Message from the Chair

It is with excitement and yet some trepidation that I write this first message as the new Chair of the Nonprofit Organizations Committee. The trepidation comes from the thought of having to fill the rather large shoes of our past chairs. The excitement is for the opportunities that exist for the Committee over the next several years.

I must start by thanking Michael Malamut for his energetic leadership and leaving us with a Committee that is strong and attracts many interesting and dedicated lawyers to participate in its work.

A little bit of information about me is probably useful for you to understand how I hope the Committee will progress over the next several years. I co-chair my firm's (a large Canadian firm, Gowling) Charity and Not-For-Profit Law National Practice Group. I act primarily for nonprofit and charitable organizations providing governance advice and often being the first line of defense when legal issues arise. Many of my clients are engaged in activities or relationships between countries.

My background means that my hopes for the committee can only be realized with the help of you, the members of this committee. For starters, many of you have a greater understanding of American nonprofit law than I do, as a Canadian lawyer. While many of the principles are the same, the details can sometimes be startlingly different. I have come to rely upon my colleagues in this committee to educate and correct me. I hope many of you will do the same.

As a lawyer who did not start my career specializing in this area (although the law of municipalities is actually the law of a specific type of nonprofit organization), I recognize that many of the members of this committee are not necessarily full-time non-profit practitioners. Many of us continue to practice in at least one other area, and most of us recall finding out how much we did not know about nonprofit law as we waded into nonprofit law, often without much guidance from colleagues within our own firms. I think the purpose of the American Bar Association and this committee is to help alleviate that gap in knowledge and to provide a community in which we can discuss and shape new developments, necessary changes and provide guidance.

I come back to needing your help. There are currently about 875 members of this committee. I have only met a very small fraction of you at meetings. I want to understand better what you want and need from this committee and I would invite you to let me know. To encourage that, I will be sending out a survey questionnaire and I would encourage you to take the time to complete and to provide me with any comments, questions and suggestions that you might have for how this committee can improve your ABA experience.

I look forward to serving you for the next three years and do hope that you will engage me and the other members of the committee.

David Tang
Chair, Nonprofit Organizations Committee
Meeting Challenges to Tax-Exempt Status
Amy Kluesner, Co-Chair, Enterprise Risk Management program

At the Business Law Section Annual Meeting in September, the Nonprofit Organizations Committee hosted a panel titled, "Enterprise Risk Management for Nonprofit Organizations: Meeting Challenges to Tax-Exempt Status." The panel discussed key risk areas for tax-exempt organizations today and what they should do to manage those risks. The panel examined the key focus areas of IRS, state attorneys general, and local regulators with regard to executive compensation and excess benefits, unrelated business income tax, fund-raising expenditures, the use of donor-advised funds, and the Form 990. Panelists looked at particular areas of interest for universities, hospitals, and churches. They also discussed the process for establishing tax-exempt status, the new Form 1023-EZ, potential advantages of foregoing tax-exempt status for certain organizations, and the development of benefit corporations and other "hybrid" entities.

Panelists included:

- Evelyn Brody, tax professor at Chicago-Kent College of Law, Illinois Institute of Technology;
- Louise Dempsey, Senior Fellow for Education Policy and retired assistant dean of Cleveland State University's Cleveland-Marshall College of Law;
- Philip Hackney, the James E. and Betty M. Phillips Assistant Professor of Law at Louisiana State University's Paul M. Hebert Law Center; and
- Amy Kluesner, Associate at Bingham Greenebaum Doll LLP in Indianapolis, Indiana.

The panel was moderated by Jeannie Frey, Sr. Vice President and Chief Legal Officer of Presence Health in Chicago, Illinois.

Religious Organizations Subcommittee Report
Sandy Greenfield, Chair

The Fall Subcommittee meeting opened with the announcement of the recent resignation of Co-Chair, David Ball, and with the recognition of his service and prior contributions to the Subcommittee.

