

NONPROFIT LAW

FORDHAM LAW SCHOOL

Spring 2023

Room 3-07

Thursdays 6:00-7:50 p.m.

Instructors:	Robert Pigott Kevin Roe
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Office Hours:	By appointment, and potentially by Zoom, but encouraged!
Credits:	Two
Textbook:	<i>New York Nonprofit Law and Practice: With Tax Analysis</i> (3d Ed.) by Victoria Bjorklund, Daniel Kurtz and James J. Fishman (“NYNL&P”) [Available online through Lexis]
Grading:	Writing Assignments (20% each / 80% total) Presentation (10%) Class Participation (10%)
Work Product:	Written assignments should be submitted by e-mail to both professors. <u>Please include your name on every attachment.</u> Work should be submitted in Word format, not PDF.
Late Work:	Except in extraordinary circumstances, written assignments submitted after the deadline for any reason will be subject to a 10% penalty. Assignments submitted more than 72 hours after the deadline will only be accepted with prior permission.

Coursework

Written Assignments (Due Dates Below)

□ Writing Assignment #1 (Two Parts)

• Part #1A

- Draft formation documents for a New York charitable, not-for-profit corporation:
 - A mission statement (one paragraph)
 - Certificate of incorporation with specifically identified corporate purposes¹
 - By-Laws

• Part #1B

- Draft the narrative for the IRS Form 1023 application for your organization to explain to the IRS why your organization qualifies under the operational test of § 501(c)(3).
 - You should modify your purposes and activities from Assignment 1A as necessary based on what you have learned about 501(c)(3) requirements.
- In addition to describing your activities, you should cite all relevant legal authority—501(c)(3), the Regs, and at least one, but preferably several, rulings or cases—and apply the law to your facts.²
- You should go beyond the citations in the textbook. The IRS has ruled on a wide variety of organizations and activities, and you should search for the best possible analogies for your activities.³

¹ Section 402(a), subparagraph 2-a, of the New York Not-for-Profit Corporation Law provides that, in stating corporate purposes in a certificate of incorporation it is “sufficient to state that the purpose of the corporation is any purpose for which corporations may be organized under this chapter as a charitable or non-charitable corporation.” Do not rely on this provision, but rather follow the above assignment instructions, and draft the corporate purposes with a reasonable degree of specificity.

² The approximate hierarchy of authority is (1) the Internal Revenue Code, (2) Treasury Regulations; (3) Caselaw (spotty – lots in some areas and none in others); (4) Revenue Rulings; (5) General Counsel Memoranda and Technical Advice Memoranda; and (6) Private Letter Rulings. PLRs are not actually precedential for other taxpayers, but they may be cited as good authority for this narrative (as we do in practice).

³ Checkpoint and BNA Tax are generally better resources for searching tax authority than Westlaw or Lexis. The Internal Revenue Manual, The § 501(c)(3) Portfolio on BNA Tax, and the Hill and Mancino treatise on Checkpoint are good secondary sources on charitable purposes and activities and will lead you to apposite rulings.

□ **Writing Assignment #2**

- Draft a plan of dissolution and a court petition for dissolution including a proposed distribution of assets on dissolution consistent with the *quasi cy pres* doctrine; include affidavit from distributee organization. The three documents need not include any of the ordinarily required exhibits. Include in the petition a paragraph explaining why/how the proposed distribution in dissolution satisfies the quasi cy pres standard.

□ **Writing Assignment #3**

- As legal counsel retained by the founder of a tax-exempt, not-for-profit corporation dissatisfied with the actions of the current board of directors, write a letter to the New York Attorney General's Charities Bureau urging an investigation, complaining of three matters the Attorney General is likely to pursue and two matters the Attorney General is unlikely to pursue. (By explanatory postscript, stepping outside your role as the author of the letter, indicate which two matters are the ones the Attorney General is unlikely to pursue and why).

