



408 Hot Topics in Nonprofit Organizations

Janine Greenwood
General Counsel and Vice President
American Student Assistance

John E. Huerta
General Counsel
Smithsonian Institution

Neal A. Jackson
Vice President for Legal Affairs, General Counsel and Secretary
National Public Radio, Inc.

Adam P. Palmer
Senior Attorney, Director of Legal Affairs
National Center for Missing and Exploited Children

Faculty Biographies

Janine Greenwood

Janine P. Greenwood is vice president and general counsel of American Student Assistance (ASA) in Boston. Her practice emphasizes areas of nonprofit corporate governance, information privacy, transactions, and intellectual property.

Prior to joining ASA, she was counsel to media organizations in New York, Los Angeles, and Boston. Immediately prior to joining ASA, she was counsel to the New England operations of The Hearst Corporation concentrating on licensing, contract law, and First Amendment issues. She has also maintained a private practice with clients ranging from the regional news channel, New England Cable News, to computer software developers.

Ms Greenwood is past president of the ACC's New England Chapter and is a fellow of the American Bar Foundation. Active in community affairs, she is a member of the Massachusetts Governor's Public Education Nominating Council and has served as chair of the advisory board of WGBH and a member of the board of Campfire Boys and Girls for Eastern Massachusetts.

Mr. Greenwood holds undergraduate degree from The University of Pittsburgh and a master's degree from Columbia University. She is a graduate of the Columbia University School of Law.

John E. Huerta

John Huerta was appointed general counsel of the Smithsonian Institution. He serves as legal advisor to the board of regents and to the secretary of the Smithsonian Institution. He is responsible for protecting the unique federal trust status of the 160 year old Institution which serves as the National Museum of the United States, and includes 18 museums, the National Zoo and nine research institutes located in nine states and abroad. The Smithsonian has an annual operating budget of one billion dollars, and 6,000, plus employees. The office provides counsel concerning the legal nature of the Smithsonian Institution and legal advice in federal administrative matters, business activities, collections management, constitutional law, gifts and estates, intellectual property, labor and employment matters, land use, tax, trust administration, and representation in administrative proceedings and litigation.

John previously served as a partner in a 10 lawyer civil litigation firm, Gronemeier, Barker & Huerta, in Pasadena, California. He was also counsel to the Western Center on Law & Poverty, Los Angeles, and was director of the Southern California Office of the Mexican American Legal Defense & Educational Fund. Additionally, he was a deputy assistant attorney general, civil rights division, U.S. Department of Justice, Washington, DC, and taught law school at the University of California, Davis, served as a public defender with the defender's program of San Diego and served an overseas service Fellow, international Legal Center, in Lima, Peru.

John received his BA from California State University Los Angeles and his J.D. degree from the University of California, Berkeley, School of Law.

Neal A. Jackson

Neal A. Jackson is vice president for legal affairs, general counsel, and secretary for National Public Radio, Inc. in Washington, DC. He is chief legal officer for this 501(c)(3) corporation, which produces and distributes audio programming and related content for broadcast by terrestrial and satellite radio and the Internet.

Prior to assuming his position at NPR, Mr. Jackson was in law firm practice in Washington, DC. He was a managing partner and represented a variety of clients in regulatory, litigation, and transactional matters.

For several years he was chair of a hearing committee of the board of professional responsibility of the DC Bar, which heard and decided charges of violations of the rules of professional responsibility brought against members of the DC Bar. Mr. Jackson is also a member of the board of trustees of the Cathedral Choral Society of Washington and a serious amateur photographer.

Neal received a B.A. from the University of North Carolina at Chapel Hill and a J.D. from Georgetown University.

Adam P. Palmer

Adam P. Palmer is the director of the Office of Legal Counsel at the National Center for Missing & Exploited Children ("NCMEC") in Washington, DC. His responsibilities include serving as counsel to the 300 employee organization, managing staff members, supervising all government related contracts, registration of intellectual property and managing all internal legal issues.

Prior to joining NCMEC, Mr. Plamer served three years as a U.S. Navy JAG Trial Counsel at Pearl Harbor, Hawaii. As a JAG lawyer, he prosecuted a variety of criminal cases and also advised senior military officers on administrative law matters. He was awarded the Navy achievement medal for outstanding service as a JAG.

Mr. Plamer earned his BA from Valparaiso University, his MBA from the University of Hawaii and, his JD from Duquesne University.

**HOT TOPICS IN NONPROFIT ORGANIZATIONS:
STATE NONPROFIT GOVERNANCE ACTIVITY**

for

ACC's 2006 ANNUAL MEETING

PREPARED BY:

