

Hastings College of the Law
Fall 2012 (Tues. 9:30-10:30; Thurs. 9:30-11:40) - Room 314 (198 building)
Professor Stephen Schwarz (Room 624, 200 building)
(Tel: 415-565-4681; e-mail: schwarzs@uchastings.edu)

NONPROFIT ORGANIZATIONS

Syllabus

REQUIRED MATERIALS:

Fishman & Schwarz, Nonprofit Organizations: Cases and Materials (Foundation Press, 4th ed. 2010) (hereinafter "CB" for "Casebook")

Fishman & Schwarz (eds.), Nonprofit Organizations: Statutes, Regulations and Forms (Foundation Press, 4th ed. 2010) (hereinafter "Stat. Supp.")

2012 Update Memorandum to Casebook. Distributed electronically and also posted on class web site, along with other occasional handouts.

Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code (Form 1023) and Instructions-- on class web site and IRS web site; see also Stat. Supp. 1099-1126

IRS PUBLICATIONS (available at <http://www.irs.gov.charities>)

Tax-Exempt Status for Your Organization (Publication No. 557)

Tax on Unrelated Business Income of Exempt Organizations (Publication No. 598)

Charitable Contributions (Publication No. 526)

and many other resources on IRS web site

SELECTED PROFESSIONAL REFERENCE BOOKS

California Attorney General's Guide for Charities available (with other publications) at <http://oag.ca.gov/charities/publications>.

Hill & Mancino, TAXATION OF EXEMPT ORGANIZATIONS (Warren, Gorham & Lamont, 2002, with current supplement). Treatise, available on Westlaw.

Hopkins, THE LAW OF TAX-EXEMPT ORGANIZATIONS (Wiley, 10th ed.). Another treatise, available in library (KF6449.H6).

Whaley, et al. (eds.), ADVISING CALIFORNIA NONPROFIT CORPORATIONS (California C.E.B., 3d ed. 2009). A good practical resource covering both federal and California law. Available in library (KFC342.A98).

Mancuso, HOW TO FORM A NONPROFIT CORPORATION IN CALIFORNIA (Nolo Press, 14th ed.). A “how to” resource that is useful for beginning or generalist lawyers who are helping to set up a new nonprofit organization. Available in library (KFC342.M363).

BLOGS (Selective list; for other Internet resources, see Stat. Supp. 1133-1137)

Nonprofit Law Blog. <http://www.nonprofitlawblog.com/>

Nonprofit Law Prof Blog. <http://www.lawprofessors.typepad.com/nonprofit/>

GUIDESTAR

Guidestar – <http://www.guidestar.org> – is a leading data base on the nonprofit sector, providing access to all publicly available Form 990s filed by thousands of U.S. nonprofit organizations. Edu@GuideStar is a free service available to students and teachers in classes related to the sector. This class will be registered for this service for the Fall 2012 semester, giving all of us access to GuideStar Premium service at no cost.

STUDENT STUDY AIDS

There is currently no recommended student study aid for nonprofit organizations. Put differently, the few available study aids are not recommended. For a good narrative overview of the tax law, see Joint Committee on Taxation, Historical Development and Present Law of the Federal Tax Exemption for Charitable and Other Tax-Exempt Organizations, April 19, 2005 (JCX-29-05), available at <https://www.jct.gov/publications.html?func=startdown&id=1586>. For a general resource on nonprofit governance best practices, see Panel on the Nonprofit Sector, Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations, available at: <http://www.nonprofitpanel.org/report/final/> (follow the links to “Final Report”) and the related Reference Edition, which includes legal background for each principle.

CLASS WEB SITE

The link to the class web site is:

<http://www.uchastings.edu/faculty-administration/faculty/schwarz/class-website/index.html>

The class web site includes this syllabus, Form 1023, and a few class handouts.

GOALS OF THE COURSE

The general goal is to survey the law governing nonprofit organizations from the perspective of both state law (formation, governance, fiduciary duty of officers, directors and trustees, and related issues) and federal (mostly tax) law. About 1/3 of the class covers state law and 2/3 covers federal tax law.

