

## President's Message

BY EILEEN WIDDISON



*Eileen Widdison*

**C**ongratulations and welcome to the beautiful city of Seattle for the 86th NICE Sales Conference.

Congratulations are in order because we've survived one of the nastiest newspaper business cycles on record. Congratulations are in order because we are still working diligently to drive our business to the next level of sales and service.

I want to take this time to thank Dale Irvine for all of his hard work and persistence. Dale devotes countless hours to our organization and we are the better for it. I also want to thank Russ Davis, Jodie Kruger and Marc Daily. These people are top notch professionals and I learn something from them each time I speak to them. The challenges we face in the industry are daunting if we are facing them alone. The challenges become exciting when we share our success and our failures with others.

All of us have heard stories about bad circumstances in the past year and all of us have been touched by difficulty in the business. I still believe in newspapers. I still believe in print and I truly believe that the great-

est thing in the world is to not worry about where you are, but to be concerned about what direction you are moving in.

This conference is a little bit about direction and a lot about connection. We are going to talk about new digital delivery devices and learn how to direct readers to different platforms. We have the opportunity to share our best ideas from the past year and I am sure that we're going to talk about how to do more with less.

This is a great and tenacious group of people who truly have much to offer the industry. I know that our members and vendors and employees at each of our newspapers subscribe to the old Japanese proverb.....Fall seven times, stand up eight. My publisher ends every meeting with this simple phrase: Let's go to work!

### HOW TO REACH US

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**Visit our website at: [WWW.NICEX.ORG](http://WWW.NICEX.ORG)**

# Legally Speaking

L. Michael Zinser • NICE General Counsel



L. Michael Zinser

No doubt, most of you have been reading articles about the Internal Revenue Service's increased focus on attacking independent contractor status. The IRS has announced it will randomly audit 6000 companies using independent contractors. The Obama administration's 2011 budget seeks millions of dollars to target the use of independent contractors. These articles falsely claim that companies deliberately classify employees as independent contractors in order to save money and deprive these individuals of benefits, etc. Basically, this is just not true. The real issue here is the current administration is trying to raise revenue at every turn to fund its various initiatives, including health care and cap and trade. The newspaper industry has been using independent contractors to distribute its newspapers for well over a century. The common law definition of independent contractor status for purposes of the Internal Revenue Code has been basically the same for over sixty years. What is afoot is a "naked revenue grab.

As Yogi Berra once said, "It's déjà vu all over again!" In the early 1990s, the Internal Revenue Service was aggressively attacking independent contractor status in the newspaper industry. There were audits and lawsuits involving not only daily newspapers but also large independent contractor distributors who, in turn, contracted with large groups of independent contractor newspaper carriers. The newspaper industry and the American Association of Independent Newspaper Distributors (AAIND) teamed up and successfully lobbied Congress to amend the Internal Revenue Code to make it easy to qualify newspaper distributors as independent contractors, non-employees for purposes of the Internal Revenue Code. Congress passed and President Clinton signed the "Small Business Job Protection Act of 1996." Under the new law, a person engaged in the trade or business of the delivery or distribution of newspapers or shopping news (including any services that are directly related to such trade or business) qualifies as a direct seller (a non-employee) if:

1. Substantially all the remuneration for the performance of services is directly related to sales or other output rather than

2. The services are pursuant to a written contract; and
3. The written contract provides that the person will not be treated as an employee for federal tax purposes.

The law was intended to apply to newspapers distributors or carriers whether or not they hire others to assist in the delivery of newspapers. This direct seller exemption applies to newspaper distributors and carriers operating under either a buy/sell distribution contract (i.e., where the newspapers distributors or carriers purchase the newspapers from the publisher) or a distribution contract under which the compensation is based upon a delivery fee per paper delivered. This new law applied whether the relationship was buy/sell or a negotiated per piece/contract fee. The new law applied to services performed after December 31, 1995.

This should have removed the IRS from the business of attacking independent contractor status of newspaper distributors. Up until the Obama administration took office that was the case. However, in the last year, I have personally handled four situations where the IRS tried to do an end run around this newspa-

per industry inspired legislative success.

In each case, the newspaper involved received an IRS form SS-8. This is a questionnaire asking many questions, designed to help the IRS make a determination of employee status. It addresses many of the various factors of the relationship. The SS-8 form's questions are "loaded", designed to try to prove employee status. However, the IRS should not have given the SS-8 to the newspaper at issue. That is because under the direct seller amendments mentioned above, you never get to the SS-8 question. My advice to each of the newspapers was to refuse to complete the SS-8 form. Rather, my advice was to draft a letter to the IRS explaining that it had made a mistake and that the individual involved is a direct seller under the Internal Revenue Code. The typical text of a letter I recommended reads as follows:

This letter is in reply to a May 28, 2008, letter from Maelene Watson concerning [distributor]. That letter advises that you are the person to contact.

