Spring: The favorite season for more people than any other season.

California (San Francisco in particular): The favorite climate for more people than any other climate.

Mix the two and we get the ABA Business Law Spring Meeting in San Francisco.

I urge you to come to the meeting if you can this April 16-18. The Nonprofit Committee's meetings will be primarily held on Friday, April 17, and Saturday, April 18.

These meetings always offer great continuing education, in CLE accredited programs, seminars and the discussions that occur in the committee and subcommittee meetings. Our Committee's primary CLE seminar at this meeting deals with issues in a situation that our clients too often find themselves in without knowing that they have fallen into it: insolvency. The duties that the directors then have and the protections from liability are the focus of Nonprofit Health Care Providers in or Near the Zone of Insolvency: Crossing the Border and Duties Upon Arrival, our program co-sponsored by the Business Bankruptcy, Corporate Health Law and Life Sciences Committees. I understand the speakers are very excited about their presentation and will be covering:

1. Change in fiduciary duties as a nonprofit healthcare provider approaches insolvency.
2. What is the zone of insolvency, and how an organization and its directors know they are there.
3. Protections of D&O insurance from suits for breach of fiduciary duty to creditors that occurred when an organization was in the zone of insolvency.

Education does not end with the formal programming. I have found that the conversations with fellow practitioners, some with decades of experience or who are right in the midst of leading the profession and their clients through novel or timely issues are even more enlightening.

However for myself, the real joy of these meetings lies outside what you learn or how you improve your skills. We talk about the opportunities for networking because that truly is a key component of the meeting. I would however encourage you to think of it as more than just "networking", which always sounds cold and clinical to me. We build relationships that are really friendships here.

Please consider coming to the Nonprofit Organizations Committee dinner which will be held on Friday, April 17, 2015 at 6:30 p.m. at First Crush (www.firstcrush.com). We are moving back to the "no-host dinner" format where you are free to order whatever you wish at the restaurant instead of being confined to a fixed menu/fixed price meal. The restaurant is near the Marriott Marquis and has an appropriately Californian-inspired menu. Would you please let Cynthia Rowland (crowland@fbm.com) know whether you are able to attend so she can make appropriate reservations?

These meetings also give us opportunities to be involved in important things. That can be participation in the ongoing work of the Model Nonprofit Corporations Act Committee, where you will have an opportunity to have a part of making law, not only in your own state, but as it applies across the entire
country. We hope to be visited by the Publications Committee at our meeting and I suspect there will be opportunities for those of you wishing to write or be published. The topical sub-committees (Athletic, Recreation & Affinity Organizations, Governance of Nonprofit Organizations (a joint meeting of the Corporate Governance Committee and our Committee), and Religious Organizations) will be discussing recent developments, potential changes on the horizon, and providing members with the opportunity to share experiences. As is becoming our practice, we will have a “brown bag lunch” where attendees can talk about current developments and bring any questions or ideas they are struggling with in their own practices for discussion.

I strongly urge you to attend the meeting in San Francisco. The meeting is the best way someone new to the Committee can determine how you can become involved in the Nonprofit Organization’s Committee. Our meetings always include discussions about upcoming projects, speaking and writing opportunities and other ways to become involved.

However, we do understand that not all Committee members can attend and so we will provide an opportunity for you to teleconference into the meeting. We will be sending out on the listserv, the telephone conference information. If you are not on the listserv, please contact me and I will provide you with the teleconference information.

I look forward to seeing many of you at the Spring Meeting.

David Tang
Chair, Nonprofit Organizations Committee

Committee Schedule at Spring Meeting: April 16-18

The Business Law Section of which the Nonprofit Organizations Committee is a part will be holding its Spring Meeting in San Francisco this April 16-18 at the San Francisco Marriott Marquis. The Nonprofit Organizations Committee meetings will be held on both Friday, April 17, and Saturday, April 18.

