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NONPROFIT ORGANIZATION REPORT – SPRING 2015

Health Care Subpoenas, A Connecticut Program to Assist with Real Estate, Volunteerism, Insights from Canada and a Connecticut Grant Program

Health Care Nonprofits and Subpoenas. Nonprofit clients providing health care services are frequently served with subpoenas for a variety of different legal proceedings. A 2014 Connecticut Supreme Court decision makes it clear that caution is in order when responding (*Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*).

The health care provider in the case, Avery Center, responded to a subpoena for Byrne's medical records by simply mailing the records to the court without informing Byrne of the subpoena, filing a motion to quash, or moving to seal the records. Byrne sued Avery for breach of privacy by bringing two Connecticut state "common law" claims:[1] negligence and negligent infliction of emotional distress.

The trial court dismissed the common law claims based on the legal theory that they are preempted (barred) by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[2] The Connecticut Supreme Court disagreed and reversed the trial court's decision, adding that HIPAA may actually provide the applicable standards to be used at trial when determining if Avery was negligent or negligently inflicted emotional distress on Byrne.

The bottom line is that, when a patient has not provided a health care provider with a *written, HIPAA compliant, authorization*, the provider should pay careful attention to federal and state privacy laws in addressing a subpoena for a patient's health information. It may be a good practice to have a basic written protocol for staff members to follow whenever a subpoena is served. A policy could be as simple as requiring all subpoenas to be forwarded to a designated member of management. Any questions on this topic can be directed to Attorneys Adam Carter Rose (arose@rrlawpc.com) or Peter Rydel (prydel@rrlawpc.com).

Connecticut DECD Program Provides Opportunities for Nonprofits. Connecticut nonprofits in the market for real estate should be aware of opportunities that may be available to them through a "brownfield" development program at the Department of Economic and Community Development (DECD). For readers not familiar with the term, "brownfield" refers to abandoned or underutilized properties which are environmentally tainted but capable of being remediated and restored for use. Title to these properties can often be acquired very inexpensively (because of the need for remediation), with the DECD program used to finance the cleanup. DECD programs include grants to municipalities where the property is located (which can then be passed on to the nonprofit), and direct loans to the nonprofits.

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[1] A "common law" claim is a civil claim based on a legal theory that the courts have recognized, but is not embodied in a statute. Byrne also brought a breach of contract claim based on the health care provider's privacy policy and a negligent misrepresentation claim based on the provider's assertion that it would protect Byrne's privacy in compliance with law.

[2] HIPAA is a federal law, while the tort claims are a matter of Connecticut law. As a general matter, federal law supersedes state law when the two conflict.

We are passing this information on to readers because a nonprofit client recently completed a DECD transaction of this type. The client, Ball & Socket Arts, used DECD financing to acquire and remediate the historic site of the Ball & Socket Manufacturing Company in Cheshire, Connecticut. The site is being converted into a community arts center. DECD was very happy with the results of the Ball & Socket transaction, and its representatives have noted publicly that it is a "great illustration of the fact that this program works for nonprofits."

We frequently assist nonprofits with real estate leases, purchases and financing; and while a brownfield program of this type may not typically come to mind, it could be of tremendous value in the right circumstances. Any questions on this topic can be directed to Attorney Mary Miller at mmiller@rrlawpc.com.

Nonprofit Volunteers – Should You Have a Volunteer Policy Statement? The words "nonprofit" and "volunteer" fit as comfortably in the same sentences as our feet fit into our favorite slippers. Putting aside board members (who almost always serve voluntarily), volunteers provide help and assistance in a variety of different settings – some on a short term basis for special events such as banquets or golf tournaments – and others for more long term projects or studies. Like most things these days, complexity seems only to increase over time, and unfortunately the same is true of volunteerism. Let us make the point with a discussion of two recent Connecticut cases, which lead us to suggest that a volunteer policy statement may be worth considering for your organization.

In the first case, *Hochman v. Eddy*, the Superior Court dismissed a case against a 16 year old boy who was watching a youth football game sponsored by a nonprofit football league, and who was asked to help the referees by moving the first down marker (basically a pole with a ten yard long chain along the ground) whenever a team earned a first down. A 14 year old player on the field ran into the marker, was injured, and his parents sued the 16 year old claiming that his negligence caused the injury. The lawyers representing the defendant moved to dismiss the case based on the federal Volunteer Statute, but the plaintiff (incredibly to us) actually tried to argue that the 16 year old was not a volunteer for purposes of the statute. While the court rightfully threw the suit out because of the self-obvious "voluntary" nature of the activity, the fact that the case went as far as it did speaks for itself as to the need for diligence in this area.[3]

The second case involves a volunteer at a nonprofit volunteer ambulance company who filed a discrimination claim with the Connecticut Commission on Human Rights and Opportunities (CHRO) after she was told her volunteer services were no longer desired. The claim was brought under the Connecticut Fair Employment Practices Act (CFEPA), which prevents discrimination in *employment* based on many factors, including race, gender and age.