Particular goals (also known as desired “learning outcomes”) are to: (1) learn about a fascinating and dynamic area of the law, using an approach that blends theory, legal doctrine and practice; (2) provide an opportunity for skills training through a real-world simulation exercise; and (3) have a stimulating classroom experience in an informal seminar-like setting. The course is designed to be valuable for students whose career path will include interaction with the nonprofit sector as an employee, grantseeker, donor, board member, voyeur, journalist, or a paid or volunteer legal advisor to all of the above.

ASSIGNMENTS AND GRADES

Final grades will be based 30% on a take-home skills training exercise and 70% on a conventional final exam. In addition, as discussed below, discretionary grade adjustments may be made based on class participation.

The exercise will require preparing an application for tax-exempt status for a hypothetical nonprofit organization, along with a brief memo addressing a few aspects of the formation and application process. The assignment will be distributed on Thursday, September 27 and will be due on Monday, October 29. More details will be provided in class.

The open book three-hour final exam (you can bring anything you want except your attorney) will consist of a series of essay questions of varying length. It is tentatively scheduled for Tuesday, December 4, 2012, in the afternoon. More information, including some questions from past exams, will be provided near the end of the semester.

ATTENDANCE AND CLASS PARTICIPATION

Regular attendance is assumed, and participation in class discussion will be greatly appreciated and rewarded if it adds value. In determining final grades, discretionary grade adjustments of up to one level (e.g., "B" to "B+", or vice versa) may be made based on meaningful contributions to class discussion or deficient preparation, chronic muteness, extraneous surfing on your laptop, or non-attendance.

READING ASSIGNMENTS AND COURSE OUTLINE

The weekly allocation of reading assignments is intended to be a close approximation. You are encouraged to complete the reading for a particular week even if (as is possible) the class discussion is so lively that we fall slightly behind this schedule.

At the beginning of most assigned topics, the casebook provides references (in bold type) to original sources, such as statutes and regulations, virtually all of which can be found in the Statutes, Regulations and Forms Supplement. Assignments (sometimes abridged) to these sources also are provided on the syllabus. **Follow the syllabus.** Most assignments also include problems in the casebook. They usually will be the focus of class discussion. The statutes and regulations are most effectively used as research tools for solving the problems, especially on the more technical tax topics.

Items marked with an asterisk (*) will be given accelerated treatment. "Skim" means that you only need to look at and be generally familiar with the material assigned.

Week of:

8/20/12 **Scope Note:** Our first two classes provide an introductory overview of the nonprofit sector -- its dimensions and demographics, historical roots, role in contemporary society, and legal framework. We then will turn to the major legal issues that arise on the formation of a nonprofit organization, particularly choice of legal form under state law, organizational logistics, and the attorney's role in all of the foregoing. This introductory coverage concludes with an exploration of the rationale for charitable tax exemptions. A few specific hypothetical fact patterns will be provided to facilitate discussion of the theoretical portions of the reading assignment.

In explaining the attorney's role on formation of a nonprofit organization, the California C.E.B. text, *Advising California Nonprofit Corporations* (Chapter 1), poses 12 basic questions. They are:

1. Is a new entity necessary?
2. Is there a sound business plan and is the new entity financially viable?
3. Should the organization be a nonprofit entity and what are the circumstances to consider?
4. Should the organization be a nonprofit entity and what special treatment is available?
5. If nonprofit, what type of entity should it be?
6. In what state or country should it be organized?
7. If a California nonprofit corporation, should it be public benefit, mutual benefit, or religious?

Week of:

8/20/12
(cont'd)

8. If a California nonprofit corporation, should it have voting members?
9. Is tax exemption appropriate and desirable?
10. If tax exemption is desirable, under what section of the Internal Revenue Code?
11. If the organization will be exempt from tax under § 501(c)(3), can it qualify for public charity classification under § 509?
12. If the organization does not qualify as a public charity, can it accept various restrictions applicable to private foundations?
13. And this additional question . . . how much should I charge for doing all this work? Should I get paid up-front?

