

Recent Updates from the Attorney General's Nonprofit Division

March 7, 2017

Several attorneys from the Non-Profit Organizations/Public Charities Division of the Office of the Attorney General (the Division) participated in an engaging panel discussion at the Boston Bar Association last week. The discussion covered a number of topics of interest to nonprofit organizations in the Commonwealth, including required and requested reporting related to “fundamental transactions,” probate issues, governance challenges faced by nonprofits, and an update regarding charitable fundraising in the Commonwealth.

Courtney M. Aladro (Division Chief) provided introductory remarks regarding the Division and introduced her colleagues: Jonathan Green (Deputy Chief), Eric B. Carriker, Philip Schreiber, and several attorneys who recently joined the Division: Argie Kosmetatos Shapiro, Emily Gabrault, and Bernardo Cuadra.

Fundamental Transactions

Certain transactions that signal a significant or fundamental shift in the governance, structure, assets or operations of a charitable corporation require notice to the Division and sometimes, court approval. Mr. Green and Ms. Shapiro took the lead discussing in some detail the notice requirements under M.G.L. Ch. 180 s. 8A(c) regarding a sale or transfer of all or substantially all of a charitable corporation's assets. In this case, “substantially all” refers to transfers of 75 percent or greater. They noted that one issue the Division examines closely in this context is whether the Board of the transferring charity has managed conflicts of interest well and they encouraged organizations that may be contemplating such a transfer to refer to the Division's published guidance (available [here](#)).

Mr. Green also stated that the Division is mindful of deadlines related to such transfers and suggested that providing the Division with advance notice helps to facilitate a more efficient review of such transactions.

Ms. Gabrault noted that a transfer of all or substantially all of the assets of a nonprofit acute-care hospital or nonprofit health maintenance organization requires a slightly amplified set of notice requirements under M.G.L. Ch. 180 s. 8A(d).

Another “fundamental transaction” involves a transfer for less than fair market value transfer of a large part of a charitable corporation's assets (including gifts). This requires both notice to the Division and a filing of what is known as a *Beede* petition with the probate court or the Supreme Judicial Court (sitting in single justice session). Mr. Green and Ms. Gabrault encouraged charitable organizations that are contemplating a “more than de minimis” transfer to contact the Division to determine whether the contemplated transfer would be considered to involve a “large part” of the charity's assets. It was noted that the *Beede* requirement did not apply to charitable trusts and that the Division had recently published guidance regarding *Beede* petitions (available [here](#)).

Although there is no regulatory or judicial notice requirement for a merger of charitable organizations or a governance shift whereby an unrelated organization becomes the sole statutory member of a Massachusetts charitable corporation, the Division considers these fundamental transactions as well and requests informal notice when such transactions are contemplated.

Probate Issues

Mr. Cuadra took the lead in discussing probate issues. He provided an overview of the types of probate-related matters handled by the Division in 2016, noting that the Division was involved in over 800 wills, over 1000 interim accounts, and over 600 final accounts and closing estate documents. He said that the primary issue of concern to the Division is whether charitable beneficiaries receive their fair share of the bequest, and to that end, the Division tends to focus on the fees – including attorney fees – that are charged in connection with settling an estate.

Governance Concerns

Mr. Carriker discussed governance challenges that face nonprofits. He noted that there are three primary duties with which boards and officers must comply: the duty of care, the duty of loyalty, and the duty to mission. While the duties of care and loyalty are described in M.G.L. Ch. 180 s. 6C, this latter duty to mission is not part of the statute and is more closely applicable to trusts and restricted funds under the Uniform Prudent Management of Institutional Funds Action (M.G.L. Ch. 180A).

The duty of care is breached when directors fail to exercise careful oversight and reasonable intelligence in managing the affairs of the nonprofit corporation. The duty of loyalty is breached in cases of embezzlement or private inurement by directors or officers. Mr. Carriker noted that the Division routinely investigates and prosecutes cases involving the breach of these duties. He also noted that the Division has taken the position, for example in the case *Lifespan Corp. v. New England Medical Center, Inc.*, No. 06-cv-421-JNL (D. R.I. May 26, 2011), that the business judgment rule does not apply to charitable corporations.

Nonprofit corporations may take certain preventative measures to mitigate the possibility of a breach of these duties, including instituting internal controls over expenditures, establishing an audit committee of the board, regularly providing the financial to the board, and adopting a robust whistleblower policy. When financial mismanagement is discovered, organizations are encouraged to communicate promptly with the Division.

Fundraising Update

The Division periodically issues a Report on Professional Solicitations for Charity fundraising by the 27,000 charities operating in the Commonwealth. The purpose of the report is to help the public to make informed decisions when making charitable contributions and to promote transparency. The most recently released report focused on fundraising during calendar year 2015 (available here).

Mr. Schreiber provided an overview of some of the information from the 2015 report. A total of approximately \$200 million was raised by professional fundraisers following traditional fundraising techniques. Consistent with previous years, on average charities retained 41 percent of the funds raised by these fundraisers. This means that the professional fundraisers retained approximately \$119 million for their efforts.

If the percentage retained by the professional fundraisers seems surprising, that may be part of the reason why the Division considers transparency regarding fundraising so important. Donors who prefer that a greater percentage of their contribution be retained by the recipient of their generosity may find that the report contains helpful questions to ask and issues to identify when deciding to make a donation. Even so, the 2015 report states that “There is no requirement that a minimum percentage or amount of funds donated through professional solicitor campaigns be passed through to the charity on whose behalf the donations are given. In fact, the United States Supreme Court has held that charitable solicitation is a form of speech protected by the First Amendment and that states are not permitted to establish a requirement that a minimum percentage of funds raised through solicitors go to the charity.”

The 2015 report also noted identified fundraisers that followed certain “unconventional” fundraising strategies. These fundraisers raised approximately \$380 million and on average retained a much smaller percentage of the funds raised. In one case, Network for Good, Inc., an online fundraising platform and donor-advised fund, raised \$254 million of which 97 percent went to charity.

Conclusion

Toward the end of the hour, the panelists posed several questions that merit further consideration by the nonprofit community as well as by the Division, including:

- Do charitable boards have a fiduciary duty to obtain a better deal from their professional fundraisers than an average of 41 percent of the funds raised?
- How will proposed tax reform affect charitable giving in the Commonwealth?
- How do the new Administration’s immigration policies affect universities and their foreign student populations?
- What is the Attorney General’s role regarding transparency regarding tax-exempt organizations when there is less transparency at the federal level due to the widespread use of Form 1023-EZ and Form 990-N.

RELATED PRACTICES

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