
The Attorney General's Regulatory Authority

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In most states, the Attorney General is the primary regulator of the activities of nonprofit organizations that are incorporated in or do business in that state.¹ This chapter provides an outline of the authority and responsibilities of the Attorneys General as they affect nonprofit organizations.

Introduction

The Attorneys General typically have broad authority to oversee and regulate charities and charitable activities within the state. This authority derives from the common law notion, which originated in England through the ancient Statute of Uses, granting the King jurisdiction and responsibility for assuring that gifts to charity would be used for their intended purpose and would not be defeated by the interests of private individuals. Consequently, the Attorney General is usually responsible both for protecting the interests of the ultimate beneficiaries of charities, that is, the public at large, and for protecting the donors of charitable gifts by ensuring that charitable assets are utilized for their intended purposes. In addition to this historically derived authority, the modern day Attorney General usually has authority over solicitation of funds from the public.

Although the extent of the Attorney General's jurisdiction varies by state, this chapter will describe the three aspects of its general scope:

- (1) jurisdiction over charitable trusts and gifts;
- (2) jurisdiction over the governance and operation of nonprofit corporations; and
- (3) jurisdiction over charitable solicitation from the public.

This chapter will also address the Attorney General's enforcement authority over nonprofit entities and activities.

The Attorney General's Jurisdiction

Jurisdiction over Charitable Trusts and Gifts

In most states, the Attorney General has statutory authority over charitable trusts and gifts, a direct vestige of the common law authority discussed above. The Attorney General must be notified when the trustee of a charitable gift given for a specific purpose seeks to be relieved of that restriction. Such relief may only be granted by a court pursuant to the principle of *cy pres*. That doctrine, which means "as near as possible" in archaic French, requires a trustee to show that circumstances have changed so dramatically since the donor imposed the original restrictions on the gift that they are impossible or impracticable to fulfill. For example, if a donor gave a gift to a hospital for cancer research, but the hospital either became unable to conduct the research or never was in a position to do so, it could make a court application for *cy pres* relief. If the court were satisfied as to impossibility, it would then substitute another use for the monies "as near as possible" to the original charitable intent. In New York, for example, Section 8-1.1 of the Estates, Powers, and Trusts Law permits modifications in restrictions upon charitable gifts only if a court finds that changed circumstances have made literal compliance with the terms of the gift impossible or impractical.² In such proceedings, the Attorney General, as representative of the beneficiaries of the gift, must be notified.

Similarly, upon the probating or distribution of an estate containing a gift to charity, many state laws require that the Attorney General receive notice of the proceeding. This is the case even if the charitable organizations that are beneficiaries in the estate have appeared in the estate proceeding to represent their interests. In such proceedings, the Attorney General can object to the administration of the estate, the conduct or decisions of the executors, or the fees and expenses charged to the estate.³ Moreover, trustees of charitable trusts who file accountings of their administration of such trusts must serve the Attorney General, in addition to any named charitable beneficiary, with copies of the accountings. The Attorney General may object to improper or imprudent decisions made by a trustee in administering the trust and, in extreme cases, may seek a judicial determination that the trustee make payments into the trust to correct any financial harm caused by the trustee's improper or imprudent decision.⁴

Jurisdiction over Nonprofit Corporations

In general, the Attorney General of each state has broad supervisory and regulatory authority over the activities and corporate structure of nonprofit corporations incorporated or based in that state. The Attorney General's supervisory powers include the right to sue to dissolve corporations acting beyond their charters; to remove directors for cause; to enforce the rights of members, directors, and officers; to compel an accounting from directors and officers; and to surcharge fiduciaries who cause damage to charitable corporations. For most nonprofit corporations, however, the Attorney General's regulatory authority, described below, will be of greater relevance and concern.

Registration and reporting

Most state laws require charitable nonprofit corporations that are incorporated in the state, maintain assets or operations in the state, or do business in the state to register with the Attorney General within a period of months after receiving assets and, thereafter, to file yearly financial reports with the Attorney General's office.⁵ Typically, the Attorney General will have jurisdiction over a particular organization if it was incorporated in that state, does business there, or holds assets within the state. While the statutory language and its interpretation differ from state to state, the definition of "doing business" and "holding assets" will generally require some substantial, ongoing presence in the state and will not extend to organizations that merely maintain a bank or brokerage account within the state or whose sole connection to the state is the solicitation of charitable funds from the public.

