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Business Law Section Spring Meeting
April 7-9, 2016
Montreal, QC, Canada

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Message from the Chair

Happy New Year to you all!

Nonprofit Law for the Non-Nonprofit Lawyer

The Nonprofit Organizations Committee is starting the year off with two of its well received Nonprofit Law for the "Non" Nonprofit Attorney Series webinars.

January 14, 2016, 1-2:30 PM ET, "Nonprofit Issues for the Non-Nonprofit Attorney: Essential Governing Documents". The panelists will review issues relating to preparing articles of incorporation, bylaws and governance policies, and provide important drafting recommendations.

To learn more about and register for the program, click here. The Nonprofit Organizations Committee is able to offer 10% off your registration rate when you enter this discount code CE15CPDWEBVIP at check-out.

January 21, 2016, 1-2:30 PM ET, "Nonprofit Issues for the Non-Nonprofit Attorney: Essential Federal Filing Obligations". The panelists will discuss the issues relating to nonprofit tax-related federal filing obligations. The panelists will review some of the major issues in preparing IRS Form 1023, the application for recognition of federal tax-exempt status, and IRS Form 990, the annual information return for tax-exempt organizations.

To learn more about and register for the program, click here. The Nonprofit Organizations Committee is able to offer 10% off your registration rate when you enter this discount code CE15CPDWEBVIP at check-out.

2016 Spring Meeting - Montreal: Our Committee Program

It looks like 2016 will be a year of change and foremost in those drivers of change will be the election.

Nonprofit organizations are often places where people with strong societal views are involved. The organization is a place where they want to make a difference. In a highly politicized climate there will inevitably be a call by members, directors, employees or even clients (patients, customers etc.) of nonprofit organizations to influence public policy. Nonprofit lawyers are likely to see an increase in questions about whether a nonprofit organization can or should be involved in political campaigns, in influencing public opinion on issues being debated politically, and how to do so.

Our Committee is planning a continuing education program entitled Decision 2016: Political Campaign Activities by Nonprofit Organizations in the U.S. and Canada - Rules, Limitations, and Reporting Obligations for the Business Law Spring Meeting (April 6-9, 2016). The program will help nonprofit law practitioners understand the rules, risks and consequences to various types of nonprofit organizations of engaging in political campaign activities, particularly as they apply to their tax exempt status. There will be a focus on reporting obligations, to the Federal Election Commission, the Internal Revenue Service and pursuant to state law. Because the meeting will be in Montreal, Quebec, Canada, there will also be an opportunity to explore Canadian rules and the outcome of a roundtable in the sector sponsored by a leading Canadian foundation that focuses on the nonprofit and charitable sector, which often leads to regulatory or legislative change.

Please consider coming to the meeting and we hope also to announce some changes in the structure of the Committee and more opportunities for you to be
involved.

David Tang
Chair, Nonprofit Organizations Committee

2015 Outstanding Nonprofit Lawyer Awards

The Business Law Section, of which the Nonprofit Organizations Committee is a part, held its Annual Meeting in Chicago in September. At the meeting, the Nonprofit Organizations Committee presented the annual "Outstanding Nonprofit Lawyer Awards" to the 2015 recipients.

The 2015 nonprofit lawyer award recipients were as follows:

**Vanguard Award** - for distinguished lifetime achievement in the nonprofit sector:

*Milton Cerny*, Counsel, McGuireWoods (retired)

**Outstanding Academic Award** - for distinguished academic achievement in the nonprofit sector: *Christyne J. Vachon*, Assistant Professor of Law, University of North Dakota School of Law

**Outstanding Attorney Award** - for distinguished service as outside counsel to nonprofit organizations: *Gregory L. Colvin*, Principal and Chair of the Board, Adler & Colvin

**Outstanding In-House Counsel Award** - for distinguished service by a nonprofit in-house counsel: *Suzanne S. Friday*, Senior Counsel and Vice President of Legal Affairs, Council on Foundations

