

# NONPROFIT ORGANIZATIONS

CASES AND MATERIALS

FOURTH EDITION

JAMES J. FISHMAN

STEPHEN SCHWARZ

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*by*

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FOUNDATION PRESS  
2010



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1 New York Plaza, 34th Floor

New York, NY 10004

Phone Toll Free 1-877-888-1330

Fax (646)424-5201

[foundation-press.com](http://foundation-press.com)

Printed in the United States of America

**ISBN 978-1-59941-665-6**

Mat #40853344

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*To Liz, Lisi, Diana, and Sophie*

*JJF*

*To F.K.G.*

*SS*

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## PREFACE

Nonprofit organizations have been influential in American society since colonial times. They wield considerable economic power, contributing more than five percent of the nation's gross domestic product and employing nearly ten percent of its workforce. Only within the past few decades, however, has the unique body of law affecting nonprofits attracted the broader attention of legal scholars and practitioners. In introducing its "Developments in the Law" issue devoted to nonprofit corporations almost 20 years ago, the Harvard Law Review capsulized this emergence of the nonprofit sector as a discrete field of study:

For many years, only tax specialists and a few cognoscenti appreciated the unique legal issues related to nonprofit corporations. Only recently has the rest of the bar come to recognize that representing nonprofit corporations constitutes a separate legal discipline. A number of professional working groups now focus on various aspects of nonprofit corporation law; for example, the American Bar Association recently promulgated a model nonprofit corporation statute. The academic literature in the field has mushroomed, and law schools have begun to integrate the field into their curricula.

Developments in the Law—Nonprofit Corporations, 105 Harv.L.Rev. 1578 (1992).

This book—the first comprehensive law school text in the field—was another step in this evolution. Before publication of the first edition in 1995, some law schools offered courses in nonprofit organizations, ranging from global surveys to more specialized tax offerings, but instructors and curricular growth were hindered by a dearth of published teaching materials. Our goal was to help fill the void by crafting a book to ease the burden on experienced teachers and entice newcomers to teach, study and practice in this fascinating and dynamic area. Today, the maturity of this field of study is reflected in the increasing number of law schools offering nonprofit organizations courses as well as the publication of several other casebooks. The field has appeal to students and teachers with interests in wide-ranging areas such as corporations, taxation, estate planning, constitutional law, antitrust, law and economics, environmental law, health law, and public interest law. These legal issues are increasingly of interest, we think, because so many lawyers and law students become involved with nonprofit organizations as directors, trustees, members, and volunteers, and in those capacities they are frequently called upon for advice.

With an expanding body of law and such a potentially diverse constituency, each new edition presents a challenge of covering those topics of greatest importance and yet preserving flexibility for instructors with different emphasis and expertise, all while keeping the book to a manageable

ble length. To that end, we have attempted to maintain an up-to-date teaching text that is adaptable to a two or three-unit survey course, a policy-oriented seminar, or a more specialized J.D. or LL.M tax-exempt organizations class. The state law and federal tax materials are separate, self-standing units of the book, but important tax concepts are previewed in Chapter 1 and, as relevant, in subsequent chapters that focus primarily on state law. And within the tax chapters, we selectively employ a “two track” approach to accommodate the more global classes where students and instructors may prefer a policy-oriented overview while still offering the additional detailed coverage that is suitable for a graduate tax course.

The book includes a wide variety of materials—edited cases, legislative history, excerpts from scholarly articles and books, writings from other disciplines, and authoritative IRS administrative materials. For most topics, it provides extensive authors’ text, notes, questions, bibliographic references for further reading, and problems for class discussion. To enliven the coverage, the notes and questions frequently refer to the rich array of real world controversies and news reports, offering an opportunity for students to evaluate critically the increasingly publicized underside of the nonprofit sector.

