NEWS IN THE NEWS: CURRENT ISSUES IN NONPROFIT JOURNALISM

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OVERVIEW

- Why nonprofit news and why now?
- History and evolution of nonprofit news media
- Basic legal issues for section 501(c)(3) nonprofit news organizations
- Complex issues and structures

“It’s amazing that the amount of news that happens in the world every day always just exactly fits the newspaper.”

Jerry Seinfeld
WHY NONPROFIT NEWS AND WHY NOW?

- Trends
- Role of nonprofit news organizations

“We can't quite decide if the world is growing worse, or if the reporters are just working harder.”

The Houghton Line, November 1965
HISTORY & EVOLUTION OF NONPROFIT NEWS

- Revenue Ruling 67-4
- *Big Mama Rag, Inc. v. Commissioner* (1980)
- General Counsel Memorandum 38845 (1982)
- Revenue Procedure 86-43
- Early 2010s IRS review committee for all 1023s from news organizations
HISTORY & EVOLUTION OF NONPROFIT NEWS

- Foundation for National Progress (*Mother Jones*)
- National Public Radio
- Pro Publica
- Investigative News Network
- Journalism That Matters
BASIC LEGAL ISSUES FOR 501(c)(3) NEWS ORGS

- Education as 501(c)(3) activity
- Publishing as “educational” within 501(c)(3)
- Commerciality
- Private benefit
- Funding issues
- Constraints on taking positions
EDUCATION AS A SECTION 501(c)(3) ACTIVITY

- “Educational” within the meaning of Section 501(c)(3) includes “the instruction of the public on subjects useful to the individual and beneficial to the community”
- “May advocate a particular position or viewpoint,” provided that “it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion” and does not constitute the “mere presentation of unsupported opinion”
EDUCATION AS A SECTION 501(c)(3) ACTIVITY

Big Mama Rag, National Alliance, and the IRS’s four-part methodology:

- Viewpoints unsupported by a relevant factual basis?
- Reliance on distorted facts?
- Substantial use of particularly inflammatory and disparaging terms, expressing conclusions based more on strong emotional feelings than objective factual evaluation?
- Approach to a subject matter is aimed at developing an understanding on the part of the addressees, by reflecting consideration of the extent to which they have prior background or training?
PUBLISHING AS AN EXEMPT EDUCATIONAL ACTIVITY

- News organizations may qualify as “charitable” if they further “educational” purposes
- Content and operations must meet four criteria (Rev. Rul. 67-4):
  - Content must be “educational”
  - Method for preparing content must be “educational”
  - Distribution is necessary or useful to accomplish exempt purposes
  - Manner of distribution must differ from commercial publications
PUBLISHING AS AN EXEMPT EDUCATIONAL ACTIVITY

“Educational” content

- Educates the public by adding to the sum total of knowledge on standards of substantive issues of public policy, the arts, and the humanities
- Provides an effective means for the increased diffusion and application of knowledge
- Disseminates information on a particular topic
PUBLISHING AS AN EXEMPT EDUCATIONAL ACTIVITY

“Educational” method of preparation

- Prepared in accordance with methods traditionally accepted as educational
- Provides a factual foundation for a viewpoint or position being advocated
- Provides a development from the relevant facts that would materially aid a listener or reader in a learning process
- Content chosen for educational value rather than commercial or popular mass appeal
PUBLISHING AS AN EXEMPT EDUCATIONAL ACTIVITY

Method of distribution necessary or useful to accomplish exempt purposes

- Use or distribution required to accomplish the organization’s charitable or educational purpose
- Public benefit derived from the distribution
PUBLISHING AS AN EXEMPT EDUCATIONAL ACTIVITY

Versus distribution that does not differ from commercial publications

- Sole activity is publishing, using standard commercial techniques that generate ongoing profits
- Priced competitively with other commercial publications or to return a profit
- Conducts activity in a way in which all participants expect to receive a monetary return
- Publishes materials almost exclusively for sale with only a de minimis amount of materials donated to charity
- Accumulates large profits; accumulates profits from sales in excess of amounts expended for educational purposes
When Is It Too Commercial?

*Pulpit Resource v. Comm’r*, 70 T.C. 594 (1978)

- Intent to make a profit, alone, does not negate operating in a charitable manner
- Lack of competition with commercial enterprise indicates noncommercial nature
- Market was “so limited in scope that it would not attract a truly commercial enterprise”
- All property and funds were dedicated to exempt purposes
WHEN IS IT TOO COMMERCIAL?

