

Report 11

A complete listing of the proceedings and speakers is available on [the Institute's Web site](#)

This Report, prepared by Reporter Jason Havens Esq., covers several sessions that involve the representation of charitable institutions and their donors. In addition, Reporter John Warnick Esq. previously reported in Report No. 8 on Kathryn Miree's Wednesday morning general session presentation entitled "*The Rules of Engagement: Managing Liability for Nonprofit Boards.*"

Monday Morning, January 5, 2004 - Pre-Conference Fundamentals Session

Publicly Supported Charities, Private Foundations and Everything In Between: Talking - and Understanding - the Talk

(a study of the practical and tax aspects of these entities)

Conrad Teitell

Cummings & Lockwood LLP

Stamford, Connecticut

I. INTRODUCTION

Mr. Teitell began with a quote from Democracy in America (1835) by Alexis de Tocqueville: "These Americans are the most peculiar people in the world.... In a local community, in their country a citizen may conceive of some need, which is not being met. What does he do? He goes across the street and discusses it with his neighbor. Then what happens? A committee comes into existence and then the committee begins functioning on behalf of that need.... All of this is done by private citizens on their own initiative."

II. PUBLICLY SUPPORTED CHARITIES: See IRC § 170(b)(1)(A)(i)-(vi).

Churches or conventions of churches.

Tax-exempt educational organizations with a regular faculty/curriculum/body of students attending resident classes.

Tax-exempt hospitals and, under certain circumstances, organizations directly engaged in continuous medical research in conjunction with exempt hospitals.

Organizations operated exclusively to hold and administer property for state/municipal colleges/universities.

Governmental units.

Publicly supported organizations: Must meet either:

(1) More than one-third support test (support from public/governmental sources at least one-third of total support) or

(2) Facts and circumstances/10% test (substantial support -- at least 10% of total support -- from public, nature of publicly supported organization)

III. DONOR ADVISED FUNDS -- COMMUNITY FOUNDATIONS, CHARITABLE GIFT FUNDS CREATED BY FINANCIAL INSTITUTIONS AND FUNDS MAINTAINED BY UNIVERSITIES, ETC.

Must qualify as publicly supported organization (one of two tests above)

Key: ADVICE: Donor gives advice (not absolute direction)

IV. SUPPORTING ORGANIZATIONS

Three types: IRC § 509(a)(3) (very detailed and complex rules):

Type I: "parent-subsidiary" relationship: operated, supervised, or controlled by publicly supported charity, which designates majority of Type I's governing body

Type II: "brother-sister" relationship: supervised or controlled in connection with publicly supported organization

Type III: "kissing cousin" relationship: operated in connection with one or more publicly supported organization

See Nancy P. Marx, *The Right Fit: Matching Client Goals with Charitable Entities*, Tr. & Est. (Oct. 2003).

V. PRIVATE FOUNDATIONS

Any organization described in IRC § 501(c)(3) except organizations described in IRC § 509(a)(1), -(a)(2), -(a)(3), or -(a)(4). 501(c)(3) organizations basically divided into two classes: private foundations and public charities. Most private foundations are non-operating foundations, but other categories include operating foundations, exempt operating foundations, and pass-through (conduit) foundations.

VI. PRIVATE OPERATING FOUNDATIONS: spends at least 85% of its adjusted net income or its minimum investment return, whichever is less, directly for the active conduct of its exempt activities (income test) and also meets the assets test, the endowment test, or the support test.

VII. EXEMPT OPERATING FOUNDATIONS

VIII. PASS-THROUGH (CONDUIT) FOUNDATIONS

IX. COMPANY FOUNDATIONS

X. TAXES ON SELF-DEALING -- IRC § 4941, TREAS. REG. 53.4941

Acts between private foundation and "disqualified person."

Examples of transactions that constitute self-dealing:

- Sale, exchange, or leasing of property;
- Lending money or other extensions of credit;
- Providing goods, services, or facilities;
- Paying compensation or reimbursing expenses to disqualified person;
- Transferring foundation income or assets to, or for use/benefit of, disqualified person; and
- Certain agreements to make payments of money or property to government officials.

