Leadership Message

As Chair, I have the privilege to work with a wonderful group of volunteers who put together program content and area updates that our Committee members consistently rate as one of their most important reasons for joining the committee. The committee leadership team puts in an enormous amount of volunteer time making the Committee work. The recent Spring Meeting in Las Vegas epitomizes that teamwork. The Nonprofit Organizations Committee and its Subcommittees put on and co-sponsored several programs, both for CLE credit and for information. We welcomed new active members and renewed friendships while engaging in cutting-edge programming. We also had the pleasure of congratulating Vanguard Award Recipient Thomas Silk in person at our meeting.

We had a very productive and challenging committee business meeting in Las Vegas. We discussed upcoming CLE and webinar opportunities and look forward to some great programming coming your way in the next few months and at the Annual Meeting in Chicago in August. As of now, we anticipate a program there on service-related liability issues for nonprofits, focusing especially on head injuries and concussions in nonprofit sports associations. Due to a jam-packed schedule we ran out of time for debate on the subject of the new hybrid nonprofit/business entity forms, such as benefit corporations, multiple purpose corporations, and L3Cs. However, we anticipate providing a webinar on the topic in the next few months. If you have any ideas for future meetings or programming between meetings, I welcome all suggestions.

Michael E. Malamut  
Chair, Nonprofit Organizations Committee

Las Vegas Meeting - The Care and Feeding of Members

By Ingrid Mittermaier, Adler & Colvin, San Francisco, CA

The committee held a program on membership nonprofits. Three speakers, Carolyn Shushelski, William Klimon, and Allen Sparkman, shared their experiences and legal analysis regarding nonprofit corporations with voting members. Ms. Shushelski, who serves as counsel to the Ontario Real Estate Association and has worked for other associations in the past, discussed the challenges for membership associations to retain their membership. She emphasized how important it is to ensure that members have the chance to provide input into how an association is operated. She mentioned successful coalition building around a lobbying campaign to have input on new legislation and a widely used dispute resolution system as the types of valuable services offered to members.

The second speaker, Mr. Klimon, noted the trend to having corporations without voting members and with "self-perpetuating boards" in which the directors elect their own successors. He then presented several practical reasons why a membership structure might still make sense, including (i) using a membership structure as a mechanism to provide control to founders or donors, (ii) using members to approve an interested director transaction and obtain the rebuttable presumption of reasonableness under the Treasury Regulations interroretino Section 4958 of the Internal Revenue Code ("IRC"), (iii) using the
on different issues. We are also seeking articles on other substantive subjects. If you are interested in submitting an article, please contact:

- Megan Christensen at Christensen@blankrome.com or
- Cari Campbell at cari@campbelllegal.com or
- Matthew Wright at matthew@mgwrightlaw.com.

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### Newsletter Editorial Board

- Willard L. Boyd III, Des Moines, IA
- Cari Campbell, Kieler, WI
- Megan A. Christensen, Washington, D.C.
- Patrick Sternal, Northridge, CA
- Matthew G. Wright, Waco, TX

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### Las Vegas Meeting - The Committee Meeting

The following case was discussed at the Nonprofit Committee meeting in Las Vegas:

**Supreme Court Affirms the Ministerial Exception to Employment Discrimination Laws**

*By Patrick Sternal, Runquist & Associates, Northridge, CA*

In an important decision regarding church-state issues, the Supreme Court upheld the so-called "ministerial exception" to federal, state, and local laws against employment discrimination in *Hosanna-Tabor v. EEOC*, 132 S. Ct. 694 (2012). The ministerial exception is judge-made law, rooted in the First Amendment's Religion Clauses, whereby civil courts are barred from reviewing employment disputes between churches and ministers. While the ministerial exception has long been recognized by all the federal appellate courts to varying degree, it had not been affirmed by the Supreme Court prior to this decision.

At issue in *Hosanna-Tabor* was whether a teacher, fired from her position at a parochial school affiliated with a Lutheran church, could bring employment discrimination claims against the church under the Americans with Disabilities Act and state civil rights and whistleblower protection laws. The church argued that the teacher was a minister of the church and therefore, according to the "ministerial exception," her suit against the church for employment discrimination was barred. The District Court agreed with the church that her claim was barred by the ministerial exception. The Sixth Circuit, although acknowledging the ministerial exception, held that the teacher could not be treated as a "minister" under that exception because her duties were not primarily ministerial.

In its *Hosanna-Tabor* decision, the Supreme Court reversed the Sixth Circuit, unanimously affirming the ministerial exception and dismissing the teacher's claim. Significantly, the Court declined to adopt a limitation of the ministerial exception to only those workers who perform exclusively religious functions. At the same time, while finding the teacher in *Hosanna-Tabor* to be a minister, the Court declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." Instead, the Court leaves it for the civil courts to further define who is a minister in future litigation.