The current schedule for the meetings is below (subject to change):

Athletic, Recreation, & Affinity Organizations
Friday 4/17/2015 8:30AM - 9:30AM
Marriott Marquis
Foothill D, Second Level

Current Developments in Nonprofit Corporation Law
Saturday 4/18/2015 12:00PM - 1:30PM
Marriott Marquis
Pacific C, Fourth Level

Governance of Nonprofit Organizations
Saturday 4/18/2015 9:00AM - 10:00AM
Pacific I, Fourth Level

Joint Subcommittee Pro Bono Veterans Services Governance Advising Project
Friday 4/17/2015 5:00PM-6:00PM
Marriott Marquis
Foothill F, Second Level

Model Nonprofit Corporation Act
Saturday 4/18/2015 10:00AM - 11:30AM
Marriott Marquis
Foothill J. Second Level

Nonprofit Organizations Committee
Friday 4/17/2015 2:00PM - 3:30PM
Marriott Marquis Sierra C, Fifth Level

Program: Nonprofit Healthcare Providers in or Near the Zone of Insolvency; Crossing the Border and Duties Upon Arrival (see below)
Friday 4/17/2015 10:30AM - 12:30PM
Marriott Marquis
Salon 12 & 13, Yerba Buena Ballroom, Lower B2 Level
Religious Organizations
Friday 4/17/2015 7:30AM - 8:30AM
Marriott Marquis
Foothill D, Second Level

**CLE Program in San Francisco: Nonprofit Healthcare Providers in or Near the Zone of Insolvency: Crossing the Border and Duties Upon Arrival**

Steering a nonprofit organization through a period of financial difficulty is a challenge for any nonprofit board and the nonprofit's legal advisors. Strategies have to be developed and difficult decisions made. Many board directors and nonprofit legal advisors are unaware that as such challenges are being navigated, directors may owe heightened fiduciary duties to the nonprofit they serve. Not only that, but they may also owe fiduciary duties to other stakeholders in the nonprofit's financial health, such as creditors. As more nonprofits in sectors ranging from healthcare to the arts find themselves confronting insolvency and restructuring, understanding these legal issues takes on increasing importance. At the ABA Business Law Section's upcoming Spring Meeting in San Francisco, a panel of nonprofit and bankruptcy attorneys and turnaround experts will provide program attendees with an overview of the evolving and patchwork jurisprudence regarding directors' shifting fiduciary duties in the event of insolvency and its particular application to the nonprofit sector. Attendees will also receive guidance on specific steps a board should take in this scenario to minimize their exposure to legal liability.

The CLE program will be on Friday, April 17, 2015 from 10:30 am until 12:30 pm.

**Economic Development Organizations, Trickle Down Charity and the Private Benefit Doctrine**

*By Matthew J. Rossman*

Professor Rossman teaches at Case Western Reserve University's School of Law and practices in and co-directs the School's Milton A. Kramer Law Clinic Center. He and his students represent a wide range of nonprofit organizations, as well as for profit entities that seek to achieve a charitable purpose.

The following feature is a summary of Professor Rossman's article "Evaluating Trickle Down Charity: A Solution for Determining When Economic Development Aimed at Revitalizing America's Cities and Regions Is Really Charitable", 79 Brooklyn L. Rev. 1455 (2014). A link is provided toward the end of the summary for a free download of the full law review article.

Read more...

**Nonprofit Lawyer Profile**

Mrs. D'Ann Johnson works for Texas RioGrand Legal Aid on the Texas C-BAR project. Texas C-BAR's mission is to improve the quality of life for low-income populations in Texas by providing pro bono business law resources to nonprofits and microentrepreneurs.

Texas RioGrande Legal Aid, project Texas C-BAR
djohnson@trla.org

**What attracted you to working with nonprofits?**
When I joined Texas C-BAR in 2001, the project was in its infancy. We focused on community and economic development organizations whose work made a lasting impact in low-income communities. The organizations built infrastructure
and quality affordable housing while encouraging local leadership to make
decisions affecting their neighborhoods.

**How did you come about participating in Texas C-BAR?**
I had previously worked at the Texas Department of Banking. I was familiar with
the Community Reinvestment Act and other legal issues related to community
development work. I was active in many organizations in Austin and had a
strong network of contacts. I had clerked for Legal Aid in law school, and the
director considered me when the new position became available.

