

The Legal Angle

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**An Electronic Newsletter from Davis & Davis, P.C. covering Legal Issues
for Healthcare Providers.**

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ENGLISH-ONLY RULES IN THE WORKPLACE

Employers are occasionally faced with questions of the legality of rules requiring that only English language be spoken in the workplace. Although English-only workplace rules are not automatically illegal in Texas, they can violate federal and state laws prohibiting national origin discrimination in employment and should be enacted with caution. In order to be legal, an English-only rule must be adopted for nondiscriminatory reasons. Blanket English-only rules are likely to be found illegal. Further, a policy that prohibits some but not all of the foreign languages would be unlawful. According to the federal Equal Employment Opportunity Commission (“EEOC”), an English-only rule should relate to specific circumstances in the workplace and is justified by “business necessity” if it is needed for an employer to operate safely or efficiently. According to EEOC guidance, the following are situations in which business necessity would justify an English-only rule:

- For communications with customers, coworkers, or supervisors who only speak English
- In emergencies or other situations in which employees must speak a common language to promote safety

- For cooperative work assignments in which the English-only rule is needed to promote efficiency
- To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers

The EEOC recommends that employers weigh the business justifications for an English-only policy against possible discriminatory effects and the EEOC provides the following considerations for making the decision:

- Evidence of safety justifications for the rule
- Evidence of other business justifications for the rule, such as supervision or effective communication with customers
- Likely effectiveness of the rule in carrying out objectives
- English proficiency of workers affected by the rule

Obviously, health care employers are faced with situations where effective communication is crucial to ensuring patient safety and which might require an English-only policy. When such a policy is enacted, the employer should clearly spell out the business related, nondiscriminatory justification for the rule in writing and the rule should be drawn narrowly to address the business related reasons. Broadly written English-only policies, particularly those that attempt to prohibit the use of other languages on breaks or in casual conversation, should be avoided.

A. Craig Carter

Board Certified, Civil Trial Law, Texas Board of Legal Specialization

Board Certified, Labor & Employment Law, Texas Board of Legal Specialization

SARBANES-OXLEY & NONPROFITS

The Sarbanes-Oxley Act was signed into law on July 30, 2002, largely in response to a number of major corporate and accounting scandals. While the Act does not currently apply to non-public companies, including not-for-profit organizations, it establishes new or enhanced standards for corporate accountability. In fact, some commentators believe that nonprofit institutions should adopt some of these new rules as they look for ways to enhance institutional accountability and responsibility.

Since Congress enacted the American Competitiveness and Corporate Accountability Act of 2002, more commonly called the Sarbanes-Oxley Act, people in the nonprofit world have been discussing and speculating on what it means for nonprofits and their practices.

Sarbanes-Oxley is Congress' response to corporate abuses perpetrated by companies such as Enron and WorldCom, sometimes with the knowing or unwitting help of their auditors, attorneys and accountants. Sarbanes-Oxley is intended to restore public confidence shaken by corporate officers who "cooked the books" to raise their company's stock prices so they could profit. The legislation is designed to promote transparency, accountability and corporate responsibility. To improve the quality and accuracy of financial reporting is one of its goals, but its mission is to bring true reform to corporate boardrooms where people all too often are asleep at the wheel.

Sarbanes-Oxley applies to publicly held companies. With two exceptions, Sarbanes does not generally apply to nonprofits. Nonetheless, many in the nonprofit sector are urging nonprofits to voluntarily adopt the Sarbanes-Oxley measures. While Sarbanes-Oxley has little direct impact on nonprofits, the indirect affect is a very different story. It has undoubtedly raised the bar on expectations for nonprofit governance. Nonprofits should examine their governance structure and internal controls and make necessary adjustments taken from Sarbanes-Oxley. It is likely that in the future, insurance companies will require those measures in place prior to issuing a policy. The requisites of Sarbanes-Oxley that are adaptable to nonprofits have been added to the compendium of best practices in the nonprofit sector. Nonprofits should incorporate them into their governance and management structure.

As previously stated, only two Sarbanes-Oxley provisions apply to nonprofits. They are whistleblower protection and document destruction. Sarbanes-Oxley prohibits a corporation from retaliating against an individual who reports suspected illegal activity. To help ensure compliance, each nonprofit should adopt a written policy on handling employees and volunteer complaints. The policy should be included in the employee manual. People who want to make a complaint should know how to do so and feel confident that a system is in place to address the complaint without fear of retaliation. In regard to document destruction, Sarbanes-Oxley makes it a crime to alter, hide, destroy or falsify documents to prevent their use in litigation or official proceedings. Every nonprofit should develop a document retention and destruction policy and adhere

to it. The policy should be guided by document retention requirements already imposed on nonprofits by external third party forces.

Although Sarbanes-Oxley does not generally apply to nonprofits, there are a number of provisions in it that nonprofits can incorporate into their governance structure to avoid mismanagement, self-dealing and financial errors caused by lack of oversight.

The following is a brief overview of Sarbanes-Oxley provisions that are adaptable to nonprofit organizations. It is meant to highlight the measures on which Boards should stay focused:

AUDIT COMMITTEE

The Board of Directors should have an independent and competent audit committee with defined responsibilities. This can be accomplished in a number of ways, including adoption of a by-law or a resolution creating the committee. Each member of the audit committee should be a director of the nonprofit and be independent. “Independent” means that a member of the audit committee cannot be part of management, including the CEO. This forces the separation between management and the external auditors. Committee members should not receive compensation, directly or indirectly, from the nonprofit. At least one member of the audit committee should be a financial expert or at least have someone on the committee who is knowledgeable enough to ask the right questions. The audit committee, not management, should be responsible for hiring the auditors, setting the auditors’ compensation and overseeing the auditors’ activities. The audit committee and management should be prepared for tough scrutiny from its auditor.

