Greetings from the Nonprofit Organizations Committee Chair.

After a long, cold, snowy winter, it is nice to contemplate the arrival of spring. I write this column waiting for what I hope will be the last snowstorm of the season (late March) here in New England. The snow is fun here, where we are ready to handle it, especially in the beginning of the winter, but this year the cold weather hit the south and southeast almost as hard as the north.

With the coming of spring we anticipate the coming of the ABA Spring Meeting in sunny Los Angeles, April 11-12, where the winter we faced in the rest of the country was just a story on the evening news. A respite in the land of perpetual sunshine provides a great opportunity for Nonprofit Organization Committee members to welcome the new season in style.

We look forward to interesting, informative programs and the sharing of practice experience with our colleagues from around the country. Our feature continuing legal education program, Multi-Level and Cross-Border Structures, Principles, Traps & Unintended Consequences, will explore issues such as franchise law that affect not only associations, but all nonprofits with subsidiaries and affiliates. The effect of franchise law on multi-level associations has not been analyzed in detail in many places and poses potential traps for many organizations.

The subcommittees that will be meeting at the Spring Meeting will all present substantive programming: Athletic & Recreational Organizations will continue the discussion on concussions; Religious Organizations will discuss the parsonage allowance, and Nonprofit Governance will discuss governance in the context of sexual misconduct allegations. The highlight of the full Committee meeting will be the recommendations for the Outstanding Nonprofit Lawyer Awards. The subcommittee meetings and the full committee meeting will all be open to all Committee members by teleconference.

Those of you who can attend in person are in for several days of camaraderie and sharing of professional experiences. Our successful brownbag luncheon roundtable on recent practice issues will continue, providing an opportunity for committee members to reflect on conundrums in their own practices and seek the experience of Committee colleagues in an informal setting. We’re looking forward to Friday night dinner and entertainment at Universal Studios with the Section and a Committee dinner on Saturday at that hot eatery, Engine Company No. 28. I’m hoping that many of you will be able to join us and help bring in the spring in style.

Michael E. Malamut
Chair, Nonprofit Organizations Committee
Nonprofit Structures: Principles, Traps and Unexpected Consequences

Have you been asked to help structure the relationship between a national or global nonprofit organization and a local/state or international branch or chapter? In an increasingly global world, nonprofit organizations often wish to operate, build support and membership or spread across borders. Many organizations have several levels in their structure. Whether you are acting for the "parent" organization, a national organization under a global head office or a truly local chapter, this program will provide you with principles and concepts to keep in mind. The program's panel discussion, interacting around a precedent agreement proposed by the "parent" organization will provide you with models to use, options for structuring the relationship, concerns unique to each level of organization, cross-border concerns that may wreak havoc and some traps which you may not have thought about. The discussion will include a discussion about the potential application of franchise laws on the systems that nonprofit lawyers have used in the past and how to deal with those concerns.

Nonprofit Lawyer Profile: Sharon L. Diaz

Sharon L. Diaz serves as the Associate Director for Donor Engagement for the Scott & White Healthcare Foundation, one of the foundations for the Baylor Scott & White Health system located in Texas. She is a 2009 graduate of the Texas A&M School of Law and prior to her legal career worked in youth services for religious organizations and the State. She was in private practice before joining the Foundation. Her responsibilities include securing philanthropic gifts from grateful patients, the general community, and physicians, and intersect fundraising with various compliance requirements such as HIPAA and the healthcare anti-kickback laws. Read more...

Feature: It’s election time again and it’s time to caution nonprofit clients against political activities

By Larry Beaser and Megan Christensen

As this newsletter goes out, we are squarely in the middle of the election cycle for Congress and, in many states, for state and/or local offices. This is a time that nonprofits - and the lawyers who represent them - must be particularly aware of prohibitions against political activity by charitable nonprofits.

Federal tax law prohibits Section 501(c)(3) nonprofit corporations ("charities") from directly or indirectly participating in political campaigns. The prohibition is absolute - there is no de minimis exception. Even an insubstantial amount of political activity can lead to revocation of a nonprofit's tax exempt status. However, nonprofit board members and employees of nonprofits may be involved in political activities in an individual capacity, but not as a board member or an employee. Read more...