[Publishing Company] is in the business of publishing a daily newspaper. [Distributor] was a signatory to an Independent Contractor Distribution Agreement on May 30, 2007. Completion of an SS-8 form in this matter does not seem appropriate. This contractor rela-

tionship is governed by 26 U.S.C. §3508.

Enclosed is a copy of the signed contract between [Publishing Company] and [distributor]. Also enclosed is IRS Form 1099, which was filed for federal income tax purposes.

[Distributor] had a written contract with [Publishing Company]. With respect to taxes, that Agreement provides: Contractor will be solely responsible for and shall timely pay all state and/or federal income, social security and unemployment taxes due with respect to Contractor and its employees . . . Contractor and the Company agree that the Company will treat Contractor as an independent contractor for federal, state and local tax purposes under all applicable laws, including, but not limited to, 26 U.S.C. §3508. Further, at the end of the contract, and immediately preceding Contractor's signature, the Agreement acknowledges that the: "Contractor understands and agrees it is its sole responsibility to prepare and file a Schedule C tax form and report and pay income and self employment tax upon all income relating from the services rendered under this Agreement." [Distributor] was not paid based upon hours worked or time involved in the delivery of newspapers. Rather, [distributor's] Independent Contractor Distribution Agreement provided for negotiated compensation based

upon sales/output, not hours worked. I direct your attention to Schedule 1 of the Independent Contractor Distribution Agreement. [Distributor] was paid a delivery fee per newspaper delivered.

Therefore, pursuant to amendments to the Internal Revenue Code that became effective January 1, 1996, [distributor] is a "direct seller," pursuant to 26 U.S.C. §3508.

I trust this letter will satisfactorily resolve this issue.

In each instance, the IRS decided to back away and recognize the direct seller status. This writer does not know whether the IRS agent involved was unaware of the direct seller amendment or the IRS was banking on the particular newspaper publisher not knowing about it. Regardless which is the case, newspapers should not be so burdened under the current statutory framework.

If you receive a letter from the IRS asking you to complete the SS-8 and provide information concerning the independent contractor status of a newspaper distributor, proceed cautiously and consult experienced counsel. My advice: do not talk to an IRS agent or auditor without legal counsel. Inside your organization establish a precise procedure for responding to IRS requests for information.

# THIS CONFERENCE WILL INCLUDE

The Business program will feature: Dan Schaub, VP Audience Development, Sacramento Bee will discuss the future of circulation. Alan Fisco, VP Circulation, Seattle Times will lead a discussion on customer retention. Plus, an expert panel will discuss the latest on Digital Delivery. Always a conference favorite, NICE General Council and President's Award recipient, Michael Zinser will help us identify and hopefully step over the legal land mines out there. Mike will also bring us up to date on the Employee Free Choice Act and other important legislation before Congress.

The Workshop sessions will again be featured, breaking participants down into smaller groups. Here's your chance to meet in an informal setting with your peers to discuss what is and isn't working at your newspaper. It's an invaluable opportunity to learn from the successes and failures of others, as well as to discuss issues of concern to you!

A Hot Ideas Exchange gives you a chance to share what's worked best for you recently, and hear what others are doing.

Network with other circulation and newspaper executives. Many opportunities to socialize will allow you to network, as well as try hands-on demonstrations of an array of tools including software and hardware from business representatives.

Seattle Mariner's baseball, Tuesday, May 4th versus the Tampa Bay Rays. Here is your chance to see Safeco Field and a ticket to the game is included in your registration.

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HOTEL RESERVATIONS should be made directly with the Best Western Executive Inn, 200 Taylor Avenue North, Seattle, WA 98109, Phone (206) 448-9444. Our limited room block and \$109 room rate expires April 5, 2010 and after that date rooms are only available on a space available basis. The Best Western Executive Inn is 100 percent nonsmoking facility.

87th Annual Sales Conference Registration • The Best Western Executive Inn • Seattle, Washington May 4-6, 2010

Please fill out this form, and mail with check payable (in U.S. funds) to: NICE, Post Box 778, La Conner, WA 98257

Name (As you want it to appear on name badge— please print clearly)

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Spouse or children's names (if attending)

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Newspaper or Firm

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Title

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Mailing Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ E-mail \_\_\_\_\_

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Number of Mariner Game Tickets for Tuesday, May 4th Game \_\_\_\_\_

**Registration Fees:**

NUMBER AND TYPE OF REGISTRATION	COST	TOTALS
___ FIRST N.I.C.E. MEMBER	\$150	_____
___ ADDITIONAL SAME NEWSPAPER EACH	\$100	_____
___ NON-MEMBERS	\$250	_____
___ SPOUSE or CHILDREN	\$50 EACH	_____
___ HONORARY MEMBER AND SPOUSE	\$0	_____
 TOTAL		_____

\_\_\_ This is my FIRST N.I.C.E. CONFERENCE.

The Mariner game will start at 7 PM, Tuesday, May 4th. The conference will begin at 10 AM, Wednesday, May 5th and conclude around noon, May 6th. FOR MORE INFORMATION please contact, Secretary/Treasurer Dale Irvine at nice@galaxynet.com or 360-466-2006.