The surprising "takeaway" from this case is that a so-called "volunteer" can actually be considered an "employee" for purposes of CFEPA.[4] However, as the Connecticut Appellate Court stated in *Commission on Human Rights and Opportunities v. Echo Hose Ambulance, et al*., to bring a case the "volunteer" must show that he or she has received direct or indirect remuneration from the alleged employer, either in the form of "substantial benefits" that were not merely incidental to the voluntary position, such as health or

[3] We suspect that the 16 year old defendant was covered under the football team's liability insurance policy which paid for his legal defense. But even so, the mere fact that he was actually sued is as disturbing as it is frightening.

[4] While we routinely defend CHRO complaints for nonprofit clients, we have never considered a claim brought by a volunteer. This also is an issue of first impression for the Connecticut courts.

life insurance, vacation or sick pay, pension or survivor's benefits, etc. In other words, while the court acknowledged that a volunteer could qualify as an employee in some circumstances, it also set the bar high, implying that nominal pay and limited benefits, without more, would not meet the standard. This case has been appealed and we will watch it to see what the appellate court decides.[5]

As a closing thought, these cases (and others) caused us to think about the advisability of a written Volunteer Policy to try to bring some clarity to the topic. After all, in one of the above cases there were plaintiffs claiming that a 16 year old volunteer was not really a volunteer for purposes of one statute (the Federal Volunteer Protection Act); and in the other case we had a volunteer claiming she was really an employee for purposes of another statute (CFEPA).

We did an internet search and found several sample volunteer policies. They addressed things such as age qualifications, orientation, training, time commitments, a dress code, smoking, and safety. It might be worthwhile, and not too time consuming, to look at samples and to craft one that fits the practices of your organization. As an extra benefit, having something in writing provides guidance and "air cover" to staff members dealing, for example, with a volunteer who is acting inappropriately. It is always easier if staff members running an event (and who must, for example, tell someone to stop smoking) have a written policy to point to so that the volunteer does not feel "singled out" for any reason. Any questions on this topic can be directed to Attorney Peter Rydel (prydel@rrlawpc.com).

A Canadian Perspective on the Governmental Threat to the Charitable Sector. People interested in preserving the vitality and independence of the nonprofit sector in this country will find food for thought in a recent paper by University of Victoria (British Columbia) law professor Kathryn Chan, entitled *The Co-optation of Charities by Threatened Welfare States.*[6]

While the paper focuses primarily on Canadian charities, it is relevant to us for at least two reasons: the Canadian and American nonprofit sectors have a common structure as both are derived from the English law of charities, and the "co-optation" of which Professor Chan writes is also a threat to nonprofit independence in this country.

The starting point of Professor Chan's paper is that, under the Anglo-American legal and political systems, nonprofits have occupied the space between government and the private sector, where they operate with a substantial degree of autonomy with respect to mission and governance, even while dependent on both private and governmental sources of revenue.

As Professor Chan puts it, "[t]here is a growing chorus of voices, centered in England but audible across the Anglo-Commonwealth world, expressing concern that charities are increasingly being treated as instruments of government welfare policy, rather than as independent institutions." She adds that the situation is intense in "times like the present, when governments struggle with extensive welfare commitments they no longer can or want to sustain." One form of government-nonprofit co-optation she

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[5] More clarity would be appreciated because of the myriad different ways in which people can be volunteers, and the last thing that nonprofits need is another CHRO complaint to deal with. Having said this, it would seem that in the case of the ambulance company, the "volunteer" has an interest in the medical training the volunteer work provides, which is not the case with most other volunteers.

[6] Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516610

recognizes is "the exertion of government influence over the administration or management of charities through the negotiation and implementation of service delivery contracts…."

When we look at the IRS's dubious attempt to regulate nonprofit governance,[7] Medicaid reimbursement at rates below the cost of providing services, the ongoing political chatter about limiting the charitable deduction, the multiple layers of regulatory oversight,[8] and burdensome state contract terms, it is not too much of a leap to have concerns about the autonomy of the sector in our own backyard.

State Grant Money for Human Service Nonprofits. The State of Connecticut announced in early April that it will award approximately $30 million in grants-in-aid to selected private, nonprofit health and human service organizations that are exempt under Section 501(c)(3) and that receive funds from the State to provide direct health and human services to State agency clients. The purpose of the grant is to improve the efficiency, effectiveness, safety and/or accessibility of health and human services being delivered by nonprofit organizations under contracts with or funding from State agencies, including Medicaid. The due date for application is June 26, 2015, and information can be found at the Office of Policy and Management website: http://www.ct.gov/opm/cwp.

The Reid and Riege Nonprofit Organization Report is a quarterly publication of Reid and Riege, P.C. It is designed to provide nonprofit clients and others with a summary of state and federal legal developments which may be of interest or helpful to them.

This issue of the Nonprofit Organization Report was written and/or edited by John M. (Jack) Horak, Chair of the Nonprofit Organizations Practice Area at Reid and Riege, P.C., which handles tax, corporate, fiduciary, financial, employment, and regulatory issues for nonprofit organizations.

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[7] Discussed in the Winter 2015 edition of this newsletter, available at www.rrlawpc.com.

[8] A recent anecdote from a nonprofit client about the burdensome regulatory environment came from an Executive Director who bemoaned the fact that she had to fill out two separate cost reports for the pack of batteries she recently purchased: the batteries used in a group home flashlight went on one report, and the batteries used in the smoke detector went on another.