

NONPROFIT MATTERS



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We hope this third edition of Nonprofit Matters finds you and your organization well. This newsletter is designed to provide you information that will help answer some of the questions you have in the day to day management of your nonprofit organization. With this third edition we mark the third anniversary of our Community Organizations Legal Assistance Project (COLAP). By providing Orange County nonprofits with free business law legal assistance, COLAP seeks to strengthen the ability of Orange County's exceptional nonprofits as they address an array of issues affecting the people in our community. We've been able to reach our three year anniversary due to the critical financial sponsorship of the law firm of Buchalter Nemer and the visionary leadership of Equal Justice Works, through which we receive our AmeriCorps support. We thank them and all of you for making Orange County a better place.

Ken Babcock,
Executive Director & General Counsel

Nothing in this newsletter should be construed as legal advice. For more information about complying with the various laws mentioned in this newsletter, please consult a legal or tax professional.

Trademark Protection for Nonprofits

By Tirzah Abé Lowe and Gregory Tse
Knobbe, Martens, Olson, & Bear, LLP

Imagine you are the director of a national nonprofit organization based in Santa Ana called "Jobs for the Needy." Your organization has provided job assistance to the homeless for twenty years and has earned a reputation for being an effective organization that uses its donations efficiently.

While surfing the web, you come across another organization called "Jobs for Those in Need" that provides similar services to your organization. It is based in Los Angeles and

appears to have launched in the past year. The new organization has set up a website to collect online donations. After a little investigating, you discover through your staff that loyal donors who once contributed annually to your organization are now making the mistake of contributing online to the new, less established organization. Significant sums of money that were supposed to support your organization are now being diverted into the coffers of another. What do you do? As the director, it is time to take control and assert your organization's trademark rights.

What Is A Trademark?

If you are an established organization, you already have trademark rights at a minimum in your organization's name. A trademark or "mark" is a word, symbol, or phrase used to identify and distinguish the goods or services of one provider from those of another. Examples of marks used by nonprofits include the SAVE THE CHILDREN® name, the Red Cross design owned by the American Red Cross, and the LIVE STRONG® slogan used by the Lance Armstrong Foundation.

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New Federal Law Governing Charitable Giving

On August 17th, President Bush signed the Pension Protection Act of 2006 ([HR 4 ENR](#)). This bill mainly deals with overhauling our nation's pension system, but it also contains a number of provisions that dramatically impact tax-exempt nonprofit organizations in areas such as tax compliance, charitable giving requirements, and corporate governance

procedures. Look to Title XII of the bill for these provisions.

A few of these provisions specifically apply to small community organizations, including those earning less than \$25,000 a year-- organizations that have historically been exempt from having to file an annual Form 990 with the IRS. Under the new law, these organizations

still do not have to report on their earnings and expenses. However, they will have to file an annual notice that will update the IRS about contact information changes and other important information relating to the nonprofit. As this bill just became law, the IRS has yet to create such a form, but look to our next

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Focus on Executive Compensation

With nonprofit accountability the buzz phrase of the day, and with the IRS engaged in a compliance initiative on this topic, organizations should closely scrutinize the salary and other compensation they give to executives and officers of the organization.



The compensation of nonprofit employees must be "just and reasonable." But, really, what does that mean for the

day to day operations of a nonprofit that wishes to attract and retain top talent and pay a competitive wage in a community with an increasingly high standard of living?

Like most areas of tax law, there is no bright line rule for determining what is or is not "reasonable" compensation. Instead, the IRS relies on a complete facts and

circumstances test, looking to the amount normally paid for (1) like services (2) by like enterprises (3) under like circumstances.

A number of factors can be used to compare your employee's salary to other salaries meeting the three factors above. Specifically, if nonprofit managers want to rely on the "rebuttable presumption" of reasonable compensation, they must compare the proposed salary to at least three others, looking to the factors described below.

Comparing Like Services

Nonprofit managers should look to (1) the type of work; (2) the geographic scope of the work; (3) the level of responsibility of the work (employee supervision and financial responsibility); and (4) whether the work is full or part-time.