For example, in New York, a corporation is "doing business" when it engages in sufficiently continuous and systematic activity in New York that it has established an ongoing presence in New York.⁶ Although there is no precise measurement of the nature or extent of the activities in which a foreign corporation must engage in order to be subject to New York's jurisdiction, the Court of Appeals has stated that the test for doing business "is and should be a simple and pragmatic one" that evaluates the facts in a commonsense manner to determine whether assertion of jurisdiction is warranted.⁷ No specific guidelines have been set, but it is recognized that isolated and casual activity does not constitute doing business.⁸

Typically, certain types of charitable nonprofit organizations are exempt from such registration and reporting. While the scope and identity of the exemptions vary from state to state, religious organizations, organizations with less than \$25,000 in assets, hospitals and other health care organizations, and educational organizations are often exempt from registration and reporting.⁹ Religious corporations are exempt out of a concern that registration violates the constitutionally mandated separation of church and state. The rationale for other exemptions appears to be a recognition that certain organizations are sufficiently regulated by other agencies of state government or that the burden

of regulation would be too great. The Attorney General's enforcement authority over organizations exempt from registration and reporting is usually the same as his or her authority over organizations that are required to register and report.¹⁰

Supervision of governance and operations

In states with a well-developed body of law governing nonprofit corporations, the Attorney General must be notified of most major events in the corporate lives of charitable nonprofits.¹¹ In addition, some states require nonprofits to seek court approval when they make significant changes in their structure or activities. Many states require that the Attorney General be given notice when two organizations merge or consolidate,¹² when an organization sells or exchanges all or substantially all of its assets,¹³ or when an organization decides to dissolve its corporate existence.¹⁴ The specifics of when the Attorney General must be given notice and whether court approval will be required varies from state to state—indeed, some state statutes (Delaware's, for example)¹⁵ do not contain any requirements to notify the Attorney General of any of these events.

However, the nature of the review that these statutes require is relatively uniform. The statutes typically provide that the Attorney General must review the transaction to determine whether it promotes the charitable purpose of the organization and is to the organization's advantage. Thus, the Attorney General's review of changes in a charitable organization's corporate structure are similar to the inquiry made in actions seeking relief from the restrictions of a charitable gift, described above.

The imposition of a standard akin to *cy pres* stems from the notion that any assets held by a charitable nonprofit are deemed to be held for the purposes articulated in the organization's charter and for no other purposes. As the New York Court of Appeals explained in *Alco Gravure v. Knapp*,¹⁶ the Attorney General (and in New York, the judiciary as well) must examine a proposed amendment of a corporation's purposes to determine if it carries out the overall purpose of the corporation, and, if not, to assure that steps are taken to preserve the corporation's existing assets for the original corporate purpose. Similarly, the Attorney General will scrutinize other proposed governance changes or changes in the form or use of a nonprofit corporation's assets to determine if the change carries out the organization's overall charitable purpose.

Jurisdiction over Charitable Solicitation

Some thirty-seven states require charities that raise funds from their citizens to register with the Attorney General or other state official and to file yearly financial reports,¹⁷ even if the organization does not otherwise do business in that state and is not incorporated there.¹⁸ Exemptions for this filing requirement are similar to those for the doing-business registration requirement discussed

above.¹⁹ The content of the registration and reporting requirements varies from state to state but follows certain patterns. The New Jersey law is fairly typical. When registering with the Attorney General in New Jersey, the following information must be included:

- (1) the name of the organization (and any name it intends to use for solicitation purposes);
- (2) the names, addresses, and telephone numbers of each officer, director, trustee, and principal salaried executive staff employee as well as whether any of them has been adjudged liable in a civil or administrative action or convicted in a criminal action of theft, fraud, or deceptive business practices;
- (3) a copy of the most recent IRS Form 990;
- (4) a description of the specific programs or purposes for which solicitations will be used; and
- (5) whether there are any blood relationships between the organization's officers, directors, trustees, or principal salaried executives.²⁰

