



Tuesday, October 20
11:00 am–12:30 pm

806 Sizzling Hot Topics for Nonprofit Attorneys

Thomas Dorer
General Counsel and Secretary
University of Hartford

GJ Stillson MacDonnell
Shareholder
Littler Mendelson

Jonathan J. Oviatt
Chief Legal Officer and Secretary
Mayo Clinic

James A. Woehlke
General Counsel
New York State Society of Certified Public Accountants

Faculty Biographies

Thomas Dorer

Thomas Dorer is general counsel and secretary at the University of Hartford in Hartford, Connecticut.

Previously, he served as general counsel at West Virginia University; associate counsel at the University of Massachusetts; an associate attorney at the law firm of Dow, Lohnes & Albertson; and law clerk to the Hon. Anne E. Thompson, US District Court for the District of New Jersey. Mr. Dorer also worked in university administration at Brown University and Ohio University prior to attending law school.

Mr. Dorer is a member and volunteer with the National Association of College and University Attorneys.

He received his JD from the University of California, Berkeley, an EdM from Harvard University, and a BA from Brown University.

GJ Stillson MacDonnell

GJ Stillson MacDonnell is a shareholder and chair of the employment taxes practice group of Littler Mendelson, San Francisco. Littler Mendelson is a national management employment and labor law firm. Ms. MacDonnell represents and advises all types of organizations regarding payroll and employment (state and federal audits), benefits, independent contractor, visa-related and litigation settlement tax issues.

Prior to joining Littler, Ms. MacDonnell was in private practice in Connecticut and served as pension counsel for a major Hartford insurer.

Ms. MacDonnell has provided pro bono services to various bar associations, federally chartered credit union and non-profit organizations in California and Connecticut. Ms. MacDonnell has been member of and chaired several government commissions. Most recently, Ms. MacDonnell served as chair of the employment tax committee, tax section of the ABA and is currently a board member of tax section of BASF. Ms. MacDonnell has written extensively on legal issues including most recently writing, as a chapter author, ABA publication: Effectively Representing Your Client Before the IRS (4th Edition, 2009). Ms. MacDonnell was honored as a Life Fellow of The American Bar Foundation (2007).

Ms. MacDonnell is a graduate of the University of Connecticut, School of Law.

Jonathan J. Oviatt

Jonathan J. Oviatt is chief legal officer and corporate secretary of Mayo Clinic in Rochester, Minnesota. Mayo Clinic is an academic medical center with national and international programs in clinical practice, medical education, and medical research. Mr. Oviatt's responsibilities include the legal department, compliance office, and other administrative functions.

Prior to joining Mayo Clinic, Mr. Oviatt was a shareholder in the Minneapolis office of Moss & Barnett, P.A. He also served on the Congressional staff and campaign staff of US Senator Larry Pressler.

Mr. Oviatt is vice chair of the in-house practice group of the American Health Lawyers Association; director of ACC; past chair of the Council of Attorneys of the American Medical Group Association; past director and officer of the Minnesota State Bar Association Section on Health Law; past director of Legal Advice Clinics, Ltd.; past president of Olmsted County Legal Assistance; past director and secretary of Integrative Therapies Foundation; and former chancellor of the United Methodist Church—Minnesota Conference.

Mr. Oviatt received his JD from the University of Minnesota and his BA from Augustana College.


James A. Woehlke

James A. Woehlke is general counsel of The New York State Society of CPAs and the Foundation for Accounting Education, Inc.

He has been with the NYSSCPA as general counsel, legal counsel, technical services director, and tax policy director. Previously, Mr. Woehlke was a technical manager in the AICPA's Tax Division, practiced public accounting with KMG/Main Hurdman, including one year with that firm's Washington national tax office, and law with the Wichita, Kansas, law firm of Fleeson, Goings, Coulson & Kitch.

He chairs ACC's Nonprofit Organizations Committee, having also previously chaired it and is currently treasurer of ACC America's Greater New York Chapter. He is serving his second term on the ASAE Legal Section Counsel and was a member of the New York City Bar Association's Nonprofit Organizations Committee. He holds the Certified Association Executive designation offered by the American Society of Association Executives.

Mr. Woehlke received his Master of Law, with distinction, from Georgetown University Law Center, his JD and MBA from Drake University and his BA from Grove City College, where he graduated cum laude.




Sizzling Hot Nonprofit Topics: Intro

- Tightening Regulatory Environment and Fiscal Hardships
- Institutional Investments – Due Diligence
- Endowments and UPMIFA
- Additional Accounting and Auditing Issues
- Fundraising: Charity Rating Agencies

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!




Sizzling Hot Nonprofit Topics: Intro

- Research-related and Fed'l Contracting Issues
- Copyright Issues
- IRS Form 990
- Boards: Best Practices
- Philanthropy: Challenges of Fundraising
- Employment and Labor Law Issues

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!



Sizzling Hot Nonprofit Topics: Tightening Regulatory Environment and Fiscal Hardships

- Doing more . . . With less
- While under increased scrutiny and regulation
 - Coordinated state scrutiny re employment laws
 - Revised 990
 - Cross-border regulation by states
- Economic conditions raising litigation risks

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

**Sizzling Hot Nonprofit Topics:
Institutional Investing / Due Diligence**

- Charitable Orgs as Madoff Victims
- Reminder of need for heightened due diligence
- Board responsibilities
 - Manage assets prudently
 - Due diligence in selecting investment advisors
- Madoff errors:
 - Checking Madoff's *bona fides* and concentrating investments
 - CT AG activity

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

**Sizzling Hot Nonprofit Topics:
Institutional Investing / Due Diligence**

- Seduction by Madoff led to criticism of nonprofit boards
- Reasons:
 - Failure to check investment vehicle *bona fides*
 - Allocating too much to a single vehicle
- Looking forward, boards should examine
 - Anomalies and deviation from normal investment results
 - Controls funds have in place, for example unknown auditing firm

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

**Sizzling Hot Nonprofit Topics:
Endowments and UPMIFA**

- Recommended by Uniform Law Commission in 2006.
- Now passed in 42 states with 5 more in wings
- Replaces UMIFA / Improvements include
 - More guidance on prudent management of assets
 - New standards for delegation of investment authority
 - More authority for courts to modify endowment terms

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Endowments and UPMIFA

- UPMIFA's improvements include
 - Permits small (<\$25K) and old (>20 years) endowments to be modified without court action
 - Increases expenditure flexibility
- NOTE: UPMIFA like all uniform laws may vary from state to state and is subject to state-based interpretation
 - EX : CT does not permit small fund modification without court action

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Endowments and UPMIFA

- UPMIFA and Expenditure of Funds
 - UMIFA imposed restrictions when funds were below "historic dollar value" . . . "underwater funds"
 - These funds limited to disbursing current income
- UPMIFA replaces HDV with 7-factor approach that balances competing goals of
 - Expending funds and
 - Growing assets

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Endowments and UPMIFA

- UPMIFA's Seven Factors
 1. the duration and preservation of the endowment fund
 2. the purposes of the institution and the endowment fund
 3. general economic conditions
 4. the possible effect of inflation on deflation
 5. the expected total return from income and the appreciation of investments
 6. other resources of the institution
 7. the investment policy of the institution

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Endowments and UPMIFA

- UPMIFA
 - Does not permit unchecked depletion of funds, but does permit reaction to short-term changes in investments
 - Does not require under water funds to be restored to original value; expenditures above current income are permitted from under water funds

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Endowments and UPMIFA

- UPMIFA and FASB Staff Position No. 117-1
 - Fund losses are not charged to “permanently restricted assets”
 - If “above” water, charged to temporarily restricted assets
 - If “under” water, charged to unrestricted assets
 - Caveat: A charge of losses to unrestricted assets could cause an organization to violate covenants associated with bond issuances and letters of credit. An April 2009 Moody’s report doubted this would adversely affect credit rating, however.