After announcements and as a follow-up to the substantive topic presented at the Spring Subcommittee 2013 meeting, a presentation was given on "The ACA Contraceptive Mandate: A brief history and current developments." The presentation focused on the recent Hobby Lobby and Wheaton College Supreme Court decisions and the issuance by the Departments of interim final rules for nonprofits and proposed rules for for-profits after these court decisions. The presentation was followed by an open and active dialogue about the potential impact of these decisions and the practical applications of the new interim and proposed rules.

The meeting closed with a request for suggestions for substantive topics for future meetings and with an invitation to anyone who would like to become more involved in the Subcommittee leadership.

Nonprofit Governance Subcommittee -- Disaster Planning Discussion
Kimberly A. Lowe, Fredrikson & Byron, P.A., Minneapolis, MN

Generally, the subcommittee discussed the role of the board of a nonprofit organization in the context of disaster planning and response. Disasters for nonprofit organizations arise in a couple of different situations: (1) a disaster
happens that impacts the governing body's ability to come together for governance purposes; (2) a disaster happens that impacts the population served by the nonprofit organization; or (3) a disaster arises that impacts both the governing body's ability to come together as well as its ability to continue to serve the population served. In light of this background, the subcommittee discussed:

1. Emergency bylaws (two types): (a) the power to pass new bylaws in emergency or (b) previously passed bylaws that come into effect in emergency. The subcommittee discussed when and how the Board of Directors should plan for emergency bylaws or other options that may be available in lieu of emergency bylaws including: (a) a geographically connected executive committee, (b) statements of authority, or (c) alternative check signing authority.
2. Succession planning in the event of a disaster: (1) emergency directors or (2) court-appointed directors/trustees.
3. Delegation: (a) emergency officers or (b) power of attorney.

After discussing the governance related topics, the subcommittee turned its attention to specific pre-disaster planning including:

1. Insurance, including: (a) general liability insurance, (b) K&E insurance, (c) terrorism risk insurance, or (b) other types of special insurance coverage.
2. Financial issues including: (a) investment authority and decision-making, (b) bank accounts - appropriate additional signatories, and (c) being cognizance of FDIC limits and emergency circumstances.
3. Records: (a) copies (maintained offsite), electronic versions or cloud access.

Next Steps: The subcommittee discussed possible CLE topics for the upcoming Spring Meeting focused on the Disaster Planning topic.

Task Force Governance of Social Benefit Entities — Annual Meeting September 11, 2014
Kimberly A. Lowe, Fredrikson & Byron, P.A., Minneapolis, MN

The group of participants in this Task Force was diverse, representing lawyers from California, Rhode Island, Pennsylvania, Minnesota, Toronto, Delaware and Arizona. Each participant discussed the nuances of the passage of benefit legislation in their home state. The discussion then moved to what do we do now and how as a task force we can produce content that would be of value to the Business Law Section membership. We discussed the fact that many different practice specialists in the Business Law Section may be asked to assist with the formation of a benefit corporation. Twenty-seven (27) states have passed benefit entity legislation with 13 states with pending legislation. With this thought in mind, we determined that we need to educate broadly but to also take a deep dive into governance issues facing these new entities.

1. The Social Benefit Entity world. Primarily, the benefit entity concept comes up in several contexts and differs from state to state. Generally, the list includes the following:
   - Benefit corporation enabling statutes
     - Both specific and general benefit corporations, overlay state business law statutes.
     - States have adopted B Lab Model Legislation without modification; B Lab Model Legislation with modification; B Lab sampled legislation; and flexible purpose-like legislation.
   - Benefit LLCs
   - L3Cs
   - B Certified enterprises - for profit enterprises that have obtained B Lab certification with respect to operations.
   - Social Enterprises - nonprofit organizations undertaking revenue
1. Generation projects with a mission driven component.