This Fourth Edition incorporates many new developments occurring during the four-year shelf life of its predecessor, most notably the enactment of the Pension Protection Act of 2006, the most comprehensive legislation affecting charitable nonprofits since 1969. The IRS also has been busy, ratcheting up its scrutiny of hospitals and universities, redesigning the Form 990 information return, issuing new regulations on the public support tests that enable charities to avoid private foundation status, and expanding its jurisdiction over governance matters that traditionally have been a prerogative of the states. The Fourth Edition also reflects several recent state law developments, such as the almost universal adoption of the Uniform Prudent Management of Institutional Funds Act (just in time for the economic downturn and its devastating impact on charitable endowments) and new case law on donor standing, as well the American Bar Association’s major revision of its Model Nonprofit Corporation Act and the steady progress of the American Law Institute’s project on Principles of the Law of Nonprofit Organizations.

This edition is more than just an update. Concerned that the barrage of new developments and the authors’ voracious appetites were causing the book to gain far too much weight, we revisited every chapter with the goal of pruning wherever possible. Some of the longer cases and notes have been edited, and dated or redundant materials were removed. Although the Fourth Edition still may have too many details for some (and not enough for others), it is almost 100 pages shorter than its predecessor—no small feat given the long-winded proclivities of the legal and academic professions.

Turning to the specifics of organization and coverage, the Fourth Edition consists of five parts. Part One (Chapter 1), an introduction, describes the universe of nonprofits, addresses the principal theoretical

rationales for the nonprofit sector and introduces the tax treatment of charities, which are the dominant presence in the sector. If the study of nonprofit organizations has serious academic merit, as we believe it does, theoretical questions such as why the nonprofit sector exists should be addressed at an early point and revisited frequently. To that end, the introductory chapter provides a history of nonprofit organizations in the United States and offers a balanced perspective on the role of the nonprofit sector in the economy and society, both domestic and international.

Part Two (Chapters 2–4) looks at nonprofit organizations from the state perspective. Chapter 2 covers formation, including choice of form, the practical aspects of formation, basic state statutory approaches to the nonprofit entity, and the purposes and powers of nonprofit corporations and charitable trusts. Since the choice of legal form by an organization's founders may have profound ramifications if it dissolves or seeks to modify its purposes, Chapter 2 also addresses dissolution issues, including the doctrines of *cy pres* and deviation, and the legal questions confronting a nonprofit organization that seeks to restructure its operations or convert to a for-profit form.

Chapter 3 explores operation and governance, beginning with an overview of the legal responsibilities and role of the governing board, and then turning to the shifting standards of fiduciary obligations relating to the duty of care, the duty of loyalty and conflicts of interest, the duty of obedience, investment responsibility, and state enforcement of fiduciary obligations. Chapter 4 concludes the state law coverage by examining the regulation of charitable solicitation, including constitutional obstacles confronted by state regulators and proposals for a federal regulatory scheme.

Part Three (Chapters 5–8) is devoted to the tax treatment of charitable organizations. The emphasis in Chapter 5 is on the affirmative requirements and operational limitations faced by organizations seeking tax-exempt status as charities under § 501(c)(3), with more abbreviated coverage of state and local tax exemption issues. This edition incorporates a number of important new qualification developments, including the evolving definition of charity, the increasing scrutiny of hospitals and universities by Congress and the IRS, and continuing concerns over excessive compensation and political activities.

Chapter 6 addresses the dynamic issue of commercial activities—their impact on qualification for tax exemption; the unrelated business income tax; and the special challenges and planning opportunities presented by complex structures such as taxable subsidiaries and joint ventures. Chapter 7 turns to the distinction between private foundations and public charities, first describing the universe of private foundations and grantmaking alternatives, such as donor-advised funds and supporting organizations. It goes on to identify strategies to avoid private foundation status and surveys the regulatory challenges facing organizations unable to escape the private foundation regulatory regime. Chapter 8, which is devoted to law and philanthropy from the perspective of donors and fundraisers, includes a

variety of basic and advanced materials on the charitable contributions deduction and planned giving opportunities. All these chapters employ, more or less, the “two track” approach mentioned earlier, beginning with an overview, then turning to basic tax principles, and concluding with more advanced and often technical material. This organization allows instructors to pick and choose the depth of their tax coverage.

