THE ATTORNEY GENERAL'S AUTHORITY OVER CHARITABLE NONPROFIT CORPORATIONS

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CHAPTER 11

Please note that the opinions expressed herein and the opinions expressed by the presenter are not intended to necessarily represent the position of the Attorney General of Texas regarding any particular matter and are intended in no way to be offered as legal advice. The presenter acknowledges the contributions to this outline by past and present members of the Charitable Trusts Section. Gratitude for the updates reflecting recent codifications and amendments to the law is expressed to Assistant Attorney General Katharine Hodgins.

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Ms. Staricka is a frequent speaker in the Texas nonprofit and legal community, including regular presentations at the annual Nonprofit Organizations Institute sponsored by the University of Texas School of Law in Austin, the annual Governance of Nonprofit Organizations Course sponsored by the Texas State Bar and the annual Legal and Accounting Institute sponsored by the Nonprofit Resource Center of Texas in San Antonio. She has also participated as a guest speaker at the RJK School of Philanthropy at the LBJ School of Public Affairs and is a regular speaker at the ACC Center for Community-Based and Nonprofit Organizations, both in Austin.

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THE ATTORNEY GENERAL'S AUTHORITY OVER CHARITABLE NONPROFIT CORPORATIONS

I. INTRODUCTION

The Attorney General of the State of Texas is charged with the duty of protecting the public interest in charity. Most, though not all, nonprofit corporations are charitable organizations. The Attorney General discharges his duty through various means and under the authority of a number of statutes and the common law. A detailed summary of this authority is contained in these materials.

The Charitable Trusts Section of the Office of the Attorney General executes the Attorney General's duty. Charitable Trusts is contained within the Consumer Protection and Public Health Division. In executing the duty to protect the public interest in charity, the Attorney General must balance many factors and critically consider all options toward obtaining a result most beneficial for charity. Perhaps the most obvious and primary goal is to preserve the organization under scrutiny. Consequently, it is rarely the goal of the Charitable Trusts Section to destroy and conquer, but rather, to preserve and protect. However, in common scenarios, the Attorney General may be faced with the apparent need to protect the organization from an individual who holds himself out as the organization's lifeline. Under such circumstances, it is not uncommon to seek out creative solutions crafted to sculpt relief for the organization and appropriate sanctions against those individuals who have placed the organization in peril. Under other circumstances, the organization may not be operating for a legitimate public purpose and dissolution may be the desired relief.

II. PERSPECTIVES FROM THE OAG

A. Overview of Investigatory Process

The Charitable Trusts Section of the Office of the Attorney General is responsible for receiving and processing all complaints related to charitable activity within the State of Texas. There are over 60,000 active nonprofit, charitable organizations operating within this state, and countless trust entities over which the Attorney General has oversight authority. Of course, the Office of the Attorney General has only limited time and resources available to assist in its varied enforcement efforts and ongoing duties. Consequently, we are unable to conduct full investigations of every matter that is referred to us and must weigh various factors in making a determination as to whether a complaint warrants further involvement by this office. Although each determination is different, primarily, we must ascertain the existence of, and restrict our review to, those situations involving substantial harm to the public and the charitable interest at stake.

If the complaint is of a nature that suggests further attention should be given to it, our investigator forwards the complaint to the chief of the section for review and consideration, along with any recommendations for handling that may have been formulated. Further pre-investigative work may be done prior to the opening of a formal investigation. If a determination is made to investigate, approval to open an investigation will be sought. Once a formal investigation is opened, most commonly, pre-suit investigation will be initiated by the issuance of either a request to examine documents pursuant to the Miscellaneous Corporations Act and/or a civil investigative demand under the authority of the Deceptive Trade Practices-Consumer Protection Act.

Once we have viewed the documents requested, it is common to request additional documents and/or supplemental information to help clarify questions we have generated in our review. Failure to comply with our requests may result in a legal action for enforcement of the request and penalties, whether or not substantive legal claims have been developed at that time. We may also issue a request to take a sworn statement under oath of anyone with knowledge of the subject matter of interest and/or the operations of the corporation. In the majority of cases, concerns are dealt with through a negotiation process and remedial actions are instituted voluntarily. It is sometimes necessary, however, to initiate litigation to address the harm identified.