**What do you wish law school would teach about nonprofits?**
I wish law schools and business schools would recognize the impact of
nonprofits in the local and national economies. According to the Independent
Sector, employees of nonprofit organizations accounted for 9.2% of wages paid
in the U.S. in 2010 and the nonprofit sector paid $587 billion in wages and
benefits to its employees in 2010. Volunteer hours in 2010 produced an
estimated value of $173 billion. In addition, nonprofits are often the creative
geniuses behind problem solving. For example, nonprofit organizations were
the first to provide shelters for the homeless and domestic violence victims,
serve people infected with AIDS, and rescue abused children and animals. The
public sector learned from such innovations and often began funding or
providing similar services. I do not believe the value of this type of innovation is
recognized.

**What do you wish nonprofit lawyers would understand regarding the charity
world?**
I don't think I can speak to what nonprofit lawyers understand or don't
understand. Our project works with small and start up nonprofits. These are very
different animals than universities and hospitals, although they are all lumped
together as nonprofit organizations. I think the federal policy makers have made
some good distinctions regarding the filing requirements for large and small
organizations. State law generally does not make the same type of distinctions
based on size of the organization.

**What has been the most rewarding case regarding nonprofits and what was
the key issue?**
That is a difficult question since I have 14 years of history working with nonprofits
in this project. My favorite cases are rewarding for different reasons. In an early
case, my eyes were opened to rural poverty issues, like lack of water and sewer
connections, and solutions, such as Rosenwald Schools in the 1920's, when I
worked with Sweet Union Development Corporation to obtain their tax exempt
status. Working with another organization has been rewarding because of the
success of the group. We helped Workers Defense Project with a variety of legal
issues including assistance with their tax exemption application, analysis of
various legal issues affecting worker centers, and reviewing contracts. Over the
years the organization has grown significantly and is now one of the most
influential and effective organizations in the country. For the past six years I have
represented the Taxi Driver Association of Austin. From a handful of people who
just accepted the lop­sided treatment of franchises and city enforcement officials,
they have become educated about the city ordinance governing vehicles for
hire, cognizant of the city council machine that has established the system that
exploits drivers, and aligned with the National Taxi Worker Alliance as the third
association in the country to gain membership. The key issue continues to be
unjust industry practices and regulations. For example, taxi drivers in Austin are
only allowed to drive for franchises that take half their earnings, unlike UBER
drivers who aren't held to the same standards and oversight.

**Regarding the law, what legal issues do you wish nonprofits would
understand better?**
Nonprofit staff often does not understand that the law expects the same level of
compliance from them whether they are making the world a better place or
making a profit.

**What do you think are the legal challenges that nonprofits will face in the
next decade?**
I think nonprofits will be expected to be increasingly transparent and
accountable to the public and enforcement authorities.
What book, web site, listserv or other resource would you recommend to lawyers and nonlawyers regarding nonprofits?

The IRS website is actually rather user friendly for questions about nonprofits. The book, “The Revolution Will Not be Funded” will give readers a different perspective on the role of nonprofits and community change.

National Updates

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

1. The Effect of IRS Realignment and Budget Cuts on Exempt Organization Private Letter Rulings

As of January 2, 2015, private letter rulings for exempt organizations will be handled by the Office of Associate Chief Counsel (Tax Exempt and Government Entities Counsel) rather than the IRS TE/GE Division, and effective February 2, 2015, the PLR user fee rose to $28,300 from $19,000. Revenue Procedure 2015-3 lists dozens of issues for which the IRS will not issue private letter determinations. Janine Cook, Deputy Division Counsel/Deputy Associate Chief Counsel of TE/GE, does not expect any new revenue procedures yet. However, depending on how the office handles these new responsibilities, new issues may be added in a future revenue procedure.

At the January 30, 2015, American Bar Association Section of Taxation meeting in Houston, Associate Chief Counsel for Tax Exempt and Government Entities, Victoria Judson, said that cuts to the IRS budget would affect the ability of the Office of Associate Chief Counsel to issue private letter rulings, but the IRS will consider issuing guidance for issues that repeatedly come up in letter ruling requests. Ms. Judson also reminded attendees about the importance of submitting complete letter requests. “We encourage you to include documents relating to the transaction. It will help us all move more quickly.” If the request is incomplete, the organization has 21 days to provide the missing materials before the request is closed. After the request is closed, the organization must pay another $28,300 user fee for a new letter ruling request.

