



NONPROFIT ORGANIZATIONS COMMITTEE NEWSLETTER

Third Quarter, 2016

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April 6-8, 2017

New Orleans, LA

Editorial Board

David Levitt, San Francisco, CA

Emily Chan, San Francisco, CA

Megan A. Christensen,

Washington, DC

Matthew G. Wright, Waco, TX

Message from the Chair

As we come down to the eve of the 2016 presidential election I realize that content of this newsletter cannot compete with the latest news on how the candidates are doing. Nor would I normally expect to have very much to say about the election as a non-profit organizations lawyer. Nonprofit organizations lawyers are rarely called upon to comment significantly to presidential elections.

This year, however, we've had a unique opportunity. We have had chances to impress on our conversation partners the importance of distinguishing between the Donald Trump Foundation and the Clinton Foundation on the basis of whether they are private non-operating foundations or operating foundations. We can wow them with our easy access to Guidestar and take them on guided, in-depth tours of both Foundations' Form 990s (perhaps explaining the differences in the 990-EZ). We are ready to discuss the intricacies of how the governance structures of these two differ and why. We even (finally) have an opportunity to explain why and how a State's Attorney General can play a significant role in the regulation of charities.

Is that really happening regularly when we speak to our friends and colleagues - even other lawyers? Is there enough understanding amongst the general public and other lawyers about non-profit organizations and charities for them to even ask us about these and other issues?

Our committee exists in part to help the rest of the legal profession understand enough of the basics of non-profit law to both provide effective advice to their clients and to ensure that there is enough sensitivity to the depth of our sector's issues that appropriate advice can be given, with more specialized assistance if needed. This goal is ongoing and as a Committee we are very active in doing that. This is the explicit focus of one of the articles in the upcoming *Business Law Today*, part of that issue's mini-theme on non-profit organizations. Our Committee's participation in the broader Business Law Section publication through all of the mini-theme's articles enhances the broader business lawyer community's understanding of the area. We also see that purpose in the Committee's ongoing webinar series, "Nonprofit Law for the Non-Nonprofit Lawyer". Lisa Runquist, the author of the very popular *ABC's of Nonprofits* book, has also just announced a Spanish language edition. One of the Continuing Legal Education Programs our Committee is planning for the Business Law Section Spring meeting in New Orleans (April 6-8, 2017) will be on Nonprofit Law Basics. Together with that CLE Program, we expect to announce in the spring a new book that will be a practical guide for non-specialists, based on the approach and materials from the Nonprofit Law for the Non-Nonprofit Lawyer webinar.

You may want to begin thinking about circulating that mini-themed issue of *Business Law Today* and encouraging your colleagues to look at one of the Committee's many publications, meeting to come to that CLE Program if they go to New Orleans or registering for the webinar series.

On the other end of our activities, the Model Nonprofit Corporations Act Subcommittee is about to engage in a significant revision of the Model Nonprofit Corporations Act in light of the new 2016 Revision of the Model Business Corporations Act. A team of drafters is being formed, composed of those with a commitment to attend all of a number of in-person working sessions (to be scheduled). Anyone interested in that initiative should contact Lawrence Beaser,

the Subcommittee Chair.

At the Committee's meeting in September in Boston we were pleased to have two of this year's awardees with us. Outstanding Young Lawyer Brandon Dickerson and Outstanding Lawyer, Gene Takagi were on hand to receive their awards and to participate in our meeting. The following award winners were announced as well: Vanguard - Thomas Troyer, Outstanding In-House Counsel - Sherry Hibbert and Judith Andrews shared the Outstanding Award. They unfortunately were unable to attend.

I also want to introduce some people who have taken on responsibilities with the Committee recently. Emily Chan of Adler & Colvin LLP has assumed responsibility for Content while J.J. Harwayne Leitner of Davis Wright Tremaine LLP has been charged with our Diversity portfolio. There continue to be areas within the Committee where leadership can be assumed and I would encourage you to consider how you might like to participate and speak to me.