B. How to Get the Attorney General's Attention

Below is a list of eleven ways to get the attention of the Attorney General's Office. NOTE: This is not a list of activities which will necessarily result in the filing of a lawsuit. It is a list of common indicators of a potentially problematic situation. There may be ways to explain. Then again, there may not.

The following list is loosely categorized by organizational and management issues, fundraising issues and disbursement issues.

ORGANIZATIONAL AND MANAGEMENT ISSUES

1. Let your Executive Director control it all

- Allow the individual who founded the organization to pay himself or herself as the executive director and allow that individual to elect/choose and control the board.
- Maintain a board which is uninformed and serving in a merely "advisory" capacity/fail to provide proper board training.

- Fail to independently review the operations of the organization as a board member and trust what the executive director tells you, rather than reviewing documents/financials and seeking alternate recommendations to determine the course of action which is in the best interest of the organization. This is especially critical in the financial area.

2. **Fail to adopt or follow policies and procedures**
- Fail to have clear policies in place and accessible for directors, officers and employees, especially with regard to finances, budgeting and reimbursements.
- Allow reimbursement for expenditures after the fact because of lack of understanding of the policy/allow for use of corporate credit cards for personal expenditures
- Fail to conduct regular board meetings documented with minutes which are maintained and available for review.

3. **Fail to produce documents to the public when requested to do so in accordance with the Texas Non-Profit Corporation Act and the Texas Business Organizations Code.**
- Art. 1396-2.23A.C. and TEX. BUS. ORG. CODE § 22.353 Require that all books and records of the corporation be available to the public for inspection & copying.

4. **Complicate your organizational structure**
- Create multiple subsidiaries or incorporate related organizations with the same board, officers, or managers.
- Develop overlapping or identical charitable purposes of related organizations and move funds from one organization to another.
- Compensate one individual for similar tasks within related organizations or compensate different "related" individuals for same or similar job responsibilities.

5. **Convert/merge/joint venture with a for profit entity**

FUNDRAISING ISSUES

1. **Solicit deceptively or through telemarketers or other fundraisers who keep most of the money or pay out excessive amounts to for profit organizations**
- Utilize high pressure tactics/official sounding names/courier pick up of donation.
- Allow the donor to be confused as to the identity of the caller, i.e. believing that the charity is the caller.
- Allow the majority of funds to pass to the fundraiser. Although the amount a fundraiser is allowed to receive is not a determined figure under the law, the question is simply this: When does fundraising become a fraud on the donor?
- Represent that funds will be used locally when they are taken out of state.
- Give the charity a name that is deceptively similar to that of an established charity.
- Claim to offer programs which do not exist or are merely in the planning stages.

DISBURSEMENT ISSUES

1. **Spend organization's assets on expensive, nonessential purchases/gifts/trips**
- Travel to another city or foreign destination (i.e., Belize, Europe) by directors, officers, staff (and family members) and charge all expenses to the organization.
- Fail to restrict credit card expenditures to essential items for the charitable purpose of the organization and/or fail to require proper documentation for reimbursement, i.e. corporate credit card purchases and undocumented reimbursements (expensive hotels, restaurants, stores accessible in airports (shoe shines, book stores, brew pubs)).
- Conduct board meetings at luxurious meeting places, even if it's within the same city as the organization's location.
- Purchase and use exercise clubs/membership clubs.
- Purchase personal care items (massages, beauty salons, clothing).

2. **Hoard organization's money**
- Distribute small amounts for charitable purposes in proportion to donated funds/earned income.

3. **Outrageous salaries and benefits**
- Pay your directors/employees/officers or "outside professionals" exorbitant salaries and benefits.
- Purchase cell phones for directors and their families, and employees not needing them for the performance of their jobs.
- Purchase vehicles for board members and/or employees whose job descriptions do not require them. Insure these vehicles. Cover all fuel and maintenance costs.

4. **Use donated funds (including government grants) for unauthorized purposes**
- Hold fundraising campaign for a specific purpose and fail to use the funds for that purpose.