□ **Writing Assignment #4**

- Client Inquiries: Respond to short answer questions in the form of legal advice to a non-profit organization.
- Questions and detailed instructions to be provided.

Presentation

□ **Date Requests due by 11:59pm on Tuesday, Jan. 24**

□ **Article Selections due by 11:59pm on Tuesday, Feb. 14**

Presentation on a nonprofit issue reported in the press. Students may select from articles in the course library (posted on the intranet) or may propose an article. In addition to presenting fully the issues raised, students should comment on whether the existing charities laws are adequate for addressing them.

We will have 1-2 presentations per class during Classes 4 through 13. You should submit your first, second, and third choice for dates.

Presentations should be 10-12 minutes long, and to help you practice for professional presentations (and to make sure we have time to cover course material), we will be enforcing time, giving you a signal at 5 and 10 minutes, and cutting you off at 15.

Class Schedule and Readings

Class 1 — Jan. 19 — The Nature of Nonprofit and Tax-Exempt Status

An overview of the nonprofit sector in the U.S., the policies underlying tax exemption of charitable organizations, the variety of not-for-profit corporations and exempt organizations and the distinction between state law corporate status and federal tax status.

- Required Reading
 - NYNL&P
 - Chapter 1
 - **except**
 - §1.02[2][b] (pp. 1-6 to 1-8)
 - §1.03 (pp. 1-13 to 1-16)
 - Chapter 2
 - **except**
 - §2.02 (pp. 2-3 to 2-13)
 - §2.03[3][-4] (pp. 2-18 to 2-27)
 - §2.04[2] (pp. 2-28 to 2-30)
 - Chapter 13
 - §§13.01-13.03 (through p. 13-9 only, stopping before §13.03[1][a])

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Presentation Date Requests due by 11:59pm on Tuesday, Jan. 24

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Class 2 — Jan. 26 — Formation and organization of nonprofit organizations and the Delaware alternative

- Required Reading
 - NYNL&P
 - Chapter 2
 - **except**
 - §2.02 (pp. 2-3 to 2-13)
 - §2.03[3][-4] (pp. 2-18 to 2-27)
 - §2.04[2] (pp. 2-28 to 2-30)
 - Chapter 3, (selected sections)
 - §§3.01-3.02
 - §3.03[2]
 - §3.04

- §3.05, excluding table at pp. 3-25 to 3-32
- §§3.06-09
- §3.12[1], [2], [6] & [10]
- §3.14
- Chapter 4 (selected sections)
 - §4.01[1]-[5] & [7][a]
 - §4.02
 - §4.06[1]
 - §4.07 (optional)
 - §4.08
 - §4.09[2][a]-[b]
- Optional Reading
 - Robert Pigott, “The Death of Charitable Corporate Purposes,” *The New York Law Journal*, July 1, 2014
 - *Herbert H. Lehman College Foundation, Inc. v. Fernandez*, 292 A.D.2d 227 (1st Dep’t 2002)

Assignment # 1A – Due by 11:59pm on Tuesday, Feb. 7

Class 3 — Feb. 9 — Architecture of the Code and Taxonomy of Exempt Organizations / Overview of Charitable Purposes

Overview of the categories of 501 organizations. Discussion of the requirements for exemption under 501(c)(3). Public charities, private foundations, and other categories of charitable organizations. Preview of 170 rules and Chapter 42 regulations.

- Required Reading
 - Code Sections: 501 and 509, plus the sections of 170 that are referenced in 509(a)(1). In reading 501, please read 501(c)(1)-(8) carefully, but you may skim all other subsections of 501(c).
 - NYNL&P: Chapter 13 (review); Chapter 15; and Chapter 18.