**JANINE GREENWOOD
VICE PRESIDENT & GENERAL COUNSEL
AMERICAN STUDENT ASSISTANCE**

AND

**NICOLE LAPIERRE NEWMAN
ASSOCIATE COUNSEL
AMERICAN STUDENT ASSISTANCE**

AUGUST 15, 2006

STATE NONPROFIT GOVERNANCE ACTIVITY

	CALIFORNIA LAW¹	MASSACHUSETTS LEGISLATION²	NEW YORK LEGISLATION³	DISTRICT OF COLUMBIA LEGISLATION⁴
DIRECTOR/OFFICER INDEPENDENCE	Attorney general may investigate transactions to ascertain whether purposes of Corporation are being carried out. §12588 Members of the Committee may not receive compensation in excess of board fees or hold a material financial interest in an organization doing business with the Corporation. §1286(e)(2) See also "Self-Dealing Transactions" §5233 et seq. of the Corporations Code and the regulations under Title 11, Division 1, Chapter 15, §999.1	Board members serving on the Audit Committee could not receive compensation beyond a normal board fee. (Chapter 12 Section 8P)	Would make contracts with a director or officer voidable by the corporation or Attorney General unless they meet the IRS intermediate sanctions test. Excluded are contracts about which the director or officer has no knowledge and do not exceed 1% of the gross receipts of the charity of \$100,000, whichever is less. §715(a)	Attorney General could bring action to place nonprofit in receivership if the corporation has or would act in a manner or transfer assets in a way that is inconsistent with its purpose. (D.C. Official Code § 29-301.53 new section (c).
FINANCIAL STATEMENTS	All charities must file a report under oath as to the nature and administration of assets. §12586 (a) charities with a gross revenue > \$2 million must prepare and file an audited financial statement. §12586 (e)(1)	Annual filing including financial and governance information required. Charities with revenues in excess of \$500,000 or with \$5 million in assets are required to file an audited financial statement. Boards would have to verify that they had reviewed the filing. (Chapter 12 Section 8F.)	Reports and filings must be complete and accurate. §520. Officers would have a duty to disclose material weaknesses in financial controls or fraud to Board. §727	

¹ Chapter 919 Statutes of 2004.

² Amends MGL Section 8 Chapter 12.

³ Multiple cites: AB 11251, S05237, and S05235.

⁴ Amends the District of Columbia Nonprofit Corporations Act Public Law 87-569; D.C. Official Code § 29-301.01 et. seq.

Last Updated 8/17/2006

STATE NONPROFIT GOVERNANCE ACTIVITY

	CALIFORNIA LAW ¹	MASSACHUSETTS LEGISLATION ²	NEW YORK LEGISLATION ³	DISTRICT OF COLUMBIA LEGISLATION ⁴
AUDIT COMMITTEES	Corporations with a gross revenue > \$2 million must have an audit committee that confers with the independent auditor and approves non-audit services from the firm. Members of the Finance Committee may not constitute 50% or more of the members of the Audit Committee. §1286(e)(2)	Charities with revenues in excess of \$500,000 or with \$5 million in assets are required to have Audit Committee of not less than three persons. Members of committee may not be employees and may not receive compensation beyond normal board fees. Duties may be included in those of Finance Committee. Audit committee responsible to make recommendations concerning external auditor, monitor internal controls, review management letter and review non-audit services of external auditor. (Chapter 12 section 8P)	§520 (g)(1) requires Corporations who have an independent auditor or have revenue >\$2 million to have an Audit Committee, unless prohibited by its bylaws. Committee members must be independent.	
INDEPENDENT AUDITORS	Charities with Gross revenue >\$2 million must have an independent audit with the audited financial statement available to the Attorney General within 9 months of the close of the fiscal year. §1286(e)(1)	Annual audited financials for charities with revenue in excess of \$500,000 would have to be signed by Board Chair and CEO (Chapter 12 Section 8F)		
EXECUTIVE COMPENSATION	Board must approve the compensation (including benefits) of CEO and CFO to ensure they are "just and reasonable" §12586(g)	"Excess benefits transactions" prohibition would become part of state law. Relevant files would have to be retained for four years and subject to attorney general inspection. (Chapter 12 Section 8 Q)	Would require that Board ensure that executive compensation compensation is "fair and reasonable" within the meaning of 4958 of the IRC. 715(e)	Attorney General may bring action to place nonprofit in receivership is the corporation has or would pay excessive compensation. (D.C. Official Code § 29-301.53 new section (c).

Last Updated 8/17/2006

STATE NONPROFIT GOVERNANCE ACTIVITY

	CALIFORNIA LAW ¹	MASSACHUSETTS LEGISLATION ²	NEW YORK LEGISLATION ³	DISTRICT OF COLUMBIA LEGISLATION ⁴
BOARD COMPENSATION		"Excess benefits transactions" prohibition would become part of state law. Relevant files would have to be retained for four years and subject to attorney general inspection. (Chapter 12 Section 8 Q)	Would require that board compensation be voted by the majority of the Board and be "fair and reasonable" within the meaning of 4958 of the IRC. 715(f)	Attorney General may bring action to place nonprofit in receivership is the corporation has or would pay excessive compensation. (D.C. Official Code § 29-301.53 new section (c).
WHISTLEBLOWER		Charities may not retaliate against a whistle-blowing employee who complains about the misuse of charitable assets. Provision would require retention of complaints in file for four years and available to attorney general on request. (Chapter 12 Section 8C)	Would require the audit committee or board to establish a whistleblower process. §712(g)(4)	
BOARD SIZE			A corporation with 25 or more directors must designate an executive committee of three or more members unless prohibited by its bylaws. §712(a) See related committee requirements in this section.	
OTHER	Fines for fraud may be assessed up to \$10,000. §12591.1(a)	Attorney general may seek penalties of \$5000 per violation and may seek remedy for excess benefit transactions. (Chapter 12 Section 8E)	Indemnified officer or director could simply promise to pay litigation costs rather than posting bond.	