All these questions will be answered during the course.

INTRODUCTION

AN OVERVIEW OF THE NONPROFIT SECTOR

Skim I.R.C. §§ 501(a)-(c); 170(a)(1),(c); 509(a); Calif. Corp. Code § 5410,
first sentence only

CB 2-19, 25-28 (read quickly for general background), 30-38

FORMATION OF A NONPROFIT ORGANIZATION

CHOICE OF LEGAL FORM; TAX EXEMPTION

Calif. Corp. Code §§ 5111; 5130; 5227

I.R.C. § 508(a)-(c)

CB 39-44, 48-58, 317-319

Skim sample organizational forms (Stat. Supp. 1006-1018) and Form 1023 (Stat. Supp. 1099-1126)

Problem: CB 45

CHARITABLE TAX EXEMPTIONS: THEORY, STAKES AND QUALIFICATION REQUIREMENTS

RATIONALE FOR TAX EXEMPTION

CB 294-314

Week of:

8/27/12

Scope Note: This week's classes begin a survey of the affirmative requirements for charitable tax exemption under § 501(c)(3). The threshold question is: what purposes and activities are "charitable?" The standards will be studied in context, beginning with health care providers (primarily hospitals) and then turning to other types of "charities." The focus will be – what *are* the requirements (warning – this material can be a little slippery) but we also will devote some attention to policy issues (i.e., what *should* be they be).

ORGANIZATIONAL AND OPERATIONAL TESTS

I.R.C. § 501(c)(3)

Regs. §§ 1.501(c)(3)-1(a), (b)(1)-(4), (c)(1)-(2)

CB 315-317

THE EVOLVING CONCEPT OF "CHARITY"

Introduction

Treas. Reg. § 1.501(c)(3)-1(d)(1) & (2)

CB 319-323; skim 72-77

Hospitals and Health Care Organizations

CB 323-343; look at Form 990, Sch. H (Stat. Supp. 1080-1083)

Problems: 343-344

*Public Interest Law Firms; Legal Services

CB 344-351

Problems: 350-351 (omit (c))

*Community Development and Low-Income Housing

CB 351-357

*Protection of the Environment

CB 357-362

Week of:

8/27/12
(cont'd)

*Credit Counseling Organizations

CB 368-369

Disaster Relief

CB 362-367

Problems: CB 367

9/3/12

Scope Note: This week's classes begin with the public policy limitation, a judicially-created rule that has been principally applied to deny § 501(c)(3) tax exemption to racially discriminatory schools. We then consider the special qualification requirements and issues for educational and religious organizations, and a few other specialized types of § 501(c)(3) charities.

The Public Policy Limitation

CB 369-397; look at Form 990, Sch. E (Stat. Supp. 1072)

Problems: CB 397-398

Educational Organizations

Treas. Reg. § 1.501(c)(3)-1(d)(3)

CB 398-414

Problems: CB 414-415

Churches and Other Religious Organizations

CB 415-430

Problems: CB 430-431

*Other Charitable Purposes

Skim I.R.C. §§ 501(e), (f), (j)

CB 431-432, 437-439

Week of:

9/10/12

Scope Note: The next two weeks and part of the following week are devoted to the role and fiduciary duties of officers and directors and how they are enforced under state and federal law. Coverage begins from the perspective of state law, using California as the model, and then turns standards and sanctions imposed by federal tax law. The goal is to study what the law requires (this sometimes is amorphous) and what are "best practices" for nonprofit officers and directors.