2. Form 1023-EZ Assists in Reducing Exempt Application Backlog

The Form 1023-EZ, a short form version of the Form 1023 for organizations with total assets of $250,000 or less and up to $50,000 in annual gross receipts, has streamlined the application process for organizations seeking tax-exempt status. According to a March 9, 2015, update on the IRS website, the IRS is able to process a Form 1023-EZ in less than 30 days. In the past 6 months, the IRS has approved over 90% (18,169 out of 20,123) of the Form 1023-EZ applications it received. Additionally, the backlog of applications that are more than 270 days old was reduced by 91% (54,564 to 4,791) between April 2014 and September 2014. According to TE/GE Division Commissioner Sunita Lough, less than 1,000 applications have been denied, mostly because ineligible organizations attempted to file the form. Although the Form 1023-EZ helped to reduce the application backlog, concern exists that some organizations are being erroneously granted 501(c)(3) status. To ensure that only eligible organizations are being granted tax-exempt status by filing the Form 1023-EZ, the IRS randomly selects 3% of Form 1023-EZ applications for predetermination review and plans to conduct correspondence audits of a random sample of organizations that filed the form and were granted exempt status starting in the 2016 fiscal year. This will allow the IRS to ensure that newly exempt small organizations are in compliance after they have been in operation for a year or more.

3. Religious Tax-Exempt Organizations Must Comply With the Affordable Care Act (For Now)

In February 2015, the Third Circuit ruled in Geneva College v. Secretary United States Health and Human Services that three religious nonprofits were required to comply with the contraception coverage provisions in the Affordable Care Act
Several nonprofits affiliated with the Catholic Church challenged the requirement that they must provide contraceptive coverage to their plan participants and beneficiaries as a violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4. The nonprofits were eligible for an accommodation under the ACA whereby those services would be provided by a third party administrator or independently by an insurance issuer once the nonprofit notified its insurance provider of its objection. The nonprofits alleged that the accommodation violates RFRA because the nonprofits "trigger" the provision of contraceptive services when they notify the insurance issuer or third party administrator of their objection. On the basis of this argument, the Western District of Pennsylvania granted injunctions against the contraception provision for the religious nonprofits. The three-judge appellate panel unanimously rejected the nonprofits' objections under RFRA and reversed the injunctions. The Court stated that the accommodation does not pose "any burden on...religious exercise" and submitting an objection "does not make the [nonprofits] 'complicit' in the provision of contraception coverage." Therefore, the religious nonprofits must comply with the ACA by submitting a declaration that they object to the provision of contraception coverage to the third party administrator or insurance issuer.

4. Over-regulating Colleges & Universities

On February 24, 2015, the Senate Health, Education, Labor and Pensions (HELP) Committee held a bipartisan hearing examining the regulation of colleges and universities. Prior to the hearing, the committee released a report by the Task Force on Federal Regulation of Higher Education entitled "Recalibrating Regulation of Colleges and Universities." The specific regulations the committee is examining include: verification of student eligibility for financial aid; return of federal financial aid funds; financial responsibility standards; accreditation; state authorization of distance learning programs; uniform definitions of crimes that must be included in a school's Annual Campus Security Report; and several regulations unrelated to education, safety, or stewardship. Some of the suggestions made to address these problems include: establishing clear regulatory safe harbors; having the Department of Education publish an annual compliance calendar; and focusing enforcement efforts on those institutions that do not act in good faith (and recognizing when institutions clearly are acting in good faith).

State Updates

Emily Chan, Adler & Colvin, San Francisco, CA

California

On January 23, 2015, the Supreme Court of California announced that it had unanimously voted to eliminate an ethics exception for nonprofit youth organizations in the California Code of Judicial Ethics to the general rule that judges are prohibited from holding membership in any organization that practice invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation. Compliance is required by January 21, 2016. This did not affect another exception to the general rule for religious organizations which still remains in effect.