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Endowments and UPMIFA

- FSB 117-1 New Disclosure Requirements Regardless of UPMIFA Applicability
 - Describe the governing board’s interpretation of the law on which its net asset classification of donor-restricted asset funds is based
 - Describe Board’s policy for appropriation of endowment funds for expenditure
 - Describe Board’s endowment investment policy
 - State the composition of its endowment by net asset class
 - Provide a reconciliation of the beginning and ending balance of its endowment in total and by net asset class

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Additional A & A Items

- Accounting Standards Codification – 168 is the Final FAS Statement
- Migration to International Financial Reporting Standards – IFRS
 - www.ifrs.com
 - AICPA recognized the International Accounting Standards Board as an “authoritative” standard setter.
 - FASB and IASB set 2011 as goal for convergence of standards

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Additional A & A Items

- FAS Interpretation Number – FIN – 48
 - Originally issued to be effective in 2006
 - For nonpublic and nonprofit organizations twice delayed. Effective for fiscal years beginning after 12/15/2008.
 - Public comment requested exclusion for nonpublic and nonprofit entities – FASB has twice said no
 - Accounting Standards Update No. 2009-06, issued Sept 2009, has latest guidance

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Additional A & A Items

- FIN 48 Requires Two-Step Process
 - Determine if “recognition threshold” is met that requires disclosure of material uncertain tax positions
 - If met, measure the uncertain tax positions
- Recognition standard
 - “More likely than not” to be sustained
 - May not take “audit lottery” into effect
 - Positions failing to meet standard are “derecognized”, i.e. tax computed with interest and penalties

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Additional A & A Items

- Tax Positions Include
 - Classifying a transaction, entity, or other position as tax exempt
 - Allocating or shifting income between jurisdictions
 - Excluding taxable income from the tax return
 - Not filing a required tax return

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Research/Federal Contracting Issues

- E-Verify
 - Federal on-line system used to verify ability to work in US
 - Became effective September 8th
 - All current and new employees working on federal contracts and all new employees regardless of work on federal contract must be "e-verified"

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Research/Federal Contracting Issues

- E-Verify: Covered Transactions: Fed'l Contracts
 - are governed by the Federal Acquisition Regulations
 - have a term of performance of at least 120 days
 - are valued above \$100,000
 - are performed in the U.S.

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

**Sizzling Hot Nonprofit Topics:
Research/Federal Contracting Issues**

- E-Verify: Exempted Transactions
 - commercially-available off-the-shelf items
 - bulk cargo
 - grants to universities
- Certain Contractors Must Only E-verify for New Hires (Not All Employees Working on Contract)
 - colleges and universities
 - state and local governments
 - federally recognized Indian tribes
 - sureties

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

**Sizzling Hot Nonprofit Topics:
Research/Federal Contracting Issues**

- E-Verify – Additional Issues
 - Past problems with “false negatives”
 - Homeland Security says system is improved
 - Some states require e-verification of employees beyond those required by federal law

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

**Sizzling Hot Nonprofit Topics:
Copyright Issues**

- Copyright Fallacies
 - No one can copy my idea, it's copyrighted
 - Copyright only protects works of art, like books, movies and music
 - We're a nonprofit, so it's fair use
 - I'm making these copies to teach a class, so it's fair use
 - I'm not charging for these copies, so it's OK

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Copyright Issues

- Copyright Fallacies
 - I found it on the internet, so I'm free to copy it
 - There's no copyright notice on it, so there's no copyright protection
 - This is really old, the copyright must have expired
 - I created it, I own it
 - I bought the CD, so I can play the music it at my company event or incorporate it into my PowerPoint® presentation

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: IRS Form 990

- Form 990 Significantly Revised
- Board Management Questions
 - Independence of voting board members
 - total number
 - number who are independent
 - relationships between officers, directors and key employees
 - minutes taken at board and board committee meetings?
 - Does Board receive a copy of Form 990 before it is filed?
 - What is process for review of Form 990?

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: IRS Form 990

- Board Management Questions
 - Existence of a written conflict of interest policy?
 - Officers, directors, and key employees required to disclose each year interests that could give rise to conflicts?
 - Monitoring and enforcement of conflict of interest policy.

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: IRS Form 990

- Other policies
 - Written whistleblower policy
 - Written document retention and destruction policy
 - Follow rebuttable presumption procedures
 - Invest in a joint venture with a taxable entity
 - Make Form 1023 available
 - Make governing documents, policies, and financials available?

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: IRS Form 990

- Compensation Reporting and Related Processes
 - Who gets how much, and who decides?
 - Compensation information: Part VII of Core Form and Schedule J
 - Process of setting compensation
 - Schedule J:
 - Fringe benefits: first-class or charter travel; companion travel; tax indemnifications and gross-ups; discretionary accounts; housing; payments for business use of personal residence; club dues; and personal services
 - Severance or change in control payments
 - Supplemental nonqualified deferred compensation

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: IRS Form 990

- Best Practices
 - Gap analysis regarding required policies and reporting requirements
 - Update compensation approval procedures
 - Update bookkeeping and information gathering to systematically produce all required information
 - Develop relevant summary of Form 990 for Board
 - Monitor current “open issues”
 - Schedule R: Related Organization Reporting

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Fund-raising Challenges & Opportunities

- Donor-Advised Funds and Donor Initiated Fund Raising
- Pledge & Gift Agreement Issues

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Employment and Labor Law Issues

- IRS National Research Project
 - Comprehensive employment tax audits for up to 2,000 employers beginning November 2009
 - Audits will review
 - Worker classification
 - Fringe benefits
 - Reimbursed expenses
 - Compensation of owner employees.

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Employment and Labor Law Issues

- IRS National Research Project: Action items
 - Designate an internal point person and support team
 - Prescreen potential employment tax issues

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Employment and Labor Law Issues

- Independent Contractor
 - Issue both for IRS and state taxing authorities
 - Tests of independent contractor status are inconsistent from state to state and not consistent with federal tests
 - Evaluate independent contractor status
 - Before it starts
 - During the relationship **AND**
 - As the relationship terminates

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Employment and Labor Law Issues

- Independent Contractor
 - GJ's Golden Rules
 - Never engage a former employee as a contractor.
 - Never be a contractor's first customer.
 - Never engage someone as a contractor who is/has been employed anywhere within the last 18 months.
 - Never engage someone as a contractor who will do the same work / under similar conditions as employees.
 - Never convert a contractor to an employee.

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!


ACC Association of Corporate Counsel

Sizzling Hot Nonprofit Topics: Employment and Labor Law Issues

- Independent Contractor: Action Items
 - Review how organization determines independent contractor status under various state and federal laws
 - Adopt a pre-engagement and follow-up evaluations process to determine appropriate status
 - Designate a compliance czar with resources to review and monitor use of contractors and consultants.


