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Nonprofit *Alert*®

Alerting nonprofit leaders to key legal developments and responsive risk management steps.

Inside This Issue:

Disability Settlement with AOL

Does ADA Cover Web Sites?

The National Federation of the Blind has agreed to drop the lawsuit it filed last fall against America Online (AOL), tabling for the moment the question of whether such Internet activities are subject to the Americans With Disabilities Act (ADA).

The lawsuit alleged that AOL's software was inaccessible to blind users because its icons and graphics could not be translated into Braille. (*NPA*, Mar.'00). The dispute was seen as a test case for many other web sites that are inaccessible to disabled users because of translation problems that occur with web browsers known as screen access programs. These programs transform screen text into speech or Braille for blind users.

Internet sites, such as AOL, that rely heavily on graphics and incorporate exclusive icons cannot be entirely or easily translated. The lawsuit claimed AOL, because of its worldwide reach, was a public accommodation subject to ADA requirements.

If that argument prevails, all web sites that contain novel graphics or icons may need to comply with the ADA. As part of the settlement, AOL agreed to design its next version of software (due for release this fall) with disabled users in mind. AOL also promised to make its software compatible with programs for the visually impaired and says it will adopt guidelines for making future products accessible to the disabled.

➤**Still unresolved is the question of whether the ADA applies to web sites. The Justice Department has said it does, but no formal legislative or judicial guidance has been issued. If you operate a web site, keep these issues in mind.**

Saving Face: Charity Exec Resigns Over Cosmetic Costs

Catholic Charities of the Archdiocese of San Francisco has accepted the resignation of its CEO after embarrassing disclosures hit local newspapers revealing he had used charity funds to pay for his own "Botox" anti-wrinkle injections and laser hair removal.

The charity released an internal report showing the executive spent $73,000 over the past two years on cosmetic procedures and entertainment, including an average of $500 per week on meals at lavish restaurants in San Francisco. Much of the spending was approved by the executive's personal assistant instead of the board of directors, as the charity's internal procedures required. The board acted quickly to replace the exec and to establish better internal controls and oversight.

➤**Proper accounting controls and meaningful staff/board accountability procedures could largely eliminate these embarrassing abuses. Put proper controls in place, then enforce them without exception. Nonprofit *Alert*® Memos, *Accounting and Fiduciary Guidelines for Nonprofits,* and *Converting Your Annual Audit Into Vital Risk Management,* can help. Turn to the back page to order both memos from Gammon & Grange, P.C.**

★★★ Political Platforms Address Faith-Based Groups ★★★

Both the Republican and Democratic party platforms pay homage to faith-based social service groups. The Republican platform pledges to "aid and encourage the work of charitable and faith-based organizations," while the Democratic platform says "partnerships with faith-based organizations should augment—not replace—government programs..." Read more at http://gopconvention.com. and www.dems2000.com.

Liability & Risk Management

Church Copyright Dispute: A Legacy of Litigation

Doubtless, the Swami monk Yogananda didn't expect his fervent religious followers would fight over who owns copyright to his writings, but a vow of poverty and an assignment of rights he made in 1935 set the stage for an unexpected legal battle that has ensued almost 50 years after his death. The Self Realization Church ("SRC"), founded by the monk, claimed copyright to his books, magazine articles, lectures, and recordings. Many years later, a rival group broke away from the church and began publishing some of the same materials. The SRC filed a copyright infringement action, claiming it owned the copyrights under either the "work for hire" doctrine or under the monk's 1935 assignment of rights. The Ninth Circuit Court of Appeals dismissed the "work for hire" argument, finding that Yogananda wasn't induced by the church to produce his works. The works were a self-expression and lacked any hierarchical relationship to the church, the court said. However, the court upheld the assignment of rights, but remanded the case to a lower court for additional findings of fact regarding the monk's intent. *Self Realization Fellowship Church v. Ananda Church of Self Realization,* 2000 U.S. App. LEXIS (9th Cir., 2000).

Many nonprofits created since WWII are about to face similar challenges. Founded by prolific visionaries and dependant on the video, audio, and print recordings of their leaders, these nonprofits probably don't have clear copyright ownership of such, nor have they secured the separate and vital right of publicity (*i.e.* right to use the author's name or likeness). Now is the time to review your intellectual property, and if there's any uncertainty regarding the rights to that property, contact Nancy LeSourd who heads up the intellectual property practice at Gammon & Grange.