OPERATION AND GOVERNANCE

INTRODUCTION; DIRECTORS, TRUSTEES AND MEMBERS

Calif. Corp. Code §§ 5210; review § 5227
CB 123-128

FIDUCIARY DUTIES AND BEST PRACTICES

The Fiduciary Concept

CB 134-136

The Duty of Care

Calif. Corp. Code §§ 5230; 5231; 5047.5
CB 136-157 (it's ok to read the three cases quickly, focusing on how the directors or trustees got into trouble and what standards were applied by the courts in evaluating their fiduciary behavior)
Problems: CB 157-158 (omit (e))

The Duty of Loyalty

Calif. Corp. Code §§ 5227; 5233(a)-(d), (g), (h); 5235; 5236; skim § 7233
CB 163-166; 170 (begin with Notes)-189; 196-198
Problems: CB 198-199 (Problems 1(a)-(b), (e), (g), (h))

*The Duty of Obedience

CB 199-202

*Insurance; Indemnification

Skim CB 158-162

Week of:

9/17/12

Scope Note: Tuesday's class is devoted to a fiduciary's responsibility for investments and endowments under state law. On Thursday, the focus shifts to state enforcement of fiduciary duties (including the role of donors), the cy pres doctrine, and an introduction to the federal fiduciary regulation regime.

Investment Responsibility; Endowments

Skim UPMIFA (at Stat. Supp. 237-243)

CB 202-220

Problems: CB 212, 220-221

ENFORCEMENT OF FIDUCIARY DUTIES

In General

Skim core portions of Form 990 (Stat. Supp 1045-1056)

CB 221-226

State Law (Role of the Attorney General)

CB 226-231

Donors (and Donor Standing Issues)

CB 231-237

Cy Pres and Deviation

CB 90-106

Federal Tax Law: Introduction – Inurement and Private Benefit

I.R.C. § 501(c)(3); look at § 4958

Treas. Reg. §§ 1.501(c)(3)-1(c)(2)

CB 445-460; 249-256; 460-461; look at Form 990, Sch. J (Stat. Supp. 1086-1087)

Week of:

9/24/12

Scope Note: Tuesday's class will apply the inurement and private benefit limitations and the intermediate sanctions excise tax rules to the assigned problems. Thursday's class begins a survey of the first of two major "border patrol" limitations on § 501(c)(3) exempt status: the limitations on lobbying and political campaign activities. We start by examining the permissible level of lobbying activities by § 501(c)(3) organizations. The main event is the § 4911 expenditure test election, which is rather technical. Don't get discouraged by all the detail. Our goal is to develop an appreciation of the considerable opportunities for charities to influence the political process. After a brief discussion of the *Christian Echoes* case and a mini-lecture on the § 501(h) election, we will turn to the problems at pp. 506-508.

Federal Tax Law – Intermediate Sanctions

I.R.C. § 4958(a), (b), (c)(1), (d), (e), (f)

Treas. Reg. §§ 1.501(c)(3)-1(f) (it's ok just to read a few of the examples);
53.4958 as needed for problems

CB 461-471

Problems: CB 471-474 (Problems 1(a), (c)-(f) & 2 if time permits)

LOBBYING AND POLITICAL CAMPAIGN ACTIVITIES

Background

CB 474-476; look at Form 990, Sch. C (Stat. Supp. 1063-1065)

No Substantial Part Test

I.R.C. §§ 501(c)(3); 504; 4912; 170(f)(6)

Treas. Reg. § 1.501(c)(3)-1(c)(3)

CB 476-488

*Constitutional Issues

CB 488-497 (this is a "skim"; it's an important and interesting case but our discussion will cut to the chase on its rationale and the concerns expressed in Justice Blackmun's dissent)

Week of:

9/24/12
(cont'd)

The § 501(h) Expenditure Test Election

I.R.C. §§ 501(h); 4911(a)-(e), (f)(1)(A)

Treas. Reg. -- The § 1.501(h) and § 1.4911 regulations should be used selectively as a research source for the problems

CB 497-506

Problem: CB 506-508 (some of this will spill over to next week)

10/1/12

Scope Note: After finishing up the lobbying problem we move to the political campaign limitations under tax and election law, focusing on the problems at pp. 536-537, and conclude by considering the impact on nonprofit organizations of the Supreme Court's controversial *Citizens United* decision. Private foundations will be introduced near the end of Thursday's class.