*Presbyterian & Reformed Publ’g Co. v. Comm'r*, 79 TC 1070 (1982), *rev'd*, 743 F.2d 148 (3d Cir. 1984)

- Substantial profits alone to not, by themselves, serve as a basis for finding that the organization operated in a commercial manner
UNIQUE PRIVATE BENEFIT ISSUES

- Donor influence
- Editorial independence
FUNDING

Sources of Revenue
- Grants, donations
- Subscriptions
- Sponsorships
- Licensing
- Advertising
- Investments

Challenges:
- Public support test - 509(a)(1) v. 509(a)(2)
- Commerciality
- Unrelated business income

“News is something someone wants suppressed. Everything else is just advertising.”
Grace Kelly
CONSTRAINTS ON TAKING POSITIONS

Restrictions on lobbying and political campaign intervention under Section 501(c)(3) apply

- May not engage in more than an insubstantial amount of lobbying
- Strict prohibition on any political campaign intervention

“As a journalist, one tends to think there’s nothing off limits.”
Peter Jennings
CONSTRAINTS ON TAKING POSITIONS

Practical considerations

Potentially problematic content:

- Editorials
- Advertising
- Social media
- User-generated content
COMPLEX LEGAL ISSUES

- Funding issues
- Conversion from for-profit to nonprofit
- Commercial newspapers as taxable subsidiaries of 501(c)(3) entities
FUNDING ISSUES

- Grants from (c)(3) funders to for-profit news entities
- Contracts for services
- Program-related investments
- Joint ventures
- Donor advised funds
- Gift acceptance policies
- Examples
CONVERTING FROM FOR-PROFIT TO NONPROFIT

- IRC Section 337 issues
- Conversion options
  - Asset transfer
  - Merger with 501(c)(3) organization as surviving entity
  - Conversion in place
Taxable Subsidiaries of 501(c)(3) Entities

- **St. Petersburg Times / Poynter Institute for Media Studies**
  - The Poynter Institute is a school described under section 501(c)(3) that teaches and inspires journalists and media leaders.
  - The Poynter Institute owns 100% of the stock of a taxable corporation that controls a number of news organizations, including the *St. Petersburg Times*, which accept advertising and subscriptions.

- **Philadelphia Inquirer / Lenfest Institute**
THE PHILADELPHIA EXPERIMENT

In 2015, sole owner (in his 80s) of *Philadelphia Inquirer*, a for-profit daily newspaper established in 1829, sought to:

- Ensure that public interest journalism, so important to the local community, would be sustained into the future
- Use philanthropy to support local journalism, including at for-profit newspapers
- Have ownership of the newspaper put in the hands of the community
- Support the transition of printed newspaper to digital
THE PHILADELPHIA EXPERIMENT

The Solution:

- Formation of new independent charitable entity to which sole owner would transfer the stock of the for-profit newspaper
  - Conversion to a section 501(c)(3) tax-exempt organization was not a possibility
  - Board of charity comprised of community members, including experts in journalism, such as deans of various schools of journalism

- Purpose of new charitable entity includes providing support for local journalism and transition of newspaper to digital journalism
THE PHILADELPHIA EXPERIMENT

The Solution: *(continued)*

- Creation of significant endowment by sole owner to support new charitable entity and implementation of development team
- Conversion of newspaper to a Delaware public benefit corporation
Public Charity versus Private Foundation:

- Significant funds coming from one individual, raising private foundation status issues:
  - Section 4943 Excess Business Holdings (pre-“Newman’s Own Exception”)
  - Section 4942 Qualifying Distribution Requirements (including on value of newspaper, which is substantial)
  - Expenditure responsibility issues for grants to for-profit newspapers

**Conclusion:** Charitable entity to hold newspaper must be a public charity, not a private foundation
How to Make Charitable Entity a “Public Charity”?

Preliminary alternatives considered:

- Section 509(a)(3) supporting organization
- Educational organization under Section 170(b)(1)(A)(ii)
- Holding endowment in a restricted fund at Section 170(b)(1)(A)(vi) organization
THE PHILADELPHIA EXPERIMENT

Ultimate Structure Utilized:

- Partnership with local community foundation Type I supporting organization ("SO") already in existence (financial support not relevant to public charity status)
- Formation of single member limited liability company ("SMLLC") owned and controlled by Type I SO
- SMLLC is a disregarded entity – considered to be one and the same as Type I SO for federal tax purposes (IRS Notice 2012-52)
The Philadelphia Experiment

Ultimate Structure Utilized: (continued)

- Certificate of Formation and Operating Agreement of SMLLC closely resemble articles of incorporation and bylaws of a section 501(c)(3) tax-exempt organization
- Board of Managers of SMLLC appointed
- Sole owner of newspaper contributes all stock of newspaper and endowment fund to SMLLC pursuant to gift agreement