Exceptions to self-dealing:

Compensation or reimbursement to disqualified person that is not excessive;
Providing goods, services, or facilities to disqualified person if made available to general public on at least as favorable a basis AND provision of same is functionally related to foundation's exempt purpose; and
Leasing of property to disqualified person if without charge.

XI. TAXES ON FAILURE TO DISTRIBUTE INCOME -- IRC § 4942, TREAS. REG. 53.4942

Distributable amount = minimum investment return of private foundation reduced by sum of any income taxes and tax on investment income, and increased by (1) amounts received or accrued as repayments of amounts taken into account as qualifying distributions for any tax year, (2) amounts received or accrued from sale or disposition of property to extent that property's acquisition was considered a qualifying disposition for any taxable year, and (3) any amount set aside for specific purpose to extent that amount set aside was not necessary for purpose set aside.

Minimum investment return = 5% of excess of combined FMV of all foundation assets, other than those used or held for use for exempt purposes, over amount of indebtedness incurred to buy these assets.

XII. TAXES ON EXCESS BUSINESS HOLDINGS -- IRC § 4943, TREAS. REG. 53.4943

XIII. TAXES ON INVESTMENTS WHICH JEOPARDIZE CHARITABLE PURPOSE -- IRC § 4944, TREAS. REG. 53.4944

Jeopardizing investment = investment that shows lack of reasonable business care and prudence in providing for long-term and short-term financial needs of foundation for it to carry out its exempt purpose.

XIV. TAXES ON TAXABLE EXPENDITURES -- IRC § 4945, TREAS. REG. 53.4945

Examples of expenditures normally not considered taxable expenditures include:

Expenditures to acquire investments that generate income to be used to further organization's purpose;
Reasonable expenses related to acquiring these investments;
Payment of taxes;
Expenses that qualify as allowable deductions in figuring tax on unrelated business income;
Any payment that is qualifying distribution;
Any deduction allowed in arriving at taxable net investment income;
Reasonable expenditures to evaluate, acquire, modify, and dispose of program-related investments;
and
Business expenses of recipient of program-related investment.

XV. DISQUALIFIED PERSONS -- IRC § 4946, TREAS. REG. 53.4946

All substantial contributors to foundation;

All foundation managers;

Owner of more than 20% of (1) total combined voting power of a corporation, (2) profits' interest of a partnership, or (3) beneficial interest of trust or unincorporated enterprise, which is (during ownership) a substantial contributor to foundation;

Member of family of any of above;

Corporation of which more than 35% of total combined voting power is owned by persons described above;

Partnership of which more than 35% of profits interest is owned by persons described above; or

Trust, estate, or unincorporated enterprise of which more than 35% of beneficial interest is owned by persons described above.

XVI. PRIVATE FOUNDATIONS -- 10 PITFALS

Pledges: satisfying pledge made by disqualified person. Treas. Reg. § 53.4941(d)-2(f)(1).

\$250-and-over substantiation requirement.

Tickets to fundraising events: purchasing such a ticket for a disqualified person ("rubber chicken!"). See PLR 8449008; PLR 9021066.

Disqualified person's purchase at auction.

Terminating CRTs and dividing proceeds between life beneficiary and charitable remainder organization (private foundation) based on respective interests at time of termination. See PLR 200310024; PLR 200314021; PLR 200225092.

"Qualified appreciated stock" to private foundation (generally deductible at cost basis only unless gift is truly "qualified appreciated stock").

IRA gift to private foundation -- 2% excise tax? See PLR 9838028; PLR 9341008. But see PLR 9633006.

Five-year carryover NOT available when lead trust for benefit of private foundation. PLR 8824039.

CLT benefiting private foundation. See PLR 200138018 (road map for avoiding inclusion of lead trust assets in donor's estate where lead trust beneficiary is donor's private foundation -- must relinquish ALL control of CLT).