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	CALIFORNIA LAW ¹	MASSACHUSETTS LEGISLATION ²	NEW YORK LEGISLATION ³	DISTRICT OF COLUMBIA LEGISLATION ⁴
LINK TO TEXT	http://www.leginfo.ca.gov/cgi-bin/statquery	http://www.ago.state.ma.us/filelibrary/FinancialIntegrityPublicCharities.rtf	http://assembly.state.ny.us/leg/?bn=A11251 http://assembly.state.ny.us/leg/?bn=S05237&sh=t http://assembly.state.ny.us/leg/?bn=S05235&sh=t	http://www.dccouncil.washington.dc.us/images/00001/20060525131713.pdf

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HOT TOPICS IN NONPROFIT ORGANIZATIONS:
CHART OF STATE NONPROFIT REGISTRATION AND SOLICITATION REQUIREMENT RESOURCES

for

ACC'S 2006 ANNUAL MEETING

PREPARED BY:

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AUGUST 15, 2006

**CHART OF STATE NONPROFIT REGISTRATION AND SOLICITATION
REQUIREMENTS RESOURCES**

STATE	CITE	PROVISIONS	LINK TO TEXT AND MATERIALS
Alabama	Alabama Code §§ 13A-9-70 through -84	Registration & Solicitation	http://www.ago.state.al.us/consumer_charities.cfm
Alaska	9 AAC 12.010 – 9. AAC 12.900 AS 45.68.010 – AS 45.68.900	Registration Solicitations	http://www.dps.state.ak.us/cdvsa/asp/
Arizona	A.R.S. § 44-6554 A.R.S. § 44-6561 A.R.S. § 44-6551 (<i>Definitions</i>)	Registration and annual financial reports Solicitation	http://www.azag.gov/consumer/charitable.html http://www.azsos.gov/business_services/Charities/Default.htm
Arkansas	SB 156 Arkansas General Assembly Act Act 1198	Solicitations Registration, Annual reports and fiscal records	http://www.arkleg.state.ar.us/ftp/proof/bills/2005/public/sb156.pdf http://www.ag.state.ar.us/ppd/act1198synopsis.pdf http://www.sos.arkansas.gov/corp_forms.html
California	California Corporations Code 5110, 7110, 9110 et. seq. AG's Guide to Charitable Solicitations	Registration Solicitations	http://www.leginfo.ca.gov/html/corp_table_of_contents.html http://ag.ca.gov/charities/publications/99char1.pdf
Colorado	Colorado Charitable Solicitations Act, Title 6, Article 16, C.R.S. Colorado Revised Statutes 6-16-110.5(3)	Solicitations Internet Registrations	http://www.sos.state.co.us/pubs/bin/go_raffles/charitable.htm
Connecticut	Summary of Charitable Funds Solicitations Act	Solicitations	http://www.ct.gov/ag/lib/ag/charities/public_charity_revisedgenl_info_cscfa_(2).doc

**CHART OF STATE NONPROFIT REGISTRATION AND SOLICITATION
REQUIREMENTS RESOURCES**

STATE	CITE	PROVISIONS	LINK TO TEXT AND MATERIALS
Delaware	Title 8: Corporations	Registration	http://www.delcode.state.de.us/title8/index.htm#TopOfPage
District of Columbia	Registration Information only	Registration	http://brc.dc.gov/nonprofit/requirementsorg/requirementsorg.asp
Florida	Florida Statutes XXXVI Ch. 617	Registration and Governance	http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=Ch0617/tit0617.htm&StatuteYear=2005&Title=%2D%3E2005%2D%3EChapter%20617
Georgia	Georgia Code Ch. 14-3	Registration	http://www.legis.state.ga.us/cgi-bin/gl_codes_detail.pl?code=14-3-101
Hawaii	Hawaii Nonprofit Corporations Act	Registration	http://www.capitol.hawaii.gov/hrscurrent/Vol08_Ch0401-0429/hrs0414d/HRS_0414D-0001.htm
Idaho	Idaho Nonprofit Corporation Act	Registration	http://www3.state.id.us/idstat/TOC/30003KTOC.html
Illinois	805 ILCS § 105	Registration	http://www.ilga.gov/legislation/ilcs/ilcs2.asp?ChapterID=65
Indiana	Indiana Code Title 23 Article 17	Registration	http://www.in.gov/legislative/ic/code/title23/ar17/
Iowa	Iowa Code 504	Registration	http://www.sos.state.ia.us/usefulLinks/frameIACode.asp?c=504 Iowa Principles & Practices for Charitable Non-Profit Excellence: http://www.sos.state.ia.us/pdfs/Nonprofits/IAPP4CNE.pdf