Thank you for your continued support of this Committee. Please reach out to me with any questions or suggestions.

Respectfully submitted

David Tang
Chair, Nonprofit Organizations Committee



2016 Fall Business Law Section Meeting of the Nonprofit Organizations Committee

Religious Organizations Subcommittee Report

Brendan Wilson, Chair

At the 2016 Fall Business Law Section Meeting of the Nonprofit Organizations Committee, the Religious Organizations Subcommittee reviewed current developments in the law and discussed a number of important recent cases, including a decision issued on July 28, 2016 by the U.S. Bankruptcy Court of the District of Minnesota in a case styled as *In Re Archdiocese of Saint Paul and Minneapolis* (Case No. 15-30125). In that decision, the committee representing the creditors in the Archdiocesan bankruptcy asked the court to consolidate the Archdiocese with two hundred other Catholic entities under the direct or indirect control of the Archbishop, including parishes, schools, and charitable organizations. Consolidation would have allowed the creditors to seek a recovery that would have included the assets of each of the two hundred entities, as well as the assets of the Archdiocese. The bankruptcy court refused to allow the consolidation on the grounds that each of the entities proposed for consolidation were separately incorporated and functioned as distinct legal entities. The court noted that the Archbishop exerted direct or indirect control over each of the entities, but acknowledged that such control was permissible under applicable state law and that the Archbishop's exercise of that control did not function as an

abuse of the corporate form. The court also refused to allow the consolidation on the grounds that the bankruptcy code provides that churches and charities cannot be forced into bankruptcy involuntarily, and consolidating two hundred non-debtors would essentially force them to involuntarily submit to bankruptcy court proceedings. The fact that the two hundred entities were separately incorporated therefore protected them from being pulled into the bankruptcy proceeding. The Subcommittee's discussion of the case focused on a variety of topics, including whether and when religious organizations should seek protection in bankruptcy, whether religious organizations should avoid using the corporation sole, whether religious organizations should incorporate their separate parishes or ministries, and what governance arrangements hierarchical church organizations should use to minimize liability risks among affiliated entities. We look forward to continuing our discussion of these issues at the spring meeting.

Nonprofit Organizations Committee Program: Chan Zuckerberg & Friends: Using Philanthrocapitalism to Accomplish Charitable Goals: Will Foundations Become an Endangered Species?

At the Business Law Section Annual Meeting in Boston, the Nonprofit Organizations Committee hosted this panel, inspired by the formation of the Chan Zuckerberg Initiative.

The panel was chaired and moderated by Philip Hackney, Associate Professor of Law at Louisiana State University Paul M. Hebert Law Center, Baton Rouge, LA.

The panelists were as follows:

- Will Fournier, Associate at Caplin & Drysdale, Washington, DC
- Will Fitzpatrick, General Counsel of the Omidyar Network;
- David Levitt, Principal at Adler & Colvin, San Francisco, CA
- Sharon Lincoln, Counsel at Foley Hoag LLP, Boston, MA
- Bill Callison, Partner at Faegre Baker Daniels, Denver, CO

This panelists explored the impetus for donors seeking alternatives to traditional philanthropy and discussed benefits and traps regarding these alternatives for accomplishing social good; in particular, using LLCs, other philanthropic ventures, and non-charitable tax-exempt entities. Topics included governance, political impact, program and mission-related investing, and charitable oversight by state Attorneys General.

All of the meeting materials have been posted online and are available to Business Law Section members. To access the materials, login through your ABA membership and see the [Annual Meeting web link](#).

Outstanding Nonprofit Lawyer awards

At the annual meeting, the Nonprofit Organizations Committee presented the annual Nonprofit Lawyer Awards. These awards are given annually to attorneys who have made outstanding contributions to the nonprofit sector and/or the development of nonprofit law.