2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

 **Sizzling Hot Nonprofit Topics:
Employment and Labor Law Issues**


- State Unemployment Contribution Method
 - Nonprofits and government employers have two choices
 - “Pay as you go”
 - Direct reimbursement method
 - Action items
 - Review current unemployment insurance coverage
 - Evaluate appropriateness of a change in method

2009 Annual Meeting
October 18-21 Boston *Don't just survive. Thrive!*

 **Sizzling Hot Nonprofit Topics:
Employment and Labor Law Issues**


- IRC §3402(t) – originally required payments by federal government contractors for goods or services to become subject to 3% federal income tax withholding after 12/31/10.
- Now delayed until after 12/31/11
- Movement to repeal

2009 Annual Meeting
October 18-21 Boston *Don't just survive. Thrive!*

 **Sizzling Hot Nonprofit Topics:
Employment and Labor Law Issues**

- Adjusting Workforce: RIFs, Furloughs, Pay Adjustments
 - Peaked Winter 2009
 - In these decisions, very important to keep objective criteria nondiscriminatory
- Action Items
 - Review to ensure decisions are based on nondiscriminatory basis under state/federal laws
 - Maintain documentation for decisions

2009 Annual Meeting
October 18-21 Boston *Don't just survive. Thrive!*



**Sizzling Hot Nonprofit Topics:
Employment and Labor Law Issues**

- 403(b) Documents: Action items
 - Review status of organization compliance with final 403(b) regulation, if organization maintains such plan
 - Arrange for adoption or updating of plan document, with any necessary Board/Trustee approval, prior to 2010.

2009 Annual Meeting
October 18-21 Boston

Don't just survive. Thrive!

Sizzling Hot Topics for Nonprofit Attorneys
ACC 2009 Annual Meeting
Session 806

I. Introduction – Tightening Enforcement Environment and Fiscal Hardships for Nonprofits

- A. Nonprofit organizations are being asked to do more – e.g., serving increasing numbers of financially distressed persons and communities; filling in the gaps caused by shrinking governmental programs.
- B. Simultaneously, nonprofits are themselves under increasing challenges. Fundraising, endowments and governmental support are impacted by the economic downturn; public confidence in nonprofits continues to erode among some; and governmental agencies are increasing enforcement efforts.
- C. Examples of increased governmental scrutiny include
 - 1. States are coordinating enforcement actions among all employers, including nonprofits, in such areas as payroll taxes (e.g., independent contractor versus employee) and Fair Labor Standards Act enforcement.
 - 2. The IRS has greatly expanded its review of nonprofit governance through the revised Form 990.
 - 3. States continue to reach beyond their borders to regulate or otherwise attempt to control entities nationally based on relatively slim transactional connections.
- D. General economic conditions also increase the risk that nonprofits will face legal challenges.
 - 1. For example, economic layoffs, other fiscally protective employment measures and general employee uncertainty can lead to an increase in lawsuits and complaints to enforcement agencies.
- E. Most of the topics covered in this outline relate directly or indirectly to the themes of responding to increased governmental scrutiny and dealing with the general economic crisis.

II. Institutional Investments post-Madoff – Due Diligence

- A. Among the numerous victims of Bernie Madoff's Ponzi scheme were charitable organizations, including health care organizations, educational institutions, religious organizations and several foundations.

1. Some commentators speculated that Madoff may have preferred or even targeted nonprofits, whose long-term investment outlook would provide a stable source of funds to pay later “investors.”
- B. Along with sympathy for their losses, some charitable victims have been subject to criticism, and all not-for-profit entities have received a powerful reminder of the need for due diligence and careful oversight in investment management.
- C. Nonprofit boards have fiduciary duties to manage their assets prudently, and are expected to practice due diligence in making investment decisions.
 1. Errors in the Madoff case included failing to examine the bona fides of the investment vehicle and putting too much of their assets into one fund.
 2. Connecticut Attorney General Blumenthal even considered investigating nonprofit victims of Madoff for failing to meet their fiduciary obligations: board members might have faced personal liability for the losses.
- D. UPMIFA imposes on boards certain standards of care in the investment of assets, including investing “with the care an ordinarily prudent person in a like position would exercise under similar circumstances” (UPMIFA, § 3(b)); “mak[ing] a reasonable effort to verify facts relevant to the management and investment of the fund” (id. § 3(c)(2)); and diversifying investments absent specific donor instructions or “special circumstances, [such that] the purposes of the fund are better served without diversification” (id. § 3(e)(4)).
- E. However, boards may reasonably rely on professionals, subject to appropriate board oversight, regardless of actual returns. See, e.g., *In re Bankers Trust Co.*, 636 N.Y.S.2d 741 (N.Y. Sup. 1995) (delegation to professionals); *Hoye v. Meek* (795 F.2d 893 (0th Cir. 1986) (insufficient oversight).
- F. Learning from the Madoff scandal, boards or their investment professionals can help protect against fraudulent investments by such actions as:
 1. Examining investment results for anomalies and a reasonable basis for believing stated investment strategies relate to actual market results; and
 2. Considering the controls in place for investment funds, such as adequacy of the auditors (something significantly lacking in the Madoff case).
- G. Even charities that did well by Madoff, innocently drawing out more than they invested before the fraud was revealed, may have to return much of their profits under bankruptcy code “clawback” provision for fraudulent transfers of assets – going back two years under federal standards, and potentially longer under state law. See 11 U.S.C. § 548; NY DCL § 273, et seq. (six years under NY law).

III. Endowment Funds and UPMIFA

A. Brief Overview

1. UPMIFA, the Uniform Prudent Management of Institutional Funds Act, was approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) for recommendation to the states in July of 2006. UPMIFA text is available at http://www.law.upenn.edu/bll/archives/ulc/umoifa/2006final_act.pdf.
 - a) Since then, UPMIFA has been adopted in some form in 42 states and D.C. as of summer 2009. 5 states (AK, KY, MI, MS, NY) have considered but not passed legislation and three have not considered (FL, LA and PA).
2. UPMIFA is intended to replace the Uniform Management of Institutional Funds Act (UMIFA), developed by NCCUSL in 1972. As stated by NCCUSL (see <http://www.UPMIFA.org>), UMIFA introduced two key concepts: “1) that assets would be invested prudently in diversified investments that sought growth as well as income, and 2) that appreciation of assets could prudently be spent for the purposes of any endowment fund held by a charitable institution.”
3. UPMIFA incorporates several significant modifications to UMIFA:
 - a) It provides greater detail on prudent management of investments;
 - b) It sets standards for the proper delegation of investment management, and identifying several factors to be taken into account;
 - c) It allows courts greater flexibility to release or modify restrictions on the management and purposes of endowment funds;
 - d) It permits restrictions on small (< \$25,000), old (> 20 years) endowment funds to be released or modified without court action; and
 - e) It increases flexibility in expenditure of funds. (See discussion below.)
4. NOTE: Because NCCUSL only develops model laws, states are free to revise UPMIFA. Further, state attorneys general and other enforcement agencies may impose their own interpretations. Check your state's implementation.
 - a) Example – Connecticut's adaptation of UPMIFA excludes the provision allowing modification of smaller funds without court action.

B. Expenditure of funds

1. Old approach – UMIFA generally imposes restrictions on spending when a fund is below its “historic dollar value” – an “underwater fund.”
 - a) “Historic dollar value,” or “HDV,” is the total of all contributions to an endowment, whether at the time of creation or later, plus accumulations to principal required by the terms of a gift instrument.
 - (1) Funds might fall below HDV because of expenditures or decreases in the market value of investments.
 - b) Under UMIFA, expenditures on underwater funds are limited to no more than current income (e.g., dividends and interest). This can frustrate the donor’s charitable intent, and can be difficult to administer. In a market downturn, the number of underwater funds can skyrocket, in particular among recently established endowment funds.
2. New approach – UPMIFA increases flexibility by replacing the intended protective purposes of the HDV approach with seven factors to be considered to prudently balance competing goals of expending funds and growing fund assets. Unless the gift instrument sets a different donor intent, spending decisions must be based on: “(1) the duration and preservation of the endowment fund; (2) the purposes of the institution and the endowment fund; (3) general economic conditions; (4) the possible effect of inflation on deflation; (5) the expected total return from income and the appreciation of investments; (6) other resources of the institution; and (7) the investment policy of the institution.” UPMIFA, § 4(a).
3. UPMIFA does not permit unchecked depletion of endowment funds. It does allow institutions to react prudently to short-term changes in investments.
4. On the other hand, UPMIFA does not require an underwater fund to be restored to its original value – an underwater fund can remain so. Further, expenditures can be made from an underwater fund beyond current income.
 - a) NOTE: It is important to be familiar with official interpretation of UPMIFA in your jurisdiction: some state enforcement officials may take the position that underwater funds do need to be restored to their original value.