The Uniform Registration Statement developed by the National Association of State Charities Officials is now accepted by thirty-three jurisdictions (thirty-two states and the District of Columbia), somewhat lessening the burden of multi-state registration for charities raising funds throughout the country.²¹

The Attorney General's Enforcement Authority

In most states with substantial nonprofit organizations, the Attorney General has plenary enforcement authority over all activity and assets held by nonprofit corporations and charitable trusts in the state. This authority includes the power to investigate possible wrongdoing and to issue subpoenas and examine records of organizations, as well as the power to bring legal action to protect the public's interest in the charity's assets or activities.

Enforcement activity in this area varies greatly from state to state. In large states such as California and New York, the Attorney General's enforcement authority is extremely broad, and investigations of and actions against nonprofit corporations are more common. At the other extreme, states such as Arizona have not provided the Attorney General with enforcement authority over nonprofit corporations in the state, and case law specifically limits the Attorney General's authority to that which has been set forth in its statutes, thus eliminating any common law authority the Attorney General might otherwise have had in this area.²²

However, even in the larger states where the personnel devoted to such work is relatively extensive, far fewer people and resources are earmarked for charitable enforcement activity than is necessary to fulfill the Attorney General's statutory mandate. In small states, there may be only one attorney who devotes 50% of his or her time to enforcing the laws governing nonprofit governance, charitable trusts, and charitable solicitation.

With respect to nonprofit corporations, where state law establishes an enforcement role for the Attorney General, the parameters of that authority generally include the right to "enforce any right given...to members, a director, or an officer."²³ Under appropriate circumstances, the Attorney General will have the power to sue to remove directors and officers, to compel fiduciaries to account, and to sue to have a receiver appointed.²⁴ The Attorney General usually will have the authority to seek the involuntary dissolution of a corporation that procured its articles of incorporation through fraud or operated in excess of the authority conferred upon it by law.²⁵

Similarly, state laws defining an enforcement role for the Attorney General with respect to charitable trusts typically give the Attorney General investigative subpoena power and the right to bring actions to prevent or redress negligent management or fraudulent use of charitable assets.²⁶ In addition, the Attorney General generally will have authority to investigate and bring actions to prevent charitable trustees from deviating from the restricted purposes of the trust without permission of the court.

Actions taken by Attorneys General include proceedings against officers and directors of charitable corporations for failure to fulfill their obligations as fiduciaries. These obligations include both the duty of loyalty, which proscribes conflicts of interest, and the duty of care, which requires directors to act prudently and in good faith. In situations in which violations of law result from ineptitude or carelessness, the Attorney General may attempt to resolve the matter in a manner that remedies the problems without litigation and that also furthers the general charitable purpose. However, where the focus of the action is acts of self-dealing or clear impropriety, the Attorney General may pursue the matter aggressively to a litigated judgment. (For more information on the topics discussed above, see Chapter 3, "Nonprofit Accountability: The Board's Fiduciary Responsibility" and Chapter 8, "Duties and Potential Liabilities of Officers and Directors of Nonprofit Organizations.")

In states requiring registration for charities that raise funds from the public, the Attorney General normally will have broad authority to investigate and bring action to remedy any violation of the registration law. Most charitable solicitation laws make it illegal for charities to solicit without prior registration with state authorities. In addition, those laws typically outlaw misleading or fraudulent solicitation as well as solicitations that do not make affirmative disclosures required by law.²⁷

Pursuant to the enforcement authority granted under the charitable solicitation laws, the Attorney General will generally have the right to seek a variety of remedies. These include an injunction against unregistered fund raising or

fraudulent fund raising, restitution of amounts raised in such fund raising, and/or the appointment of a temporary receiver.²⁸ Some statutes authorize the payment of fines and the state's investigative expenses as well.²⁹ These actions are often brought against charities in addition to professional fund raisers acting on their behalf. Where the facts are egregious, or where the defendants have been found guilty of similar infractions in the past, the remedies may include an injunction against any future fund raising in the state.³⁰

Conclusion

The Attorney General plays a critical role in the lives of nonprofit corporations and charitable trusts, overseeing their operations, reviewing their financial transactions, and taking steps to assure that charitable assets are used for their intended purposes. Although this chapter gives an overview of the Attorney General's jurisdiction, it is important that all organizations and trusts determine the particular requirements of the states in which they are organized and in which they operate or solicit funds from the public.