**Outstanding Young Attorney Award** - for distinguished service by an attorney in the nonprofit sector who is under the age of 35 or has been in practice less than 10 years:

*Anne K. Gerson*, Associate, Tax-Exempt Organizations Practice, Carter Ledyard & Milburn LLP
 Outstanding Attorney of the Year, Greg Colvin

 Outstanding Young Attorney of the Year, Anne K. Gerson

 Outstanding Academic Attorney, Christyne Vachon

Top Ten (Actually Eleven) Copyright and Trademark Tips for Nonprofits

Jeffrey S. Tenenbaum and Armond J. Zottola

Whether it is protecting your own intellectual property or avoiding the infringing of others', copyright and trademark law should play an important role in the typical activities of every nonprofit. Fortunately, the well-informed nonprofit can go a long way toward protecting its interests in this area without the involvement of lawyers. While the advice and guidance of counsel is recommended and encouraged in formulating and implementing your nonprofit's intellectual property policies, there are internal steps that all nonprofits can undertake without the direct involvement of counsel.

Read more...

Business Law Section Meeting in Montreal: April 2016

The Nonprofit Organizations Committee will meet at the Business Law Section's Spring Meeting in Montreal this April 7-9. A full meeting schedule can be found here.

Decision 2016: Political Campaign Activities by Nonprofit Organizations
The Internal Revenue Code and Treasury Regulations, as well as IRS rulings, dictate how much campaign-related activity a tax-exempt organization may conduct. For instance, a charity may not engage in electioneering - support or opposition of a candidate or group of candidates for public office - to any extent. However, it can engage in certain election-related activities, such as voter education or registration, if conducted in a nonpartisan manner. Other tax-exempt organizations, such as social welfare organizations, trade associations, and unions, may engage in political activities to a certain extent, but what qualifies as partisan political activity, and how much is permissible, have been topics of great debate.

The Nonprofit Organization Committee's continuing education program for the Business Law Spring Meeting in Montreal (April 6-9, 2016) will address political campaign activities by nonprofit organizations. Topics to be covered include:

- Governance considerations: Should a nonprofit organization be involved in political campaigns; if so, what should the organization's method be; and who is authorized to deliver that message.
- Tax-exemption considerations: Navigating and understanding the various rules, risks, and consequences that apply to different organizations depending on the organization's tax-exempt status; and Canadian rules and coming changes.
- Reporting obligations: When and where is the organization obligated to report on its political activities: In the U.S. - Federal Election Commission, Internal Revenue Service, state reporting obligations; and in Canada - Canadian Revenue Authority, etc.

We hope you can attend.

National Updates
Megan A. Christensen, Manatt, Phelps & Phillips, LLP, Washington, DC

Proposed Regulations on Substantiation Requirements for Charitable Contributions

[In January, the Internal Revenue Service withdrew the proposed regulations described below in response to extensive public comments expressing concerns, in particular about donee organizations collecting and maintaining taxpayer identification numbers. Therefore, the exception to the contemporaneous written acknowledgement requirement described below remains unavailable unless and until final regulations are issued.]

On September 17, 2015, the IRS issued a Notice of Proposed Rulemaking proposing regulations to implement the exception to the "contemporaneous written acknowledgement" requirement with respect to substantiating charitable contribution deductions of $250 or more under IRC Section 170(f)(8). That section requires a taxpayer who desires to claim a charitable contribution deduction of $250 or more to obtain a contemporaneous written acknowledgement from the charity, which includes a description of the contribution, whether any goods or services were provided by the charity in consideration for the donation, and a description and good faith estimate of the value of any such goods or services provided. An exception to the contemporaneous written acknowledgement requirement is also provided in Section 170(f)(8) if the charity files a return, as prescribed in regulations, that includes the same information that would be included in a the contemporaneous written acknowledgement. Until now, the Treasury Department and the IRS had declined to issue such regulations. The proposed regulations would have provided a prescribed form a donee organization to have the option of using, which would, in addition to the information described above, include the name, address, and taxpayer identification number of the donor, and would be required to (1) be filed on or before February 28 of the year following the calendar year in which the contribution was made, and (2) be furnished to the donor in the same time frame.
IRS releases Report on the First Year of Form 1023-EZ