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STATE	CITE	PROVISIONS	LINK TO TEXT AND MATERIALS
Kentucky	KRS Chapter 273.00	Registration	http://lrc.ky.gov/KRS/273-00/CHAPTER.HTM
Louisiana	Registration	Registration	http://www.sos.louisiana.gov/com/corp/corp-index.htm
Maine	Title 13B – Maine Nonprofit Corporation Act	Registration	http://janus.state.me.us/legis/statutes/13-B/title13-Bch0sec0.html Nonprofit Brochure: http://mainegov-images.informe.org/ag/dynld/documents/Charities_Brochure.pdf
Maryland	Business Regulation Article, §§6-101 through 6-701 of the Annotated Code of Maryland.	Registration	http://mlis.state.md.us/cgi-win/web_statutes.exe
Massachusetts	Massachusetts Business Corporations Act G.L. C156D 950 CMR 113.00 – Massachusetts Business Corporations Act (Emergency Regulations) Ch. 68 – Solicitation of Public Funds for Charities	Registration Solicitations	http://www.sec.state.ma.us/cor/cor_pweb/corpn/npfrm.htm http://www.sec.state.ma.us/cor/cor_pdf/e950113b.pdf http://www.mass.gov/legis/laws/mgl/gl-68-toc.htm
Michigan	Michigan Nonprofit Corporation Act 162 of 1982	Registration	http://www.cis.state.mi.us/bcsc/forms/corp/stat/act162.pdf

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STATE	CITE	PROVISIONS	LINK TO TEXT AND MATERIALS
Minnesota	Minnesota Statutes Ch. 317A Charities Laws	Registration	http://www.revisor.leg.state.mn.us/stats/317A/index.html http://www.ag.state.mn.us/brochures/GuidetoCharitieslaws.pdf
Mississippi	Mississippi Charities Act Rules Regulation of Charitable Solicitations	Registration	http://www.sos.state.ms.us/regenfcharities/regcharsol.asp
Missouri	Missouri Revised Statutes Chapter 355	Registration	http://www.moga.mo.gov/STATUTES/C355.HTM
Montana	Montana Code Annotated 2005, Title 35 Ch. 2	Registration	http://data.opi.mt.gov/bills/mca_toc/35_2.htm
Nebraska	Statute Section 33-101	Registration	http://uniweb.legislature.ne.gov/LegalDocs/view.php?page=s3301001000
Nevada	NRS Chapter 82 Attorney General's Guide to Nonprofits	Registration	http://www.leg.state.nv.us/NRS/NRS-082.html http://ag.state.nv.us/menu/top/publications/Guide%20to%20NonProfits.pdf
New Hampshire	RSA Ch. 292 – Voluntary Corporations and Associations	Registration	http://www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-XXVII-292.htm
New Jersey	Registration Guide	Registration	http://www.nj.gov/njbgs/

**CHART OF STATE NONPROFIT REGISTRATION AND SOLICITATION
REQUIREMENTS RESOURCES**

STATE	CITE	PROVISIONS	LINK TO TEXT AND MATERIALS
New Mexico	12.3.3 NMAC Instructions for Forming a Nonprofit Corporation in New Mexico	Registration	http://www.nmcp.state.nm.us/nmac/cgi-bin/hse/homepagesearchengine.exe?url=http://www.nmcp.state.nm.us/nmac/parts/title12/12.003.0003.htm:geturl;terms=corporations http://www.ago.state.nm.us/divs/cos/charities/formingnp.htm
New York	NYCRR Title 19, Chapter IV	Registration	http://www.dos.state.ny.us/corp/corpsregs.htm
North Carolina	North Carolina Non-Profit Business Corporations Act Guidelines to non-profit incorporation Charitable Solicitations Act, G.S. 131F.	Registration Solicitation	http://www.ncga.state.nc.us/gascrip/ts/Statutes/StatutesTOC.pl?Chapter=0055A http://www.secretary.state.nc.us/Corporations/# http://www.ncga.state.nc.us/gascrip/ts/Statutes/StatutesTOC.pl?Chapter=0131F
North Dakota	Charitable Organization Information How to begin a nonprofit in North Dakota	Registration	http://www.nd.gov/sos/nonprofit/charitableorg/index.html http://bookstore.lexis.com/bookstore/catalog?action=product&prod_id=7087
Ohio	Charitable Registration Information Charitable Solicitations Information sheet	Registration Solicitations	http://www.ag.state.oh.us/business/forms/char/ann_fin_rpt_char_org.pdf http://www.ag.state.oh.us/business/pubs/char/char_solicit_reg_info.pdf
Oklahoma	Oklahoma Statutes, Title 18	Registration	http://www.lsb.state.ok.us/osStatutesTitle.html

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STATE	CITE	PROVISIONS	LINK TO TEXT AND MATERIALS
Oregon	Oregon Revised Statutes, Ch. 65 Nonprofit Corporations	Registration	http://www.leg.state.or.us/ors/065.html
Pennsylvania	PA Code Title 19 A Guide to Business Registration in Pennsylvania	Registration	http://www.pacode.com/secure/search.asp http://www.dos.state.pa.us/corps/lib/corps/guide_to_business_guide_in_pa.pdf
Rhode Island	R.I.G.L. Title 7, Chapter 7.6 R.I.G.L. 7-6-91 R.I.G.L. 7-6-94	Registration	http://www.rilin.state.ri.us/Statutes/TITLE7/7-6/INDEX.HTM
South Carolina	Title 33, Chapter 31 - South Carolina Nonprofit Corporation Act Guidelines for South Carolina Nonprofit Organizations Solicitation of Charitable Funds Act	Registration Solicitation	http://www.scstatehouse.net/code/t133.htm http://www.scsos.com/charities/npmanual.pdf http://www.scstatehouse.net/code/t33c056.htm
South Dakota	Title 47 Chapters 22-28	Registration	http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=47
Tennessee	Filing Guide Non Profit Organizations Tennessee Corporations, Partnerships and Associations Law Annotated w/CD-ROM, 2005 Edition	Registration	http://tennessee.gov/sos/forms/fg-np.pdf http://bookstore.lexis.com/bookstore/catalog?action=product&prod_id=7087
Texas	Business Organizations Code Section 22.001(5)	Registration	http://www.oag.state.tx.us/consumer/charitabletrusts.shtml
Utah	Utah Code Title 16, Chapter 06A, Utah Revised Nonprofit Corporation Act	Registration	http://business.utah.gov/business/starting/government_starting.html