- Obtain government funds for specified purpose and redirect the funds to another purpose. (Even another charitable purpose may be inappropriate.)
- Maintain organization's property on personal property.

5. Fail to cooperate with OAG when we attempt informal inquiry

- Often times our inquiries are merely to establish the invalidity of a complaint.
- Failure to cooperate will heighten our suspicion and need to step up the inquiry into a formal investigation.

III. THE AUTHORITY OF THE ATTORNEY GENERAL AS TO NONPROFIT ENTITIES

It is the duty of the Attorney General to represent the public's interest in the proper use of the funds donated to or raised and held by charitable organizations. In Texas, the Attorney General and his authorized staff protect the public interest in charity[1] through a combination of common law, constitutional, and statutory authority.

A. Common Law Authority

Texas law provides that the Attorney General is the representative of the public interest in charity and is charged with the duty of ensuring that nonprofit, charity assets are used for appropriate charitable purposes. The Attorney General's authority and standing in this area is like that of an attorney for the stockholders of a for profit corporation in a derivative action. In the case of a nonprofit, charitable entity, the "stockholders" are the general public who are the ultimate beneficiaries of such charitable assets.

Based upon well-established case law, the Attorney General is the representative of the public interest in charity.[2] The Attorney General's duty to protect the public interest in charities and his broad authority to carry out that duty has been uniformly recognized by Texas courts.[3]

This power and duty was originally derived from old English law, particularly the Statute of Charitable Uses, 43 Elizabeth I, Chapter 4 (England 1601) which established general definitions of charity (charitable uses)[4] and promulgated regulation for the protection of charitable interests.[5] The Statute of Charitable Uses also established or defined various areas of charitable endeavor, for example, the promotion of health. [6]

Texas law encourages charitable uses and the finding of charitable status.[7] Texas courts will presume a charitable status and adopt constructions which operate to sustain charitable status.[8] The reason for this favored status is made evident by the courts: "[Charities] tend to relieve the government of a part of its responsibility to a portion of its citizens and thus reduce the general tax burden on the public. They are therefore to be encouraged rather than discouraged." [9]

B. Constitutional Authority

After outlining specific duties of the Attorney General, the Texas Constitution provides that the

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[1] Charity is a gift to general public use and it may embrace fulfillment of the needs of either the rich or poor, without financial gain. ***Taysum v. El Paso Nat. Bank***, 256 S.W.2d 172 (Tex.Civ. App.–El Paso 1952, writ ref'd). A public charity is one that benefits the public at large, or a substantial and indefinite segment of it, and serves a purpose that would otherwise require the services of the community or the state. ***Wooten v. Fitzgerald***, 440 S.W.2d 719 (Tex.Civ.App.–El Paso 1969, writ ref'd n.r.e.).

[2] ***Boyd v. Frost National Bank***, 196 S.W.2d 497, 502-03 (Tex. 1946); ***Powers v. First National Bank of Corsicana***, 137 S.W.2d 839 (Tex.Civ.App.–Waco 1940) ***affirmed***, 161 S.W.2d 273, 284 (Tex. 1942); ***Nacol v. State***, 792 S.W.2d 810, 812 (Tex.App.–Houston [14th Dist.] 1991, writ denied). ***Blocker v. State***, 718 S.W.2d 409, 416 (Tex.App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.); ***Carroll v. City of Beaumont***, 18 S.W.2d 813, 820 (Tex.Civ.App.– Beaumont 1929, writ ref'd).

[3] ***Id***; ***Allred v. Beggs***, 84 S.W.2d 223, 227 (Tex. 1935).

[4] ***See Powers*** 161 S.W. 2d at 279.

[5] ***See Vidal v. Girard's Executors***, 2 How.127, 197-199, 11 L.Ed. 205 (1844), for a discussion of the older common law of charitable trusts.

[6] *See generally* the Restatement of Trusts (Second) § 368; *and* ***DeModena v. Kaiser Foundation Health Plan, Inc.***, 743 F.2d 1388, 1392 (9th Cir. 1984), ***cert. denied***, 469 U.S. 1229 (1985).