C. UPMIFA and FASB – FSP No. FAS 117-1

1. The Financial Accounting Standards Board (“FASB”) has issued FASB Staff Position No. FAS 117-1 (“FSP 117-1” or “the FSP”), affecting how institutions implement UPMIFA.
 - a) FASB is the U.S. body mainly responsible for establishing generally accepted accounting principles (“GAAP”) for nongovernmental entities. While GAAP is not written into law, organizations are often expected to be GAAP compliant, e.g., to receive certain federal grants and contracts.
2. FSP 117-1 (text available at <http://fasb.org>) stresses maintaining an endowment fund’s value from an accounting perspective, even as UPMIFA releases institutions from a strict focus on maintaining value from a legal perspective.
3. The FSP’s analysis starts from the classification of donor-restricted endowment fund assets as either permanently restricted, temporarily restricted, or unrestricted.
 - a) “Permanently restricted assets” are that portion of the fund which either “must be retained permanently in accordance with explicit donor stipulations,” or “in the absence of such stipulations, the organization’s governing board determines must be retained (preserved) permanently consistent with the relevant law.” FSP 117-1, ¶ 5.
 - b) Any amount in excess of the permanently restricted assets – putting the fund, in effect, “above water” – are classified as temporarily restricted assets – subject to the donor’s restrictions – until they are appropriated for expenditure, at which time they become unrestricted assets.
4. FSP 117-1 affirms that fund losses may not be charged to permanently restricted assets. If the fund is above water, losses will be charged to temporarily restricted assets. If the fund is underwater, losses will be charged to unrestricted assets.
5. Although FSP 117-1 does not alter UPMIFA by requiring the value of underwater funds to be restored with an influx of unrestricted funds or barring expenditures beyond current income from underwater funds, the FSP can lead to consequences when a fund goes underwater and losses are charged against unrestricted assets.
 - a) A charge of losses to unrestricted assets, for example, could cause an organization to violate covenants associated with bond issuances and letters of credit.

- b) On the other hand, Moody's issued a report in April of 2009 expressing its preliminary belief that the impact of UPMIFA on unrestricted assets will be unlikely to materially affect an organization's credit rating.
6. FSP 117-1 does not mandate how an institution will determine how much of a fund's assets should be designated permanently restricted. However, the FSP emphasizes at several points the importance of retaining value in order to meet donor intent for a perpetual fund.
- a) The very act of designating part of each endowment fund as "permanently restricted" creates such an emphasis. FSP 117-1 at Appendix A ¶ A4. In contrast, under UPMIFA, fund preservation is one of several factors. The detailed justification for the FSP's conclusions stresses a fiduciary duty to maintain a perpetual fund, *id.* at ¶ A8, and more than one commentator has noted that the examples in Appendix C to the FSP appear to presume that permanently restricted assets will likely be based on HDV.
7. As a result, some have criticized FSP 117-1 as effectively reintroducing HDV or a similar concept in the face of UPMIFA's explicit intent to get rid of HDV as a controlling factor in endowment fund management.
- D. FSP 117-1 - Disclosures
1. The FSP at ¶ 11 also imposes new disclosure requirements relating to endowment funds, even where UPMIFA has not been adopted. Each organization must:
- a) Describe the governing board's interpretation of the law on which its net asset classification of donor-restricted asset funds is based;
 - b) Describe its policy for appropriation of endowment funds for expenditure;
 - c) Describe its endowment investment policy;
 - d) State the composition of its endowment by net asset class; and
 - e) Provide a reconciliation of the beginning and ending balance of its endowment in total and by net asset class.

IV. Additional Accounting and Auditing Items

- A. Accounting Standards Codification. FAS 168 was the last FASB Statement. It announced that all accounting literature has now been codified into approximately 90 accounting topics. The subject of item C. below, FIN48, for example, is now included in the accounting codification's Topic 740, Income

Taxes. A transitional type of document, the Accounting Standards Update, or ASU, is being used by FASB to announce changes in the codification. The codification is intended to simplify user access.

- B. IFRS, International Financial Reporting Standards. In May 2008, the AICPA's governing body, recognized the International Accounting Standards Board as an "authoritative" standards setter, which will enable CPAs to report that statements based on IFRS are in accordance with GAAP. For more on the convergence of international accounting standards, see, www.ifrs.com. FASB and IASB set a goal of completing their joint efforts by 2011. For a discussion of the impact of IFRS on U.S. companies, see, J. Langmead and J. Soroosh, "Planning Ahead for IFRS 1: Initial Adoption of IFRS by U.S. Companies", *CPA Journal*, <http://viewer.zmags.com/publication/742328e2#/742328e2/26>
- C. FIN 48 – Disclosure of Uncertain Tax Positions
1. Financial Accounting Standards Board Interpretation Number 48 (FIN 48), *Accounting for Uncertainty in Income Taxes, an interpretation of FASB Statement No. 109*, was issued in 2006, and requires annual valuation and disclosure of uncertain tax positions. The effective date was twice delayed for nonpublic and nonprofit entities, but is currently effective for fiscal years beginning after December 15, 2008. FIN 48 can be obtained from www.fasb.org (click the "standards" tab).
 2. Public comments had called for nonpublic and nonprofit entities to be exempted from FIN 48. This was rejected by the Board in FASB Staff Position FIN 48-3, which nevertheless moved the effective date to fiscal years beginning after December 15, 2008.
<http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175818749140&blobheader=application%2Fpdf>.
 3. In September 2009, FASB issued ASU No. 2009-06, *Income Taxes (Topic 740) Implementation Guidance on Accounting for Uncertainty in Income Taxes and Disclosure Amendments for Nonpublic Entities*. ASU 2009-06 again rejected the calls to exempt nonpublic and nonprofit entities from the application of FIN 48. The ASU also clarified the application of FIN 48 to nonprofit entities and provided examples.
 4. FIN 48 requires a two-step process.
 - a) First, the entity must determine if a recognition threshold is met that requires disclosure of material uncertain tax positions. The recognition threshold is whether the position is "more likely than not" to be

realized. This means a greater than 50% likelihood that the taxing authority would ultimately accept the position if fully audited, that is, there is no reliance on an audit lottery.

- b) Second, the entity needs to measure the uncertain tax position to ascertain the amount to report. This is the largest amount of tax benefit that is more likely than not to be realized. This measurement will be based on an analysis of the amounts and outcome probabilities.
5. A tax position that fails to meet the recognition threshold is “derecognized”, i.e. the tax computed plus interest and penalties.
 6. Nonprofit entities are required to disclose
 - a) The total amount of interest and penalties recognized
 - b) Where it is significantly likely that within twelve months of the financial reports’ issue date there will be a significant increase or decrease in unrecognized tax benefit of the entity’s uncertain tax positions, the entity must disclose . . .
 - (1) The nature of the uncertainty
 - (2) The nature of the event within the 12-month period that could change the tax benefit
 - (3) An estimate of the range of the reasonably possible change in tax benefit or a statement that such an estimate could not be made
 - c) A description of the tax years that remain subject to examination by major tax jurisdictions.
 7. Tax positions include, among other things, a nonprofit’s tax exemption, positions taken relating to the unrelated business income tax or UBIT, and the private foundation excise tax on investment income. Specifically, FIN48 lists as examples
 - a) Classifying a transaction, entity, or other position as tax exempt
 - b) Allocating or shifting income between jurisdictions
 - c) Excluding taxable income from the tax return
 - d) Not filing a required tax return

V. **Fundraising: Charity Rating Agencies**

- A. More donors are looking to online not-for-profit organizations that rate charities.
 1. Three prominent online rating groups are Charity Navigator (<http://www.charitynavigator.org>); the American Institute of Philanthropy’s

Charity Watch (<http://www.charitywatch.org>); and the Better Business Bureau's Wise Giving Alliance (<http://www.give.org>).