**CHART OF STATE NONPROFIT REGISTRATION AND SOLICITATION
REQUIREMENTS RESOURCES**

STATE	CITE	PROVISIONS	LINK TO TEXT AND MATERIALS
Vermont	Vermont Statutes Title 11B Vermont's Charitable Solicitations Law	Registration Solicitations	http://www.leg.state.vt.us/statutes/chapters.cfm?Title=11B http://www.atg.state.vt.us/display.php?smod=10
Virginia	Charities Information	Registration	http://www.virginia.gov/cmsportal2/business_4096/business_resources_4100/index.html
Washington	Governance, nonprofit miscellaneous and mutual corporations act revised, HB 1545, * SHB 1545, CH 271 (2001) Title 24 RCW	Registration	http://apps.leg.wa.gov/billinfo/bills/bytopic/Results.aspx?year=2001&subject=NONPROFIT%20CORPORATIONS http://apps.leg.wa.gov/rcw/default.aspx?Cite=24
West Virginia	CHAPTER 31E. West Virginia Nonprofit Corporations Act	Registration	http://www.wvsos.com/business/code/wvnonprofitcorp.htm
Wisconsin	Wisconsin Statutes Chapters 181	Registration	http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=35330679&infobase=stats.nfo&jump=ch.%20181&softpage=Browse_Frame_Pg
Wyoming	Wyoming Non-Profit Corporation Act W.S. Title 17, Chapter 19	Registration	http://soswy.state.wy.us/corporat/np.htm



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Hot Topics in Nonprofit Organizations

State Activity on Nonprofit Corporate Governance

Janine Greenwood

*Vice President and General Counsel
American Student Assistance*



History of Modern State Public Charity Regulation

● Enactment of State Registration Statutes

New Hampshire	1943
Rhode Island	1950
South Carolina	1953
Ohio	1953
Massachusetts	1954
California	1955
New York	1697

Uniform Act for Supervision of Trustees for Charitable purposes 1954



The scope of State regulatory Authority is dependent on the powers granted to the Attorney General

“No such specific power has been granted by the legislature [to the Attorney General] regarding nonprofit Corporations devoted to charitable purposes”. Virginia vs. The JOCO Foundation (2002)



As a result of this case the Virginia Code was quickly Amended

- 2.2-507.1. **Authority of Attorney General regarding charitable assets**
- A. The assets of a charitable corporation incorporated in or doing any business in Virginia shall be deemed to be held in trust for the public for such purposes as are established by the governing documents of such charitable corporation, the gift or bequest made to such charitable corporation, or other applicable law. The Attorney General shall have the same authority to act on behalf of the public with respect to such assets as he has with respect to assets held by unincorporated charitable trusts and other charitable entities, including the authority to seek such judicial relief as may be necessary to protect the public interest in such assets.
- B. Nothing contained in this section is intended to modify the standard of conduct applicable under existing law to the directors of charitable corporations incorporated in or doing any business in Virginia. (2002, c.792;2004,c.289.)



States with the Largest Base of Assets in Charities and Trusts

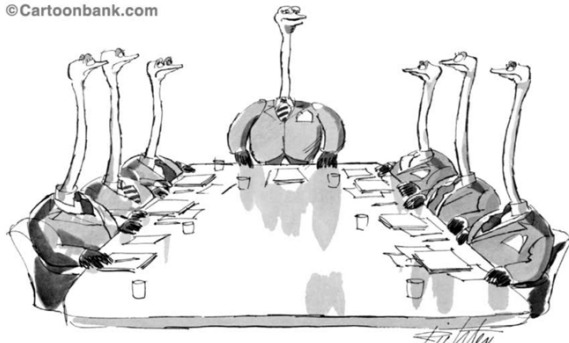
	Public Charities	Private Foundations
New York	\$ 147,984,000	\$ 71,994,000
California	\$ 142,465,000	\$ 56,985,000
Massachusetts	\$ 127,702,000	\$ 9,151,000

Source: National Center for Charitable Statistics, Urban Institute (2003 data)



“The motion has been made and seconded that we stick our heads in the sand”

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“The motion has been made and seconded that we stick our heads in the sand.”

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



California Statute

- Gives Attorney General power to monitor adherence to corporate purpose
- Sets state “excess benefits” standards
- Requires financial reporting for charities with gross revenues in excess of \$2 million
- New requirements for charitable solicitation

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California Enforcement Experience

Investigation of J. Paul Getty Trust

“The Attorney general’s primary enforcement objective is to ensure charitable assets are used properly and, if they are not, to ensure the nonprofit organization is made whole for any losses.”