Presentation Article Selections due by 11:59pm on Tuesday, Feb. 15

Class 4 — Feb. 16 — The Duties of Directors

A discussion of the fiduciary duties of care, loyalty and obedience owed by directors of not-for-profit corporations; self-dealing transactions; the business judgment rule, including New York state law limits on executive compensation

- Required Reading
 - NYNL&P
 - Chapter 5
 - **Except** §§5.01[3], 5.03[3], 5.04, 5.05
 - Chapter 6
 - §§6.01-6.03
- Optional Reading
 - American Baptist Churches of Metropolitan N. Y. v. Galloway, 271 A.D.2d 92 (1st Dep't 2000)

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Assignment # 1B – Due by 11:59pm on Tuesday, Feb. 21

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Class 5 — Feb. 23 — Managing Charitable Assets

New York Prudent Management of Institutional Funds Act; cy pres relief; donor standing

- Required Reading
 - NYNL&P
 - Chapter 8 (selected sections)
 - §§8.01-8.04[2][c]

Class 6 — Mar. 2 — Corporate transactions requiring Court or Attorney General approval

- Required Reading
 - NYNL&P
 - Chapter 9 (selected sections)
 - §9.01
 - §9.02[1]-[2]
 - §9.03[1]-[2]
 - §9.04[1]-[2]
 - §9.04[7][a]-[b]
 - Excerpts from MEETH decision (*Manhattan Eye, Ear & Throat Hospital v. Spitzer*, 186 Misc. 2d 126, 149-58 (N. Y. County Sup. Ct. 1999))
 - Rose Ocko decision (*Rose Ocko Foundation, Inc. v. Lebovits*, 259 A.D.2d 685 (2nd Dep't 1999))
 - MSSO Decision (*In re Multiple Sclerosis Service Organization of N.Y., Inc.*, 68 N.Y.2d 32 (1986))
- Optional Reading
 - *Alco Gravure v. The Knapp Foundation*, 64 N.Y.2d 458 (1985)

Class 7 — Mar. 9 — The Role of the New York Attorney General in regulating not-for-profit corporations

- Required Reading
 - NYNL&P
 - §6.05
 - Grasso Case Readings
 - Court of Appeals Decision (11 N.Y.3d 64 (2008))
 - R. Pigott, *Enforcement of Charities laws in a Post-Grasso World*, NYLJ, Aug. 4, 2008
- Recommended Reading
 - Attorney General Enforcement Actions – selected press releases and reported and unreported decisions

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Assignment # 2 – Due by 11:59pm on Sunday, March 12

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Class 8 — Mar. 23— Regulation of the Conduct of Charitable Organizations

Excess benefit transactions/intermediate sanctions; private foundation excise tax regime; donor advised fund excise tax regime.

- Required Reading
 - NYNL&P: Chapter 16; Chapter 17;

Class 9 — Mar. 30 — Lobbying and Political Campaign Activity

Federal rules for tax-exempt organizations and New York State and New York City registration and reporting laws applicable to broadly-defined lobbying activities.

- Required Reading
 - NYNL&P: Chapter 15

Class 10 — Apr. 13 — Unrelated Business Income Tax: 510-514; Joint Ventures; Filing and Reporting Requirements

- Required Reading
 - NYNL&P: § 14.02[4]; Chapter 19; Chapter 22 (you may skim § 22.02[4] and skip § 22.02[6]-[7])

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Assignment # 3 – Due by 11:59pm on Tuesday, April 17

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Class 11 — Apr. 20 — Charitable Contribution Deductions

- Required Reading
 - Code: Before you do the textbook reading, read § 170 carefully in its entirety. There is a lot of detail, but try to get a sense of what each subsection is doing and how they interact. Also, see if you can identify Professor Roe’s favorite provision in the entire tax code.
 - NYNL&P: Chapter 21

Class 12 — Apr. 27 — The regulation of charitable solicitation and fundraising

- Required Reading
 - NYNL&P – Chapter 11
 - Excluding
 - 11.02[3]-[4]
 - Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003)

Class 13 — May 4 — Recent and Future Developments / Course Takeaways

- Required Reading
 - Relevant articles and materials to be circulated in advance of class.

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Assignment # 4 – Due by 11:59pm on Wednesday, May 17

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