- B. The rating agencies generally rely on publicly available financial information (e.g., Form 990s), but may consider additional criteria. The number of organizations reviewed varies considerably from 500+ at Charity Watch to 5,000+ at Charity Navigator.
- C. Criticisms of the raters can include (depending on the agency and its criteria) too much focus on fiscal management issues, without consideration, for example, to program effectiveness; reliance on financial information that can be manipulated or answered within a range of acceptable approaches; and use of simplistic criteria which do not always distinguish among different types of organizations.
 - 1. Some agencies consider more extensive and variable factors.
 - 2. For two critiques from 2005 of the main three charity rating agencies, see National Council of Nonprofit Associations, *Rating the Raters: An Assessment of Organizations and Publications That Rate/Rank Charitable Nonprofit Organizations*, May 2005 (<http://www.councilofnonprofits.org/files/Rating-the-Raters.pdf>); and Lowell, Stephanie, Brian Trelstad, and Bill Meehan. "The Ratings Game: Evaluating the Three Groups that Rate the Charities." *Stanford Social Innovation Review*. Summer 2005 (http://www.ssireview.org/articles/entry/the_ratings_game/).
- D. Nonetheless, these rating agencies are likely to see an increasing influence, so nonprofit organizations are well-served to be aware of their ratings and be prepared to provide information in response.
- E. Nonprofit organizations should consider the impact organizational structure has on its ratings—separating the entity that accepts charitable donations from the legal entities that incurs operational expenses may result inaccurate ratings.

VI. Research-Related and Federal Contracting Issues

- A. American Recovery and Reinvestment Act of 2009 (ARRA)
 - 1. The ARRA is the federal economic stimulus bill passed into law in February of 2009 in response to the economic downturn. The act includes funds for special projects in such areas as health care, education, energy, homeland security and law enforcement.
 - 2. Built into the ARRA are increased reporting and transparency expectations. Compared to typical federal grants and contracts, ARRA fund recipients are

subject to increased reporting requirements, including tighter filing schedules.

- a) All recipients and first-tier recipients must be registered in the Central Contractor Registration system (<http://www.ccr.gov>)
 - b) Recipients must submit quarterly reports on use of ARRA funds within 10 days after the end of quarter. Reports may be submitted online at <http://www.federalreporting.gov>: an additional registration with the site is required. Quarterly reports will include such information as a description of the project, activities during the reporting quarter, project status and information on jobs created as a result of the project.
 - c) All reports will be available to the public.
3. Additional information is available at:
- a) Office of Management and Budget:
http://www.whitehouse.gov/omb/recovery_default/
 - b) Recovery Accountability and Transparency Board: <http://recovery.gov>

B. E-Verify

1. E-Verify is a federal online system designed to help employers confirm that new employees are eligible to work in the United States, whether based on citizenship, permanent residency or visa status. Information on new employees is compared against databases to determine whether or not the employee is eligible to work.
 - a) E-Verify supplements rather than replaces the "I-9" Employment Eligibility Verification Form.
2. Originally a voluntary pilot program, in June of 2008, Executive Order 13465 required certain federal contractors to use an electronic employment verification system, and E-Verify was designated as the approved system. Final regulations were issued on November 14, 2008. See 73 Fed. Reg. 67651 (11/14/08); 48 CFR Parts 2, 22, 52.
 - a) Originally scheduled for January 2009, implementation has been delayed. As of August 2009, the regulations will become effective September 8, 2009.
 - b) All current and new employees working on a covered federal contract, and all new employees, regardless of whether they are working on the contract, must go through E-Verify.

- c) Covered transactions include federal contracts which (a) are governed by the Federal Acquisition Regulations; (b) have a term of performance of at least 120 days; (c) are valued above \$100,000; and (d) are performed in the U.S.
 - d) Certain transactions are exempted, including (a) commercially-available off-the-shelf items; (b) bulk cargo; and (c) grants to universities.
 - e) Certain contractors are only required to use E-Verify for employees assigned to the contract, not to all new hires: (a) colleges and universities; (b) state and local governments; (c) federally recognized Indian tribes; (d) sureties.
3. Current E-Verify issues:
- a) For a number of years after implementation of E-Verify, many employers experienced a high rate of “false negatives” – employees inaccurately flagged as ineligible to work. The Department of Homeland Security has assured federal contractors that the system has been improved.
 - b) Some states require E-Verify for all employees (e.g., Arizona, Mississippi) or state agencies and state vendors (e.g., Georgia, Rhode Island, South Carolina). Thus, employees partially exempt from the federal contractor regulations may be required to use E-Verify under state laws.
4. Additional information is available at <http://www.uscis.gov/e-verify>. Participating employers are required to enter into a Memorandum of Understanding: the MOU is available at <http://www.uscis.gov/files/nativedocuments/MOU.pdf>.
- C. Conflict of Interest – Proposed HHS regulations
- 1. The Department of Health and Human Services has proposed new regulations to address conflicts of interest in human subject research projects funded by the Public Health Service. See 74 Fed. Reg. 21610 (5/8/09). HHS is considering revising existing regulations to expand requirements for disclosing financial interests; narrow financial interests currently exempt from the definition of “Significant Financial Interest”; increase institutional obligations in the management of conflicts; and expand COI rules to include institutional conflicts, in addition to individual researcher conflicts.

2. Organizations should expect federal agencies to continue to expand their interest in and tighten their controls over conflicts of interest in funded research.

D. Private Foundation Funded Research

1. Private foundations and other non-profit organizations that fund research have been developing grant award agreements with terms that may come into conflict with the policies or interests of grant recipients. For example:
 - a) Provisions governing intellectual property may extend to the funding entity rights in resulting intellectual property, or proceeds from IP, at a level exceeding normal practices of the recipient entity.
 - b) Funding entities may restrict the ability of recipient entities to include indirect costs.
2. Although these provisions are not necessarily new, as some funding sources dry up, both funding and recipient entities may experience increased pressure to negotiate these types of provisions and reconsider the balance of interests.

VII. Copyright Issues: In-house counsel routinely provides advice regarding when the organization's works require copyright protection and when activities of the organization risk infringement on the copyrighted materials of third parties. The following FAQs address common issues and myths:

- A. "No one can copy my idea, it's copyrighted." Copyright does NOT protect ideas, concepts, processes, formulas, etc." copyright protects the creative expression of an idea or concept. Ideas are protected, if at all, under patent and trade secret law. US Copyright Law Section 102(b).
- B. "Copyright only protects works of art, like books, movies and music" The scope of copyright is extremely broad. Copyright protects "works of authorship," and that term is broadly interpreted. Section 102(a) of the Copyright Law lays out a number of the more obvious examples, but this list is not exhaustive, and has been held to include some non-intuitive things, such as building designs (now part of the statute), fabric designs, instructions sheets, computer software, and advertisements.
- C. "We're a nonprofit, so it's fair use." Fair use is a challenging analysis that one court has called "the most troublesome in the whole law of copyright." Section 107 of the Copyright Law, does not draw bright lines. A number of factors come into play, and no one factor is determinative. Among the factors considered:
 1. The purpose of the use (for-profit vs. nonprofit)

2. The nature of the work copied (artistic vs. factual; the former receiving more protection)
3. The amount and substantiality of what's been copied
4. The effect of the copy on the market for or value of the work.