Investigation of Getty Trust

Areas reviewed included:

- Travel expenses
- Gifts to trustees
- Consulting fees
- Sale of property
- Grants
- Severance
- Legal Fees
- Compensation

No enforcement action but monitoring for two years.



New York

- Sets state “excess benefits” standards
- Requires an audit committee for corporations with revenue greater than \$2 million
- Requires whistleblower process
- Requires larger boards to designate executive committee

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Massachusetts

- Financial filings with board review for charities with revenue of \$500,000
- Audit Committee required
- State standards for “excess benefits” transactions
- No retaliation against whistleblowers

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Other State Activity

- Ohio
- Washington D.C.
- Pennsylvania



Applicability to Foreign Corporations

- 90,000 charities now registered in California
- Registration Fees
- Solicitation vs. Doing Business

Non-Profit Joint Ventures

- Non-profits may enter into joint venture agreements with for-profits without losing their tax-exempt status, as long as doing so furthers the organization's exempt purposes.

Legal Timeline

- 1978 and earlier The *Per Se* Rule
- 1982 *Plumstead Theatre*
 and the 2-Prong Test
- 1998 Revenue Ruling 98-15
- 2004 Revenue Ruling 2004-51

The *Per Se* Rule

- Participation by a non-profit organization in a joint venture lead to an automatic revocation of the organization's tax exempt status.
- IRS attempt to avoid impermissible private economic benefit

The 2-Prong Test

- Came out of case *Plumstead Theatre Society v. Commissioner*, 1982
- Non-profit may form a joint venture with a for-profit under certain circumstances and retain tax-exempt status
- Two prong “close scrutiny” test:
 1. activities of joint venture must further charitable activities
 2. structure of joint venture must minimize private benefit

Revenue Ruling 98-15

- Based on whole-hospital joint ventures
- Adopts *Plumstead* 2-prong test with emphasis on “control” of non-profit in the venture
- “Control” must be evident in both organizational documents (legally binding) and day-to-day operation of the joint venture

Non-Profit “control”

- Organizational documents should
 - Limit the for-profit’s right to remove exempt organization as general partner
 - Limit for-profit’s right to amend terms of the joint venture agreement
 - Limit the joint venture’s activities to those that further exempt purposes
- Day-to-Day operations should include
 - Non-profit voting power to commit venture’s assets for charitable purposes
 - Members of the venture’s management team includes non-profit representatives with decision making authority
 - Non-profit has power to set terms of any management contract

Management of Joint Venture

- Rev. Rul. 98-15 allows for use of a management company to operate joint venture
- Management company agreements should include:
 - term of agreement set for a definite number of years
 - agreement renewable by mutual consent of all partners
 - agreement may be terminable by the joint venture for cause
 - fees are based on gross revenues
 - terms, fees, and conditions of the management agreement are reasonable and comparable to management contracts of other firms for similar services.

Revenue Ruling 2004-51

- Based on a joint venture situation between a tax-exempt university and a for-profit company that conducts interactive video training programs.
- Addresses two questions:
 1. Whether the university's participation in the joint venture affects its tax-exempt status
 2. Whether the university is subject to unrelated business income tax (UBIT) on income generated by the joint venture

Rev. Rul. 2004-51 Implications

- If a tax-exempt organization can show that its participation in a joint venture with a for-profit is an *insubstantial* part of its activities, then such participation will not have any impact on the exempt status of the organization.

Rev. Rul. 2004-51 implications

- To avoid being assessed UBIT on the non-profit's share income from the joint venture, the partnership should meet the following criteria:
 - Joint venture must contribute to non-profit's exempt purpose
 - Exempt organization should have sufficient control over venture activities
 - All contracts/transactions between venture and others should be at arm's length and fair market value
 - Ownership interests and returns, allocations and distributions of capital should be proportional to each partner's respective capital contributions to the venture

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The Duty of Loyalty of the NFP Director From Another Specified Organization

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Summary

The director of a not for profit ("NFP") corporation who sits by designation of another organization or by virtue of a position held elsewhere (the "designated director") often believes that she is there to represent the interests of her other organization or position. This can result in negative dynamics within the board of directors of the NFP corporation. The directors not so sitting will sometimes informally exclude the designated director from important board activities, such as informal discussions where sensitive issues may be addressed, or not fully disclose all issues or agendas when formal discussions take place, all out of concern that the designated director does not share their sense of corporate loyalty. Management may also not trust the designated director

The belief that she represents another interest is erroneous. Unless there is a state or federal statute holding expressly to the contrary, the designated director's *exclusive* duty of loyalty is to the board on which she is sitting, not her other organization or position. While there is only a modicum of case law explicitly so holding, it supports this conclusion as does the policy behind important elements of the governing law for NFP corporations. This duty should be explained to every new director, designated or otherwise, at the time of orientation, and continuously emphasized to the board.

Background of the Problem

The duties of corporate directors were principally formulated by the courts, though they now have been codified into various statutes applicable to corporations.² In the case of NFP corporations the directors' duties generally identified are those of (a) due care, (b) loyalty to the corporation, and (c) obedience to the decisions of the board, though obedience has also been said to be simply a subsidiary duty of loyalty.³

¹ Thanks to Adam Shoemaker, a student at Harvard Law School and 2006 summer intern in the Office of the General Counsel at NPR, for his valuable assistance in the preparation of this material.