Comparing Like Enterprises

Nonprofit managers should look to (1) the size of the entity (budget, revenues, number of employees,

number of persons served, etc.); and (2) the sector served (for example pre-schools versus universities). Entities can be a mix of nonprofit and for-profit entities.

Comparing Like Circumstances

Nonprofit managers should look to (1) the total compensation (non-salary compensation, taxable and non-taxable compensation, etc.); and (2) geography factors (urban v. rural, size of the area, and cost of living).

And of course, all this information needs to be looked at prior to making the decision. Individuals deciding upon compensation should carefully document the full basis for their decision so they remain transparent to donors and government regulators.

This article was adapted from presentation materials from a May 2006 [IRS Phone Forum](#). Additional information is available from [GuideStar.org](#).

Updates from the IRS

IRS Increases Application Fees

On July 1, the IRS increased the application fee for federal tax-exemption for the first time in a number of years. The "user fee" for Form 1023 now costs \$300 if your gross income averages under \$10,000 or \$750 if your average gross income exceeds that amount. Group exemption letter requests also increased from \$500 to \$900.

IRS Form 990 Updated

IRS Form 990, the annual information return for tax-exempt organizations, was updated for tax year 2005. In response to these changes, the IRS has posted [new FAQ's](#) on its web-site. Materials from a IRS phone forum on Form

990 are also posted. A complete overhaul of Form 990 is expected by May 2007.

Election Resources & Information

Protect your organization this election year! Organizations should review the [new resources](#) from the IRS on political campaign intervention. More information about complying with the political campaign restrictions is available in our last edition of *Nonprofit Matters*, available on the Public Law Center [website](#).

Resources for Low-Income Housing Providers

The IRS recently issued a [directive for processing tax-exemption applications](#) of organizations that partner with for-profit investors to finance low income housing projects. The directive includes

safeguards and best practices organizations can follow to ensure the protection of their charitable status.

Complying with Counter-Terrorism Guidelines

In a post 9/11 world, nonprofits that do charitable work abroad must comply with the USA PATRIOT Act and other counter-terrorism guidelines. The IRS recently released "[Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities](#)." The guidelines are designed to help organizations to guard against the threat of charitable funds being diverted by terrorists and their supporters.

New Laws Affecting Your Clients

California Budget:

The Governor signed the 2006-07 budget earlier this summer. This year's budget has a number of notable items for nonprofits and their clients, including: increased state funding for Child Welfare Services & Foster Care initiatives; expanded eligibility for subsidized child care; and a federal cost of living adjustment for SSI/SSP grants. To read more about these and other budget highlights, please visit the [California Department of Finance's webpage](#).



Civil Rights:

[SB 1441](#) adds "sexual orientation" to the list of protected statuses in Government Code section 11135 for which discrimination by programs or agencies of the state is prohibited. The bill also expands the definition of discrimination under this Government Code provision. SB 1441 just needs a signature from the governor before it becomes law.

Unfortunately, the courts have not been as supportive of gay rights. In July, a California Appellate Court heard oral arguments for and against Proposition 22, which bans same-sex marriage.

A ruling is expected in the fall, and the case will most likely be appealed to the California Supreme Court. Other state courts, including New York and [Washington](#), have issued a rash of opinions against gay marriage. For more information on these cases, read this Q&A article from the [Los Angeles Times](#).

Criminal Rights:

In July, the Governor signed into law [SB 1137](#), which amended the Substance Abuse and Crime Prevention Act of 2000 (also known



as Proposition 36). The bill allows for brief jail time for offenders with probation violations and requires drug-testing of participants in Prop 36 funded treatment programs. The [Drug Policy Alliance](#) has initiated a court action challenging the constitutionality of SB 1137.

Worker Rights:

Last August, Governor Schwarzenegger issued new emergency regulations aimed at protecting employees who work outdoors. In the midst of a heat-wave, these first in the nation regulations became permanent this summer. According to the [Governor](#), these regulations "require employers and employees to know how to recognize, prevent and treat heat stress, [ensure that] access to a shaded area is available to any outdoor employee who feels the need to cool off or get out of the sun, and refocus attention on current law that makes water available to every outdoor worker at all times."