Complicating matters further, the Supreme Court in the Campbell v. Acuff Rose case (which concluded that the rap group 2Live Crew's use of sections of Roy Orbison's song "Pretty Woman" constituted fair use), appears to have added another factor to the analysis: is the later work a "transformative work?" If so, this weighs heavily in favor of a finding of fair use. Suffice it to say, it is very difficult to predict with certainty when a particular use is fair use. However it is clear that nonprofit use, by itself, does not automatically equate to fair use.

- D. "I'm making these copies to teach a class, so it's fair use." Closely related to the nonprofit myth is the idea that there is blanket immunity for classroom copying. That is simply not the case. Congress did commission a group consisting of representatives from education and publishing to create guidelines for classroom copying. The guidelines do not have the force of law, but if you fall within the guidelines it's considered persuasive evidence of fair use. Unfortunately, the guidelines are fairly restrictive. Teachers can make a single copy of a chapter from a book or an article from a periodical or newspaper. For all other uses, copying will only meet the guidelines if they satisfy the following 3 criteria:
1. Brevity (Prose: 1,000 words or 10%, whichever is less. Illustration: one chart, graph, diagram, drawing, cartoon or picture per book or periodical issue);
 2. Spontaneity (there's no time to request permission); and
 3. Cumulative effect (Limitation to one class, two excerpts from the same author, and nine instances of copying per course per term) Classroom copying that does not meet this restrictive test must meet the general test for fair use, or it is copyright infringement.
- E. "I'm not charging for these copies, so it's OK." Copyright infringement arises from copying (or violating any of the other exclusive rights of the copyright holder, such as the right to publicly display the work), whether or not a fee is charged.
- F. "I found it on the internet, so I'm free to copy it." A rose is a rose is a rose. Material posted to the internet is subject to copyright just as is any other "work of authorship." Posting something to the internet does not cause it to enter the public domain, or provide any additional rights for copying.

- G. “There’s no copyright notice on it, so there’s no copyright protection.” For many years under US copyright law you could lose your copyright protection by not following required copyright formalities, such as registering your copyright or putting an appropriate notice on your copyrighted works. That is no longer the case since the US joined the Berne Convention in 1989. Copyright protection is automatic, and begins upon creation of a copyrightable work (i.e. at the time it is “fixed in a tangible medium of expression.” Copyright Law Section 102). It’s still a good idea to register your copyrightable works (it allows you to get statutory damages if it’s infringed), and to put a copyright notice on your works (it deters people who haven’t read this FAQ and think that anything without a copyright notice is in the public domain). The form of a copyright notice is “© [year of creation] [name of author].” It’s also a good idea to add the phrase “all rights reserved” to your copyright notice as there are a few countries in Latin America where you can waive some of your rights if you do not include this phrase.
- H. “This is really old, the copyright must have expired.” The length of copyright has expanded over the years and has been much in the news of late. A number of parties have challenged the constitutionality of these extensions, which many commentators have, rightly or wrongly, felt were enacted at the behest of corporate media giants like Disney. Copyright now lasts for the life of the author plus 70 years, so copyrights can now last for well over a century. This means that the fewer and few works (and virtually nothing from our modern media age) is passing into the public domain. Determining exactly when a copyright has expired for older works can prove challenging, as it involves analyzing what the copyright term was at the time the work was created and/or expired, as well as how subsequent amendments impacted the expiration. Short of performing this analysis, an easy rule of thumb is to assume that anything published after 1922 could still be protected by copyright. Anything published prior to that date is definitely in the public domain.
- I. “I created it, I own it.” Not really a myth, since in most instances this is true. However, there is a very important exception. Section 201 of the Copyright Law states that copyright ownership vests in the author or authors of the work. However, if a work is performed “by an employee within the scope of his or her employment” it is considered to be a “work made for hire” and the employer--not the employee--is considered to be the author of the work unless the parties agree otherwise in writing. Copyright Law Sections 101, 201(b). Certain types of specially commissioned works, such as contributions to collective works, translations and instructional texts can also be considered works made for hire, however the parties must agree to this in writing.

- J. “I bought the CD, so I can play the music it at my company event or incorporate it into my PowerPoint® presentation.” Purchasing a copy of a work only gives you the right to transfer ownership of that particular copy. You can sell or give away that one copy, but you cannot exercise any of the exclusive rights of the copyright holder:
1. The right to reproduce the work.
 2. The right to make derivative works.
 3. The right to distribute copies of the work.
 4. The right to publicly display the work.
 5. The right to publicly perform the work.

Playing a CD at a meeting or other gathering, or incorporating it into your PowerPoint presentation infringes the copyright owner's rights to publicly display and perform the work and to make derivative works, unless you can make the appropriate showing of fair use.

VIII. IRS Form 990

- A. History: Revised Form 990 issued in December, 2007; Final Instructions released August, 2008; Implementation for 2008 required; Phase-in of Schedules H (Hospitals) and K (Bonds).
- B. Revised Structure: Form 990 was primarily a tax return—it has become primarily a disclosure document. Primary form and summary page plus sixteen schedules tied to organizational attributes/activities. Link to form: <http://www.irs.gov/charities/article/0,,id=185561,00.html>
- C. Primary Form:
 1. Summary page with signature block
 2. Statement of program services
 3. Checklist of required schedules
 4. Governance, management, and disclosure questions
 5. Compensation reporting
 6. Financial reporting—revenue, expenses, balance sheet, and financial statement
 7. Required Schedules
 - (1) Public Charity Status
 - (2) Schedule of Contributors

- (3) Political and Lobbying
- (4) Supplemental Financial
- (5) Private School
- (6) Foreign Activity
- (7) Professional Fundraising and Gaming
- (8) Hospitals
- (9) Grants
- (10) Compensation Detail
- (11) Bonds
- (12) Transactions with Interested Persons
- (13) Non-Cash Contributions
- (14) Terminations and Major Dispositions
- (15) Supplemental Information
- (16) Related Organizations and Certain Joint Ventures

D. Board and Management Questions

- 1. Independence of voting board members: total number; number who are independent; relationships between officers, directors and key employees; minutes taken at board and board committee meetings?
- 2. Does Board receive a copy of Form 990 before it is filed?
- 3. What is process for review of Form 990?
- 4. Existence of a written conflict of interest policy?
 - a) Officers, directors, and key employees required to disclose each year interests that could give rise to conflicts?
 - b) Monitoring and enforcement of conflict of interest policy.