Reformation to conform to donors' intent that private foundation is allowable remainder organization of CRUT (by trying to remove 170(b)(1)(A) reference to type of charity allowed to receive CRUT remainder).

XVII. TERMINATION OF PRIVATE FOUNDATION STATUS -- EXIT STRATEGIES

See Rev. Rul. 2003-13, 2003-4 IRB 1; Rev. Rul. 2002-28, 2002-20 IRB 94.

XVIII. HELPFUL IRS PUBLICATIONS AND FORMS

XIX. INCOME TAX CHARITABLE DEDUCTION REDUCES COST OF GIFT: ELEMENTARY (ELEMOSYNARY) DEAR WATSON

XX. CHARITABLE DEDUCTION ENABLES DONOR TO MAKE BIGGER GIFT THAN ORIGINALLY PLANNED BY A GIFT OF TAX ADVANTAGE

XXI. "3% REDUCTION RULE"

XXII. AMOUNT OF CONTRIBUTION AND APPLICABLE INCOME TAX CEILING ON DEDUCTION DEPENDS ON TYPE OF GIFT, HOLDING PERIOD, TYPE OF DONEE, AND SOMETIMES ELECTION MADE BY DONOR

[Covered in IRS Pub. 526, "Charitable Contributions": <http://www.irs.gov/pub/irs-pdf/p526.pdf>.]

XXIII. GIFT AND ESTATE TAX CHARITABLE DEDUCTIONS

XXIV. PARTNERSHIPS: IRC § 702(a)(4); IRC § 703(a)(2)(E); TREAS. REG. 1.170A-1(b)(7)

XXV. CORPORATION GIFTS: IRC § 170(b)(2), -(d)(2), AND -(a)(2); TREAS. REG. 1.170A-1(b)(7)

XXVI. GIFT VS. BUSINESS EXPENSE

XXVII. SERVICES

XXVIII. UNREIMBURSED VOLUNTEER EXPENSES

XXIX. AVOIDING CAPITAL GAINS ON GIFT OF APPRECIATED SECURITIES

XXX. GIFT OF PROPERTY HAVING FAIR MARKET VALUE LOWER THAN COST BASIS

XXXI. BARGAIN SALE

XXXII. PLEDGES

XXXIII. GIFT OF UNDIVIDED PORTION OF DONOR'S ENTIRE INTEREST IN PROPERTY: IRC §§ 170(f)(3)(B), 2522(c)(2), 2055(e)(2); TREAS. REG. 1.170A-7(a)

XXXIV. SPLIT-INTEREST CHARITABLE GIFTS

Idea of QTIP/CRUT combination (besides discussion of overview of split-interest techniques from Mr. Teitell's other excellent charitable planning materials, which are also available for attendees of his Salvation Army presentation)

XXXV. SUBSTANTIATING INCOME TAX CHARITABLE DEDUCTIONS

XXXVI. THE APPRAISAL REQUIREMENTS

See Treas. Reg. 1.170A-13(c).

XXXVII. INFORMATION RETURN BY DONEES -- THE "TATTLETALE" RULE

XXXVIII. IRS'S PUBLIC LISTINGS OF TAX-EXEMPT ORGANIZATIONS

XXXIX. JEOPARDIZING TAX-EXEMPT STATUS

XXXX. INUREMENT TO INSIDERS

XXXXI. PRIVATE BENEFIT

XXXXII. INTERMEDIATE SANCTIONS -- IN BRIEF

XXXXIII. EXEMPT ORGANIZATIONS -- LEGISLATION AND ISSUES ON THE HORIZON

Mr. Teitell highlighted the importance of the passage of the CARE Act (HR 7) and encouraged everyone to continue supporting it.