[AB 1835](#), which has been introduced in the state legislature, would increase the minimum wage to \$7.25 July 1 next year, and to \$7.75 in July 2008. Beginning in 2009, and each January 1 thereafter, the minimum wage would be automatically adjusted to keep pace with the rate of inflation. Please visit the [California Legislative Information webpage](#) to keep current on the status of this bill.

In [Smith v. Superior Court of Los Angeles County](#), the California Supreme Court reaffirmed the statutory requirement that employees must be paid all unpaid wages on the last day of employment and specifically held that this requirement does not depend upon the length of employment or the reason for the termination.

Housing & Homelessness:

In [Jones v. City of Los Angeles](#), the U.S. Court of Appeals for the Ninth Circuit issued a landmark ruling, holding that the Eighth Amendment to the U.S. Constitution prohibits Los Angeles from punishing individuals who involuntary sit, lie, or sleep on public sidewalks because this is an unavoidable consequence of being homeless and unable to find shelter in the city. The decision was based on the city's admission that "[t]he gap between the homeless population needing a shelter bed and the inventory of shelter beds is severely large."



Government Benefits:

A new federal law went into effect July 1, which requires the California Department of Health & Human Services to obtain documentation of citizenship status from U.S. citizens who apply for or who receive Medi-Cal benefits. However, the law does not require that an individual be a citizen to be eligible for Medi-Cal, and thus non-citizen immigrants are still eligible to apply for and receive Medi-Cal. For more information, visit the [California Immigrant Welfare Collaborative website](#).

In [McWaters v. FEMA](#), a District Court in Louisiana held that FEMA is subject to judicial review for mandatory acts that may rise to the level of a constitutional violation by the agency and held that temporary housing assistance provided by FEMA is a property interest protected by the due process clause. As a result of this opinion, the court permanently enjoined FEMA from terminating an individual's Short Term Lodging Program benefits without providing 2 weeks advance notice.

"Trademark Protection" cont. from pg. 1

As A Trademark Owner, What Kind Of Rights Do I Have?

In general, trademark law gives a trademark owner the exclusive right to use a particular mark on a specific category of goods or services. The primary purpose of trademark law is to guard against public confusion in connection with providers of similar products and services.

There are two ways to acquire trademark rights in the United States. First, one may acquire state common law rights just by being the first to use the mark in commerce. Second, one may acquire federal statutory

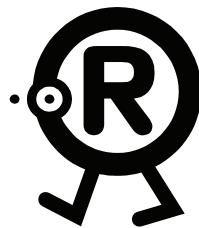
trademark rights by being the first to register the mark with the U.S.

Patent and
Trademark
Office (PTO).

State common
law rights
endure
perpetually so
long as a mark
is in use. These

rights, however, are limited to the specific geographic areas where the mark is being used. Federal rights are also perpetual, so long as the mark is in use and the maintenance fees are paid. The advantage of federal protection, however, is that it is not limited by geography. Instead, rights extend throughout the entire United States.

Because of the advantage of federal rights over state common law rights, many established nonprofit organizations have filed and obtained federal protection. Note that the three trademarks listed above, namely SAVE THE CHILDREN, the American Red Cross logo, and LIVE STRONG, have all been federally registered by their respective owners and, hence, may bear the ® symbol.



How Can I Prevent Others From Using My Trademark?

In the example given at the beginning of this article, the established organization "Jobs for the Needy" would have a strong case of trademark infringement against the startup organization "Jobs for Those in Need." The marks are similar and the services are identical. Even if the older organization does not own a federal registration, it could rely on its state common law rights since Santa Ana and Los Angeles are in the same Southern California region. Any person or business that uses a mark in a way that is likely to result in customer confusion is potentially liable for trademark infringement.