² See, Model Nonprofit Corporation Act ("Model Act"), Sections 8.30 and 8.31

³ The duties of care and loyalty of directors of NFP corporations are essentially the same as those of for profit corporations, omitting only the duties owed to stockholders, since stockholders are absent from NFP corporations.

The duty of loyalty as it has evolved requires that actions of directors always be in the interest of the corporation. This does not permit directors ever to act in their own interests unless those interests are aligned completely with those of the corporation.

The articles of incorporation, the bylaws or other organic documents of NFP corporations frequently provide that some or all directors shall be from specified organizations or positions. Examples of these might be specific government positions (e.g., the State Secretary of Fine Arts), employees of members of the NFP (e.g., the chief manager of government relations for each member), persons holding positions in an NFP that is operating in the same area of activity, persons elected by the members of the NFP, or the like.

These directors often face legal and conceptual difficulties in determining to whom their loyalty belongs. They may feel that they have been chosen by the NFP to represent the interests of the specified position or organization from which they come. Otherwise, they ask, why was the particular organization or position specified? The same notion may be harbored by directors who are not from designated organizations or positions. As a result there may be little trust among board members.

In such an atmosphere a board can become factionalized as directors may not feel that all members are seeking the same end. The designated director continuously feels conflicted in her duties, but feels that she must continue to serve the master from which she comes. This often leads decisions being made on internal political grounds rather than on rational analysis of the needs and NFP objectives of the corporation.

Conflict also spills over into board/management relations. Management, which often sees its objectives very clearly and precisely as defined by the organic documents of the corporation,⁴ may not trust the designated director, whom they perceive as representing other interests that may be less aligned or even adverse. Members may also get the wrongheaded idea that they "own" the NFP corporation, thus potentially subverting its corporate NFP (and tax exempt) purposes. Finally, public officials may think that because a public official serves on a board, the corporation should be managed for a particular public purpose associated with the public official's other responsibilities.

Indeed, it is not unusual to find lawyers for NFP organizations who believe that designated directors have fiduciary and other duties to the organizations from

⁴ Management will normally be particularly advertent to the specified corporate purposes as set out in the documents that established the corporation's tax exemption. To the extent that those would be compromised by the designated director who pursues his other interests, conflict with management will surely arise.

which they come. As we shall see below, the existing case law – along with other conceptual sources of authority – indicate that this notion is erroneous.

The Legal Issues

There is a paucity of case law on this point. Only a single decision can be found that directly addresses the issue, though it is unambiguous in supporting the notion that designated directors owe their duty of loyalty exclusively to the corporation on whose board they are sitting. That decision, *Professional Hockey Corp. v. World Hockey Assoc.*, 143 Cal. App. 3d 410; 191 Cal. Rptr. 773 (1983), held that under “both California and Delaware law” the duty of loyalty requires the directors/trustees not to act in their own self-interest when the interest of their corporation will be damaged thereby.”

In the *Professional Hockey* case, a dispute arose over an effort by one franchise owner to transfer the ownership of that franchise, which required approval by the WHA board of directors, each director of which was “designated by each [team] Owner to represent his Franchise on the League’s Board of Trustees...” Rather than taking the matter to the board as a whole, a single director telephoned each other director individually, securing the approval of all of them without a meeting. After that the president signed a document approving the transfer. Subsequently the board in a meeting ratified the transfer.

When the transferee soon fell into financial difficulty, the WHA attempted to hold the action void, arguing that the transfer was not lawfully approved. Its argument focused on the actions by the director in telephoning the other directors, arguing that such activities were a violation of his fiduciary duties to the corporation. The director responded by saying that he violated no fiduciary duty to the WHA because under its own bylaws he was explicitly appointed to “represent” the interests of his principal’s franchise, not those of the WHA as a corporation.

The court, analyzing both Delaware and California law, found that argument unconvincing. It said:

[W]hen the representatives of the various teams sit as the board of trustees of the WHA it is not their club, their bylaws, their personal concept of duty which control their obligations and duties as trustees. The law requires, irrespective of the competitive personal feelings of the various owners of teams may have towards each other, when they or their representatives sit on the board of directors of WHA to the extent they have common corporate goals, they have a duty to make decisions for the benefit of the corporation, the hockey league as a whole.⁵

⁵ 143 Cal. App. 3d at 414.

The court then went further:

To be specific there is a duty of loyalty which requires directors-trustees not to act in their own self-interest when the interests of the corporation will be damaged thereby. This duty of undivided loyalty applies even though the members of the board may also serve on subsidiary bodies or groups which make up the constituent element of the corporation. For example in *Ravens Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 799 [171 Cal.Rptr. 334], a developer and his agents and employees also served as directors of homeowners associations. The appeal court found the duty of undivided loyalty was owed and such directors may not make decisions for the association that benefit their own interests at the expense of the association and its members. These provisions of the law apply not only to ordinary business corporations, but to nonprofit corporations as well. (*Ibid.*)⁶

Although the action in approving the transfer was ultimately upheld,⁷ the court’s decision makes one thing clear – even where the bylaws say that in serving on a board a director “represents” another organization, such a designated director must have unyielding loyalty to the corporation. Indeed, from this court’s holding it would appear impossible for organizational planners ever to shift that duty from the corporation. That would appear to require language in the state corporation law or another statute to change that principle.

