Course Coverage:

This is a course in the legal issues raised in governing a nonprofit organization, primarily a charity. We will focus on the appropriate considerations of State corporate and trust law and Federal tax law, as well as some State tax issues and Federal election law issues if we have time. We will also study First Amendment protections relating to association and charitable solicitation. Additional legal issues implicated in running a nonprofit, such as employment law and torts, are generally beyond the scope of this course.

Class Assignments:

Because the law in this area is so rapidly evolving, both in prescription and practice, we will rely heavily on works-in-progress and materials available on the Web. Initially, you need:


   This Guide is supplemented by a CD-ROM containing primary sources – case law, statutes and regulations, and other material. See index to assigned material, by class number; after this Syllabus.

2. ALI Nonprofit Law Draft: We will read selections from the draft I’m preparing as Reporter for the American Law Institute’s project on Principles of the Law of Nonprofit Organizations. Caveat: Only some portions of this draft have not yet been submitted to the ALI (and even those portions are subject to revision); however, all of it reflects feedback from the project’s Advisers, ALI Members Consultative Group, and others. Your suggestions will be most timely and welcome!

3. My photocopied set of Supplemental Material: Besides this Syllabus, this packet contains additional authorities, forms, commentary, and news stories. These pages are numbered by the Assignment to which they relate (i.e., 1 through 26).

   Note: You have two ways to access the assigned Internal Revenue Code sections we will read: at the beginning of the Supplementary Material is a document called “Code & Regs”, and the Guide’s CD-ROM, under Chapters 6 and 7, contains longer versions. By contrast, only one (proposed) reg. appears in the Supp.; the rest are only on the CD-ROM.
4. **Course Website:** Additional assigned documents are available as Online Course Materials (http://www.kentlaw.edu/classes/ebrody). The Course Webpage also has links to the following key sites, which you should access where assigned and monitor for developments:

- http://www.irs.gov/charities (with material on all types of tax-exempt organizations)
- http://www.charitygovernance.com (maintained by Jack Siegel)
- http://www.sos.state.il.us/departments/business_services/home.html (Ill. Sec. State)
- http://www.ag.state.il.us/charities (Illinois Attorney General, Charities Division)
- http://www.guidestar.org (all filed IRS Form 990s for charities) (free registration)

**Buddy System:**

To make your preparation for class more effective, you must form into groups of two or three. Pick your own co-counsel, or, if you wish, come to me and I'll pair you off. Let me know who your co-counsel are. You should meet with each other regularly to discuss the material.

**Assignments, Attendance, Preparation, Exam, and Grade:**

We meet twice a week, on Mondays and Wednesdays, from 4:00 - 5:25. The assignments are numbered for each of our 85-minute classes.

Given the size of our class, I will rotate you and your co-counsel(s) through the assignments to be prepared to be “lead discussant” on the day’s topics. Of course, all of you are required to prepare the material assigned for each class, and to be ready to discuss the material. If you’re unprepared, at least come to class, but let me know.

The grade will be based primarily on your exam. The exam will be 3 hours long, and completely open-book. I reserve the right to raise or lower your grade up to one full grade point based on the quantity and quality of your class participation. You may take this course pass/fail.

Get organized; *keep up*; and contact me with questions (preferably with your co-counsel).

**LEGAL LANDSCAPE FOR NONPROFIT ORGANIZATION**

1. **Overview of the Legal Landscape for Nonprofit Organizations**

   **Guide:** Forward: pp. xxxi-xxxiv;  
   Chapter 1, *Setting the Stage*: at pp. 1-18;  

   **Supp.:** Brody, “The Legal Framework for Nonprofit Organizations,” pages 243-
2. Private Associations: Constitutional and Policy Issues

(Discussion continued in Assignment 3.)


CD-ROM: Under Ch. 3, skim Bob Jones University (at \\Associative Rights); under Ch. 6, you can find the full text of Boy Scouts.