National Updates

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

On March 10, the IRS issued Revenue Procedure 2014-22 revoking Rev. Proc. 79-6. Rev. Proc. 79-6 had previously allowed organizations to use some U.S. Department of Labor forms as substitutions for portions of the Form 990, Return of Organization Exempt from Income Tax. However, the IRS determined that requiring uniform filing of financial information by exempt organizations would improve simplicity, transparency, and the effectiveness of tax administration. The IRS revised Form 990 for tax years beginning in 2008 to prohibit the use of the Department of Labor Forms, but official revocation of Rev. Proc. 79-6 only occurred with the issuance of Rev. Proc. 2014-22.

2. IRS Issues New Sample Questions for Exemption Applications.
The IRS has issued sample questions that its Exempt Organizations specialists may use when analyzing applications for tax exemption. The sample questions are organized by topic, including questions for evaluating political activities of section 501(c)(4) social welfare organizations. The new sample questions are intended to standardize the process of requesting more information about an exemption application and help applicants be better prepared for follow-up questions.

3. IRS Unlikely to Issue 501(c)(4) Regulations Before Elections.
New IRS Commissioner John Koskinen recently told a house subcommittee that he did not expect final rules on section 501(c)(4) social welfare organizations to be completed before the November elections. Speaking at a February 26 hearing of the House Appropriates Subcommittee on Financial Services, Commissioner Koskinen told the committee that the IRS expects more than 100,000 comments to the proposed regulations it issued on November 26, 2013, to define "candidate-related political activity." The Commissioner stated that his goal is that, if final regulations are issued, they are clear, fair, and easy to administer.

4. IRS Realigns Legal Resources Of The Tax Exempt and Government Entities Division.
The IRS announced on March 20 that it would be moving certain legal functions from the tax exempt and government entities (TE/GE) division to the IRS Office of Chief Counsel. The move includes IRS personnel responsible for published guidance, as well as certain private letter rulings and technical advice memoranda. TE/GE was one of the few places where these functions were performed outside of the Chief Counsel's office, and the realignment is intended to "ensure consistency and efficiency." The IRS stated in its press release that it hoped the shift would have little impact on practitioners, but it did acknowledge that some administrative guidance will need to be updated as a result of the changes. The IRS hopes to have the realignment complete by October 1.

State Updates

Emily Chan, Adler & Colvin, San Francisco, CA

1. California
SB 594 took effect in California on January 1, 2014. This new law prohibits a nonprofit organization (as defined by the statute to not include any nonprofit organization that qualifies for tax-exempt status under Internal Revenue Code section 501(c)(3)) or an officer, employee, or agent of a nonprofit organization from using, or permitting another to use public resources received from a local agency for campaign activity, which includes, for example, communications in support of or opposition to a clearly identified ballot measure. SB 594 also mandates a number of new requirements for nonprofit organizations that engage in campaign activity, including certain disclosures to the Franchise Tax Board and on the organization's website (depending on the amount of the organization's campaign activity), and certain accounting requirements if
public resources represent more than 20 percent of the organization's gross revenues in the current fiscal year or either of the previous two fiscal years.

2. Kansas
On January 23, 2014, HB 2498 was introduced in the state House of Representatives. If enacted, HB 2498 would codify a definition of "humanitarian services" for purposes of qualifying for property tax exemption that excludes a nonprofit corporation that receives more than 40 percent of its revenues from the sale of memberships or program services that would otherwise be subject to state or local sales tax if those memberships or program services were sold by a corporation that is subject to property or ad valorem taxes under Kansas state laws. Some commentators have speculated the bill is specifically intended to eliminate property tax exemptions for YMCA organizations.

3. Kentucky
SB 178 was introduced in the state Senate on March 4, 2014, and proposes a number of changes to Kentucky's nonprofit corporation and association laws. SB 178 would enact the "Kentucky Revised Nonprofit Corporation Act 2014", which is based on the ABA's Model Nonprofit Corporations Act (3rd ed.); enact the "Kentucky Unincorporated Nonprofit Association Act" to address the current statutory silence on unincorporated nonprofit associations; and amend the "Kentucky LLC Act" to provide for the creation of nonprofit limited liability companies. If enacted, SB 178 would be the first major overhaul of the state's nonprofit corporation laws since 1968.

4. Nevada
On January 1, 2014, Nevada's new charitable solicitation registration laws went into effect. Pursuant to Assembly Bill 60, a nonprofit corporation is now required to register with the Nevada Secretary of State before it solicits tax-deductible charitable contributions within the state.

