

## Memorandum 76-15

Subject: Study 77 - Nonprofit Corporations (Generally)

Attached to this memorandum as Exhibit I (blue) is a letter from Professor Howard L. Oleck, of the Wake Forest University School of Law, concerning the basic approach to revision of the nonprofit corporation law. Professor Oleck has written extensively in the field of nonprofit corporations and is the author of the leading treatise on the subject.

Professor Oleck has three basic suggestions: (1) that the recently enacted New York and Pennsylvania statutes not be used as models; (2) that the new law be drafted with the participation of nonlawyers and noncorporation lawyers as well as corporation lawyers; and (3) that the new law depart from traditional corporation law concepts to provide a system for effective cooperation of many persons in a balance of altruistic activities.

As to Professor Oleck's first suggestion that the new law not be modeled on other recently enacted codes, this has not been our approach so far. We have used the other codes (and the ALI-ABA Model Act) for reference, but we have worked primarily within the context of the existing California nonprofit corporation law and the new California general corporation law.

Professor Oleck's second suggestion is that the drafters include persons other than corporation lawyers. Because the Commission deals with many topics other than nonprofit corporation law, its composition is sufficiently varied that Professor Oleck's concern should be satisfied. Professor Oleck also proposes that persons skilled in fields other than law be involved in the drafting, or at least be consulted; the fields he mentions are sociology, political science, parliamentary procedure, group psychology, philosophy (or theology), and social work. The Commission does on occasion hire consultants

to advise it at meetings where it believes it would be profitable to do so. Such consultants have included nonlawyers (e.g., an aircraft noise expert in the inverse condemnation study). The Commission should consider whether it wishes to employ consultants from any of the fields mentioned by Professor Oleck.

The professor's third suggestion is that the nonprofit corporation law depart from traditional corporation law concepts. Our approach so far has been to follow traditional corporation law concepts except where the nature of nonprofit corporations calls for a departure. The staff is not certain what areas Professor Oleck has in mind for differing treatment, although we glean from between the lines of his letter he is referring at least to lessening of directorial and managerial control and increasing of membership participation. He also appears to be concerned with misuse of the charitable corporation form; we assume that this will be adequately controlled in California through supervision by the Attorney General and restrictions on distributions of assets.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary



EXHIBIT I

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December 30, 1975

Mr. Nathaniel Sterling  
Assistant Executive Secretary  
California Law Revision Commission  
Stanford Law School  
Stanford, California 94305

Dear Mr. Sterling:

Your letter of December 12th, and attached material, are much appreciated.

I would like to have my name put on your mailing list, as you suggest, and will supply comments from time to time. If you need a consultant with my background, I will try to help, within reason.

In fact, herewith is an opening comment that may raise several eyebrows of your commission's members. It suggests total "new beginning" on drafting a Non-Profit Organizations Law -- in effect, discarding the customary approach, and making a truly new beginning.

The California corporations law, like that of most states, stems from the usual lawyer-minded committee approach to drafting of statutes. I suggest that the very nature (composition) of the committee (commission) is one key to a much needed new approach, in the case of not-for-profit corporation law.

First, I suggest that the recently enacted New York and Pennsylvania (and proposed Canadian) not-for-profit statutes are even worse than the A.B.A. Model Act concepts and rules. They represent the triumph of the "covert" profit motive in non-profit legislation -- provision of not-for-profit law that invites personal (hypocritical) enrichment or power-holding by profit-minded people. I would treat these new statutes as horrible examples of exactly what not to enact.

Parenthetically, I would be glad to come to Stanford for a day's conference with you and others on the commission, to explain my suggestions, if the commission will pay the fares for me (and my wife, who always travels with me).

The corporation law (business and non-profit) of most states is based on the concepts found in the A.B.A. Model Non-Profit Corporations Act, in whole or in part -- or at least parallel concepts.

A basic misconception (almost a deception) is evident in the procedure for drafting of the ABA Non-Profit Corporations Act, and in turn of its progeny. This is the fact that the drafters of the Business Act are typical business corporation lawyers from the ABA Section of Banking, Corporation and Business Law -- an ideal group to draft a business corporation Act, but not to draft a Non-Profit Act. A Business Act, basically, serves to provide a system for gathering of capital, centralization of control, and protection of investors, all aimed toward production of profit in business. A good Non-Profit Act aims at something very different -- the provision of a system for effective cooperation of many persons in a nice balance of altruistic activities pro bono publico, or at least of "general welfare" concepts.

Only some, and not all, of the drafters of a Non-Profit Corporation Act thus should be lawyers. There should be others, skilled in other subjects besides law - such as sociology, political science, parliamentary procedure, group psychology, philosophy (or theology), social work, etcetera. Their product almost surely would be very different from a business corporation statute, while borrowing freely from the useful experience of business corporation procedures and from other kinds of cooperative altruistic procedures. Or, at least, they should be called in for suggestions.

The ABA Section and its successive committees have foundered, year after year, in trying to "improve" the existing Model Non-Profit Corporations Act, because their committee members always are lawyers so steeped in business corporation concepts that they are baffled by the necessity for starting from an utterly different point of departure. As consultant to various such committees over a period of twenty years I have seen this curious phenomenon repeat itself time and again. That approach (analogy to business -- profit procedures) is hopelessly wrong, in my opinion.

In November 1974 we held a national (ALI-ABA) interdisciplinary "Symposium" on Law of Management of Non-Profit Corporations, at Wake Forest University School of Law, drawing 120 paying (\$175/each) registrants from all across the nation and from a great variety of types of organizations. Another such symposium in November 1975, also ~~held~~, on Officers' Powers ... in Nonprofit Organizations also was well attended and well received. It seems clear that the importance of non-profit organizations already is great. Such corporations already have begun to outnumber business corporations in many places. In a few years they will be the majority of corporations, or at least will be vehicles for enormous numbers of people.

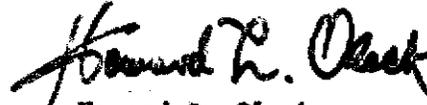
A great opportunity thus is open to your commission -- to be the pioneer in drafting Modern Non-Profit Organizations statutes, if your people have the vision to draft the first Non-Profit Corporations Act that is

based on a truly sound concept of what such a statute should do. It needs a bold new approach, surely not merely the tired old, unrealistic, patchwork, modified-business-corporation statutes that now bear the title of Non-Profit Corporations Laws.

I am profoundly interested in your commission and in what it does, as you see.

I wish you vision, daring, wisdom, and success in your work.

Yours truly,



Howard L. Oleck  
Professor of Law

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