3. Charitable and Nonprofit Purposes


Web: Read Article 3 (Purposes and Powers) in the Illinois Not-for-Profit Corporation Act, available on the Secretary of State’s website (from the course Website, go to http://www.sos.state.il.us/departments/business_services/home.html and click on “Business Organization Acts,” and then click on “805 ILCS 105 / General Not-for-Profit Corporation Act of 1986”).

Guide: Chapter 6, Tax Exemption: Introduction and “Tax Exempt Entities,” at pp. 219-29; and “Terrorism and the Non-Profit Sector,” at pp. 325-27.

Note: We consider tax exemption beginning with Assignment 19. We will cover political and lobbying activity in Assignment 22 and
the prohibition on “private inurement” in Assignment 20.


4. **Organizational Form: Comparing Charitable Trusts and Nonprofit Corporations**


   Guide: Chapter 3, *Organization Basics*: pp. 23-31 (choice of form; the players) and pp. 35-42 (directors and officers).


5. **The Corporate Form: Registration and Reporting.**

   ALI Draft: § 320 (Board Responsibilities, Functions, and Composition), pp. 58-74. (We examine board duties more thoroughly in the next few classes.)


   Supp.: American University’s Act of Incorporation, Supp. at 5-1 through 5-3 (of course, modern corporate charters looks very different!); and AU’s current Bylaws, Supp. at 5-4 through 5-13.

   Web: Go to the Charities Bureau on the Illinois Attorney General’s website (from our Course Website, click on http://www.ag.state.il.us/charities).

   Read: (1) FAQs;
   (2) Filing Requirements;
   (3) Registration and Annual Report Forms;
   (4) Rules and Statutes (just skim the Charitable Trust Act; recall from Assignment 3 that the Not-for-Profit Corporation Act is on the Secretary of State’s website);
   (5) Forming a Charitable Organization;
   (6) Volunteer Board Members of Illinois Not-for-Profit Orgs.

   Go to the Secretary of State’s website (from the Course Website, click on http://www.sos.state.il.us/departments/business_services/home.html), and read the Illinois requirements for the articles of incorporation. Also, click
on Publications and Forms, and then Not-for-Profit Corporations. Read “Articles of Incorporation” (and “A Guide for Organizing Not-for-Profit Corporations” (March 2007)) and “Not-for-Profit Annual Reports” (April 2007)

**GOVERNANCE: STATE FIDUCIARY LAW**

6. **Fiduciary Duties in General**
   *(This topic will take more than one class.)*
   
   **ALI Draft:** Introductory Notes to Chapter 3 (Governance), pp. 27-34; § 300 (Fiduciary Duties), pp. 35-41; § 305 (Modification of Fiduciary Duties), pp. 42-45; § 310 (Duty of Loyalty), pp. 46-52; § 315 (Duty of Care), pp. 53-57; § 340 (Informational Rights and Obligations of Governing-Board Members), pp. 102-06.

   **Guide:** Chapter 4, Legal Duties & Obligations: pp. 77-99.

   **CD-ROM:** Under Ch. 4: Breach of Duties: *Stern v. Lucy Webb Hayes National Training School* (known popularly as the “Sibley Hospital Case”).

7. **Fiduciary Duties (cont.); Exploring the Duty of Loyalty: Conflicts of Interest**

   **Guide:** Chapter 4, Legal Duties and Obligations: “Another Look at Conflicts of Interest,” at pp. 116-28.


8. **Exploring the Duty of Care: Delegation vs. Abdication and Investments**

   **ALI Draft:** § 325 (Committees and Delegation), pp. 75-82; and § 335 (Investment Management and Spending Policy), pp. 96-101.

   **Guide:** Chapter 3, Organizational Basics: “Board Committees,” at pp. 31-35; and Chapter 4, Legal Duties and Obligations: “A Further Look at Investments,” at pp. 99-115.