XXXXIV. PRIVATE FOUNDATIONS -- PROPOSED LEGISLATION

XXXXV. ADVANTAGES AND DISADVANTAGES OF PUBLIC CHARITIES, PRIVATE FOUNDATIONS, AND EVERYTHING IN BETWEEN: ACCOMPLISHING CHARITABLE OBJECTIVES, TAX BENEFITS, CONTROL, FAMILY INVOLVEMENT, SIMPLICITY, COMPLEXITY, AND PERSONAL LIABILITY

XXXXVI. CONCLUSION -- THE AMERICAN PHILANTHROPIC TRADITION

Wednesday, January 7, 2004 @ 9:00 AM - 9:45 AM

Charitable Trust Litigation: Enforcing Donor Intent When the Ties That Bind Become Frayed

Howard M. McCue, III

Mayer, Brown, Rowe & Maw

Chicago, Illinois

Mr. McCue delivered a very good and timely session on charitable trust litigation. His materials walk you through the analysis of a charitable trust construction case, beginning with the principles of charitable trust construction and ending with the case's resolution. Some of the most helpful materials are contained in Scott's appendices, which summarize relevant charitable trust case law.

I. INTRODUCTION

II. HOW ARE THESE ISSUES ANALYZED?

A. First Principles.

B. The Role of Donor Intent.

Mr. McCue focused on the primary principle in construing charitable trusts (and mixed charitable and private trusts): "The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is to be given effect to the maximum extent allowed by law" (quoting The Restatement of Property (Wills and Other Donor Transfers)). Donor intent is determined from the text of the trust agreement, together with all relevant evidence.

Mr. McCue stated the "plain meaning rule," which is the traditional majority rule: Extrinsic evidence cannot be introduced to contradict the plain meaning of the words used in a trust. He explained the contrary position of the Restatement of Property, Donative Transfers, which allows extrinsic evidence to inform the text of the donative document. He cited Andrea Cornelison's article, "Dead Men Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule," which traces the history of the plain meaning rule and its exceptions and was published in the American Bar Association Section of Real Property, Probate, and Trust Law's REAL PROPERTY PROBATE & TRUST JOURNAL in 2001.

C. Cy Pres.

Mr. McCue summarized the judicially applied principle of construction known as cy pres. Under the doctrine of cy pres, if property is placed in trust for a designated charitable purpose and that purpose becomes unlawful, impossible, or impractical to carry out, then, unless the terms of the trust provide otherwise, the charitable trust will not fail; rather, a court with proper jurisdiction will direct application of the property (or an appropriate share of such property) to a charitable purpose that nearly approximates the donor's designated purpose. The cy pres doctrine is also sometimes applied where enforcing the donor's designated purpose would result in a wasteful use of the entire charitable trust property. Mr. McCue used the "Hershey" cases to illustrate the principles and application of the cy pres doctrine.

D. Equitable Deviation.

Equitable deviation is another judicial remedy which, like cy pres, allows a court to change a charitable trust's purpose in a trust construction matter. However, unlike the cy pres doctrine, which is limited to cases where the donor's specific charitable purpose cannot be accomplished, equitable deviation has been applied in various cases. Mr. McCue noted that the cy pres doctrine and equitable deviation are often used interchangeably and are difficult to distinguish when reading case law. He used the Barnes Foundation litigation to discuss equitable deviation further.

E. Variance Power.

A "variance" power is sometimes included in trust agreements and allows the trustees to change the trust's terms when the trustees determine that the donor would not desire literal compliance with the terms of the trust agreement due to a substantial change in circumstances. Mr. McCue cited the New York Community Trust's invocation of a variance power to move a gift away from the Community Service Society of New York.

III. STANDING

Mr. McCue outlined the critical aspect of standing in the context of charitable trust litigation.

A. The Charitable Beneficiary.

The charitable trust beneficiary, which has an actual interest in the trust, has standing in all matters involving the construction of a charitable trust. Mr. McCue discussed the case involving the San Francisco Foundation and the Beryl Buck charitable trust.

B. The Attorney General.

Most charitable trust cases have held that the state attorney general also has standing to bring or participate in a construction case. Mr. McCue used the two Connecticut cases of Herzog and Blumenthal to illustrate the ability of a state attorney general in such circumstances.