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### Las Vegas Meeting - Healthcare and Nonprofits in Bankruptcy (Joint Program with Business Bankruptcy)

*By Ingrid Mittermaier, Adler & Colvin, San Francisco, CA*

**The Surge of For-Profits in Distressed Health Care: What Moves a Nonprofit to the For-Profit Option and How Do Nonprofit Boards Decide to Make the Move?** (March 23, 2012)
At a Joint Meeting of the Subcommittees of Health Care and Nonprofits in Bankruptcy (Business Bankruptcy Committee) and Current Developments in Nonprofit Corporation Law (Nonprofit Organizations Committee), four panelists, moderated by Jean Robertson, discussed issues affecting the financial viability of nonprofit health care organizations and how nonprofit Boards of Directors might consider a transition to a for profit model as an option. Louis Robichaux started the session with an overview about the trends in health care legislation and health care reform, and the resulting environment in which health care organizations are operating. Pamela Kaufman then shared insights from her work in the area of nonprofit senior care and housing, the trends faced in the sector, particularly involving challenges around tax-exempt bond financings, and the options for Boards of Directors in responding. Karen Dine continued discussing the role of the Board of Directors and their fiduciary duties in responding to these trends. Finally, Jerome Morasko shared insights in how to help Boards maintain oversight over the health of their organizations, most importantly by using a board governance system that ensures their oversight over the chief executive officer and the financial status of the organization.

Las Vegas Meeting - Innovative Community Economic Development Projects (Co-Sponsored with Committee on Community Economic Development)

By Megan Christensen, Blank Rome LLP, Washington, DC

The committee co-sponsored a program with the Committee on Community Economic Development regarding economic development projects. The speakers were Rochelle Lento of Dykema in Detroit, Michigan and Megan Christensen of Blank Rome LLP in Washington, DC. Ms. Lento began the program by discussing two projects in Detroit. The first was an adaptive reuse of a former pharmaceutical company on the east side of Detroit for use as an affordable assisted living development for seniors. The project makes use of a number of financing sources such as: the low-income housing tax credit; state, county, and city HOME funds; state brownfield tax credits; construction loans; state mortgage funding; and HUD vouchers. The project brought together a number of transaction partners including nonprofits, banks, and federal, state, county, and city governments. Ms. Lento discussed various challenges to bringing all of these entities and funds together into a single project.

Ms. Lento then discussed another project in north central Detroit known as the NSO Bell Building. This project is also an adaptive reuse of a former office/industrial building and will be used as a permanent supportive housing development for chronically homeless individuals. It too involved a number of funding sources and partners. Funding for this project utilized, inter alia, low-income housing tax credits, bank loans, brownfield tax credits, federal and state historic tax credits, county and city HOME funds, foundation grants, and new markets tax credits.

Ms. Christensen then discussed the use of the new markets tax credit and how nonprofits can make use of it. After reviewing the basic rules for the tax credit, Ms. Christensen discussed two projects in New York City utilizing the tax credit and involving nonprofits. The first project was a mixed-use, mixed-income, transit-oriented development with green elements, known as the Bradford in the Bedford-Stuyvesant neighborhood of Brooklyn. This project involved Bedford-Stuyvesant Restoration Corporation, the nation’s first community development organization.

The second project used the new market tax credit structure to obtain funds for the construction of the KIPP NYC College Prep High School in the Bronx. KIPP and the Robin Hood Foundation, the two nonprofits in the transaction, came together with the New York City Department of Education and several for-profit transaction partners to build a permanent location to educate 1,000 high school students, substantially all of which are expected to come from low-income communities. This project creates a few hundred construction jobs and nearly 100 permanent jobs.

Program materials and a recording of the session are available here.
Las Vegas Meeting - Investment Policies for Nonprofit Organizations 'in This Economy' (Subcommittee on Nonprofit Corporate Governance)

By William Klimon, Caplin & Drysdale, Washington, DC

At the 2012 Spring meeting of the Subcommittee on Nonprofit Corporate Governance, Laura Damerville, an associate in the exempt organizations practice of Caplin & Drysdale (Washington, D.C.), gave a presentation entitled, "Investment Policies for Nonprofit Organizations 'in This Economy." Ms. Damerville discussed the financial challenges that many nonprofits have experienced as a result of the economic crisis and the fact that a significant number of organizations are adopting or revising investment policies. Ms. Damerville discussed relevant legal standards, particularly those contained in the Uniform Prudent Management of Institutional Funds Act (know by the acronym UPMIFA), which has been adopted in some form in almost every state. She also discussed the importance of managing conflicts of interest involving investment advisors and managers, and she circulated a list of readily available resources for drafting policies.

Attendees discussed the different considerations that apply to smaller nonprofit organizations in adopting investment policies and the difficulties that many such organizations have in obtaining proper assistance in drafting corporate governance documents. In response to the number of law firms that provide pro-bono assistance to nonprofit organizations but do not otherwise have a regular nonprofit practice, the Subcommittee urged the Nonprofit Organizations Committee to consider ways in which it can raise awareness of legal pitfalls and traps that may occur in nonprofit representation.