2. Where do these entities fit substantively in the business world?
   - Operating businesses: social by operation, by sharing, or by selling
   - Public Companies/National or Multinational Companies
   - Closely Held/Family Enterprises
   - Community Economic Development
   - Procurement/Sourcing/Action/Social

3. How do benefit entities fit into the greater world of:
   - Impact investing (investors and foundations - corpus and funds under management);
   - Crowdfunding/crowdsourcing;
   - SEC disclosure - in an acquisition or subsidiary, consolidated financial statements;
   - Taxation options (S Corps, pass through options)
   - Accounting nuances.

4. If these entities are really going to be used - how will they work from a governance perspective? How will boards govern these benefit corporations?

5. What sort of thought leadership is needed now (Research/Compilation?)
   - State by state comparison chart
   - Benefit Report compilation and analysis:
     i. Reporting requirements;
     ii. Where does report go;
     iii. What does the report look like;
     iv. What liability accompanies the reports
     v. If a lawyer is asked by a client to assist with a benefit report, what do that lawyer need to know.
   - Third Party Certification and certification organizations:
     i. Who are these organizations?
     ii. What are the various standards covered and why?
     iii. Who wants to do this and why?
     iv. State certification orgs
   - Litigation - when will it start and from which perspective?
   - Compilation of research/law review articles - summarize and compile and rate the value of the various law review articles that have been written to date.
   - What do the benefit corporation statutes mean for "pure" business corporations? Are pure for-profit businesses now not allowed to consider other stakeholders or constituencies?
   - ABA CLE M&A Change of control issues - so the target is a benefit corporation.

Next Steps: Solicit interest in working on at least one of the above topics.

Nonprofit Attorney Profile: Mohamed Sabur, Director, Program to Strengthen Muslim Charities at Muslim Advocates

Why did you go into the field of nonprofit law?

Working with nonprofit organizations has always been a passion of mine. Even prior to becoming a lawyer, I was extremely involved with helping professionalize and strengthen the charities, religious organizations, and advocacy groups I personally supported. By pursuing a career in nonprofit law, I can help organizations that don't always have the resources but are in the most need of guidance to ensure that they are complying with the law, so they can continue their good work in the public interest.

Did you have any previous experiences that were particularly helpful in developing your nonprofit law practice?

In a previous life I served as a legislative and communications aide on Capitol...
Hill, where congressional offices try their best to advocate for their constituents while working with so many factors beyond their control. I see the work of nonprofit organizations much in the same way. Being sensitive to the many gears that have to turn in unison—donors, board members, staff, allies, etc.—to keep nonprofit organizations going has helped me to understand the complexities of this often underestimated area of law.

Read more...

### National Updates

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

1. **IRS Releases Interactive Form 1023-EZ (final version).** On July 1, 2014, the IRS released the final version of Form 1023-EZ Streamlined Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code introduced to help small charities apply for tax-exempt status more easily. Most applicants that expect to have no more than $50,000 in annual gross receipts and no more than $250,000 in total assets are eligible to use the form to apply for tax-exempt status. However, the form is not available to churches, hospitals, supporting organizations, foreign organizations, credit counseling organization, previously revoked organizations (other than automatic revocation for failure to file Form 990) and certain other types of organizations. In order to determine eligibility, the Instructions for Form 1023-EZ include an eligibility worksheet, which asks twenty-six yes or no questions and if the answer to any question is yes, the organization is not eligible to apply for exemption using Form 1023-EZ. Applicants must file Form 1023-EZ online using pay.gov and a $400 user fee is due at the time the form is submitted.

2. **National Taxpayer Advocate will focus on the Exempt Organizations area in 2015.** National Taxpayer Advocate Nina E. Olson released her mid-year report to Congress on July 16, 2014 identifying the Taxpayer Advocate Service’s priority issues in 2015. The report provides a status update on the recommendations offered in the 2013 mid-year report and emphasizes, among other things, the importance of continuing to make improvements in the Exempt Organizations area. The National Taxpayer Advocate also criticizes the IRS’ adoption of the new Form 1023-EZ because it does not require organizations to describe their mission and activities or send in their formation documents for review.