Political Campaign Tax Limitations & Alternative Structures

I.R.C. §§ 501(c)(4); 504; 4955; Skim § 527

CB 508-539

Problem: CB 536-537

Nontax Regulation & the *Citizens United* Case

CB 539-542, and enjoy the video clip below

<http://www.colbertnation.com/the-colbert-report-videos/398531/september-29-2011/colbert-super-pac---trevor-potter---stephen-s-shell-corporation>

**PRIVATE FOUNDATIONS, PUBLIC CHARITIES AND OTHER
FOUNDATION ALTERNATIVES**

THE UNIVERSE OF PRIVATE FOUNDATIONS

CB 703-715

10/8/12

Scope Note: Classes for the next three weeks cover the distinction between private foundations and public charities, private foundation grantmaking alternatives, and the private foundation excise taxes. Our initial goal is to understand the pros and cons of private foundations and then explore the various paths to avoiding private foundation status when avoidance is desirable. This week's material will be covered largely through discussion of the problems at pp. 737-738

Week of:

10/8/12
(cont'd)

PRIVATE FOUNDATIONS AND PUBLIC CHARITIES

I.R.C. §§ 509; 170(b)(1)(A); 507(d)(2); 4946

Treas. Reg. §§ 1.170-9T(f)(1), (2), (3), (4)(i)-(iii), (6)(i), (7)(i) (don't blame the messenger); you have been spared Treas. Reg. § 1.509(a)-3T but take a peek. Note: The "T" in the Regulations cite is for "temporary" but these regulations are now "final." A brief explanation of the distinction will be provided in class.)

CB 721-730, 739-749

Problem: CB 737-738 (Problem 1)

PRIVATE FOUNDATION ALTERNATIVES

I.R.C. §§ 509(a)(3); 4958(c)(2) & (3), (f)(1)(D); 4966 (omit (d)(4)); 4967

CB 715-720, 730-736

Problem: CB 738 (Problem 2)

*Private Operating Foundations

I.R.C. § 4942(j)(3)

CB 763-764

10/15/12

PRIVATE FOUNDATION EXCISE TAXES

Introduction

CB 765-766

*Tax on Net Investment Income

Skim I.R.C. § 4940

CB 766-768

*Charitable Distribution Requirements

Skim I.R.C. § 4942

CB 781-785

Week of:

10/15/12 Jeopardy and Program-Related Investments
(cont'd)

Skim I.R.C. § 4944
Prop. Reg. § 43.4944-3(b) Examples 11, 14, 15 & 16 (2012 Update Memo pp. 28-30)
CB 794-795; 2012 Update Memo 19-20

Excess Business Holdings

Skim I.R.C. § 4943
CB 789-791
Problem: CB 793 (omit (d))

Question Session and “Pep Talk” on Writing Assignment

During Thursday’s class, we will devote 20 minutes or so to some final tips on the writing assignment and entertain any reasonable questions about the facts and instructions.

10/22/12 **Scope Note:** This week concludes a survey of the private foundation excise taxes, focusing on some major operational issues and challenges for private foundations. The emphasis will be on preventive maintenance – how to help a private foundation avoid the various excise tax penalties.

Schedule Notes: There will be no class on Tuesday, October 23. On Thursday, October 25, the class will be taught by guest professor Barbara Rosen, a 2000 Hastings graduate, partner in the San Francisco law firm of Evans & Rosen– <http://www.evansrosen.com/>, and experienced teacher in the field.

Self-Dealing

Skim I.R.C. § 4941
CB 769-773
Problems: 780-781 (Problems 1(a)-(f), (g)(1) & (2))

Taxable Expenditures

Skim I.R.C. § 4945
CB 795-803
Problem: CB 803-804 (Problems (a), (b), (d), (g), (h))

Week of:

10/29/12

Scope Note: Classes for this week cover the impact of commercial activities on qualification for exempt status and introduce the unrelated business income tax (“UBIT”).