Employer Not Liable for "Road Rage" Accident

Plaintiff Nichols was stabbed by tractor trailer driver Gonzalez, after both drivers stopped at a red light, following a prolonged distance of aggressive driving. According to the court record, Gonzalez was driving recklessly behind Nichols and attempted to pass several times in a no-passing zone. He continued following Nichols at an unsafe distance, and Nichols responded with an obscene gesture. When the two stopped, Gonzalez jumped out of his tractor tailor and attacked Nichols with a metal cable, then stabbed him with a knife. Gonzalez was later convicted of aggravated assault. Nichols brought suit against the trucking company, Land Transport, for whom Gonzalez was working at the time of the assault. Nichols claimed the company was vicariously liable for Gonzalez's behavior and sued for damages. The court ruled that Gonzalez wasn't acting within the scope of his employment, which relieved the company of liability. On appeal, the First Circuit agreed, finding that Gonzalez was not "motivated by a purpose to serve Land Transport when he fought and stabbed Nichols" and therefore was not within the scope of his employment. *Nichols v. Land Transport Co.*, No. 99-2375 (1st Cir. 8/16/00).

"The fact that the servant...inflicts a punishment out of all proportion to the necessities of his master's business is evidence indicating that the servant has departed from the scope of employment in performing the act," the court wrote. Nonprofit *Alert*® Memo, *Minimizing Liability in the Employment Process,* discusses how to manage vicarious liability issues in your nonprofit workplace. See back page to order.

Employees & Volunteers

Outraged & Overrated: Employee Cries Retaliation

Sometimes you just can't win. After fighting an EEO charge filed by a dissatisfied employee, a company instructed the employee's supervisor to give him only good performance evaluations so the company could avoid any more EEO complaints from that employee. The employee then filed a discrimination charge, claiming the company retaliated by overrating his performance evaluation! A lower court agreed with the employee, but the Seventh Circuit Court of Appeals said nonsense. Overrating an employee's performance does not amount to an adverse employment action under Title VII, regardless of whether the overrating is accurate or not, the court ruled. The employee claimed the overrating purposefully kept him out of a performance improvement program designed to help marginal employees strengthen their work skills. The court noted, however, that the company provided a personalized training and guidance program for him instead. *Cullom v. Brown*, 209 F.3d 1035 (7th Cir. 2000).

Although this case ended favorably for the employer, this is *not* a recommended approach. Besides lacking integrity, overrating a troublesome employee in the hopes of pacifying him seriously weakens an employer's legal position if the employee is eventually terminated. Better to be truthful, document everything, and offer help to a struggling employee, then consult legal counsel to evaluate termination or other options.

Defamation Arises From Negative Recommendations

A professor at Radford University in Virginia is suing several of his co-workers for defamation arising from negative recommendations they gave about him to a tenure review committee, which resulted in the committee's denial of tenure. A lower court ruled that the recommendations were "absolute privileged communications"

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because they occurred between faculty members and, thus, were not subject to a defamation claim. But the Virginia Supreme Court overturned the ruling, finding instead that the privilege was not "absolute" but "qualified." Absolute communications are protected no matter what, but a qualified communication may lose protection if it is abused, such as when statements are communicated to a third party with no duty or legal interest in the subject matter. The supreme court then remanded the case to the lower court for a finding as to whether any abuse of the qualified privileged communications occurred through actual malice. *Larrimore v. Blaylock*, (VA 2000).

Because privileged communications may loose their protected status if they're not handled appropriately, it is extremely important to limit the people who are informed about sensitive personnel issues. Only those who play a role in the personnel action should be involved. These kinds of defamation suits have led some employers to adopt a "neutral referral policy" in responding to reference requests on former employees. Learn more with Nonprofit *Alert*® Memo, *Developing a Defamation Policy.* See ordering info on back page.

Paid Leave Now Possible for New Parents

New labor regulations that went into effect last month allow states to pay parents with state unemployment compensation funds for time off after the birth or adoption of a baby. The regulations don't make the payments mandatory, they just permit states to implement such policies if they choose. But industry groups object, saying the new benefits will cost employers too much money—as much as $28 billion annually, by some estimates. They argue that states will have to raise unemployment taxes on employers just to cover the cost of the new benefit or risk depleting their unemployment compensation coffers within three years or less. These industry groups challenge whether the Department of Labor exceeded its authority in issuing the new regs. CFR Part 604, 65 Fed.Reg. 37209 (6/13/00).

Several states are currently considering paid leave for new parents, including California, Florida, Illinois, Indiana, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New York, and Pennsylvania. But legal experts question whether the new regs will withstand expected court challenges.

Tax-Exempt Issues

Be Our Guest: IRS Okays Foundation Lodge

A private operating foundation may build a guest house on the grounds of its conference facilities without endangering its exempt status or encountering any other adverse tax problems. The IRS determined the guest house will further the foundation's exempt purposes. The foundation operates a conference center and co-sponsors various events at the center with other nonprofits and foundations that advance the greater public good. The conference center is never used by corporate or commercial entities. The guest house will accommodate conference attendees, who presently stay in motels located several miles from the conference center. The foundation will charge a rooming fee for the use of its guest house, but only conference attendees will be allowed to stay there. Because the guest house would be interrelated to the foundation's purpose, the IRS said its construction presented no adverse tax consequences.

