

## W E L C O M E

### A MESSAGE FROM ALAN M. TARTER



*Alan M. Tarter*

It is with great pleasure that we bring to you the inaugural edition of Tarter Krinsky & Drogin LLP's newsletter, *The TKD Advisor*! Our objective is to highlight recent legal trends and business practices that may be useful in your business operations. In

this issue you will find in-depth articles exploring a variety of legal matters, including the legal implications surrounding the sale of real estate after the death of its previous owner, the increase of prohibited political activity by tax exempt organizations, and a detailed discussion of the problem of an employee with a poor work ethic bringing charges of sexual harassment or discrimination in anticipation of, or as retaliation for, disciplinary action by an employer.

This edition also profiles on Anthony D. Dougherty, a Tarter Krinsky & Drogin partner who is preeminent in the field of not-for-profit or organizations, serving associations, foundations, and private educational and religious institutions.

As our intention is to make this newsletter useful to you, I encourage you to give us your feedback and we welcome your ideas and suggestions. Please do not hesitate to contact me directly at **212. 481. 8585** or by e-mail at [atarter@tarterkrinsky.com](mailto:atarter@tarterkrinsky.com). Enjoy this issue.

Alan M. Tarter  
Managing Partner

## DOES AN EMPLOYEE WITH A COMPLAINT HAVE A "LICENSE TO MISBEHAVE"?

*By Richard L. Steer*

As attorneys who routinely defend and counsel employers in connection with claims of sexual harassment and employment discrimination, we have seen it time and time again—a poor performer, on "thin ice" already, goes to management and claims to have been sexually harassed or discriminated against by a supervisor. Thereafter, the employee (and sometimes management)



*Richard L. Steer*

believes that the employee is "untouchable," free to perform poorly or engage in breaches of company policies with impunity. We sometimes see a similar attitude when an employer reinstates an employee in order to settle a discrimination or harassment claim. Experiences like those discussed above make it crucial that employers, their supervisors, and insurance adjusters handling employment practices liability cases have a thorough understanding of the legal principles surrounding retaliation claims and appreciate the need for early and accurate documentation of misconduct.

State and federal laws protect employees against company retaliation for complaints about discrimination or harassment, or for participating in company or government investigations or hearings regarding these matters.

Retaliation cases often turn on timing. An employer that can prove that it was already contemplating the employee's termination, or other discipline, before the discrimination complaint was made, has a much better chance of beating back a retaliation case than an employer who lacks such proof. E-mails are particularly important in this regard as they automatically document the dates in question. Performance improvement plans that specifically mention the possibility of termination, if itemized misconduct is not corrected,

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are also often an important part of the employer's proof.

The rules concerning when unlawful retaliation has occurred have recently changed. In a U.S. Supreme Court case<sup>1</sup> decided this past June, the Court ruled that illegal retaliation only occurs when an employer takes an action that a "reasonable employee" would have found to be "materially adverse." An employer's act is considered "materially adverse" under this ruling, where it "well might have

dissuaded a reasonable worker from making or supporting a charge of discrimination." Although retaliation may be found under this standard, even in the absence of a termination or demotion, it is clear that petty slights, minor annoyances, and a simple lack of good manners should not form the basis of a legally successful retaliation claim.

When handled properly, a claim of harassment or discrimination should not be a license to misbehave in the workplace.

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***About Richard L. Steer, Partner***

*Richard L. Steer is a partner at Tarter Krinsky & Drogin LLP. He has defended a wide range of employers, insurance companies and their policyholders in employment litigation and has extensive experience in Employment Practices Liability insurance, labor relations, and restrictive covenant disputes. In addition, Rich is an Adjunct Professor of Law at Pace University School of Law, where he has taught courses in employment discrimination law, employment law, and labor law for over 20 years. Rich can be reached at [rsteer@tarterkrinsky.com](mailto:rsteer@tarterkrinsky.com).*

## SELLING REAL ESTATE WHEN ONE OR MORE OF THE OWNERS HAVE DIED

*By Steven Troup and Edward Farrell*



***Steven Troup***

There are many issues encountered in selling real estate when one or more of the owners have died. At the inception of the transaction, prior to the execution of a contract of sale, we must ascertain (i) how title to the property was held: individually, by tenants in common, as joint tenants with rights of survivorship, or as tenancy by the entirety between husband and wife; and (ii) whether the decedent died with a will or without. In all cases, a copy of the death certificate is required. When we represent the estate of a deceased owner, we have much to do before a closing may be scheduled. If our client is purchasing real estate from an estate, we need to assure that the seller's attorney is aware of all of the steps needed and that he or she does not wait until the eve of a scheduled

closing to start addressing issues, as it frequently takes several weeks or more to accomplish all that is necessary.