3. **IRS issues Consolidated Interim Guidance on Optional Expedited Process for 501(c)(4) Applications.** In June 2013, the IRS offered an optional expedited process for certain organizations applying for recognition of exemption under Section 501(c)(4) whose applications had been pending with the IRS for more than 120 days as of May 28, 2013. Eligible applicants received a Letter 5228 (6-2013) explaining the expedited process and advising the applicants how to apply for participation. Due to certain modifications to the original June 25, 2013 interim guidance memorandum, the IRS has now issued a consolidated interim guidance memorandum that clearly describes the process that Exempt Organizations has used and will use in processing the identified pending applications. The consolidated memorandum is only relevant to applicants that received a Letter 5228 (6-2013) prior to December 2013.

4. **Senator introduces bill to revoke NFL’s tax exempt status.** The National Football League’s status as a tax-exempt organization has recently been the subject of public debate with critics arguing that subsidies to a multi-billion-dollar enterprise such as the NFL are not justifiable. On September 16, 2014, Senator Maria Cantwell provided support to the critics by announcing that she will introduce a bill to revoke the NFL’s tax-exempt status under IRC Section 501(c)(6) because of the NFL’s refusal to address the name of the Washington Redskins. Her statement brings renewed focus to the bill commonly referred to as the PRO Sports Act which was introduced by Senator Tom Coburn last year and referred to the House Committee on Ways and Means on January 29, 2014. If the bill is adopted, professional sports organizations with...
annual revenues over $10 million will be prohibited from enjoying tax-exempt status under IRC Section 506(c)(6).

State Updates
Emily Chan, Adler & Colvin, San Francisco, CA

California

The following bills were signed into law by Governor Jerry Brown and will become effective January 1, 2015:

- Signed on August 15, 2014, SB 896 creates exemptions to California's Finance Lenders Law requirements for certain nonprofit corporations and organizations exempt under Internal Revenue Code Section 501(c)(3). The bill aims to "encourage nonprofit organizations to help facilitate the making of zero-interest, low-cost loans, through lending circles and other programs and services that allow individuals to establish and build credit histories or to improve their credit scores." For example, under the new law, a 501(c)(3) organization could lend up to $2,500 at zero interest without applying for a California Finance Lenders license provided other requirements are met.

- Signed on September 27, 2014, SB 1301 amends California's Corporate Flexibility Act of 2011. Among the significant changes are: (1) flexible purpose corporations will be renamed "social purpose corporations"; (2) a director, in discharging his or her duties, now must consider factors such as the social purposes of the corporation and give weight to those factors, as the director deems relevant; and (3) the previous exemptions from certain reporting requirements for a corporation with under 100 shareholders will be eliminated.

- Signed on September 30, 2014, AB 2755 amends Section 5047 of the California Corporations Code which defines the term "directors" for nonprofit public benefit corporations, nonprofit mutual benefit corporations, and nonprofit religious corporations. As amended, Section 5047 clarifies that a person who is designated by the articles or bylaws of the corporation to serve ex officio as a director, without limitations on his or her right to vote as a member of the governing body, is a director for all purposes and has the same rights and obligations, including voting rights, as the other directors. This bill was sponsored by the Nonprofit Organizations Committee of the Business Law Section of the California State Bar.

Colorado

Citizens United, the well-known Virginia non-stock corporation that was plaintiff in the 2010 U.S. Supreme Court case Citizens United v. FEC, filed a lawsuit in August 2014 in the U.S. District Court for the District of Colorado against Colorado Secretary of State Scott Gessler to challenge the application of Colorado's campaign finance laws to a Citizens United documentary film, Rocky Mountain Heist. A district judge denied Citizens United's motion for preliminary injunction on September 22, 2014. On October 14, 2014, the 10th Circuit Court of Appeals granted in part and denied in part Citizens United's emergency motion for injunction pending final disposition of its appeal.