COMMERCIAL ACTIVITIES AND THE UBIT

Introduction

CB 567-570

UBIT History and Policy

CB 591-596, 601-603

Impact of Commercial Activities on Exempt Status

CB 570-590

Treas. Reg. § 1.501(c)(3)-1(b)(1)(i), (iii), -1(c)(1), -1(e)

Problems: CB 590-591

Nature of an Unrelated Trade or Business

I.R.C. §§ 511(a), (b); 512(a)(1); 513(a), (c), (f), (h), (i); skim § 513(d)

Regs. §§ 1.513-1 as necessary, -4 & -7

CB 603-605, 613-633

Problems: CB 633-635

Exclusions from Unrelated Business Taxable Income

I.R.C. §§ 512(b)(1)-(5), (7)-(9), (15)

Regs. § 1.512(b) as necessary

CB 635-640

Problems: CB 641 (Problem 1 only)

*Computation of UBTI and Planning

I.R.C. §§ 512(a)(1); 512(b)(6), (10), (12)

CB 642-643

Week of:

11/5/12

Scope Note: Tuesday's class and most of the first hour on Thursday are devoted to advanced topics related to commercial and investment activities. Coverage of unrelated debt-financed income will be limited to a brief lecture and a few hypotheticals based loosely on the problems at pp. 662-663. We will look more deeply at the use of controlled taxable subsidiaries by tax-exempt organizations, joint ventures between for-profits and nonprofits, and the emerging social enterprise movement and the hybrid entities that it has spawned. The second half of Thursday's class will cover mutual benefit organizations, emphasizing the rationale for exemption and some special tax and constitutional law issues affecting social clubs and other private membership associations.

*Unrelated Debt-Financed Income

Skim I.R.C. §§ 514(a), (b)(1)-(3), (c)(1), (c)(9)(A)-(C)
CB 651-653, 659-662 (omit Note 1)

COMMERCIAL ACTIVITIES: ADVANCED TOPICS

Use of Controlled Subsidiaries

CB 663-667

Joint Ventures and Other Structures

CB 667-689
Problem: CB 689-690

Social Enterprises and Hybrid Entities

CB 28-30; 2012 Update Memo 3-5

MUTUAL BENEFIT ORGANIZATIONS

RATIONALE FOR TAX EXEMPTION

CB 900-909

***TRADE ASSOCIATIONS AND BUSINESS LEAGUES**

I.R.C. § 501(c)(6)
CB 916-917; skim CB 926-930

Week of:

11/5/12
(cont'd)

SOCIAL CLUBS AND FRATERNAL ORGANIZATIONS

I.R.C. §§ 501(c)(7),(8) & (10)

CB 931-947

Problems: CB 947 (Problem 1 & 2(a))

PRIVATE MEMBERSHIP ASSOCIATIONS: SELECTED CONSTITUTIONAL ISSUES

CB 987-995 (skim the dissent at 995-1002), 1002-1005; 2002 Update Memo 25-26

Problems: CB 1002

11/12/12

Scope Note: Our final week begins with a policy-oriented introduction to the charitable deduction and then surveys the basics of § 170 and, as time permits, some special issues related to gifts of property other than cash. Some of this material was covered in basic income tax. The focus will be selective (what's interesting and fun) and practical.

CHARITABLE CONTRIBUTIONS

INTRODUCTION

CB 807-812, 817-827

BASIC PRINCIPLES

I.R.C. §§ 170(c), (f)(8); 6113; 6115

CB 828-845 (*Sklar* is not assigned but the issue in the case is raised in Problem (l) at p. 866, so take a look if you are curious); 856-858, 861-865

Problems: CB 865-866

CONTRIBUTIONS OF PROPERTY

CB 867-868, 872-873, 876-880

Problems: CB 888-889 (Problems 1(a)-(i) – we may not get to all of these)

Week of:

11/12/12 PLANNED GIVING TECHNIQUES

(cont'd)

You'll need to take the Estate Planning seminar

A LOOK TO THE FUTURE

Cheesecake (fresh from Brooklyn, NY – see <http://www.juniorscheesecake.com/> – I recommend the “plain”) will be served near the end of the last hour during which bold predictions will be made about the future direction of the law affecting nonprofit organizations and their donors.

FINAL EXAM: December 4, 2012