C. The Donor.

Mr. McCue pointed out that the donor does not always have standing to enforce the charitable gift based on the inconsistent cases on this issue. Mr. McCue contrasted the Herzog and Smithers cases on the issue of a donor's standing. He also recommended that donors make explicit in their gift agreements a retained right to enforce the restrictions placed on a charitable gift.

D. The Donor's Family and Other Representatives of the Donor.

Mr. McCue highlighted the new trend of allowing -- or disallowing -- the donor's family (or other donor representatives) to challenge the use of charitable gifts. Mr. McCue used the Sybill Harrington and Avery Fisher family case involving the Lincoln Center and the New York Philharmonic to illustrate this new trend.

E. Third Parties.

Mr. McCue used the Hershey cases to describe situations where third parties have also sought standing to challenge the administration of charitable funds.

IV. HOW ARE THESE ISSUES RESOLVED?

A. Political Considerations.

Charitable trust cases are inherently political, often involving the attorney general, government officers and officials, lawyers, public charities, and others. Mr. McCue cited the Bishop cases involving the late Princess Bernice Pauahi Bishop, the last surviving member of the Royal Kamehameha (Hawaii) family.

B. Venue.

Mr. McCue underscored the importance of venue which, like political considerations, is very important when the impact of one conclusion may favor citizens of one community over the citizens of another.

C. Sometimes Legal Issues Get Lost.

Mr. McCue analyzed the relegation of legal issues in some of the high-profile cases, such as Hershey and Barnes, where the courts have relied more upon practical (or other) considerations.

D. Compromise Solutions.

As in most multi-party litigation situations, charitable trust disputes often result in compromises. Mr. McCue cited the Buck, Barnes, and Bishop cases to illustrate that these cases are complex multi-party disputes.

V. SOME LEGISLATIVE APPROACHES TO THESE PROBLEMS

A. The Uniform Trust Code.

The Uniform Trust Code (UTC) codifies the cy pres doctrine, grants broad authority to a court to apply the doctrine of equitable deviation, and expressly addresses the issue of standing. The UTC allows a donor to maintain a proceeding to enforce a charitable trust (section 405(c)).

B. The Uniform Management of Institutional Funds Act.

VI. PRACTICAL GUIDANCE IN DRAFTING

A. Recognizing the Practical Issues of Administration.

Mr. McCue urged drafters to articulate the donor's intent with clarity and with sufficient detail to permit the charitable donee and other interested parties to determine what is intended over the period of administration. Mr. McCue cautioned drafting to do anything "in perpetuity," as circumstances change over time.

B. Anticipate Enforcement Issues.

Mr. McCue recommended drafting for enforcement issues, but certainly not as a substitute for clarity as to donor intent. He also noted that providing for an alternative use of the gift property may be appropriate to consider, although that "gift-over" may not be recognized after a certain period of years.

C. Avoid the Predictably Dysfunctional.

Mr. McCue challenged the estate planner to discuss practical issues candidly with clients. He reminded us that we bring the benefit of our training and experience to the table. If a client's dispositive plan will not work, we should challenge the client and urge the client to reconsider the plan. He concluded with the Barnes case as an example of a plan that was impractical from the beginning.

SPECIAL SESSION I-D: charitable trust litigation: enforcing donor intent when the ties that bind become frayed:

Wednesday, January 7, 2004 @ 2:00 PM - 3:30 PM Special Sessions I

Session 1-D: Charitable Trust Administration: Enforcing Donor Intent When the Ties That Bind Become Frayed

Howard M. McCue, III

Mr. McCue's special session centered on a hypothetical case study involving entertainment lawyer

Louis Howe, his third wife Ilsa de Freshlinghoven, and Louis' two children from his first marriage, Hubert and Dewey. Louis had built a mansion home on a 300-acre island in the Florida Keys, where whooping cranes began to migrate. Louis and Ilsa developed a strong affection for the whooping cranes, and Louis decided to make his island a sanctuary and research center to be run by the University of Miami (UM). His sons were concerned about Louis' distraction from his "extraordinarily complex estate plan" that had been designed by a well-known estate planning attorney and would benefit the sons primarily. Louis approaches you and states that he wishes to protect (1) Ilsa, (2) whooping cranes in south Florida, and (3) Hubert and Dewey.