[7] *See* ***Powers,*** 137 S.W.2d at 841; *See also* 10 American Jurisprudence, § 55.

[8] ***Id***. *See also* ***Powers***, 161 S.W.2d at 282-283 (affirming the lower court ruling and stating, "charities ... are held in such high regard by the law that the rules of construction are more liberal to sustain them than they would be if the gifts were to individuals."); ***Boyd v. Frost National Bank***, 196 S.W.2d 497, 503 (Tex. 1946); ***Wooten v. Fitz-Gerald***, 440 S.W.2d 719, 723 (Tex.Civ.App.–El Paso 1969, writ ref'd n.r.e.); ***Taysum v. El Paso National Bank***, 256 S.W.2d 172, 176 (Tex.Civ. App.–El Paso 1952, writ ref'd) (stating that where the matter is in doubt, "the construction which will give [the charity] effect will be adopted and that which would defeat it rejected).

[9] *Powers*, 137 S.W.2d at 841.

Attorney General shall "perform such other duties as may be required by law."[10] This provision has been interpreted to include the Attorney General's common law duty to protect the public interest in charitable entities and thus to give the Attorney General constitutional authority to oversee charities and charitable interests.[11]

This same section of the Constitution also provides the Attorney General with general oversight authority of all Texas corporations - nonprofit and for profit (and any foreign corporations doing business in Texas):

> [The Attorney General] shall represent the state in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power ... not authorized by law.[12]

C. Statutory Authorities

1. Chapter 123 of the Texas Property Code defines charitable trusts to include virtually all charitable entities, including nonprofit corporations with a charitable purpose. Chapter 123 provides that the Attorney General is a proper party (not a necessary party) to proceedings involving charitable trusts.[13] The Attorney General must receive notice of judicial proceedings involving charitable trusts, and has the right to intervene on behalf of the public's interest. Will contests and declaratory judgments involving will interpretation and proceedings to modify or terminate a trust are the most common. (See discussion below regarding modification/termination proceedings.) No notice under Chapter 123 is required, however, if a proceeding is initiated by an application that exclusively seeks the admission of a will to probate, regardless of whether the application seeks the appointment of a personal representative, if the application is uncontested and is not subject to Section 83 (Procedure Pertaining to Second Application) of the Texas Probate Code.[14] If notice is required, any judgment or settlement agreement entered without notice to the Attorney General is voidable by an action by the Attorney General.[15] Chapter 123 does not define the powers of the Attorney General regarding the enforcement of charitable trusts, but builds on the common law concepts of the Attorney General's authority.[16]

Proceedings under Section 112.054 of the Texas Property Code are common proceedings involving charitable trusts of which the Attorney General is notified. Such modifications and terminations are allowed if the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill or because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust. Recent amendment to §112.054 has significantly broadened the court's authority, allowing modifications of administrative, nondispositive terms of the trust if necessary or appropriate to prevent waste or avoid impairment of the trust's administration and modifications if necessary or appropriate to achieve the settlor's tax objectives where such modification is not contrary to the settlor's intentions. Additionally, terminations/modification of the trust may be obtained if continuance of the trust is not necessary to achieve any material purpose of the trust or the order is not inconsistent with a material purpose of the trust. The court may not take this action unless all beneficiaries of the trust have consented to the order or are deemed to have consented to the order.[17]

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[10] Article IV, § 22, Texas Constitution

[11] ***Hill v. Lower Colorado River Authority***, 568 S.W.2d 473, 478 (Tex.Civ.App.–Austin 1978, writ ref'd n.r.e.) citing ***Powers***, and *see* § 5.001, Texas Civil Practice and Remedies Code.

[12] Article 4, Section 22 Texas Constitution

[13] TEX. PROP. CODE ANN. § 123.002 (Vernon 2007 & Supp. 2008 [Supp. 2008 is not yet distributed]; see also, West's Texas Statutes and Codes, Texas Property Code, 2008); *See* ***Gray v. Saint Matthews Cathedral Endowment Fund, Inc.***, 544 S.W.2d 488, 490 (Tex.Civ.App.--Texarkana 1976, writ ref'd n.r.e.).

