sen - 2011 Award for Outstanding In-House Counsel.

Subcommittee Spotlight

The Nonprofit Governance Subcommittee is a joint subcommittee of the Nonprofit Organizations and Corporate Governance Committees. The subcommittee explores recent developments in governance practices for nonprofit organizations. The subcommittee follows developments arising from new and proposed legislation and regulation; recent court decisions; enforcement actions; common practices in drafting governing documents and governance policies; industry-based standards and "best practices"; major studies; and requests by funding,
Nonprofit Governance and Management, Third Edition, published in the last couple months, is a collaboration of the American Bar Association and the Society of Corporate Secretaries and Governance Professionals. It is written as a practical guide for executive staff and boards of directors of nonprofit organizations. The book serves as an overview of the basics of nonprofit governance, as well as board structure and operation. Topics covered include, tax-exempt status, internal controls, lobbying, financial reporting, intermediate sanctions, and the unrelated business income tax. It also provides specific guidance on issues such as financial management, fund-raising, oversight of the executive officer, and crisis management. The Third Edition includes and expanded discussion of financial and tax matters, which has significantly changed since the Second Edition. Each chapter includes a section on "Practical Advice", providing sample forms and guidance that are intended to convert ideas into actions and are based on the experiences of the authors and editors. The book is designed for use by nonprofits of any size. One review states that it is "the single best resource for executives and management working in the nonprofit area."

National and State Updates

National Updates

Megan A. Christensen, Blank Rome LLP, Washington, D.C.

1. IRS Publishes Guidance Regarding Community Health Needs Assessment.
   On July 25, 2011, the IRS published guidance, Notice 2011-52, describing provisions anticipated to be included in future regulations with respect to the Community Health Needs Assessment (CHNA) requirement, applicable to tax-exempt hospital organizations, set forth in Section 501(r)(3) of the Internal Revenue Code, enacted earlier this year. The CHNA requirements will be effective for taxable years beginning after March 23, 2012. The Notice describes anticipated regulations regarding (1) hospital organizations subject to the CHNA requirements, (2) hospital organizations with more than one hospital facility, (3) documenting a CHNA, (4) the manner and timing in which a CHNA is conducted, (5) the community served by a hospital facility, (6) persons representing the broad interests of the community, (7) the requirement to make a CHNA publicly available, (8) adoption of an implementation strategy, (9) excise taxes for failure to meet the CHNA requirements, (10) CHNA reporting requirements, and (11)
effective dates. The notice also solicits comments from the public regarding the scope of the CHNA requirement. The notice may be found at http://www.irs.gov/irb/2011-30_IRB/ar08.html.

2. IRS Releases New Form 8940 for Miscellaneous Determination Requests.
The IRS released new Form 8940 in order for tax-exempt organizations to request certain advance determinations. The form may be used to request (1) advance approval for certain private foundation set-asides, voter registration activities, and scholarship procedures, (2) advance determination of unusual grants, (3) exemption from Form 990 filing requirements, (4) initial determination of or change in type of supporting organization, (5) reclassification of foundation status, and (6) and certain terminations of private foundation status. Further information may be found at http://www.irs.gov/charities/article/0,,id=243251,00.html.

GuideStar has released a new report regarding nonprofit executive compensation. The report covers such topics as IRS rules on compensation of executives at tax-exempt organizations, the types of data on which executive compensation should be based, and ways nonprofit professionals and board members can mitigate risk through their compensation practices. The report may be downloaded at http://www2.guidestar.org/rxg/news/publications/nonprofit-executive-compensation.aspx.

4. Final Regulations Implementing Redesigned Form 990 Released by Treasury.
The Department of the Treasury has issued final regulations, effective September 8, 2011, to implement the redesigned Form 990. The revisions include a new threshold amount for reporting compensation, a requirement to report compensation on a calendar year basis, modification of the scope of organizations subject to certain information reporting requirements, and alteration in the public support computation period. The final regulations eliminate the advance ruling process for new organizations. These regulations apply to all tax-exempt organizations required to file annual information returns.

State Updates
Patrick Sternal, Runquist & Associates, Northridge, CA

1. New York
A New York State task force sent inquiry letters in August to hundreds of nonprofit organizations that receive state money. The letters ask for further information about the organizations' executive compensation practices. The letters were sent to the more than 600 health- and welfare-services providers. The data will be compiled and analyzed and, based on the findings, may lead to public hearings, a report and proposals for reform. The task force was set up by Gov. Andrew Cuomo following an article in The New York Times in early August about executive salaries at some nonprofits, which has led to concern that some of these organizations serve as vehicles to enrich certain individuals.

2. New Jersey
The New Jersey Supreme Court ruled on August 23 in Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities that the New Jersey State League of Municipalities, a nonprofit unincorporated association, is a public agency and subject to the same disclosure requirements as governmental entities. The trial court had dismissed the complaint last year, ruling that the League was not a "public agency" under the Open Public Records Act (OPRA), because it did not possess any traditional...
Act (OPRA), because it did not carry out any traditional government functions. The appellate court upheld the ruling, but the NJ Supreme Court unanimously overturned it. The court held that the league meets the definition of a public agency for OPRA purposes, because it is an "instrumentality … created by … political subdivisions," and therefore is required to make available government documents pursuant to OPRA's provisions.