An important tool in the trademark owners' arsenal is the "cease and desist" letter. Sent from the organization or a trademark attorney, the letter generally includes an outline of the trademark owner's case for infringement and a demand that the infringer "cease and desist" all use of the infringing mark. Frequently, these letters avoid costly litigation and are the preliminary steps toward negotiating a settlement agreement. If the infringer fails to respond or refuses to comply, however, you should contact an attorney, if you have not already, and consider filing a lawsuit.

Is There A Downside To Asserting My Trademark Rights?

Before sending a "cease and desist letter," a nonprofit organization should consider possible negative consequences of its actions. Other than the obvious burden of legal costs, nonprofit organizations, in particular, may garner unintended publicity by the threatening of legal action against another nonprofit. In addition, some donors may be less inclined to contribute to an organization in which the donations may be supporting a

court battle. You may wish to take preemptive action by informing your donor base of the business reasons for filing the case.

Another way to combat negative publicity would be to seek out pro bono representation from a law firm. Many law firms are willing to waive their legal fees for nonprofit organizations and charge only the actual costs of the case. In such a situation, you could reassure your donors that their contributions are going primarily to charitable services, rather than legal fees.

Conversely, there is a downside to not asserting your trademark rights. In addition to possible lost revenue from confused donors, the infringer could later claim that you consented to its use of similar name by taking no action. Hence, an organization needs to weigh the costs and benefits of each action.

How Do I Make Sure I Am Not A Trademark Infringer?

No one wants to be at the receiving end of a lawsuit. Hence, when developing a new campaign or event, your organization should conduct a trademark clearance search on the potential mark. This is the process of searching for pre-existing trademarks and analyzing the search results to determine whether the proposed mark is safe to use.

An initial clearance search may be conducted inexpensively by searching the Internet for similar marks currently in use. In addition, the U.S. Patent and Trademark Office website has a free searchable database of federal trademark applications and registrations, located at <http://www.uspto.gov/main/trademarks.htm>.

This is an excellent starting point to conduct an initial clearance search.



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"Trademark Protection" cont. from pg. 4

A trademark lawyer can provide an organization with a much more thorough clearance search and legal assessment. Since such searches can be costly, consider inquiring if a firm offers *pro bono* trademark services, or contact the [Public Law Center](#) to connect you with a law firm willing to provide *pro bono* services.

Trademark law exists to protect the goodwill of your organization. A strong trademark is closely tied to a strong reputation; both are vital to a successful nonprofit organization.



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"Federal Nonprofit Law" cont. from page 1

Nonprofit Matters in January for an update about this requirement. It is important that small nonprofits comply with this provision because under HR 4, if they fail to file the notice for three consecutive years, they will have their tax-exemption automatically revoked.

The law also requires nonprofits to publicly disclose their unrelated business income, reported to the IRS on Form 990-T. The disclosure requirements for Form 990-T are similar to the requirements for Form 990.

Additionally, Section 1212 of the bill continues the federal government's crackdown upon self-dealing and excess benefit transactions by doubling the excise

Changes in Charitable Fundraising Laws

Illegality of Charitable Gaming Activities — Update

As we reported in our January edition of *Nonprofit Matters*, in November 2005, the California Attorney General issued a Fundraising Alert: [No Charity Poker Games](#). Since that time, a bill has been introduced in the legislature to create a charitable exception to state gaming law. [AB 839](#) is very similar to the state's charitable raffle law in that it would require registration and restrict fundraising activities by requiring at least 90 percent of revenue from gaming fundraisers to be used for charitable purposes. The bill has been approved both the Assembly and the Senate Floor, so all it needs is a signature from the governor. If it becomes law, look for a detailed description of this bill in our next *Nonprofit Matters* in January.



New Guidance from the IRS Relating to Donor Tax Deductions

Vehicle Donations:

In response to the new rules of the American Jobs Creation Act of 2004, The IRS recently updated Publication 4303, a Donor's Guide to Donated Vehicles. For IRS guidance on the hot topic of charitable donations of vehicles, visit [this IRS webpage](#).