Notes

1. The Internal Revenue Service, of course, determines exemptions from federal income tax and regulates the activities of exempt entities from a federal tax perspective. In addition, in many states, the Secretary of State plays a variety of regulatory roles in the lives of nonprofit organizations, while in others, the courts must approve certain transactions. Except to the extent that these offices intersect with the responsibilities of the state Attorneys General, however, they will not be discussed in this chapter.

2. *Alco Gravure, Inc. v. Knapp*, 64 N.Y. 2d 458, 490 N.Y.S.2d 116 (1985); *In re Multiple Sclerosis Serv. Org. of New York*, 68 N.Y.2d 861, 505 N.Y.S.2d 841 (1986).

3. *See, e.g., In re Duffin*, 59 Misc.2d 987 (1969); *In re Garrison*, 137 A.2d 321, 323 (Pa. 1958).

4. *See, e.g., In re Rothko*, 43 N.Y.2d 305 (1977); *McInnes v. Goldthwaite*, 52 A.2d 795 (N.H. 1947).

5. Under the Illinois Charitable Trust Act, for example, all organizations organized for a charitable purpose must register with the Attorney General within six months of receiving any income that is to be used for charitable purposes. In addition to the initial registration, those organizations must file annual written reports signed under oath setting forth "information as to the nature of the assets held for charitable purposes and the administration thereof by the trustee" with the Attorney General. *See generally* Illinois Charitable Trust Act, 760 ILL. COMP. STAT. ANN. §§ 55/1-55/19 (West 1992 and Supp. 2001); *Compare* REVISED MODEL NONPROFIT CORP. ACT § 16.22 (1987) (requiring that domestic and foreign corporations doing business in the state file an annual report with the Secretary of State, rather than the Attorney General. The report includes a description of the corporation's activities and a list of its directors but does not include any financial information).