   **CD-ROM:** Ch. 4: Bielfeldt Foundation\III. AG Complaint.
9. **Understanding Nonprofit Financial Statements**


10. **Sanctions for Breach and Enforcement of Fiduciary Duties**

*(Note: This assignment will likely take more than one class.)*

ALI Draft: Chapter 3 (Governance), Introductory Note to Topic 2, pp. 107-08; § 350 (Enforcement of Fiduciary Duties by Charity or Co-Fiduciary), pp. 109-18; § 360 (Remedies and Sanctions for Breach of Duties), pp. 119-123.

Chapter 6 (Supervision and Enforcement), § 620 (Roles of the Charity, Public Officials, and the Courts), pp. 206-10; Introductory Note to Topic 2 (Private Enforcement: Standing), pp. 214-15.

Note: For assignment 13, we will read about suits by donors. More generally, I will describe the difficulties of the current legal regime for private standing and “derivative” litigation on behalf of nonprofit organizations.

CD-ROM: Under Ch. 4: *Boston University Governance Agreement* (at ‘Boston University); *John v. John* (at ‘Breach of Duties); and King Foundation Jury Instructions and Jury Questions (at ‘King Foundation).


11. **Limitations on Fiduciary Liability**


**Charitable Contributions**

12. **Exploring Fiduciary Duties: Restricted Gifts**

   ALI Draft: Chapter 4 (Gifts), Introductory Note, pp. 146-48; § 400 (Effects of Gifts to Charity), pp. 149-51; § 405 (Creation of Gift Restrictions or Conditions), pp. 152-56; § 410 (Permitted Terms in a Gift Instrument), pp. 157-60; § 415 (Unenforceable Gift Provisions), pp. 161-64.


   CD-ROM: Ch. 7\Restrictions\PLR 200202032.

13 & 14. **Board Responsibilities With Respect to Donors; Consequences of Breach**

   *(Note: This Assignment will take us more than one – but less than two – classes to discus. Please prepare all indicated material before the first class.)*

   ALI Draft: § 420 (Compliance With Gift Restrictions and Conditions), pp. 165-71; and § 470 (Ratification of Charity’s Breach), pp. 196-97. Compare § 650 (Suit by Donor or Alternative Beneficiary), pp. 217-23, with the May 2007 preliminary draft of § 94 of the Restatement (Third) of Trusts, which would reverse the Second Restatement and automatically allow settlor standing. I’ll distribute this or, if available, a later draft for our class.


15. **Change of Purpose: Cy Pres and Equitable Deviation Charitable-Trust Doctrines; “Duty of Obedience”; Nonprofit “Conversions” to For-Profit Form**


16. **Regulation of Charitable Solicitations**


   CD-ROM: Ch. 9/World Church of the Creator. Under Supreme Court Trilogy, read the most recent case, *Madigan v. Telemarketing Associates, Inc.*

   Web: On the Illinois AG’s website, click on “Charities,” then Rules and Statutes, and skim the Solicitations for Charity Act.


17. **Pledges**


   CD-ROM: Ch. 10/Pledges: *Woodmere Academy* (Saul Steinberg); and skim *Maryland National Bank*.

**TAX EXEMPTION AND OTHER TAX BENEFITS FOR CHARITIES AND OTHER NONPROFITS**
18. **Tax Treatment of Charitable Contributions**

**CD-ROM:** Note: The Supplement begins with excerpts from Code § 170.

Ch. 7: Internal Revenue Code: Skim § 170(a)(1), (c) and (f)(8), (f)(16) & (f)(17) [in class we will briefly discuss subsections (b) and (e) – not in the Supplement]. Skim § 6115 (quid-pro-quo contributions) and regs under \Regulations.

In the cases, read Sklar v. Commissioner, 282 F.3d 610 (9th Cir. 2002), where the Ninth Circuit not only rejected a claim by orthodox Jewish parents that they could deduct the portion of private-school tuition paid for religious training, but it also ruled that the settlement between the IRS and the Church of Scientology (not a party to this case) was unconstitutional! The taxpayer also lost in Tax Court in the subsequent case (a later year).