The 2016 award recipients were as follows:

Vanguard Award for distinguished lifetime achievement in the nonprofit sector:

Thomas A. Troyer, Member, Exempt Organizations Group, Caplin & Drysdale, Chartered (retired)

Outstanding Lawyer Award for distinguished service as outside counsel to nonprofit organizations: *Judith Andrews*, Of Counsel, Apex Law Group LLP

Outstanding Lawyer Award for distinguished service as outside counsel to nonprofit organizations: *Gene Takagi*, Managing Attorney, NEO Law Group

Outstanding In-House Counsel Award for distinguished service by a nonprofit in-house counsel: *Sherry Hibbert*, General Counsel, Houston Livestock Show and Rodeo

Outstanding Young Lawyer 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: *Brandon Dickerson*, Partner, Likes Meyerson Hatch LLC



Award recipient Gene Takagi



Award recipient Brandon Dickerson

Social Entrepreneurship and Social Benefit Entities Joint Subcommittee

The Joint Committee on Social Entrepreneurship and Social Benefit Entities recently participated in the [Business Law Section's mini-theme series dealing with benefit corporations](#).

An Introduction to Benefit Corporations

Michael Vargas

Benefit corporations, a corporate form that aligns the business with a social mission, are the new kid on the corporate scene. Some lawyers and scholars think it is a fad that will eventually die out, but the trend lines tell a different story. Thirty-one states have passed benefit corporation statutes in just the past five years, including in Delaware. Consumers are choosing socially responsible alternatives to everything from the products they consume to the services they procure. Established mega-businesses like Clorox and Amazon are being forced to compete with socially responsible startups. Young entrepreneurs and MBA grads are looking for a businesses and work environments that offer value beyond just a paycheck. More of our clients are asking about it, and more are electing to found their companies using this corporate form. And the trends suggest that this is only the beginning.

Unfortunately, most attorneys still don't have a lot of information about how to counsel benefit corporations, their founders, their directors, or their shareholders. With no case law, limited public exposure, and only early commentary on the topic, there isn't a whole lot of information out there, but as these business entities continue to grow more numerous, we will need more guidance on how they work. Sponsored by the ABA's Joint Subcommittee on Social Entrepreneurship and Social Benefit Entities (SESBE), this mini-theme is designed to fill in some of the gaps in our knowledge. We have gathered the architects of these statutes and leading scholars on the issue to answer some of the important and tough questions that have arisen regarding this innovative new corporate form.

We sincerely hope that this mini-theme will serve as a thought-provoking introduction to a growing trend in corporate law. In the years to come, the Joint Committee on Social Entrepreneurship and Social Benefit Entities will continue to generate commentary and thought leadership on these and other important developments in the law of benefit corporations. If you are interested in being a part of this conversation, please contact Michael Vargas (michael.vargas@rimonlaw.com), Kim Lowe (klowe@jux.law), or David Levitt (levitt@adlercolvin.com) for more information.

National Updates

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

FASB Revises Financial Reporting Guidance

On August 18, 2016, the Financial Accounting Standards Board (FASB) issued an Accounting Standards Update that is intended to simplify and improve classification of net assets and the presentation of liquidity, financial performance and cash flows by a nonprofit organization. The Update includes qualitative and quantitative requirements to improve presentation and disclosures in order to provide more relevant information about resources to donors, creditors, and grantors, including with respect to net asset classes, investment return, expenses, liquidity and availability of resources, and presentation of operating cash flows. According to FASB, the changes will affect charities, foundations, colleges and universities, health care providers, religious organizations, trade associations, cultural institutions, and others. The changes go into effect for annual financial statements issued for fiscal years beginning after December 15, 2017, and for interim periods within fiscal years beginning after December 15, 2018.