On December 1, 2015, the IRS reported in its Form 1023-EZ First Year Report (the "Report") that Form 1023-EZ, the simplified application for Federal income tax exemption for smaller organizations, is reducing taxpayer burden and increasing cost effectiveness of the operations of the Exempt Organizations division ("EO") of the IRS. According to the IRS, applicants have informally responded favorably to the form's abbreviated length, ease of completion, lower user fee and electronic submission format. The Report states that the average processing time of the shortened form is 13 days and that between July 1, 2014 through June 26, 2015, EO received 43,157 Forms 1023-EZ, which is about 52% of all 501(c)(3) exemption applications filed during that period. The Report also states that customer satisfaction rose to 77% in the six-month period ending on March 31, 2015 compared to 44% in the prior six-month period.

According to the Report, EO will initiate a post-determination compliance program in 2016 for through correspondence audits of organizations whose applications filed on Form 1023-EZ were approved. The IRS will use the findings from the compliance program to improve and modify the Form 1023-EZ and processes.

Tax Status of Museums Questions by Senate

On November 29, 2015, The New York Times reported that the Senate Finance Committee sent letters to eleven private museums created and operated by private collectors, focusing on whether sufficient public benefit is present to justify such museums' federal tax-exempt status. Senator Orrin G. Hatch, the Committee’s Chairman, sent letters to small galleries such as the Brant Foundation Art Study Center in Greenwich, Conn., the Glenstone museum in Potomac, Md., and Eli and Edythe Broad’s new $140 million art museum in Los Angeles, requesting information regarding visiting hours, donations, trustees, valuations and art loans. Republican committee staff members said the inquiry was part of a broader effort to re-examine institutions that have long enjoyed preferential tax treatment.

IRS Publishes Final Regulations for Equivalency Determinations

On September 25, the IRS published final regulations for private foundations making good faith determinations that a foreign organization is equivalent to a public charity (other than a Type III non-functionally integrated supporting organization) or a private operating foundation. The regulations finalize the provision in proposed regulations expanding the class of professional tax advisors able to provide reliance opinions for foundations making good faith determinations, delete provisions allowing foundations to rely solely on grantee affidavits in making equivalency determinations, and provide that an equivalency determination will generally be valid for two years.

State Updates

Emily Chan, Adler & Colvin, San Francisco, CA

Alabama

On August 19, 2015, Governor Bentley signed into law SB24, which promulgated new requirements for exemption from sales, use, and lodgings taxes. SB24 requires all persons or companies exempt from the payment of sales, use, and lodgings taxes, other than governmental entities, to annually obtain a certificate of exemption from the Department of Revenue, and requires all persons or companies exempt from the payment of sales, use, and lodgings taxes to file information reports with the Department of Revenue. For purposes of this act, "governmental entity" means the Federal Government, the State of Alabama, Alabama public schools, Alabama public universities, healthcare authorities, Alabama counties and municipalities, and public corporations incorporated under any of the provisions of Chapter 50 of Title 11, Chapter 50A of Title 11, Chapter 5 of Title 37, or Chapter 7 of Title 39. The law became
operative for all applicable exempt persons or companies on January 1, 2016.

California

On September 21, 2015, Governor Brown signed into law AB 556, which affects the regulation and enforcement of laws regarding charitable solicitation in California. The changes brought by AB 556 include expanding the definition of "commercial fundraiser" to include any individual, corporation, unincorporated association, or other legal entity that plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of funds, assets, or property for charitable purposes, as specified. (It excludes from the definition of a commercial fundraiser for charitable purposes, a trustee, a charitable corporation, specified financial institutions, or an escrow agent or caging company, as defined, that receives or controls funds as a result of a solicitation for charitable purposes.) This new law, which took effect January 1, 2016, also allows a 10-year statute of limitations for the Attorney General to bring actions for violations of these provisions, such as an action for civil liability against a person who aids or abets a violation of the standards of conduct for directors and officers of nonprofit public benefit corporations.