6. Weinstein-Korn-Miller, NY Civ. Prac. § 301.16; *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917).
7. *Bryant v. Finnish National Airline*, 15 N.Y.2d 426, 432, 208 N.E.2d 439, 441, 260 N.Y.S.2d 625, 629 (1965).
8. *Tauza*, *supra* note 6.
9. See, e.g., N.Y. EST. POWERS & TRUSTS § 8-1.4 (religious organizations, hospitals, educational institutions, museums, and historical societies exempt); see also MINN. STAT. § 501B.36 (1999) (religious associations, charitable trusts operated exclusively for religious purposes, and split-interest trust are exempt).
10. Many of the statutes that set out a state's Attorney General's enforcement authority over organizations do not state any exceptions, unlike the statutes governing registration (see *supra* note 5); see, e.g., MICH. COMP. LAWS § 450.2821 (West 1990).
11. REVISED MODEL NONPROFIT CORP. ACT § 1.70 requires that the Attorney General be given notice of certain dissolutions, mergers, sales of assets, and actions to remove nonprofit directors. In most states, the Attorney General has far more extensive powers over nonprofit corporations organized for charitable purposes (usually, those corporations that have received an exemption from federal tax under Internal Revenue Code § 501(c)(3)) than he or she will have over nonprofit corporations organized for non-charitable purposes. The statutory terms for the different types of corporations varies from state to state. For example, Nevada law refers to charitable nonprofits as public benefit corporations.
12. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 907 (McKinney 1996); Cf. CAL. NONPROFIT CORP. CODE § 6010 (West 1990 and Supp. 2002) (requiring Attorney General's written consent for the merger of a public benefit corporation with a non-public benefit corporation; otherwise, a public benefit corporation can only merge with another public benefit corporation, religious organization, or foreign nonprofit corporation with charitable purposes); REVISED MODEL NONPROFIT CORP. ACT § 11.02(c).
13. See, e.g., TENN. CODE ANN. § 48-64-102 (2000); WASH. REV. CODE § 24.03.240 (1994); REVISED MODEL NONPROFIT CORP. ACT § 12.02(g) (public benefit corporation must give written notice to Attorney General if sale is outside regular course of business).
14. See, e.g., GA. CODE ANN. § 14-3-1403 (1994); MONT. CODE ANN. § 35-2-722 (2001); REVISED MODEL NONPROFIT CORP. ACT § 14.03.
15. See, generally, DELAWARE CORP. LAW tit. 8, § 225.
16. See *Alco Gravure* 64 N.Y.2d at 467, 479 N.E.2d at 760, 490 N.Y.S.2d at 121.
17. In many states—for example, Georgia, Illinois, Kansas, Michigan, New Mexico, New Jersey, and Tennessee—larger organizations will be required to file audited financial reports, while smaller organizations need not undertake this additional burden.
18. Alabama, Alaska,* Arizona,* Arkansas, California, Connecticut, District of Columbia, Florida,* Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina,* North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah,* Virginia, Washington, West Virginia,* and Wisconsin all require charitable organizations to register with them. (States with a * next to them require registration but do not accept the Unified Registration Statement); *supra* note 11. See *Florida Police Benevolent Assn. v. Pinellas County*, 373 So.2d 422 (Fla. Dist. Ct. App. 1979).
19. See, e.g., ARK. CODE ANN. § 4-28-404 (Michie Supp. 2001) (religious organizations, educational institutions, political organizations, governmental organizations, hospitals, and organizations raising less than \$25,000 per year are exempt).
20. Charitable Registration and Investigation Act, N.J. STAT. ANN. § 45:17A-24 (West 1995).
21. *The Unified Registration Statement*, at <<http://www.nonprofit.gov/library/gov/urs/index.html>> (last modified July 20, 2000). The question of whether the states can require the registration of organizations that raise funds via their web sites is addressed in "Legal Implications of the Internet for Nonprofits" in this volume.
22. *Gershon v. Broomfield*, 642 P.2d 852 (Ariz. 1982).

23. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 112(a)(7); REVISED MODEL NONPROFIT CORP. ACT § 1.70.
24. NEV. REV. STAT. § 82.536 (Michie 1999); REVISED MODEL NONPROFIT CORP. ACT § 8.10.
25. See, e.g., S.D. CODIFIED LAWS § 47-26-16 (Michie 2000); IOWA CODE § 504A.53 (West 1999).
26. See, e.g., 760 ILL. COMR. STAT. ANN. § 5519 (West 1992); MASS. GEN. LAWS ANN. ch. 68, § 30 (West 2001); NEV. REV. STAT. § 82.536; N.J. STAT. ANN. § 45:17A-33; N.M. STAT. ANN. § 57-22-9 (Michie 2000); OR. REV. STAT. § 128.710 (2001); WASH. REV. CODE ANN. § 19.09.410 (West 1999).
27. N.Y. EXEC. LAW § 172-D (McKinney Supp. 2001); MASS. GEN. LAWS ANN. § 28; FL. STAT. ANN. § 496.515 (West 1997); KAN. STAT. ANN. § 17-1769 (1995).
28. See, e.g., CONN. GEN. STAT. ANN. § 21A-8 (West 1994); N.M. STAT. ANN. § 57-22-9; WASH. REV. CODE § 19.09.277.
29. See, e.g., IND. CODE § 23-7-8-8.31 (Michie 1999).
30. See, e.g., ALA. CODE § 13A-9-76 (Supp. 2002); CONN. GEN. STAT. § 21A-1901; D.C. CODE ANN. § 44-1702 (2001); WIS. STAT. ANN. § 440.475 (West 1998).

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- <<http://www.naag.org>> is the web site of the National Association of Attorneys General, which contains information about the offices around the country, including addresses and phone numbers.
- <<http://www.nonprofits.org/library/gov/urs>> provides state requirements for charitable solicitation registration and contains telephone numbers, web sites, and addresses of charities regulators in all states.
- <<http://www.oag.state.ny.us>> is the web site of the New York State Attorney General. It features a subdivision about the Charities Bureau and the New York charities laws.