**Supp.:** I.R.C. § 170 (excerpts), in Supp. at Code & Regs 1-3; stories on noncash gifts, Supp. at 18-1 through 18-3; ILM 200623063 (quid-pro-quo penalty), Supp. at 18-4 through 18-8; and “IRS Studying Bold Policy,” at 18-9.

19. **Federal Tax Exemption: Basic I.R.C. § 501(c)(3) Requirements**


**CD-ROM:** In Ch. 6, under \Internal Revenue Code Provisions, read I.R.C. § 501(c), particularly subsection (3) [also in Supp. at Code & Regs 3-6]; and under \Taxexempt Status_Generally\Tax Regulations, read Treas. Reg. § 1.501(c)(3)-1(a), (b), (c) & (d).

**Web:** Explore the application form for charities, Form 1023, available at www.irs.gov/charities.

This website also has links to the annual information returns (Forms 990, 990-EZ, and 990-PF); and to Forms 990-T (UBIT) (which we cover in Assignment 23) and 1120-POL (which we cover in Assignment 22), as
well as Form 8283 (covered in Assignment 18).

The IRS has proposed a major re-design of the Form 990; go to http://www.irs.gov/charities/article/0,,id=171216,00.html (the core form of the proposed revision is also on our Course Website).

Starting in 2008, those organizations too small to file a Form 990 (or 990-EZ) must file an e-Postcard – failure to file 3 years in a row causes loss of tax exemption. Can you imagine how many orgs will have to re-apply for exemption?! For FAQs on the e-Postcard, go to our Course Website.


20. Prohibitions on Private “Inurement”

Private Inurement and Private Benefit:


CD-ROM: See Treas. Reg. § 1.501(c)(3)-l(c)(2) and -l(d)(1)(ii) (private benefit prohibition).


Intermediate Sanctions:


Interaction Between § 501(c)(3) and § 4958:

21. Private Foundations

Note: The full ramifications of “private foundation” status are beyond the scope of this course; just appreciate that it carries more restrictions than the “public charity” alternatives under Code section 501(c)(3). All 501(c)(3)’s are presumed to be private foundations unless excluded under the rules of I.R.C. § 509.


Supp.: Description of Pension Protection Act of 2006 re donor-advised funds and supporting organizations.

Web: Take advantage of the Ford Foundation’s laudable amount of disclosure – go to http://www.fordfound.org/about/governance.cfm, and click on the links to the Foundation’s Charter/Articles of Incorporation, Bylaws, Committee Charters and Membership, Standards of Independence, Trustee Code of Ethics, Staff Code of Conduct and Ethics, Procedures for approving affiliated grants, and Procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls and auditing matters.

22. Advocacy, Lobbying, and Political Activities; 501(c)(3)/(c)(4)/PACs (§ 527) Affiliations


CD-ROM: In Ch. 6, I.R.C. § 501(h) [also in Supp.]. Note: The dollar limits are in § 4911 (not in your Code & Regs).

Web: On our Course Website, read Revenue Ruling 2007-41 (classifying activities by (c)(3)’s) (go to “politics-rr-2007-41”). Skim Revenue Ruling
2004-6 (advocacy activities by (c)(4)’s, (c)(5)’s, and (c)(6)’s)); and skim the IRS’s report on its project on political activities (go to “IRS-2006paci_report”). If you’re interested, read Jack Siegel’s study of the use of charities by politicians (or the other way around), at “jbs-EOTR-politics.pdf.”