The attendees of the special session had a wonderful and entertaining exchange of ideas as to how to achieve his estate planning goals and how to represent UM. The consensus was that Louis would convey the property to UM during lifetime. The majority of attendees also agreed that a trust would probably not be appropriate here. One attendee suggested consideration of a supporting organization (SO), probably a Type I, to be governed by representatives from three other charitable organizations that are involved in the study of birds and two representatives from the family; however, there were strong concerns against involving Hubert and Dewey because of their lack of interest in Louis' donative intent.

We also discussed a more simplistic outright transfer with a retained life estate. Another attendee mentioned that UM would want the ability to change the use of the donated property if the circumstances changed substantially, e.g., if the whooping cranes decided not to migrate to Louis' island sanctuary. Attendees voicing concerns on behalf of Louis stated that they would want to retain the ability for Louis and/or Ilsa to enforce the agreement.

Then more facts were supplied. Louis decided to negotiate his own agreement with UM, donated the property with a retained life estate (the last-to-die of Ilsa and Louis), and provided a \$20M endowment for the research institute. Louis provided that Ilsa and his sons serve on an advisory committee, but included no alternative "gift-over" of the property to another charitable organization. Later, after Louis' death, the cranes stop coming to the sanctuary and instead migrate to the Everglades. The chair of UM's Department of Biodiversity suggests that the facilities be converted to a research institute for red tilapia, which Ilsa does not like. The President of UM says that the endowment cannot support the research institute and that Ilsa should consider (1) contributing additional funds to continue the study of the whooping cranes or (2) selling the island, adding the proceeds to the endowment, and broadening the focus of the endowment. Ilsa also learns that Hubert and Dewey are proposing that a donor advised fund be created with the proceeds to benefit UM, but shift the focus of the benefit to the UM athletics program (as they are "serious football fans").

The attendees then analyzed the additional facts. We agreed that UM could assert the cy pres doctrine or pursue equitable deviation to devote the property and endowment to another purpose. One of the attendees emphasized that if the property is sold, the proceeds should be used to enforce Louis' specific purpose to study the whooping cranes. Thus, the research institute would need to continue in the Everglades.

One attendee noted that an additional contribution from Ilsa is inconsistent with the gift agreement. Another attendee stated that Ilsa can probably enforce the gift agreement, although Louis should have included language affording standing to her in the gift agreement. Lastly, we agreed that the alternative charitable organization and the "gift-over" probably should have been inserted in the gift agreement.

We concluded that we would recommend a 50-year supporting organization and then allow UM to take the property. The concern is that the family will "blow up" the plan. It is also not realistic to create a perpetual charitable vehicle in these circumstances, given the tenuous status of the whooping cranes.[Reposted from report #8 and reported by john warnick, esq.]

Wednesday, January 7, 2004 @ 9:45 AM - 10:30 AM

The Rules of Engagement: Managing Liability for Nonprofit Boards

Kathryn W. Miree

NOTE: This general session was previously reported on by John Warnick Esq. in Heckerling Report No. 8. Readers are referred to that Report for the details. The follow up Special Session on this topic that was held Wednesday afternoon is reported on below by reporter Jason Havens Esq.

Wednesday, January 7, 2004 @ 3:45 PM - 5:15 PM Special Sessions II

SESSION II-A: The Rules of Engagement: Managing Liability for Nonprofit Boards

Kathryn W. Miree

Kathryn W. Miree & Associates, Inc.

Birmingham, Alabama

Jerry J. McCoy

Attorney at Law

Washington, D.C.