Intellectual Property: The IRS has also recently revised [Form 8899](#), Notice of Income From Donated Intellectual Property. The donee organization may be required to file this form and provide a copy to donor.

The Panel on the Nonprofit Sector, convened by Independent Sector, released a [supplement](#) to its final report, which gives additional recommendations in nine areas related to nonprofit management.

tax penalty for these transactions.

Most notably, HR 4 changes a number of rules related to charitable giving. It provides increased regulation of areas where the IRS has noted abuses, such as when property donated to a charity is not used for charitable purposes (see Section 1215 of the bill), and incentives for greater charitable giving. For example, Section 1201 of



the bill provides for tax-free distributions from IRAs for charitable purposes. Some of these provisions, including Section 1201, will expire if not renewed by Congress in two years.

An important requirement is that under Section 1217, no donor will be allowed a charitable tax-deduction

unless he or she maintains a bank record or written communication from the donee organization "showing the name of the donee organization, the date of the contribution, and the amount of the contribution." Although not as strict as the "contemporaneous writing" rules relating to substantiation for gifts over \$250, this rule will require donors to keep records (such as a credit card receipt or bank statement) for all monetary gifts for which they desire to claim a deduction.

For more analysis about HR 4, read [Independent Sector's analysis](#), [this article](#) from the law firm of Steptoe & Johnson, LLP, or the House of Representative's Committee on Ways & Means [Detailed Summary](#) of the Charitable Provisions. Feel free to contact the [Public Law Center](#) if you have questions about this bill.



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Nonprofit Matters will be sent out twice a year. If you already receive the newsletter and would like to change your subscription information, please let Viki know.

The Public Law Center, Orange County's pro bono law firm, is committed to providing access to justice for low income residents. Through volunteers and staff, the Public Law Center provides free civil legal services, including counseling, individual representation, community education, and strategic litigation and advocacy to challenge societal injustices. Now in its 25th year, PLC is sponsored by the Orange County Bar Association and is supported by lawyers throughout the county.

PLC may be able to assist your clients who are low-income Orange County residents and have certain types of immigration, family law and civil legal problems, including: landlord-tenant, homeownership, collection, bankruptcies, consumer, estate-planning, discrimination, employment, adoptions, guardianships, custody matters, divorces involving children or domestic violence, and immigration work that does not involve naturalization or work visas. To determine whether your clients are eligible for services, they may contact the Legal Aid Society of Orange County, which regularly refers cases to PLC, or attend one of PLC's clinics at various homeless shelters and community organizations around Orange County.

New COLAP Service in 2006

PLC's Community Organizations Legal Assistance Project (COLAP), through staff and pro bono volunteer attorneys, provides free transactional legal assistance to local non-profit organizations that face a variety of business law issues in areas such as contract law, employment law, and real estate law. COLAP



also provides free legal assistance to those interested in starting new nonprofit organizations designed to benefit Orange County's low-income population.

COLAP now assists organizations through a legal check-up program. Through this program, teams of volunteer attorneys and law students conduct legal checkups of organizations to make sure they are

complying with various state and federal laws. The service allows organizations to address legal issues before they become a problem. If nonprofits do not comply with legal requirements, they may be subject to administrative fines or they can even lose their tax-exempt status. This project helps organizations avoid these consequences.

For more information on COLAP services, please visit our [webpage](#), or contact [Shannon Anderson](#).

Are you a CHILD CARE PROVIDER who needs FREE Legal Assistance?

COLAP now assists eligible providers with business law needs, including obtaining conditional use permits. To request an application for legal services, contact [Shannon](#) at PLC.

Upcoming Workshops

In Collaboration with the Volunteer Center of Orange County

To Be or Not to Be a 501(c)(3)
August 25, 10-11 a.m.

How to Start a Nonprofit
September 14, 6-9 p.m.

In Collaboration with CONNECT: Partnership for Nonprofit Solutions

Legal Issues of Social Enterprise
August 31, 9 a.m. - 12 p.m.

For more information about the workshops, contact [Shannon Anderson](#). To attend, you must RSVP with the partner agency.