[14] TEX. PROP. CODE ANN. § 123.003 (Vernon 2007 & Supp. 2008 [Supp. 2008 is not yet distributed]; see also, West's Texas Statutes and Codes, Texas Property Code, 2008).

[15] ***Id.*** § 123.004(a).

[16] For example, the Attorney General may initiate or intervene in a court proceeding and request the Court invoke its *cy pres* power on behalf of the public. *See* ***Blocker, supra.*** *Cy Pres* is an equitable power authorizing a court to effectuate the general charitable purpose of a testator/settlor when his particular intent cannot be carried out or becomes impractical or illegal, whereupon the court may direct trust funds or property to be expended or utilized in a charitable manner as near to the donor's intent as possible.

[17] §112.054 TEX. PROP. CODE. ANN. (Vernon 2007 & Supp. 2008 [Supp. 2008 is not yet distributed]; see also, West's Texas Statutes and Codes, Texas Property Code, 2008).

The Texas Uniform Prudent Management of Institutional Funds Act[18] requires notice to the Attorney General (as specified in Chapter 123 of the Texas Property Code), even in circumstances where a court proceeding is no longer necessary. Section 163.007 of said Act allows for release or modification of restrictions on management, investment, or purpose on funds subject to the Act under like conditions as contained in Section 112.054 of the Property Code, but only if the fund has a value of $25,000 or less and more than 20 years have elapsed since the fund was established. Upon notice to the Attorney General and the expiration of 60 days after receipt of said notice, the trust may be modified without the necessity of filing a court proceeding. Assumedly, though not stated specifically in the statute, it would be the Attorney General's burden to advise the instititution of any objection.

2. Some statutes confer specific enforcement authority on the Attorney General. When statutes involve charities, the enforcement duties are usually handled by the Attorney General's Charitable Trusts Section.[19]

a. The Bingo Enabling Act,[20] allows certain charities to conduct bingo games as licensed and regulated by the Alcoholic Beverage Commission (formerly under the Comptroller's Office; now handled by the Texas Lottery Commission) and provides the Attorney General (as well as other enforcement authorities) with investigative authority and the authority to petition a district court to enjoin violations of the act and impose civil penalties.

b. The Charitable Raffle Enabling Act,[21] allows charities holding 501(c)3 status, including religious associations, volunteer emergency or fire departments and grand lodges, to conduct raffles. The prize may not be valued at over $50,000.00, unless it is a residential dwelling which may be valued up to $250,000, if the charity pays any consideration for the prize and a qualified organization may hold only two raffles per year. There is no limitation on the prize value if it is donated to the charity. There is no licensing requirement nor any regulatory agency supervising the conduct of raffles; however, the county or district attorney or the Attorney General may sue to enjoin violations of the Act.

c. Solicitation for Veterans Organizations,[22] covers solicitations for veterans organizations. It requires registration and bonds; prohibits materially false or misleading statements of fact during solicitations; and gives the Attorney General audit powers and the power to obtain injunctions and civil penalties of not more than $10,000 per violation of the chapter and not less than $100,000 for violation of an injunction.

d. Solicitation for Public Safety Organizations,[23] relates to solicitations by public safety organizations, publications, and independent promoters. This article requires organizations and solicitors that, in soliciting funds, use any term in a manner that reasonably implies that the organization is composed of law enforcement or public safety personnel or that a contribution, purchase or membership will benefit public safety personnel, to file registration statements and requires solicitors to post bonds. It also requires that specific information be disclosed by solicitors orally or in writing and prohibits unfair and deceptive acts or practices in the conduct of solicitations and gives audit powers to the Attorney General. It further provides criminal and civil penalties, making any violation a class A misdemeanor and limiting civil penalties to $2,500 for a single violation and $10,000 for cumulative violations.

e. Telephone Solicitations by Charitable Organizations[24] , the Law Enforcement Telephone Solicitation Act ("LETSA"), requires charitable organizations that solicit funds by telephone for a charitable purpose relating to law enforcement as defined by the Act to register with the Attorney General's office. Commercial telephone solicitors as defined by the Act must post a $50,000.00 surety bond with the Secretary of State.