E. Existence of Specific Policies:

- 1. Written whistleblower policy
- 2. Written document retention and destruction policy
- 3. Follow rebuttable presumption procedures
- 4. Invest in a joint venture with a taxable entity
- 5. Make Form 1023 available

6. Make governing documents, policies, and financials available?
- F. Compensation Reporting and Related Processes
1. Who gets how much, and who decides?
 2. Compensation information: Part VII of Core Form and Schedule J
 3. Process of setting compensation
 4. Schedule J:
 - a) Fringe benefits: first-class or charter travel; companion travel; tax indemnifications and gross-ups; discretionary accounts; housing; payments for business use of personal residence; club dues; and personal services
 - b) Severance or change in control payments
 - c) Supplemental nonqualified deferred compensation
- G. Schedule K: Bonds
1. Supplemental information on tax-exempt bonds
 2. Significant new information requested to confirm recordkeeping and record retention compliance
 3. Only Part I required for 2008; Parts II-IV required for 2009
- H. Schedule L: List of specific transactions with interested persons:
1. Excess benefit transactions
 2. Loans to or from interested persons
 3. Grants or assistance benefitting interested persons;
 4. Business transactions involving interested persons
- I. Best Practices
1. Gap analysis regarding required policies and reporting requirements
 2. Update compensation approval procedures
 3. Update bookkeeping and information gathering to systematically produce all required information
 4. Develop relevant summary of Form 990 for Board
 5. Monitor current "open issues"
 - a) Schedule R: Related Organization Reporting

IX. Board of Directors: Challenges and Best Practices

- A. Orientation Materials and Keeping the Board Engaged
- B. Compensation Review and Transparency
 - 1. IRS Rebuttable Presumption Requirements
 - 2. How to involve/inform the Board
 - 3. Special challenges
- C. Oversight vs. Management
- D. Board Committees

X. Philanthropy: Challenges and Opportunities of Fundraising

- A. Donor-Advised Funds and Donor Initiated Fund Raising
 - 1. Basic structure of DAF. Two excellent overview articles regarding Donor Advised Funds are: Thomas W. Smith, CFP “Donor Advised Funds—Don’t Get Left Behind”, 15th National Conference on Planned Giving; and C. Alan Korthals, “Should Your Institution Accept Donor Advised Funds?”, Advisor’s Quarterly, 4th Quarter, 2001 which are both found at:
http://www.pgdc.com/files/ncpgpdf/Donor_Advised_Funds_Dont_Get_Left_Behind.pdf
 - 2. Charitable purpose and DAF authorization in Articles of Incorporation
 - 3. State Solicitation Registrations for professional fundraisers
 - 4. Public relations issues
 - 5. Samples of the language for the Articles of Incorporation to permit it
 - 6. Pros and Cons
 - 7. Checklist Tool for organization considering DAF
- B. Pledge & Gift Agreement Issues: Drafting, execution, and enforcement of pledge and gift agreements present ongoing issues for non-profit organizations.
 - 1. Challenges of the Recession: Some donors seek to renegotiate or to terminate obligations in light of their changed financial circumstances.
 - 2. Enforceability: Preservation of the relationship with the donor is often emphasized over the issue of legal enforceability. Enforceability varies from state-to-state. In many cases, the agreement is not enforceable unless the non-profit can demonstrate substantial reliance.

3. Private Foundations: Donors facing financial set-backs may seek to shift payment of individual pledges to their private foundations. Counsel for the non-profit should make sure that the donor has competent independent counsel who can review the potential risks of self-dealing and related adverse tax consequences to the donor and to the private foundation.
4. Balance Sheet and Audit Considerations: If an “enforceable” agreement has been recorded on the books of the organization and it is later forgiven in whole or part, it must be written down on the books. Accountants are booking Agreements as “enforceable” under FASB 116 (which focuses on binding language in the agreement) even when they may not be enforceable under applicable state law.

XI. Employment and Labor Law Issues (Separate Handout)

The panel wishes to recognize the assistance in the preparation of this outline received from Kevin Melvin, Legal Counsel, Mayo Clinic; and Virginia "Nickie" Bruce, Administrator, Legal Contract Administration, Mayo Clinic. Responsibility for the accuracy of the outline, of course, resides solely with the panelists.

**Sizzling Hot Topics for Nonprofit Attorneys
ACC 2009 Annual Meeting
Session 806**

**Tuesday, October 20, 2009
11:00 a.m. to 12:30 p.m.**

**ADDENDUM
GJ Stillson MacDonnell, Shareholder, Littler Mendelson**

IX. Employment and Labor Law Issues

- A. Overview of sizzling topics.
 - 1. Upcoming IRS National Research Project: 5000 employment tax audits promised.
 - 2. Who is an independent contractor?
 - 3. Should your organization be changing its state unemployment contribution method?
 - 4. Government contractor federal income tax withholding requirements delayed until January 2012.
 - 5. Employee, volunteering employees, Interns—Who is whom for tax, wages and hour and other employment-related-purposes?
 - 6. Social networking issues for nonprofits.
 - 7. Adjusting workforce through the use of: RIF, furloughs and pay adjustments.
 - 8. Updating IRC §403(b) document by year end—complying with final IRS regulations.
 - 9. Considerations related to the creation and administration of Employee Sick Leave Sharing Programs.

- B. IRS National Research Project
1. IRS announced earlier this year that it will randomly select up to 2,000 employers per year, beginning November 2009, for comprehensive employment tax audits.
 2. Audits will review: worker classification, fringe benefits, reimbursed expenses and compensation of owner employees.
 3. Action items: Employers should designate an internal point person and support team to coordinate response to any IRS audit notice. Recommend prescreening of potential employment tax issues, not just wait for random selection by IRS, as these issues could also trigger both state and IRS audits.
 4. Reference: Littler ASAP, September, 2009, [IRS to Launch Employment Taxes Audit of 5000 Employers—Is Your Company Ready?](http://www.littler.com/PressPublications/Lists/ASAPs/DispAsaps.aspx?id=1429&asapType=Employment%20Taxes) [http://www.littler.com/PressPublications/Lists/ASAPs/DispAsaps.aspx?id=1429&asapType=Employment%20Taxes\]](http://www.littler.com/PressPublications/Lists/ASAPs/DispAsaps.aspx?id=1429&asapType=Employment%20Taxes)
- C. Who is an independent contractor?
1. This is an issue for both IRS and state tax and other agencies. Apart from random audits, audits often triggered indirectly when a contractor cannot land new clients and/or loses his/her “day” job.
 2. State unemployment funds are largely depleted. Nevertheless, states continue to generously providing unemployment benefits while liberally construing what constitutes employment for such benefits purposes; increasing the risk of misclassification rulings in conjunction with unemployment claims.
 3. Who is an independent contractor varies under state laws (tax and other), and such laws are not consistent with federal laws.

- a. Common law tests.
 - b. Statutory (ABC) tests.
4. For more practical test for prescreening classification of contractors – consider GJ’s Golden Rules:
- a. Never engage a former employee as a contractor.
 - b. Never be a contractor’s first customer.
 - c. Never engage someone as a contractor who is/has been employed anywhere within the last 18 months.
 - d. Never engage someone as a contractor who will do the same work / under similar conditions as employees.
 - e. Never convert a contractor to an employee.
5. Contractor status should be evaluated before relationship commences and appropriate contract executed; during the course of the relationship to monitor conformance with contract and law; and as relationship terminates to assure compliance with terms of contract and law, as applicable regarding terminations.
6. Action items: Review how organization determines independent contractor status under various state and federal laws; adopt a pre-engagement and follow-up evaluations process to determine appropriate status and designate a compliance czar with resources to review and monitor use of contractors/consultants.
7. Reference: Littler, The National Employer, Chapter 24 “Contingent Workers: Independent Contractors & Leased Employees” (2009-2010 edition).

- D. Should your organization be changing its state unemployment contribution method?
1. Nonprofits and government employers generally have the option of paying state unemployment taxes on a “pay as you go” basis or use the direct reimbursement method. Such organizations do not pay FUTA taxes.
 2. Under direct reimbursement method, the organization reimburses state for actual benefits paid out.
 3. Under “pay as you go”, organization pays an experience rated tax on compensation paid to each employee up to wage base designated by the state.
 4. Under either approach, organization should be sensitive to cost of such unemployment benefits.
 5. Typically states allow such organizations to change method after 2 years. If changed, this affects liability for new benefits claims only.
 6. If organization is considering significant reduction in workforce in 2010 or expecting a stabilization of terminations and layoffs by 2010, the organization may want to change its contribution method. Such changes require submission and approval by the state before year end.
 7. Action item: Review current unemployment insurance coverage, evaluate appropriateness of a change in method. If change desirable, implement process before 2010. Organization’s board approval may be necessary.
- E. Mandatory withholding from payments to independent contractors for federal contractors delayed until after 12/31/11.