3. Illinois
Following upon last year's decision against Provena Hospitals, the State of Illinois has challenged the property tax exemptions of three hospitals based upon failure to provide sufficient charity care to qualify for exemption under the tax-exemption provisions of Illinois law. If these challenges are upheld, it is expected that the state will challenge the property tax exemptions of other nonprofit hospitals with low charity care. Property tax exemption applications from 15 other hospitals are currently under review. Hospitals in Illinois are pushing for legislation that would seek to redefine the qualifications for tax exemption under the definition of charity to include patients' unpaid debts, costs of medical care not covered by Medicare health insurance for the elderly, Medicaid coverage for the poor, and direct costs that teaching hospitals pay to train doctors and conduct research.

4. California
Several nonprofit groups in California are being denied property tax exemption because the state's Board of Equalization (BOE) and the local county assessors contend they do not sufficiently meet the "community benefit test," which requires them to primarily benefit the community of residents within the geographic boundaries of the state. The charitable organizations affected include those with an international outlook and mission. It is unknown how many nonprofit groups in California have been affected, though attorneys representing two organizations have recently brought the issue to the attention of the media. The issue has become contentious now as the state and nonprofit organizations are facing financial strains due to the economic recession. The BOE has determined to review the policy at its September 20-21 meeting.

5. Illinois
An Illinois court ruled on August 18 in Catholic Charities of the Diocese of Springfield v. State of Illinois that the state can decline to renew its contract with Catholic Charities in Illinois to provide foster care and adoption services. The Illinois Attorney General argued that Catholic Charities' policy of licensing only married couples and single parents living alone as foster parents, while referring couples in civil unions to other agencies, violates state anti-discrimination laws that now accommodate couples in civil unions. The court found that Catholic Charities' history does not entitle them to an automatic renewal of contracts. Catholic Charities pointed to a clause in the Religious Freedom Protection and Civil Unions Act that they believe protects religious institutions that don't recognize civil unions, however, the Illinois Attorney General said that exemption only shields religious clergy from performing civil unions and that the policy of Catholic Charities violates state anti-discrimination laws.

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The first two speakers focused on corporate and tax issues affecting U.S. nonprofit organizations that operate in multiple jurisdictions or have multiple affiliates. Brendan Wilson, then counsel at Akin Gump, focused on the corporate aspects of structuring U.S. multi-level nonprofit organizations and discussed different ways that nonprofit organizations can use group exemptions, single-member limited liability companies, stock nonprofit corporations, and supporting organizations to structure their activities across multiple organizations. He also addressed the recent Girl Scouts of Manitou Council case in which the U.S. Court of Appeals for the 7th Circuit held that Wisconsin’s fair dealership law limited the ability of the Girl Scouts of America to revise an agreement with a local Girl Scouts affiliate. Mr. Wilson recommended that practitioners keep this decision in mind when drafting affiliation or licensing agreements between nonprofit affiliates and take the time to review existing agreements to ensure they are not subject to federal or state franchise laws.

Following these themes, the second speaker, Megan Christensen, an attorney at Blank Rome, focused on tax and regulatory issues that pertain to U.S. multi-level nonprofit organizations. She covered a variety of issues, including state and federal filing and registration requirements for nonprofit organizations, IRS rulings governing joint ventures between nonprofit and for-profit entities, and new market tax credit rules. Ms. Christensen also provided the audience with helpful guidance on structuring multi-level nonprofit organizations using supporting organizations and limited liability companies, including a reminder of the provisions that should be included in the operating agreement of multiple-member limited liability companies in order for the limited liability companies to qualify as 501(c)(3) organizations.

After considering tax and corporate issues in the domestic context, the focus of the panel turned to international issues affecting multi-level nonprofit organizations. Mark Bravin, a partner at Winston & Strawn, provided an overview of U.S. export law for nonprofit organizations. In his discussion of the U.S. export control regime, Mr. Bravin explained how U.S. government agencies monitor and enforce compliance with the U.S. export regulations and what sanctions such agencies apply when violations are detected. Mr. Bravin also provided an overview of the Foreign Corrupt Practices Act and a summary of issues that multi-level nonprofit organizations should consider when operating in countries that are subject to embargoes. He reminded the audience that even seemingly innocent actions like transporting a laptop computer into certain countries can raise export-licensing issues and encouraged practitioners to develop a basic understanding of the U.S. export control regime in order to spot potential problems for their nonprofit clients.

David P. Stevens, a partner at Gowling in Toronto, Ontario, gave the final presentation of the panel, which focused on cross-border issues involving U.S. and Canadian charities. He provided an overview of the Canadian framework for regulating nonprofit organizations and described certain conceptual and practical differences between the U.S. and Canadian regulatory regimes. Mr. Stevens also provided a description of various Canadian laws that govern cross-border activity by nonprofit organizations, including certain restrictions on foreign grant-making by Canadian charities. He concluded his presentation by offering some practical advice on how
Canadian multi-level nonprofit organizations can structure their programs to support foreign affiliates and overseas projects.

The panel was moderated by David Tang, a partner in the Toronto office of Gowlings, and William Klimon, a partner in the Washington, D.C. office of Caplin & Drysdale. The materials from the panel’s presentations will be posted on the Committee’s webpage and may also be found at http://apps.americanbar.org/buslaw/apps/updatedsearch/results.cfm?st=&sc=&sp=&sm=AM&sy=2011&ss=10

By William Klimon, Washington, DC