Publication Feature

The Guide to Nonprofit Corporate Governance in the Wake of Sarbanes-Oxley, is a publication of the ABA Coordinating Committee on Nonprofit Governance. Written for directors of nonprofit organizations and practitioners, this Guidebook provides a complete overview of the major reforms enacted or triggered by the Sarbanes-Oxley Act, including governance reforms promulgated by the SEC and the Stock Exchanges. The Guidebook includes ten key governance principles derived from such reforms that address the role of the board, the importance of independent directors as well as the audit committee, governance and nominating committee, and compensation committee, disclosure and integrity of institutional information, ethics and business conduct codes, executive and director compensation, monitoring compliance and investigating complaints, and document destruction and retention. The Guidebook discusses the potential challenges and benefits of applying such principles in the nonprofit context. The Guidebook (including e-book version) is available through the ABA here.

National and State Updates

National Updates
Megan A. Christensen, Blank Rome LLP, Washington, DC

1. Work Opportunity Tax Credit Available to Certain Tax-Exempt Organizations.
   Section 261 of the VOW to Hire Heroes Act of 2011 (Pub. L. No. 112-
056) provides a tax credit for hiring certain qualified veterans who begin work on or after November 22, 2011, and before January 1, 2013. The Act permits qualified tax-exempt organizations to claim this credit against their employer share of social security taxes. IRS Notice 2012-13 provides guidance to tax-exempt employers who seek to claim the credit.

2. IRS Issues Proposed Regulations Regarding Program-Related Investments.
On April 19, the IRS published a notice of proposed rulemaking containing proposed regulations regarding private foundations on program-related investments. Under Section 4944(a) of the Internal Revenue Code an excise tax is imposed on a private foundation that makes a "jeopardizing investment" and additional excise taxes when investments are not timely removed from jeopardy. Investments that qualify as a "program-related investment" are exempted from treatment as a jeopardizing investment and are given other special treatment under the other provisions of Chapter 42 of the Internal Revenue Code. The proposed regulations provide nine new examples of investments that reflect current investment practices and illustrate a wider range of qualifying investments, including, inter alia, investments that fund activities in foreign countries and those with a high potential rate of return.

3. IRS Clarifies Public Inspection Rules.
The IRS has issued final regulations clarifying the rules regarding information made available for public inspection under IRC Section 6104(a) and materials made publicly available under IRC Section 6110. The final regulations clarify that, inter alia, the following are subject to these public disclosure provisions: notices of status as a political organization; letters or documents filed with, or issued by, the IRS regarding private foundation status, operating foundations, and supporting organizations; unfavorable rulings or determinations issued to organizations that applied for exemption; and determination letters revoking or modifying a favorable determination letter. The regulations are effective as of February 29, reflect the IRS practice of disclosing documents regarding the denial or revocation of an organization's tax-exempt status, and finalize proposed regulations issued as a result of the case of Tax Analysts v. IRS, 350 F.3d 100 (D.C. Cir. 2003).

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

1. Minnesota
On April 3, 2012, Governor Mark Dayton of Minnesota signed into law legislation (H.F. No. 1384) giving extended immunity to charitable and religious organizations that unwittingly take donations and contributions that are the result of fraudulent gains. The law shields Minnesota nonprofits from having to return millions in tainted donations, often long after the donations were made and the money spent. The law still makes nonprofit organizations liable for the return of tainted contributions within two years of their donation.

2. California, New Mexico, Hawaii
California lawmakers passed a resolution on March 22 supporting the overturning the U.S. Supreme Court's decision in the Citizens United case. The resolution was passed by the California Assembly on a 48-22 vote, rejects the notion of corporate personhood, and calls on Congress to pursue a constitutional amendment overturning Citizens United. The New Mexico and Hawaii legislatures have passed similar resolutions. Largely at issue is the increased political and lobbying activity of 501(c) (4) social welfare organizations which has been permitted by the Citizens United decision.

3. Montana
According to a report from the Montana Attorney General issued on April 5, 2012, Greg Mortenson, the author of Three Cups of Tea, has agreed to pay $1 million to compensate his Montana-based charity for using the group to promote and buy copies of his books. The settlement between Mortenson, the Central Asia Institute, and the Montana Attorney General allows the charity to continue its operations. The report includes the following summarization of the Attorney General's investigation.

Our investigation centered on whether CAI's officers and directors satisfied their local duties with regard to...
directors satisfied their legal duties with regard to Mortensen's books and speaking engagements, and in managing the financial and operational affairs of the organization. We concluded that the board of directors failed to fulfill some of its important responsibilities in governing the nonprofit charity. Further, Mortensen failed to fulfill his responsibilities as executive director and as a member of the board.