If there was a will, we must determine whether a probate proceeding was initiated since a will is not operative, and has no force and effect, until it is filed and admitted to probate. The transfer of title of real property cannot occur until the will has been admitted and recognized by the Surrogates Court. If there was no will, the intestate heirs of the decedent must be identified, and it must be determined who among them have the authority to sign the deed and other transfer documents. The appointment of an executor or administrator may or may not be required, depending on how title to the real property is held. The seller's attorney should, promptly after the contract of sale is executed, obtain a New York State transfer tax waiver as well as New York State and federal releases of lien with

respect to the property being conveyed. Failure to do so could result in title to the property being conveyed subject to payment of any estate taxes that may become due since an estate tax lien remains.

If the property is a co-op apartment, while the approval of the board of directors is required to transfer occupancy rights, a board cannot prevent an owner from transferring ownership of the shares allocated to the apartment pursuant to a will unless the proprietary lease contains express survivor rights. The board may prevent an heir from occupying the apartment. The separate issues concerning transfer of ownership and the right to occupy a co-op apartment are unique in cooperative transactions, not



***Edward Farrell***

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<sup>1</sup> *Burlington Northern and Santa Fe Railway Co. v. White* 126 S. Ct. 2405 (2006).

condominiums where an owner of a condo does not need the approval of the board of directors to occupy the apartment. The most important factor is starting the process at the earliest possible time in order to avoid last minute surprises with unnecessary delays and expense. This article is an excerpt from a longer article published by the authors in the New York Law Journal last year.

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**About Steven Troup, Partner**

*Steve practices in the areas of cooperative and condominium law, real estate transactions, business transactions, and commercial and real estate litigation. Steve is also experienced in counseling small businesses with respect to contract, corporate and related issues. Steve can be reached at [stroup@tarterkrinsky.com](mailto:stroup@tarterkrinsky.com).*

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**About Edward Farrell, Counsel**

*Ed practices in the areas of real estate law and finance. He represents large institutional lenders in mortgage loan transactions as well as purchasers and sellers of commercial and residential real estate. Ed can be reached at [efarrell@tarterkrinsky.com](mailto:efarrell@tarterkrinsky.com).*

## BAN ON POLITICAL ACTIVITY

*By Anthony Dougherty*

In recent times, the IRS has seen a growth in the number and variety of allegations of violations by section 501(c)(3) tax exempt organizations during election years. The increase in allegations, coupled with the dramatic increase in money spent during political campaigns, has raised concerns about whether prohibited funding and activity are emerging in section 501(c)(3) organizations. Representatives of the IRS have publicly stated that, "If left unaddressed, the potential for charities, including churches, being used as arms of political campaigns and parties will erode the public's confidence in these institutions."

Because of increasing political activity in the tax exempt area, the IRS expanded its educational efforts to remind 501(c)(3) organizations about the prohibition on engaging in such political activities. The IRS conveyed this message through press releases, speeches, workshops, IRS Nationwide Tax Forums, and in a letter to national political parties. Perhaps more important, in 2004 the Service initiated the Political Activities Compliance Initiative ("PACI") project to respond in a

faster, targeted fashion to specific credible allegations of political campaign intervention. The objective of this initiative was to promote compliance with the IRC § 501(c)(3) prohibition against political campaign intervention by reviewing and addressing allegations of political intervention by tax exempt organizations on an expedited basis during the 2004 election year.