Pennsylvania

Pennsylvania has amended its Whistleblower Law with the enactment of HB 118 and HB 185, signed into law by Governor Tom Corbett on July 2, 2014. HB 118 extends whistleblower protection to employees who work for any public body or any individual, partnership, association, or for-profit or nonprofit corporation which "receives money from a public body to perform work or provide services." (HB 185 extends whistleblower protection to employees of the General Assembly and its agencies.) Previously, only employees of public bodies, as then-defined by the statute, were covered by these laws. These laws took effect August 31, 2014.
Michigan

On June 17, 2014, Michigan Attorney General Bill Schuette approved the city of Detroit's proposed exit plan to resolve approximately $7 billion of its estimated $18 billion debt, the largest municipal bankruptcy in history. The exit plan, which is commonly referred to as the "grand bargain," involves a proposed transfer of the Detroit Institute of Arts to a charitable trust in exchange for funding from outside sources for pensions in order to protect the museum's art from being sold to satisfy the city's creditors. Trial in the U.S. Bankruptcy Court for the Eastern District of Michigan to approve the plan began on September 2, 2014. It is expected that Judge Steven Rhodes will issue his decision in early November 2014.

New Hampshire

On August 4, 2014, Governor Maggie Hassan signed into law HB 1630 which is intended to increase oversight and strengthen regulation of charitable gaming activities by the state's Attorney General's Office and Racing and Charitable Gaming Commission. This bill was developed with the help of the state's Gaming Regulatory Oversight Authority which was established in 2013, in part, to recommend appropriate regulation for this estimated $75 million charitable gaming industry. Sections of the bill become effective on various dates, beginning on October 3, 2014.

New York

In June 2014, ProPublica reported it had filed a public records request with the New York Attorney General's Office for information on American Red Cross's spending of funds raised for Superstorm Sandy efforts. American Red Cross asserted to the New York Attorney General that the information was confidential under the state's Freedom of Information Law (FOIL). On June 23, 2014, New York Assistant Attorney General Bruce D. Feldman issued a determination that American Red Cross's request for a continuing exception to disclosure based on FOIL's trade secret exemption was granted in part and terminated in part. ProPublica reported in August 2014 that American Red Cross had voluntarily released some of the requested information.

In June 2014, the New York Attorney General's Office secured a $24.6 million settlement in connection with direct mail fundraising abuses by one of the largest veterans' charities, the Disabled Veterans National Foundation (DVNF), and two for-profit direct mail vendors, Quadriga Art and Convergence Direct Marketing. As part of the settlement, DVNF is required to reexamine its business model and implement governance changes including reorganizing its board of directors and creating certain committees for better oversight. Quadriga Art will be responsible for the bulk of the settlement payment and both direct mail vendors are required to adopt a comprehensive set of reforms to its business practices. The New York Attorney General's Office announced this settlement represents "the largest amount of financial relief ever obtained in the U.S. for deceptive charitable fundraising."

Article Writers Wanted

The Newsletter Editorial Board is seeking articles on nonprofit law subject matter to include in future newsletters. There is no length requirement. If you are interested in submitting an article, please contact:

- David Levitt at levitt@adlercolvin.com or
- Cari Campbell at cari@campbell-legal.com or
- Matthew Wright at matthew@mgwrightlaw.com
Nonprofit Attorney Profile:

Mohamed Sabur, Director, Program to Strengthen Muslim Charities at Muslim Advocates

Why did you go into the field of nonprofit law?

Working with nonprofit organizations has always been a passion of mine. Even prior to becoming a lawyer, I was extremely involved with helping professionalize and strengthen the charities, religious organizations, and advocacy groups I personally supported. By pursuing a career in nonprofit law, I can help organizations that don’t always have the resources but are in the most need of guidance to ensure that they are complying with the law, so they can continue their good work in the public interest.

Did you have any previous experiences that were particularly helpful in developing your nonprofit law practice?