Notice of Intent to Operate Under Section 501(c)(4) - Form 8976

The IRS released Form 8976 for organizations that intend to operate as a Section

501(c)(4) organization to notify the IRS of that intent pursuant to new Section 506 of the Internal Revenue Code. Form 8976 may only be completed and submitted electronically within 60 days of the organization's formation and a fee of \$50 must be submitted in order to complete the notification. Failure to file the notification within 60 days will result in a \$20 per day penalty up to a maximum of \$5,000. Exceptions to the notification requirement are provided for organizations that filed any of the Form 990 series or Form 1024 application for exemption on or before July 8, 2016. See Rev. Proc. 2016-41 for more information.

Decrease in Fee for Form 1023-EZ

As of July 1, 2016, the user fee to process the Form 1023-EZ, Streamlined Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code decreased from \$400 to \$275. The fee must be paid at the time the 1023-EZ application is filed.

IRS Provides Limited Penalty Relief for Tuition Statement Filers

Pursuant to Announcement 2016-17, the IRS has provided notice that it will not impose certain penalties on eligible educational institutions with respect to Forms 1098-T, Tuition Statement, required to be filed and furnished for 2016, if the institution reports the aggregate amount billed for qualified tuition and related expenses on the form rather than the aggregate amount of payments received, as required by the PATH Act. The Forms 1098-T are required to be filed by February 28, 2017 unless filed electronically, for which the due date is March 31, 2017. The Forms must be furnished to recipients by January 31, 2017.

State Updates

Emily Chan, Adler & Colvin, San Francisco, CA

California

On May 27, 2016, the Assembly Committee on Appropriations held in committee and did not advance a proposed "Warning Label" bill affecting charitable organizations. Opposed by many hundreds of nonprofits throughout the state, AB 2855, as amended, would have required a charity that operates or engages in the solicitation for charitable purposes of funds or other property in this state to include a prominent link on the home page of the charity's website that immediately directs all consumers to the Attorney General's website, which would contain information about consumer rights and protections and charity research resources. It would have also required that any document produced by, or on behalf of, a charity for the solicitation for charitable purposes of funds or other property in this state to also include the web address of the Attorney General's website. The Attorney General would have been required to develop and publish on its website by July 1, 2017, informational materials containing consumer rights and protections and charity research resources to allow donors to become informed about a charity before making a decision to give. This bill was strongly opposed by the California Association of Nonprofits, Assemblymember Lorena Gonzalez, and the almost 500 nonprofits who signed an opposition letter to the proposed bill.

Hawaii

Signed into law and effective June 29, 2016, SB 2812 amends Hawaii's charitable registration and solicitation law to require affirmative disclosures to donors by professional solicitors; clarify exemptions from registration; authorize the Department of the Attorney General to issue cease and desist orders and impose administrative fines; and make other technical amendments. Among the changes are redefining "professional fundraising counsel" to exclude a person whose only

services performed are to plan, conduct, manage, advise, consult, or prepare grant or subsidy application materials for a charitable organizations; providing that a "solicitation" does not include the submission of a grant or subsidy proposal or application to a governmental authority or any organization exempt under IRC Section 501(c)(3); adding new requirements for commercial co-venturer arrangements and increasing penalties for violations; clarifying disclosure requirements for professional solicitors; changing the audit requirement threshold from over \$500,000 in gross revenue to over \$500,000 in contributions; and eliminating the filing fee for organizations with less than \$25,000 in gross revenues. The Hawai'i Association of Nonprofits supported the bill.

Kentucky

HB 583, which would create a new section of Kentucky Revised Statutes Chapter 367 (Consumer Protection), remains in the House Standing Committee on Judiciary. HB 583 would require the Office of the Attorney General to provide public access to records relating to financial accountability of charitable organizations through the display of the records on a

website. Among the information would include a list of registered charities in the state that fail to meet the financial accountability standards recommended by the American Institute of Philanthropy's CharityWatch, among other provisions, which recommends that charitable organizations dedicate at least seventy five percent (75%) of their budgets to the organizations' stated charitable goals or programs. Inclusion on the list would be based on a three-year average of annual expenditures. Information on the website would be updated on an annual basis and include the fifty charitable organizations that fell farthest from the American Institute of Philanthropy's CharityWatch charitable spending recommendation.