Ms. Miree's and Mr. McCoy's special session also focused on case studies. We reviewed several problems and provided analysis. Following is a summary of those comments.

A. Problem 1:

In the first problem, Knowledge College has lost most of its students and its endowment over the past eight years. Knowledge College is governed by a Board of Trustees, which consists of fifteen prominent individuals, including one who is a president of a more successful college at the other end of the state. The Board has been unable to devise a successful solution to the declining enrollment and the decreasing endowment. At its next meeting, the Board will discuss whether to (a) close the college, sell the campus, and devote the remaining assets to educational purposes; (b) stay the course and keep the college going; or (c) seek a merger partner from among the other colleges in the area.

We discussed that the focus or purpose of Knowledge College is not very strategic as a "small liberal arts college." There is nothing to attract good candidates to the college. The Board needs to spend time refining the college's purpose.

We also questioned the reason for the eight-year decrease in the endowment. The Board could be facing liability, and has seemingly taken no action or even planning to correct this problem. The fact that the college is governed by a Board of Trustees means that the college is probably governed by a trust instrument, which should be analyzed (as the duty of care is generally higher than if the charitable organization were a non-profit corporation).

The main point of discussion centered on the lack of review and planning. Ms. Miree and Mr. McCoy noted that the planning process is crucial, even if the wrong decision is ultimately made. The

fact that no planning or analysis has been done leaves this Board exposed to potential liability.

Mr. McCoy revealed that this hypothetical is based on *Zehner v. Alexander* (Wilson College) (Pa. Surrog. Ct. 1979 -- Judge Keller (citation unavailable)), which took the first option -- to close the college. However, the opposing trustees, faculty/alumni, and students enjoined the closure. Wilson College survived after the injunction and is evidently still running.

B. Problem 2:

In the second problem, the Friendly City Opera Company is encountering financial difficulties. Several large bequests have saved the organization in the past. The Board wants to pursue changes and address the need of a shortage of younger supporters.

We agreed that the Board should pursue a more structured system of planned giving and financial reporting. Other facts illustrated that the Board has not been kept fully informed by the Executive Director. The more structured Board and systems are crucial.

Then Mary Sunshine, an affluent socialite, proposes that she would like to join the Board. However, she does not want to become involved in meetings or functions of the Board. "That's just not [her] thing." Nevertheless, she promises to raise \$1M in a year or else contribute it herself.

We discussed that the Board is justifiably concerned about Mary joining the Board. We concluded that the Board should create an advisory committee so that Mary can participate, but not on a full Board member level. The committee member status would insulate Mary and the Board from potential liability due to her lack of involvement.

Lastly, more facts express that the Board wants to divide its responsibilities among its members. Opponents argue that the Board should instead provide oversight and not simply delegate individual responsibilities to individual Board members. We agreed that the latter approach of providing oversight is the main function of the Board. While committees and subordinate processes can be used effectively, the Board itself must provide oversight and governance when it meets and acts.

Mr. McCoy revealed that this hypothetical is based on the Bishop case and the creation of "fiefdoms." Ms. Miree noted that the Board should function by committees, but it CANNOT shed its ultimate responsibility for making decisions.

C. Problem 3:

In the third problem, which we did not have much time to address, a situation similar to the National United Way case was discussed involving a Chief Executive Officer who had outstanding loans from the organization, advances on trips, and the like. Mr. McCoy noted the private inurement issues and also the oversight responsibilities of the organization. Ms. Miree noted that there was seemingly no fiscal policy in place for the organization.

GENERAL INFORMATION ABOUT INSTITUTE:

Inquiries/Registration:

University of Miami School of Law

P.O. Box 248087

Coral Gables, FL 33124-8087
Telephone: 305-284-4762 / FAX: 305-284-6752
Web site: www.law.miami.edu/heckerling
E-mail: heckerling@law.miami.edu

=====
Headquarters Hotel - Fontainebleau Hilton
4441 Collins Avenue
Miami Beach, FL 33140
Telephone (305) 538-2000, FAX (305) 674-4607
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