5. North Dakota
On March 11, 2014, the U.S. Tax Court filed its decision in Wachter v. Commissioner, 142 T.C. No. 7, that North Dakota state law precludes a donor of a North Dakota conservation easement from qualifying for a federal charitable contribution deduction. North Dakota Century Code section 47-05-02.1 limits the duration of an easement created after July 1, 1977 to not more than 99 years; accordingly, the court held that a North Dakota conservation easement conveyed subject to the statute does not qualify as granted "in perpetuity" under Internal Revenue Code sections 170(h)(2)(C) and (5)(A), and cannot result in a charitable contribution deduction under Internal Revenue Code section 170(f)(3)(B)(iii).
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Why did you go into the field of non-profit law?

I spent over 20 years working in youth-related ministry before I attended law school. Nonprofit law is a field that provides the opportunity to use my legal skills while promoting philanthropy that improves our healthcare system and ensures medical research continues to advance.

What do you see as the top two legal issues facing the nonprofit industry?

Internet fundraising is an issue for most nonprofits because of the numerous tax, business registration, and charitable registration requirements. The Internet or e-philanthropy is a huge opportunity for nonprofits but the compliance issues that many nonprofits are not aware of could result in penalties and hidden costs that deplete the potential for revenue.

What changes would you like to see in the nonprofit industry (general, not necessarily law specific)?

Transparency and donor-centered fundraising. Nonprofits need to embrace the need to be transparent and understand that giving is on the donor's terms. At the same time, we need to have an appreciation of the various local, state, and national laws.

What has been the most rewarding experience as a nonprofit lawyer?

Impact, plain and simple. I love knowing that what I'm doing will make lives better for the people who are served by my foundation and the various hospitals.

What has been the biggest struggle as a nonprofit lawyer?

Bridging the gap between the Foundation's legal requirements and the various fundraising projects that our volunteers want to implement. They have so many great ideas and truly want to serve our patients, caregivers and researchers, but they are often unaware of the legal requirements that must be met for fundraising activities.

What advice would you give a law student or fellow attorney about becoming a nonprofit lawyer?

You must have a passion for making the law work. You must have a passion for philanthropy. You must have a servant spirit because you will not be the wealthiest attorney. You will be rich with rewards of the spirit but not the pocketbook.

What is one thing you wish law schools would teach about nonprofits?

The law schools need to make students aware of the nonprofit field. There is a growing need for attorneys and nonprofits are hiring. Nonprofits are facing many challenges in the current economy and they need nonprofit attorneys to help navigate and survive.

What resources do you like or recommend for nonprofit legal research or information?

The American Bar Association's bookstore has some wonderful resources, but the Foundation Center, the Association of Fundraising Professionals, CASE, and the Partnership for Philanthropic Planning.
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The prohibition applies to campaigns for any elected office: federal, state or local. A charity is “participating” in a political campaign whenever the reasonable consequences of the organization’s activity have the potential to influence voter opinion, or to provide financial or volunteer aid to a candidate. Again, the penalty for a charity engaging in political campaign activity can be revocation of the organization’s tax exempt status.

A charity cannot:

- Endorse or offer support for any candidate or campaign against any candidate;
- Make direct or indirect contributions, including in-kind contributions, to or for a candidate;
- Raise funds for any candidate, including political parties, PACs and “super PACs”;
- Host, promote or coordinate fundraising activities for a public official, candidate or political party;
- Use the organization’s resources to raise money or otherwise participate in political campaigns, including mailing lists, stationery, computers, photocopiers, offices and, of course, personnel;
- Distribute candidates’ statements; or
- Encourage people to vote for or against a particular candidate or group of candidates.

As we said above, a charity’s directors and employees can volunteer their time in a political campaign, but

- None of the charity’s resources may be used in any way in a political campaign;
- They cannot volunteer as a representative of the charity;
- The volunteer activity must be actual volunteer activity – it must not be done on “company time” and not with the use of ANY of the charity’s resources or facilities;
- IMPORTANT CAVEAT: ANY use of corporate assets for political activities is prohibited.

It is very important for our democracy for citizens to be involved in the political process. However, if you are a board member or employee of a charity – or an attorney who represents charities – it is equally important to know and observe the prohibitions against political activities by charities.

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