1. IRC §3402(t) originally required payments by federal government contractors for goods or services to become subject to 3% federal income tax withholding after 12/31/10. This law's implementation has now been postponed to payments made. There is a movement to repeal the law before its implementation.
 2. States are considering similar laws (i.e. California passed similar law that was then vetoed by the Governor, December 2008).
 3. Action item: Monitor for state and federal withholding requirements. If further laws enacted or current law becomes effective, implementation of compliance will require coordination between an organization's accounts payable, payroll, legal/tax departments.
 4. Reference: See IRS ["Implementation of Contractor Withholding Delayed One Year"](http://www.irs.gov/govt/fslg/article/0,,id=204409.00.html): [http://www.irs.gov/govt/fslg/article/0,,id=204409.00.html]
- F. Employee, Volunteers, Volunteering Employee, Interns—Who is whom for tax, wage and hour, and other employment-related purposes?
1. Stressed-out organizations are asking and expecting employees to volunteer off the clock and/or are using volunteers to do work normally performed by employees.
 2. When volunteers have a history of employment and become unemployed from such "job," expect these volunteers to be inclined to see their volunteer time as employment.
 3. When employees "volunteer," organization should refrain from encouraging volunteering by nonexempt employees, but if they do, document, their voluntariness.

4. Generally, limit “Internships” to individuals pursuing “work” experience as part of their educational/academic studies.
 5. Wage and hour class actions are increasingly targeting nonprofits with claims regarding: workers’ nonexempt status, overtime pay and compensation for missed meal and rest breaks plus penalties thereon, particularly in California and Florida.
 6. Generally, “volunteering” by employees should be limited to services distinguishable from the employee’s regular work.
 7. Action items: Review use of volunteers and volunteering, particularly by nonexempt employees. Establish administrative standards for accepting staff volunteers. As to interns, before engaging evaluate their ability to qualify under educational programs for uncompensated work experience.
 8. Reference: [Littler Report: Wage and Hour Class Actions in the Healthcare Industry: Diagnosis and Prevention](#); [Littler Report: Total Wage and Hour Compliance: An Initiative to End the Wage and Hour Class Action War](#):
[<http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?id=24>]; [Littler Wage and Hour Blog: DOL Issues Opinion Letters Re: Volunteering and FLSA](#): [<http://www.wageandhourcounsel.com/2009/01/articles/volunteers/dol-issues-opinion-letters-re-volunteering-and-flsa/>]
- G. Social networking internet issues for nonprofits, the issues are:
1. Use by employees of internet “ranting site” to complain about work environment is increasing.

2. Problems created by employees use of an organization's internet access, computers and organization email addresses for social communications and job searches include defamation and privacy.
 3. Employees posting confidential organization information on internet or distributing same through their organization's email address requires monitoring and should be barred by organization's policy.
 4. Organization should have policies for personal use of company services, including internet and organization's potential for monitoring internet use.
 5. Action items: Review organization policies regarding use of organization resources, adopt policies/guidelines regarding use of internet by employees, contractors and volunteers.
 6. Reference: ASAP: [Verdict Against Houston's Restaurant Demonstrates Risks of Accessing Employee's Restricted Social Networking Sites](http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D4eae%DBf81%2D3d045b6ede6d&ID=1394): [http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D4eae%DBf81%2D3d045b6ede6d&ID=1394]
- H. Adjusting workforce through: RIFs, furloughs and pay adjustments.
1. While RIFs, furloughs and pay adjustments as a financial resources coping mechanism may have peaked late winter, 2009, it remains a tool for managing resources particular for organizations relying on donations for operating expenses.
 2. Increase in claims and litigation by employees affected by furloughs/terminations, employment discrimination claims, coupled with the perceived generosity of nonprofits, makes such organizations target for claims.

3. Organizations making staffing decisions need to maintain objective criteria nondiscriminatory.
 4. Action items: Before making adjustments, review to ensure decisions are based on nondiscriminatory basis under state/federal laws. Maintain documentation for decisions.
 5. Reference: Insights: [An Update on Furloughs and Reduced Hours: New Guidance on Cost-Cutting Strategies Other than Layoffs](http://www.littler.com/PressPublications/Lists/Insights/DispInsights.aspx?List=b526a60f%2D0ea2%2D4385%2D9f62%2D4c54238c24b3&ID=144): [http://www.littler.com/PressPublications/Lists/Insights/DispInsights.aspx?List=b526a60f%2D0ea2%2D4385%2D9f62%2D4c54238c24b3&ID=144]
- I. Updating IRC 403(b) documents by year end in compliance with final regulations.
1. Nonprofits and government employers maintaining IRC 403(b) or TSA retirement plans are subject to unique regulations.
 2. In July 2007, IRS final regulations were issued that operationally became effective January 1, 2009, and written plan documentation required by December 31, 2009.
 3. Model/prototype documents are generally available through insurance companies and other financial institutions that provide investments for such plans.
 4. Action item: Review status of organization compliance with final 403(b) regulation, if organization maintains such plan. Arrange for adoption or updating of plan document, with any necessary Board/Trustee approval, prior to 2010.

5. Reference: [ASAP: Changing the Playing Field: A Look at the Major Provisions of the Final 403\(b\) Regulations Impacting 403\(b\) Plans:](http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D4eae%2Dbf81%2D3d045b6ede6d&ID-1353)
[http://www.littler.com/PressPublications/Lists/ASAPs/DispASAPs.aspx?List=edb4a871%2D9e73%2D4eae%2Dbf81%2D3d045b6ede6d&ID-1353]
- J. Creation and administration of employee sick leave sharing program.
1. Since IRS Rev. Rul. 90-29 (1990), at least under federal law, organizations have basic standards for establishing leave sharing program for medical emergencies without donor taxation.
 2. Creation of a program providing for the donation of PTO, vacation and/or sick leave programs have become a popular concept although not widely implemented.
 3. Under such a program, the recipient employee rather than the donor will be treated as having taxable wages for payroll and payroll-related benefits purposes. Recipient receives “donated” leaves as further wages to compensate for absences because of personal or “family” related medical conditions.
 4. Federal law also authorizes special leave sharing programs during federally declared disasters.
 5. Creation of leave-sharing plans necessitates establishing an administrative structure with dedicated staffing, consideration of both privacy and fairness, as well as financial (cash flow), to name a few considerations.
 6. Action items: Review any existing program against considerations listed in the article referenced below. If such program is under initial consideration review against such consideration.

7. Reference: Insights: [An Employer's Guide to Employee Leave-Sharing Programs](http://www.littler.com/PressPublications/Lists/Insights/DispInsights.aspx?id=120): [http://www.littler.com/PressPublications/Lists/Insights/DispInsights.aspx?id=120]

Firmwide:92371908.1 999999.2810

ACC Extras

Supplemental resources available on www.acc.com

Lobbying: What Does It Mean for Nonprofit Organizations?

QuickCounsel. August 2009

<http://www.acc.com/legalresources/quickcounsel/lwdimfno.cfm>

Hot Topics in Nonprofit Organizations.

Program Material. February 2007

<http://www.acc.com/legalresources/resource.cfm?show=20121>

Ten-Step Legal Checklist for Consultation with Nonprofit Organizations.

Quick Reference. April 2005

<http://www.acc.com/legalresources/resource.cfm?show=16664>

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.