Part Four shifts the focus to mutual benefit and membership organizations. Chapter 9 is an overview of the tax exemption requirements affecting mutual benefit organizations such as trade associations, labor unions and social clubs. Chapter 10 is devoted to the special problems of private membership associations, including important constitutional questions revolving around freedom of association.

Part Five (Chapter 11) considers other legal issues that did not comfortably fit elsewhere. For now, it is confined to the application of antitrust law to nonprofits, with particular emphasis on the health care and education sectors.

To complement the casebook, we have prepared a separate and completely updated softbound Supplement (Nonprofit Organizations: Statutes, Regulations and Forms), which contains excerpts from the ABA’s recently published “third edition” of the Model Nonprofit Corporation Act, the nonprofit corporation laws of several leading jurisdictions, the Uniform Prudent Investor Act, the Uniform Prudent Management of Institutional Funds Act, and selected sections of the Restatements of Trusts and other statutes. The Supplement also includes all relevant sections of the Internal Revenue Code and Treasury Regulations; important IRS forms, such as the redesigned Form 990 information return and the Form 1023 application for § 501(c)(3) exemption; sample articles and bylaws for a nonprofit corporation; a simple charitable trust instrument; and a sample conflict of interest policy. Suggested assignments to Statutes, Regulations and Forms are provided in bold type at the beginning of most sections of the casebook.

As for other matters of style and format, we have edited cases and other original sources freely to make them more accessible to students. Citations and internal cross references in excerpted materials have been deleted without so indicating. Textual omissions are indicated by asterisks, and editorial additions are in brackets. Many footnotes from original sources have been omitted without renumbering those that remain. Our goal was to make the text gender neutral, and we have tried to alternate between masculine and feminine pronouns to represent both sexes. Coverage in this edition is current through May 1, 2010.

We are indebted to many people for their help and guidance during the gestation period of this text. This has been a collaborative effort in the best sense, and many who teach, write and practice in the field have graciously offered their advice and encouragement. We owe special thanks to John Simon, who has done so much to nurture the field, for his many helpful insights during the preparation of the First Edition; to Harvey Dale, the



founder and director of the National Center on Philanthropy and the Law at New York University School of Law, who has encouraged this project from its incubation stage and offered us the unique opportunity to present our work-in-progress to leading scholars and practitioners at an invitational conference at NYU; and to Bill Hutton, who generously allowed us to adapt problems and colorful characters that he developed and refined over many years. We also are grateful to the other participants in the NYU conference: Bob Boisture, Laura Chisolm, Marion Fremont-Smith, Harvey Goldschmid, Carlyn McCaffrey, Jill Manny, and Peter Swords. And thanks too to Rob Atkinson, whose views on the appropriate model for a law school nonprofits course greatly stimulated our thinking; to Miriam Galston for her meticulous editing and valuable substantive comments; and to John Colombo, Mike Klausner, Evelyn Brody and Ellen Aprill for their scholarly contributions to the field and thoughtful suggestions on coverage and content. Any errors or other transgressions, of course, remain those of the authors.

Professor Fishman also wishes to thank the Brooklyn and Pace University Schools of Law, which provided research support; NYU School of Law's National Center on Philanthropy and the Law, which provided access to its philanthropy library; and Kate Fitzpatrick, Brooklyn Law School class of 2009 and Alexandra Campbell-Ferrari, Pace Law School class of 2012, who served as research assistants during the preparation of this edition. Professor Schwarz extends thanks to Hastings College of the Law for its ongoing institutional support; Adele Dorison and Barbara Rosen, for their invaluable assistance as research assistants and editors on earlier editions; and the students in his classes over many years at the University of Florida, NYU, Arizona State, and Hastings (particularly the spring 2010 class), who endured rough early drafts and later helped to improve many of the problems and other materials.

And last but hardly least, we are grateful for the support of our families, friends, and colleagues, and for their understanding of the demands of producing a first edition and keeping it current.

JAMES J. FISHMAN  
STEPHEN SCHWARZ

June 2010

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## ACKNOWLEDGEMENTS

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