When considered in light of other legal policies applicable to NFP corporations, this result is not surprising. Under many state NFP corporation statutes there are strict prohibitions against the payment of the corporation’s income to any director, officer or member.⁸ Similarly, the IRS doctrine of private inurement⁹ provides that in order for an organization to qualify as a tax-exempt charity, no part of its net earnings or assets may inure to the benefit of any private individual, defining private individuals to include directors. Thus, if a director cannot derive direct financial benefit from an NFP corporation, it is easy to conclude that she also cannot manage the corporation for her indirect benefit or that of an entity with which she is associated.

⁶ 143 Cal. App. 3d at 415

⁷ The court found the subsequent ratification by the board to be sufficient approval of the transfer. 143 Cal. App. 3d at 417

⁸ D.C. Code 29-301.27

⁹ See, section 501(c)(3) of the Internal Revenue Code

The Good News

The undoing of the unfounded notion of duty has many beneficial results. Although it undoes some of the negative organizational dynamics referred to above, it also operates to create some positive ones. It frees the designated director to focus on the needs of the corporation. There is no longer any need to be looking over her shoulder constantly, worrying about the other constituency. It also gives that director the power – indeed probably the duty – to disclose to the other constituency that as a designated director she cannot lawfully serve its narrow interests.

Notwithstanding, this doctrine does not abandon the interests of the designated director's constituencies. This is because in most circumstances those constituencies share some degree of alignment with the designated director's corporation. For example, in the case of members who may have elected a designated director, the alignment may be total. In the final analysis, each member elects to become members because they support the objectives of the corporation as set forth in its organic documents. The directors have the duty to manage that corporation to serve those objectives exclusively. Those objectives are also the basis on which taxing authorities decide to give tax exempt status to the corporation. If the corporation is not managed to seek those objectives, the tax exempt status may be lost. Thus if such a designated director pursues the corporation's exempt purposes unswervingly, he is serving the interests of the members who elected him.¹⁰

How to Implement This Doctrine

The role of the attorney for an NFP corporation with designated directors in implementing this notion is to instill an unambiguous culture into all of the directors, whether designated or not, that the designated directors serve only one master – the corporation on whose board they are sitting. This process may well be complicated by years of wrongheaded thinking by directors, management and other stakeholders with regard to the direction in which the designated director's duties flow. In the end counsel must have thought through this concept and be ready to respond to tough questions from various stakeholders.

The starting point is with each new director during her orientation. This doctrine should be especially emphasized to her then, but also to other directors should also understand the concept clearly, and realize that the duties of all directors are the same. Several points to emphasize include the following:

- A board of directors is not a legislative body
- The best boards of directors operate with high degrees of trust
- Trust is developed by directors displaying trust and earning it
- Showing unyielding loyalty to the common purpose is an excellent way to earn that trust.
- That loyalty has a small price because it already is required by law.
- Making clear where the particular loyalty lies to an outside constituency will manage their expectations and reduce the external pressures on the director.
- In conveying that to a constituency, the director should also make clear that she is managing the corporation to serve the purposes for which it was created, and that will serve important interests of the constituency.

Establishing this new understanding of board loyalties often involves change, which is always hard to manage. But if this is successful, the board and the corporation will work more efficiently and effectively, and with considerably less useless stress.

¹⁰ This loyalty does not mean that a designated director will never have a conflict of interest by virtue of employment in the designated position or the relation to a constituency which elected him. In such circumstances the designated director should manage the conflict just like any other director, disclosing it to the other directors and then recusing herself unless the other directors, on full disclosure, elect to waive the conflict.



Protecting IP for the Nonprofit

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



Why is this a “Hot Topic” for me?

- Save the Children v. Unasi Inc.
 - “savethechildenn.org”; “savethchildren.org”
- United we Stand America v. United we Stand America
 - Trademark dispute
- American Diabetes Assoc. v. Green
 - “wwwdiabetes.org”
- Save the Children v. Mike Flynn
 - “savethechildern.org”

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What are the dangers?

- **Thieves:** steal anything
- **Imposters:** cybersquatters and knock-offs
- **Yourself:** giving it away
- **Violating the rights of others**



How do you find your IP?

- **MUST** perform an IP audit
- Meet with every department
- Find out how IP is being used
- Proactive investigations

NOTE: must explain importance of task
(SOX, civil & criminal liability)



What to Expect?

- Logos
- Publications, characters, art, music etc..
- Patents
- Website protection
- Computer code (open source & shareware)
- Works for Hire



Should I register?

- Clarification of ownership & use
- Statutory & Actual damages for Infringement
- Choice of jurisdictional forum
- Prima facie evidence of use/ownership
- Contracts and derivative works



Develop a Strategic Plan

- Response to Infringement
- Utilizing outside counsel
- WIPPO
- Arbitration
- Negotiation
- US litigation



Prevention is the Best Solution

- Know what IP exists
- Know what is worth protecting
- Actively register, update and track IP
- Educate organization
- Plan for response to infringement
- Know the enemy