Michigan

SB 960 is proposed legislation that has been referred to the Committee of Finance to provide clarity to the definition of the tax-exempt status of nonprofits with charitable purposes for property tax exemption purposes. Among other changes, the bill attempts to clarify the criteria set forth in the Michigan Supreme Court's holding in *Wexford Medical Group v. City of Cadillac*, which outlined six factors relevant to evaluating charitable institutions in property tax cases. The bill is strongly supported the Council of Michigan Foundations and Michigan Nonprofit Association, who helped developed the proposed legislation in response to a growing number of local tax assessor cases against charitable nonprofits with a goal to bring clarity and consistency to the process statewide in determining which entities are eligible for the exemption.

New Jersey

S-2212 and A-3888 are identical bills that would change the current law that allows property taxpayers to challenge the assessment or exempt status of other property in their county by prohibiting property taxpayers from filing property tax appeals with respect to the property of others. Some groups are increasingly concerned about property tax exemption challenges against nonprofits following the Tax Court ruling in *AHS Hospital Corporation v. Town of Morristown*, in which tax exemption was denied on most of the hospital's property, and the ongoing case *Fields vs. Trustees of Princeton University*, a lawsuit brought by a group of taxpayers. The Center for Non-Profits in New Jersey supports these bills. As of early October, S-2212 had been referred to the Senate Community and Urban Affairs Committee and A-3888 had been referred to the Assembly Appropriations Committee.

New York

On August 29, 2016, the United States District Court for the Southern District of New York dismissed in its entirety a complaint filed by Citizens United and Citizens United Foundation against the New York Attorney General, challenging

regulations under the New York Executive Law that require charitable organizations to submit an unreacted copy of the charity's Form 990 that includes Schedule B which discloses the names, addresses, and total contributions of their donors, in order to solicit funds in the state.

On August 9, 2016, the Joint Commission on Public Ethics approved emergency amendments (19 NYCRR Part 938) to its source of funding regulations to comply with disclosure requirements mandated by S.8160/A.10742 which were signed into law on August 24, 2016. Among the changes affecting nonprofits exempt as 501(c)(3) and 501(c)(4) organizations are that the disclosure requirement continues to not apply to 501(c)(3) organizations registered with the Attorney General's Charities Bureau; provided, however, that it will apply to any in-kind donations of staff, staff time, personnel, offices, office supplies, financial support of any kind or any other resources to any corporation or entity that is qualified as exempt under IRC Section 501(c)(4) when such in-kind donations are over \$2,500 and from any corporation or entity that is qualified as exempt under IRC Section 501(c)(3). In such case the entity receiving such in-kind donations shall disclose the fair market value and identify the 501(c)(3) entity providing such in-kind donations and give notice within a reasonable time to the 501(c)(3) entity that it shall be required to file a report with the department of law pursuant to the law. The law and emergency regulations took effect September 23, 2016.

Pennsylvania

On July 29, 2016, Attorney General's Office announced it reached an agreement with the Hershey Trust Company and the Milton Hershey School that supersedes the parties' 2013 agreement with the Attorney General's Office. This is the most recent agreement in a series of agreements entered into among the parties resulting from investigations conducted by the Attorney General's Office dating back to the early 2000's. This agreement implements a number of operational and governance reforms of both entities including a required conflict of interest policy that cannot be modified without prior written approval of the Attorney General's Office, prior notice to the Attorney General's Office of an elected manager or directors, mandated resignations of certain managers and directors, limits on overlapping managers and directors, and caps on director compensation and term of service.

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
- Matthew Wright at matthew@mgwrightlaw.com

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