NPA Highlight of the Month

Proposed Legislation Addresses Donor Advised Funds

Donor advised funds (DAFs) are popular tools of charitable giving, which allow donors to make a gift of assets to a fund maintained by a public charity (such as a community foundation or a university), then take an immediate tax deduction, and thereafter recommend periodic distributions of assets from the fund to other charities or charitable activities. DAFs's have been around since the 1930's, but they were given a boost in 1987 with the U.S. Claims Court decision in the National Foundation case authorizing DAFs. 13 CL Ct. 486 (1987). Still, they're only loosely governed by Treasury regulations. Nothing in the Internal Revenue Code even expressly defines DAFSs. With their growing popularity, much confusion has resulted in recent years about the informal guidelines that the IRS, DAF managers, and many practitioners have used and the lack of uniform legal standards governing DAFs. The Council on Foundations last year raised the issue of drafting much-needed legislation to cover these popular giving vehicles. Earlier this year, Treasury for the first time proposed legislation addressing DAFs as part of the President's budget plan. A working group of charity officials, in consultation with congressional staff, treasury officials and other charity officials have now crafted proposed legislation and is soliciting comments. The draft proposes to: 1) amend the tax code by adding a new subsection that defines DAFs and other related terms; 2) impose an excise tax on charities that under-distribute grants from DAFs similar to the 5% distribution requirement currently imposed on private foundations; and 3) impose an excise tax on disqualified persons who participate in prohibited transactions through DAFSs such as self dealing

To read the proposed legislation in its entirety or to comment on the proposal, contact the DAF Working Group, c/o Victoria B. Bjorklund, (212) 455-2875 or Fred Goldberg (202) 371-7110. To learn more about DAFSs, refer to Nonprofit *Alert*® Memo, *Avoiding the Pitfalls of Donor-Designated Gifts.*

Local Solicitation Law Bound for More Litigation

The Eleventh Circuit Court of Appeals has overturned a lower court ruling and has allowed a coalition of national charities and fundraising consultants to continue their challenge against a Pinellas County, Fla., charitable solicitation law. The law requires consultants to register with the county if any of their clients make fundraising appeals to county residents. Plaintiffs claim the ordinance violates the First and Fourteenth Amendments and the Commerce Clause. The case has been pending since 1998, when a lower court decreed that none of the plaintiffs had standing to bring the case, since the county had not acted to enforce the ordinance against them as yet. But the appeals court said the plaintiffs "offered sufficient evidence of a threat of enforcement," and sent the case back to the district court to determine whether plaintiffs maintained sufficient contacts in the county to subject them to the ordinance. *American Charities for Reasonable Fundraising Regulation v. Pinellas County*, No. 99-10945 (11th Cir., 8/10/00).

Last month, Nonprofit *Alert*® reported on a similar challenge in Jefferson County, Kentucky. In addition to registration, that ordinance requires personal information about nonprofit officers and executives, including social security numbers and home addresses. Nonprofit *Alert*® will follow these cases closely since the outcome could mean a giant step backward in the efforts of state regulators to simplify charitable solicitation regulations.

Worthy Investment Avoids Self-Dealing Penalties

The IRS has allowed a private foundation to convert some of its assets from two common trust funds into mutual funds, then terminate the common trust funds. A national bank served as trustee for the foundation's trusts and maintained the accounts purely for the foundation's investment purposes. A banking association acted as custodian of the funds. The foundation paid fees to both organizations for their services. The IRS said the conversion of assets would not trigger the self dealing prohibitions of the tax code. The IRS also said the fees paid to the banking organizations were permissible as well. IRS LTR 200023051.

State Rules & Regs

Frequent Fundraisers: Massachusetts Revises Taxes

The Massachusetts Department of Revenue has revised the state sales tax exemptions to provide that sales made for fundraising purposes are presumed to be casual and isolated sales, regardless of the number of events held during a calendar year, unless such sales are made in the ordinary course of the seller's business. Previously, the tax code contained frequency and duration standards for determining whether a fundraising sale was tax exempt. 830 CMR 64H.6.1.

Tax Credit Standards Change for EO's in Michigan

Effective immediately, exempt organizations must meet new standards in order for their donors to claim income tax credits for their contributions. The law now requires organizations to be in existence for at least six months, have an endowment value of at least $100,000 within 18 months of being founded, operate with an independent governing body, and employ at least one part-time or full-time employee. The new requirements were signed into law in June. MI S.B. 796.

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