On September 30, 2015, Governor Brown signed into law AB 557 which provides for new dissolution procedures. Starting January 1, 2016, a nonprofit public benefit corporation, nonprofit mutual benefit corporation, and nonprofit religious corporation may file a short form dissolution within 24 months of the date of incorporation, provided that certain criteria are satisfied, including that the corporation was created in error. Also starting this year, AB 557 makes a nonprofit public benefit corporation, a nonprofit mutual benefit corporation, a nonprofit religious corporation, and a foreign nonprofit corporation, subject to administrative dissolution or administrative surrender, as specified, if the nonprofit corporation's or foreign corporation's corporate powers are, and have been, suspended or forfeited by the Franchise Tax Board for at least 48 consecutive months.

New York

On October 26, 2015, Governor Cuomo signed into law A07641 to change the effective date of the prohibition on not-for-profit employees serving as chairperson of the board of directors of the corporation. The new effective date is now one year later on January 1, 2017. This provision is imposed by Section 713(f) of the Not-for-Profit Corporation Law that was enacted pursuant to the New York Nonprofit Revitalization Act.

On December 11, 2015, Governor Cuomo signed into law S5868A, which made clarifying edits to certain sections of the not-for-profit corporation law that were deemed necessary upon review of the New York Nonprofit Revitalization Act after it was enacted in 2013. Among the clarifying amendments to the not-for-profit corporation law are: an expanded definition of "independent director" to address activities related to a corporation's auditor and audit; the addition of "domestic partner" to the definition of "relative"; a revised definition of "related party" that includes any who exercises the powers of directors, officers or key employees over the affairs of the corporation or any affiliate of the corporation; clarification that a director or person with a conflict of interest may attend committee or board meetings for the purpose of presenting information or answering questions; clarification that a director present at a board meeting but not present for the vote on a transaction due to a conflict of interest shall be counted in the quorum; and clarification that corporations may post their conflict of interest policy on their websites for satisfying the policy distribution requirement.

Washington

A set of uniform business organizations provisions affecting the state's business corporation act, the nonprofit corporation act, the nonprofit miscellaneous and mutual corporations act, the general and limited liability partnerships and revised uniform partnership act, the uniform limited partnership act, and the limited liability companies act became effective January 1, 2016. Signed into law on May 6, 2015, SB5387 (commonly referred to as the "Hub Bill") is intended to create a more integrated legal framework by following a hub-and-spoke model:
creating uniformity in common provisions governing business organizations and other entities by consolidating these provisions into a new, single chapter RCW 23.95, while the individual entity acts contain all entity-specific requirements. The new chapter addresses, among other matters, common provisions related to the Secretary of State's oversight of such entities and common legal requirements for entity name reservation and registration, registered agents, foreign entities doing business in Washington, and entity dissolution and reinstatement.

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
Top Ten (Actually Eleven) Copyright and Trademark Tips for Nonprofits

by Jeffrey S. Tenenbaum, Esq. and Armond J. Zottola, Esq., Venable LLP, Washington, DC

Whether it is protecting your own intellectual property or avoiding the infringing of others’, copyright and trademark law should play an important role in the typical activities of every nonprofit. Fortunately, the well-informed nonprofit can go a long way toward protecting its interests in this area without the involvement of lawyers. While the advice and guidance of counsel is recommended and encouraged in formulating and implementing your nonprofit’s intellectual property policies, there are internal steps that all nonprofits can undertake without the direct involvement of counsel. The following (brief and non-exhaustive) guidelines provide the basic thinking and framework for such steps and, in particular, the implementation of effective policies and practices to manage copyright and trademark rights and avoid the infringement of others’ rights:

1. **Use Copyright and Trademark Notices.** Use copyright notices (e.g., © 2015 ABC Nonprofit. All rights reserved.) on and in connection with all creative works published by your nonprofit and trademark notices on all trademarks, service marks, and certification marks owned and used by your nonprofit (e.g., TM for non-federally registered marks and ® for federally registered marks). While copyright and trademark notices are not required, their effective use can significantly enhance your intellectual property rights, including eliminating an “innocent infringement” defense. Be sure to use them prominently, consistently, and in all media.