THE AUDITOR

If the nonprofit retains the same auditor for a number of years, the lead partner should rotate at least every five years. This is intended to reinforce auditor independence. An independent auditor should generally not perform non-audit services for the nonprofit, such as bookkeeping, financial information systems, fairness opinions and the like. However, the audit committee may decide to permit the auditor to provide certain non-audit services such as tax services.

CONFLICT OF INTEREST STATEMENTS

Most nonprofits currently already have a conflict of interest policy, but it should be reviewed to make sure that the policy requires annual disclosure of interests and that it includes top management.

INTERNAL CONTROLS AND FINANCIAL STATEMENT CERTIFICATIONS

Sarbanes-Oxley requires the CEO and CFO to certify that the corporation's financial statements are accurate and fairly represent the financial condition of the company. Most nonprofits already provide a form of certification with respect to financial reports.

While Sarbanes-Oxley is not focused on not-for-profit organizations, its provisions will have a significant impact on not-for-profit organizations, including community hospitals, especially as state Attorney Generals, directors, donors and the public are increasingly aware of the importance of good governance practices identified in Sarbanes-Oxley and may pressure non-profits to implement the practices. In particular, Sarbanes-Oxley has reminded directors of non-profit community hospitals of their duty to be engaged to ask the hard questions before approving transactions and to have mechanisms to understand the activities of senior management.

Directors should insist on having an opportunity to review and consider relevant information significantly in advance of making an important decision. While directors are permitted to rely upon information, opinions and reports prepared by others, including but not limited to senior management, the ability to appropriately rely on others is not a reason to shirk individual responsibilities. Ignorance is no longer an excuse. As a result, directors should actively question management and outside advisors when they see a red flag. Further, Boards should be more concerned about retaining necessary oversight over committees, and not rubberstamping committee or senior management recommendations.

Inspired by the financial provisions of Sarbanes-Oxley, more non-profits are requiring that the Board review and approve the accuracy of the financial statements, audit reports and the Form 990 annual information return filed with the IRS, and in some cases, are requiring that the CFO and CEO certify the financial accuracy of such statements, reports and returns. Accordingly, to the extent that

non-profits use specialized financial securities or off-balance sheet financing options, and partnerships to partner with specialty physicians, great care will have to be taken to educate Board members about the transactions so they can intelligently approve such arrangements.

SUMMARY

Compliance with the provisions of Sarbanes-Oxley may no longer be a choice. Sarbanes-Oxley alters the nonprofits' relationships with auditing and consulting firms, and changes the way your organization will be governed. It redefines financial disclosure as we know it, and can have a serious detrimental impact on business deals, financing and the legitimacy and integrity of an organization and its accounting practices. It is very important to ensure the audit committee's oversight of accounting and reporting, eliminate potential auditor conflicts, ensure better accountability and accuracy of financial documentation, implement a comprehensive records retention policy, update your organization's code and written guidelines, review accounting practices used by auditors, ensure auditors are not pressured or coerced, and finally, establish procedures for confidential, anonymous receipt of complaints.

Be certain to have a formal and written code of ethics or conduct, a conflict of interest policy and develop written Board member job descriptions, expectations and criteria for evaluating performances. Develop a written annual Board work plan that includes prioritized goals and objectives. Be aware of the annual duty to review corporate compliance plans, systems, reports and education progress. Receive regular status reports concerning weaknesses and subsequent remedial actions.

Above all, develop a culture of accountability and engagement, and realize that active and vigorous Board discussion and questioning is a good sign.

[Amanda C. Gohlke](#)

Firm News

Congratulations to shareholder Brian Jackson for recently winning a trial in Palo Pinto County for an individual nurse and the local hospital. Plaintiffs had sued the firm's clients alleging that medical negligence caused shoulder Dystocia in a newborn infant and asked the jury for two million dollars. The jury awarded them nothing and exonerated the healthcare providers.

Congratulations to shareholder Fred Davis for recently winning a trial in Travis County for an individual physician. Plaintiffs alleged that the physician failed to properly diagnose meningitis in a young boy, which resulted in hearing loss and other damages. The jury found in favor of the physician.

Congratulations to shareholder Brian Jackson for being selected by the State Bar of Texas to be an instructor at the Bar's annual Advanced Medical Malpractice course. This is the fourth straight year Mr. Jackson has been selected to speak on defending and representing County hospitals, hospital authorities, and hospital districts.

The Firm also wishes to congratulate Mark A. Keene on his recent selection as one of Texas' Rising Stars in the defense of medical malpractice cases. This honor was bestowed on less than 2.5% of all lawyers in Texas. The publication of this honor is contained in the July 2005 issue of Texas Monthly regarding Super Lawyers in the State.

About Our Firm...

Davis & Davis, P.C. is known for exacting standards, attentiveness to clients large and small, cost-efficient and aggressive representation, and a degree of legal sophistication more common in the nation's largest cities.

C. Dean Davis established the Firm in Austin Texas in 1961. The Firm continues to be A.V. rated and attributes its success to well-respected clients and the issues that concern them.

More Information on Davis & Davis can be found on the Internet at:

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If you have any questions or comments regarding this newsletter, including suggested topics to be covered, or if you no longer wish to receive this newsletter, please contact [Alex J. Fuller, Jr.](#)