The Service recently published its summary results of the 2004 PACI. The results were startling. The IRS found that nearly three quarters of the organizations examined under the initiative had engaged in prohibited political activities. This high percentage is a clear indication that the

2004 PACI addressed a significant compliance issue.

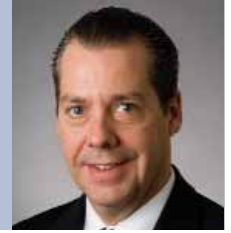
The Service examined one hundred thirty two 501(c)(3) organizations. In three cases, the IRS not only substantiated that prohibited political campaign activity occurred, but that activity warranted, and the Service proposed, revocation of the organization's tax exempt status. In 55 of the cases, the IRS issued written advisories<sup>2</sup> indicating the Service's view that prohibited campaign activity had occurred, but that revocation was not recommended. In one case, the service assessed an excise tax. In five (5) cases, the IRS found non-political intervention violations (including delinquent returns). In eighteen (18) cases, the IRS found that the organization did not engage in prohibited political campaign activity. During campaign seasons, the IRS scrutinizes the campaign activities of all 501(c)(3) organizations that it has received complaints about.

The exposure to an IRS examination can be avoided by understanding what your organization can and cannot do when an election campaign is underway.

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<sup>2</sup> A written advisory is issued when the Service believes the organization engaged in prohibited campaign activity, but the activity appeared to be a one-time, isolated violation, and the organization corrected the violation where possible.

# Special Profile: Anthony Dougherty, Partner



Anthony is an experienced litigator and trial attorney who specializes in the areas of education law, labor and not-for-profit law, particularly pertaining to religious and charitable institutions. His clients include several religious orders, not-for-profit foundations and private preparatory and post-secondary institutions. He serves as general counsel to Iona College, the Congregation of Christian Brothers and the Eastern Economic Association, an association of economists headquartered in New Rochelle, New York.

Anthony has successfully represented his clients before state and federal agencies including the New York State Division of Human Rights, the Equal Employment Opportunity Commission and the

Dormitory Authority of the State of New York. He advises on compliance with federal, state and local employment laws and the requirements of the Internal Revenue Code for qualification for tax-exempt status. Anthony recently obtained a dismissal of a race association discrimination claim from a college on a motion for summary judgment. He regularly writes and speaks on topics relating to not-for-profit organizations, including mergers, consolidations and restructuring of religious congregations.

Prior to joining Tarter Krinsky & Drogin LLP, Anthony was a member of Davidoff & Malito. He earned his Juris Doctor from Brooklyn Law School and is a member of the New York State Bar. He is also admitted to practice before the United

States District Courts for the Southern and Eastern Districts of New York. He is a member of the Labor and Employment Law section of the New York State Bar Association and the National Association of College and University Attorneys. He serves on the board of directors for the Christian Brothers Foundation and St. Joseph Residence, Inc. In 2006, Anthony was named to the Board of Directors of the Blanton-Peale Institute, a graduate institution for psychoanalytic training and a non-profit counseling center.

*Anthony can be reached at [adougherty@tarterkrinsky.com](mailto:adougherty@tarterkrinsky.com).*

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The information contained in The TKD Advisor is of a general nature and does not constitute legal advice. Consultation with our personnel is recommended before taking action based upon any of this information.

## F I R M N E W S

### TKD Offers Wage and Hour Seminar

Tarter Krinsky & Drogin LLP is pleased to announce that the firm's Labor and Employment group has developed a special seminar program on "Understanding and Strategic Avoidance of Wage and Hour Law Exposures." This special informational seminar program is designed for accountants, human resources directors and business owners to identify ways to eliminate wage and hour violations. Wage and hour suits are becoming more prevalent and our labor and employment partners, Laurent Drogin and Richard Steer, will speak on this critical topic. For more information on this seminar, or to schedule an in-house program for your firm, please contact Tanya Duprey, Firm Administrator at (212) 481-8585.

### Make-A-Wish Foundation



Tarter Krinsky & Drogin LLP congratulates Michael

Senter and ABCO Refrigeration Supply Corp.'s fundraising efforts for The Make-A-Wish Foundation. Children served by the Make-A-Wish Foundation of Metro New York will receive up to 65 wishes through the \$450,000 raised by ABCO. The Make-A-Wish Foundation honored Michael Senter, CEO of ABCO Refrigeration for participating in the fundraiser that generated more than \$1.7 million. ABCO surpassed its goal of granting 57 wishes for children, representing the 57 years that ABCO has been in business.