2. **Register Your Trademarks (Both Domestically and Overseas) and Domain Names.** Register your nonprofit’s name and important logos, slogans, certification marks, and other trademarks and service marks with the U.S. Patent & Trademark Office. While federal registration of your marks is not required to obtain and maintain trademark rights in the United States (common law rights are enforceable in the U.S.), it can be extremely helpful in enhancing and enforcing them nationwide. It also can be required for certain remedies or enforcement. In particular, registration is a necessary component in the domain name dispute process. It is also important to remember the national scope of trademark rights and to seek protection in foreign countries. In most foreign countries, trademark rights are based on a first-to-file system, so foreign trademark registration—as early as possible—is essential. Also, be sure to immediately obtain domain-name registrations for all current and prospective (important or material) trademarks. In sum, while the federal and foreign trademark registration processes are not simple and generally do require the use of legal counsel, they are well worth the effort and cost for enhanced rights and protection.
3. **Register Your Copyrights.** Register your nonprofit’s website, publications, and all other important, original, creative works (that are fixed in any print, electronic, audio-visual, or other tangible medium) with the U.S. Copyright Office. While such registration is not required to obtain and maintain a copyright in a work, it is a prerequisite to filing suit to enforce your rights and confers other important, valuable benefits. If your works are registered either within the first three months of initial publication or before infringement of the works occurs, your organization will be able to pursue statutory damages and attorneys’ fees, as opposed to just actual damages (a major difference, especially in the nonprofit setting). Copyright registration is a very simple and inexpensive process, and does not require the use of legal counsel. It also can be very helpful for protecting and enforcing your copyright rights overseas, and for getting prompt, responsive action by internet service providers, social media operators, and others where you are seeking for content to be taken down because it infringes your own copyright rights.

4. **Police Use of Your Intellectual Property.** Monitor and police the use of your copyrights and trademarks by others and enforce your rights where necessary. Use periodic web searches and outside monitoring services, among other means, to identify potential infringement of your copyrights and trademarks. Don’t hesitate to send cease-and-desist letters where warranted, but understand that enforcement can involve different types of dispute resolution processes. Enforcement does not necessarily involve the filing of a lawsuit, and does not even always require the use of legal counsel. Mediation, arbitration, and simple settlement are good alternatives as well, especially where enforcement costs are a concern.

5. **Codify All Licenses from Your Nonprofit to Others in Writing.** Whenever your nonprofit lets others—such as volunteers, members, chapters, affiliates, sponsors, certificants or accreditants, or endorsed vendors—use your nonprofit’s name, logos, copyrighted works, and other intellectual property, put the terms and conditions of the license in writing. Be sure to put strict limitations on how the intellectual property can and cannot be used, and what happens if those rules are violated. Typically, other important legal provisions will be included as well. The license does not have to be a signed paper document; online click-and-accept licenses are equally enforceable, as U.S. law recognizes electronic contracts and signatures. While oral or implied non-exclusive licenses can exist, they can be difficult to interpret, difficult to enforce, limiting in nature, and otherwise problematic for your nonprofit. In short, do not rely on such oral and implied agreements when a written agreement will better evidence contractual rights.
6. **Make Sure You Own or Have Permission to Use All Intellectual Property.** Ensure that your nonprofit owns or has appropriate permission to use all intellectual property (e.g., text, graphics, photos, video, trademarks, etc.) that it uses in its publications, on its website, on social media, and in all other media. Most common copyright problems arise from the issue of sufficient rights or permission. For example, you may have conceived the idea, supervised the work’s creation, and paid for it, but that does not mean you own the work. You may have only a limited license for a specific, narrow use. When you wish to use the work on another project or in another medium, you may learn that a separate fee and permission are required—or that such other use is even prohibited. As such, for copyrights, obtain either an assignment (transfer of ownership; must be in writing to be valid) or a license (permission to use; exclusive licenses must be in writing to be valid, but it is strongly advisable to codify even non-exclusive licenses in writing). For written copyright or trademark licenses, be sure that they are irrevocable, perpetual, worldwide, and royalty free (if applicable); specify whether exclusive or non-exclusive (or perhaps exclusive for a certain period of time); cover all possible current and future uses of the work in all media; contain a release to use the author, speaker, or owner’s name, photograph, etc. (if applicable); and contain appropriate representations and warranties (and, in limited cases, indemnification).