In a previous life I served as a legislative & communications aide on Capitol Hill, where congressional offices try their best to advocate for their constituents while working with so many factors beyond their control. I see the work of nonprofit organizations much in the same way. Being sensitive to the many gears that have to turn in unison—donors, board members, staff, allies, etc.—to keep nonprofit organizations going has helped me to understand the complexities of this often underestimated area of law.

What are your areas of specialization or in what areas are you currently focusing/spending most of your time?

I direct the Program to Strengthen Muslim Charities at Muslim Advocates, a national legal advocacy and educational organization based in Oakland, California. It is the only national program of its kind that is dedicated to strengthening the American Muslim charitable sector through guidance, advocacy, and educational resources. I work to help charity and mosque leaders understand core issues such as good governance and financial best practices, while at the same time breaking down the complex legal issues facing a community that is under increased government scrutiny.

What do you see as the top one or two legal issues that are currently of concern for the nonprofit sector?

Instability at the IRS has had an impact on both the public’s trust of the nonprofit sector, as well as an organization’s ability to be sure it is operating within the bounds of the law. In addition, the impact of the Treasury Department’s anti-terrorist financing regime on domestic charities continues to be severe. Many groups feel as though they are flying blind when it comes to the due diligence required of their foreign charitable operations, and the recent Linde v. Arab Bank decision adds further ambiguity to the list-checking obligations of organizations doing good work abroad.

What changes would you like to see in the nonprofit sector?
First, increased transparency on behalf of nonprofit organizations coupled with education of their donors as to why transparency is important. Many people are aware that tools such as Guidestar are available, but few know how to read a Form 990. Charities should be proactive in engaging donors in a conversation about how appropriate governance and oversight ensures that their contributions are put to good use. Second, we practitioners can do a better job advising prospective nonprofit founders about the realities of running a modern nonprofit organization. This would go a long way toward helping reduce the number of organizations that fold after a short lifespan, and might allow for the reallocation of resources toward supporting other organizations that are already doing good work.

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

One of the best parts of directing the charities program at Muslim Advocates is the opportunity to provide guidance to charities that do not otherwise have the resources or the connections to seek legal counsel. In particular, I get to organize educational seminars around the country that bring together nonprofit experts—including other attorneys, accountants, consultants, and charity regulators—to speak directly to the leaders of American Muslim charities on issues important to their organizations. Hearing from these charity leaders about how they have been invigorated and energized to tackle their work with solid legal footing is such a rewarding experience.

What has been the biggest struggle as a nonprofit lawyer?

Trying to keep up! Interacting with over 2,000 Muslim charity and nonprofit leaders means that I get asked nearly every day about a unique issue or angle on a situation. Just as small and midsize nonprofit organizations struggle to cope with the complex legal landscape in which they operate, it is equally difficult to master the countless legal areas one must know to advise these organizations. This is a constant challenge, but one that comes with the opportunity to become a better lawyer every day.

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

As with any field of law, know if it is what you want to do. Nonprofit law can be complex and the reputation of the nonprofit sector can be easily smeared by the bad actions of a small number of actors, but the potential upside in personal satisfaction is tremendous. Volunteer your time or services to a nonprofit you support to get a feel for the issues, and reach out to the broad network of mentors and practitioners—such as the Nonprofit Organizations Committee listserv who can help you navigate this rewarding area of law.

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

I wish law schools would teach more about nonprofits in general. Although the profit motive may be absent, the legal issues these organizations face are just as prevalent. Every 1L student is exposed to the for-profit side of corporations, and it would be a welcome gesture if more law
schools taught students about the legal aspects facing the organizations that will likely be seeking their pro bono assistance as future lawyers.

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

The ABA has a number of publications and committees that are helpful to a nonprofit lawyer. Also, there are a number of blogs and e-newsletters that provide valuable information, including Lloyd Mayer’s Nonprofit Law Prof Blog, The Nonprofit Quarterly, Chronicle of Philanthropy, and, for those who advise religious organizations, the Religion Clause blog.