On February 23, 2015, Assemblymember Jacqui Irwin (D-Thousand Oaks) introduced Assembly Bill 556 which proposes two main changes to California's Supervision of Trustees and Fundraisers for Charitable Purposes Act: (1) expand written disclosure requirements to include an individual or entity who solicits funds or property for charitable purposes with the participation of a fundraising counsel for charitable purposes to make specified disclosures regarding the fundraising counsel, and (2) increase the statute of limitations for enforcement actions against commercial fundraisers, fundraising counsel, and other third parties that aid and abet charity fraud to ten years. The California Attorney General's Office supports the bill, citing to the problems raised in an Attorney General charity enforcement case in which it was alleged that the charity had engaged in deceptive fundraising practices that involved two for-
profit fundraising firms that, as fundraising counsel, were not subject to written disclosures requirements applicable to commercial fundraisers and also were only subject to the 3-year statute of limitations that applies to causes of actions against third parties, including fundraisers, which had already run (directors and officers of charities are subject to a 10-year statute of limitations). That case ultimately settled. This bill has raised concerns among certain practitioners about the potential burdens it will impose on charitable organizations. The bill is scheduled for its first hearing in April 2015.

Oregon

A permanent rule change by the Oregon Department of Revenue, effective December 31, 2014, narrows the state’s property tax exemption for educational institutions. The new rule defines the terms "schools" and "academies" for state property tax exemption purposes which were previously not defined by the statute. The final version of the rule is not yet available, but under the draft Rule No. 150-307-145, the definition of schools and academies requires, among other criteria, that the educational institution "provide a comprehensive instructional program that is not limited to dancing, drama, music, religious or athletic instruction, or other special art or technical skill."

Pennsylvania

H.B. 435, signed into law on October 22 of last year, includes new background check requirements for volunteers of youth serving organizations. H.B. 435 is one of a series of new laws enacted in Pennsylvania in response to the sex abuse scandal involving Jerry Sandusky, Penn State, and the Pennsylvania nonprofit, The Second Mile. As of December 31, 2014, volunteers who have contact with children (as defined by the Act) are now required to provide (1) a report of criminal history information from the Pennsylvania State Police or a statement from the Pennsylvania State Police that the state police central repository contains no such information relating to that person; (2) a certification from the Department of Public Welfare as to whether the person is named in the statewide database as the alleged perpetrator in a pending child abuse investigation or as the perpetrator of a founded report of child abuse or an indicated report of child abuse; and (3) a federal criminal history record check by providing a full set of fingerprints to the Pennsylvania State Police that will be submitted to the Federal Bureau of Investigation. (23 Pa.C.S. § 6344.2(b); 6344(b)). The FBI check can be waived by Pennsylvania residents who have lived in the state throughout the entire previous 10-year period and if the position is unpaid and the volunteer swears or affirms in writing that he or she has not been convicted of certain disqualifying crimes. (23 Pa.C.S. § 6444.2(b.1)). An employer, administrator, supervisor or other person responsible for the selection of volunteers who intentionally fails to meet to require these submissions before hiring the volunteer has committed a misdemeanor of the third degree. (23 Pa.C.S. § 6444.2(B)). Additionally, effective July 1, 2015, these volunteers will also be required to obtain these certifications every 36 months. (23 Pa.C.S. § 6344.4(2)).

New York

On January 18, 2015, New York State Governor Andrew M. Cuomo presented his plan to create a new state unit, the Office of Faith-Based Community Development Services. The purpose of the Office is "to assist and leverage community and faith-based organizations in the delivery of education, health, workforce training, food programs and social services to communities, particularly those most in need." The Office will work with State Nonprofit Coordinating Unit, Department of State, and other government agencies, among other responsibilities. Karim Camara, current member of the New York State Assembly, will serve as the Executive Director of the Office.

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

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Economic Development Organizations, Trickle Down Charity and the Private Benefit Doctrine

By Matthew J. Rossman

The last fifteen years has seen a surge in charities that foster private sector job creation. Recent research I conducted indicates that each of the 50 largest metropolitan areas in the United States is now home to at least one nonprofit (usually a 501(c)(3) organization) that has a primary mission of providing direct aid to for-profit businesses in order to increase regional job opportunities. These organizations, which I term “regional economic development organizations” (REDOs), run venture capital funds, recruit companies to move to their regions, and provide low cost or no cost technical assistance and incubator space to business owners.