7. **Agreements with Independent Contractors.** Maintain written contracts for development or creation with all independent contractors to your nonprofit—such as software developers, consultants, photographers, lobbyists, and all other contractors—to ensure that your nonprofit is assigned the ownership rights (or at least sufficiently broad license rights) to all intellectual property developed or created by the contractor under the agreement. Without such a writing, the basic rule in copyright law is that the person who creates the work is the one who owns it, regardless of who paid for the work to be created. This rule does not apply to employees, ownership of whose work (that is within the scope of their employment) automatically vests in the employer. (As such, if the contractor is not self-employed, the assignment ideally should come from someone authorized to bind the employer.) If your nonprofit is a joint author of a copyrightable work with another party (e.g., nonprofit employees working side by side with an outside technology consultant to develop new software for your nonprofit), be sure to seek to obtain a copyright assignment (or at least a sufficiently broad license) from the co-author(s) if you wish to use the joint property in a manner that differs from the standard rights available to joint authors/owners (e.g., for enforcement, exploitation or profit-sharing).

8. **Agreements with Authors and Speakers.** For the same reason as stated above, obtain a written and sufficiently broad license or assignment from all
(non-employed) writers and speakers for your nonprofit, including members. Be sure that, for licenses, the permission is sufficiently broad—as outlined in #6 above—and most certainly that it permits you to use both written material (such as articles and PowerPoint presentations) and audio or visual recordings of their presentations in any manner your nonprofit may choose in the future.

9. **Agreements with Officers, Directors, Committee Members, and (Sometimes) Other Volunteers.** For the same reason as stated above, obtain a written statement from all nonprofit officers, directors, and committee members (and any other volunteers helping to create copyrightable content) assigning ownership of all intellectual property that they create (within the scope of their service to the nonprofit) to your organization. Incidentally, such a form also can be, and often is, used to impose confidentiality obligations on these individuals, to require conflict of interest disclosure, and to impose any other restrictions or guidelines on their service.

10. **Protect Your Membership Database.** For membership associations, because the name, addresses and other contact information contained in your membership directory/list are generally are not protected by copyright law—as they usually do not possess the minimum level of originality required—if your organization publishes the directory or permits others to use the list, it is imperative to use a "shrinkwrap" license, click-and-accept feature, or other form of contractual commitment to place explicit, binding limits and conditions on the use of that information by members, vendors, chapters, affiliates, and others. Failure to do so may leave your nonprofit with little or no recourse to prevent unrestricted use of this most valuable information by those who obtain a copy of it.

11. **Rules for Interactive Online Services.** Many nonprofits operate listservs, chat rooms, and other interactive online services utilized by your members, supporters, or others (who are not employees of your nonprofit). This may be done directly through your website, using outside service providers, or through social media. If so, it is important to regularly distribute rules that prohibit the posting of any copyright- and trademark-infringing information or marks (along with other rules, such as prohibiting negative comments about individuals and companies, and prohibiting the advertising or marketing of products or services). In addition, be sure to maintain a compliant "take-down" policy and to immediately remove (or have removed) any material that violates these rules if it comes to your nonprofit’s attention.
Details: jstenenbaum@Venable.com, ajzottola@Venable.com