Supp.: Explanation from the IRS about “Attempts to Influence Judicial Appointments by Exempt Organizations” (issued after the nomination of John Roberts to the Supreme Court), Supp. at 22-1; and material relating to IRS investigation of the All Saints Church, Supp. at 22-2 through 22-19. In PLR 200724033 (dated April 16, 2006 and released April 16, 2007), the IRS revoked the exemption of an anti-abortion group that engaged in numerous political campaign activities, including running full-page newspaper ads stating:

[Candidate – reportedly John Kerry] is a Catholic Baby-Killing Hypocrite! And we’re going to expose him to the world and show exactly what abortion does to innocent little Babies! This is the most pivotal election in history. If [Candidate] wins, the babies lose. Forever!

23. **Commercial Activities and the “Unrelated Business Income Tax”**


CD-ROM: In Ch. 6: Treas. Reg. § 1.501(c)(3)-1(e).

Supp.: In Code & Regs, read Code §§ 511(a) & (b); 512(a)(1) & (3) (social clubs), and (b)(1) through (12); § 513(a), (c), & (i).


Web: Go to the Metropolitan Museum of Art’s webpage at http://www.metmuseum.org/store/ and explore. Don’t miss “Luxury Fine Jewelry” in the left-hand column. Is the profit on these items exempt?!

24. **IRS and Peer Group Role in Charity Governance**

(This will take less than one class; read ahead in the Supplemental Material for
Assignment 25, in which this discussion continues.)

Supp:  
Note: The Panel on the Nonprofit Sector, convened by Independent Sector at the request of the Senate Finance Committee, hopes to release its report on self-regulation in Fall 2007. I will distribute material when available.

Web:  

*  
BBB Wise Giving Alliance Charity Standards, at http://www.give.org/standards/index.asp

*  

*  
Association of Fundraising Professionals Ethics Guides, at http://www.afpnet.org/ethics

*  
Wall Watchers, at http://www.ministrywatch.com, and read a couple of “Donor Advisories.”

25. Examining Federal Legislative and Nonprofit-Sector Proposals

Guide:  
Chapter 6, Federal Tax Exemption, box on pp. 260-61.

Supp.:  
Chronicle of Philanthropy’s comparison of recent proposals with then-current law, Supp. at 25-1 through 25-5; and story on the Pension Protection Act provision, Supp. at 25-6 through 25-8. Note that the 2006 legislation also allows the IRS to disclose to appropriate state officials information regarding organizations for which the IRS has denied or revoked tax-exempt status or certain other actions the IRS may have taken.

Web:  
On our Course Website, read “Brody-SFC-submission.PDF,” pp. 5-14.

If time, we will explore additional material from recent congressional hearings and proposals. If nothing emerges that’s more recent – :
1) On the Senate Finance Committee’s website, go to http://finance.senate.gov/press/Gpress/2007/prg071907a.pdf (it’s also on our course website) and read the minority’s “Staff Discussion Draft (Not Legislation) of Potential Non-profit Hospital Reforms” (July 18, 2007).

2) On the House Ways & Means Committee’s website, go to http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=577, and read witnesses statements (to be assigned) on the Oversight Subcommittee’s Hearing on Tax-Exempt Charitable Organizations (July 24, 2007).

26. Other Benefits

Guide: Chapter 8, Other Benefits, “Property Taxes” and “Sales Taxes,” at pp. 375-88.

CD-ROM: In Ch. 8\Property Taxes, read the Providence, R.I., PILOTs agreement; and Matter of Pacer (re zoning approvals).

Web: On our Course Website, skim brody-EOTR-prop-tax.pdf.

27. Exam Practice

On our Course Website, you can find all my old exams. I’ll divide up the class into groups to prepare and present questions for us to discuss.

EXAM

The exam will be on Thursday, December 20, at 6:00 p.m. This will be a 3-hour, open-book exam.

Take into the exam all of your written course material and your notes, and any other written material you wish. Some of you might be living out of your notebook computers. You may bring your computer into the exam, including your notes and outlines, but you may not bring any CD-ROMs or go online. Anyone who prepares for class, attends regularly, and studies the material should be able to do well on the exam; by contrast, anyone who does not keep up should not be able to do well on the exam simply by having an electronic outline.