Although REDOs are making a significant impact on local and regional job growth in some areas, those that seek to operate as 501(c)(3) charities should raise at least one challenging question for their lawyers. That is, how to satisfy the “private benefit doctrine”? The private benefit doctrine provides that an organization is not organized or operated exclusively for charitable (or other) exempt purposes under Section 501(c)(3) “unless it serves a public rather than a private interest.” Over time, the IRS has interpreted this doctrine as requiring that any benefit to private interests resulting from a 501(c)(3) organization’s activities must result only incidentally from its achieving public benefit.

The basic operating model of a typical REDO presents a conundrum in this respect. Intrinsic to its work is direct aid to entrepreneurs and for-profit businesses so that they may generate private wealth (and hopefully lots of it). In theory, if enough of these businesses ultimately succeed, secondary public benefits like the creation of jobs or the revitalization of a distressed community will follow. This represents a reversal of what the private benefit doctrine permits – it is privately owned businesses which are the direct beneficiaries of the organization’s activities and the community’s residents who benefit incidentally. Even at its most altruistic, economic development is still “trickle down charity.”

So how does the IRS evaluate REDOs that apply for 501(c)(3) status? Short answer: It depends based on what type of underlying charitable purpose the organization claims to further. Many REDOs assert that they further charitable purposes by aiding economically distressed individuals and areas. In reviewing these organizations, the IRS relies principally on three revenue rulings from the 1970s that implicitly apply the private benefit doctrine. These rulings stand for the proposition that a charity may provide its services directly to businesses provided the businesses are merely the instruments by which the organization accomplishes its charitable purposes. For example, an organization that planned to make loans to and equity purchases in

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1 Treas. Reg. § 1.501(c)(3) – 1(d)(1)(ii).
businesses located in high density urban areas inhabited mainly by disadvantaged groups qualified as a 501(c)(3) because it prioritized businesses that provided training and employment opportunities for unemployed residents who lived in those areas. On the other hand, organizations that aid all businesses in an area, without regard to those that achieve the greatest potential community benefit, should in theory not qualify as charities because they “encourage private business development while only incidentally furthering social welfare purposes.”

A second common category of economic development organizations that seek to qualify under Section 501(c)(3) are those that claim to lessen governmental burdens. An organization that demonstrates that its activities accomplish those that a governmental agency would actually have had to perform and are subject to some measure of oversight or direction from that agency usually fits into this category. Although technically these organizations must also satisfy the private benefit doctrine, IRS private letter rulings suggest that the IRS typically expends little effort assuring itself that the relative balance of public and private benefit is appropriate in these cases.

In an article recently published in the Brooklyn Law Review, I argue that the current approach to evaluating economic development charities is outdated, inconsistent and insufficient. Satisfaction of the private benefit doctrine is a fundamental issue facing almost all REDOs seeking 501(c)(3) status, and it is unfair to lower and raise the bar based on which charitable purpose an organization cites. Furthermore, the types of economic development in which 21st century charities engage are far more ambitious and geographically broad than that carried out by organizations in the 1970s which worked principally in highly distressed urban neighborhoods and heavily impoverished rural areas. The IRS should adopt more nuanced standards for evaluating REDOs and require long-term accountability from these organizations via a specialized schedule to IRS Form 990. You can download my full article for free if you would like to read more about this topic and my proposals at: http://ssrn.com/abstract=2376470.

Professor Rossman teaches at Case Western Reserve University’s School of Law and practices in and co-directs the School’s Milton A. Kramer Law Clinic Center. He and his students

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4 Rev. Rul. 74-587.
6 There are a few other categories as well. Some REDOs, in particular those that are associated with university programs and research institutions, claim 501(c)(3) status for educational or scientific purposes. Counsel should review IRS rulings specifically addressing those organizations, as the rigor with which the IRS applies the private benefit doctrine to them also varies.
7 See, e.g., Robert Louthian & Amy Henchey, Lessening the Burdens of Government, 1993 EO CPE Text (1993), in which the IRS explicitly chides its own agents for neglecting to consider the public benefit doctrine with respect to groups claiming to lessen governmental burdens.
represent a wide range of nonprofit organizations, as well as for profit entities that seek to achieve a charitable purpose.