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[18] §163.001et seq. TEX. PROP. CODE. ANN. (Vernon 2007 & Supp. 2008 [Supp. 2008 is not yet distributed]; see also, West's Texas Statutes and Codes, Texas Property Code, 2008).

[19] The Charitable Trusts Section of the Office of the Attorney General's Consumer Protection Division holds charities responsible to the public and represents the public interest in proceedings involving charitable issues.

[20] TEX. OCC. CODE ANN. CH. 2001 (Vernon 2004 & Supp. 2007)

[21] TEX. OCC. CODE ANN. CH. 2002, (Vernon 2004 & Supp. 2007)

[22] TEX. OCC. CODE ANN. CH. 1804 (Vernon 2004)

[23] TEX. OCC. CODE ANN. CH. 1803 (Vernon 2004 & Supp. 2007)

[24] TEX. REV. CIV. STAT. ANN. art 9023e (Vernon Supp.2007)

f. Duties of Nonprofit Hospitals,[25] the "Charity Care" Act, was enacted in 1993 to specify the duties and responsibilities of nonprofit hospitals for providing community benefits, including charity care.[26] This legislation requires nonprofit hospitals and hospital systems to perform a specified amount of charity care and government-sponsored indigent health care, but allows the hospitals several choices in calculating the amount provided, such as equaling charity care in an amount that is at least 4% of net patient revenue (plus at least 1% additional in community benefits) or 100% of the hospital's tax-exempt benefits, excluding federal income tax.[27] A reasonableness standard also exists for exceptional circumstances, where hospitals are unable to meet the other standards. Nonprofit hospitals are also required to prepare a community benefits plan, considering the health care needs of the community, file annual reports with the Health Department, and are subject to losing their tax-exempt status if they fail to comply. However, the statute provides an exception that once every five years the penalty will not be applied if, in addition to normal compliance, the hospital meets the shortfall the following year.[28]

3. The Attorney General has statutory authority to inquire into the activities of corporations and to investigate the operations of charities which are organized as nonprofit corporations. All of this statutory authority is now codified in the Texas Business Organizations Code,[29](TBOC) which became effective on January 1, 2006. The TBOC is a substantive codification of existing Texas statutes governing nonprofit and for profit entities. These statutes consist of the following: Texas Business Corporation Act, Texas Non-Profit Corporation Act, Texas Miscellaneous Corporation Laws Act, Texas Limited Liability Company Act, Texas Revised Limited Partnership Act, Texas Real Estate Investment Trust Act, Texas Uniform Unincorporated Nonprofit Associations Act, Texas Professional Corporation Act, Texas Professional Associations Act, Texas Revised Partnership Act, Cooperative Associations Act, and other existing provisions of Texas statutes governing private entities. In 2010, the TBOC will apply to all entities. Right now, however, the TBOC does not apply to foreign entities who were registered with the secretary of state to transact business in this state before January 1, 2006, or to those domestic entities formed before January 1, 2006 unless the entities have voluntarily elected to adopt the TBOC. The TBOC does currently apply to domestic entities formed on or after January 1, 2006, and to foreign entities that have not registered with the secretary of state to transact business in this state before the effective date the TBOC.[30] Consequently, this discussion will encompass the TBOC and also the pertinent law superceded by the TBOC, the Texas Miscellaneous Corporations Laws Act and the Texas Non-Profit Corporation Act, that still apply to those entities that have not adopted the TBOC.

a. Attorney General's Authority to Inspect and Examine Corporate Books and Records

The Texas Miscellaneous Corporation Laws Act (MCLA)[31] and the TBOC[32] provide the Attorney General with authority to inspect and examine all books and records of corporations doing business in the state. These broad powers are exercised over for profit and nonprofit corporations alike. The Attorney General, without advance notice, may present a written request to the president or other officer of a corporation under the MCLA and a managerial official under the TBOC when the Attorney General or his assistants desire to examine the operations of the corporation.[33] Failure to permit the Attorney General to examine or take copies of any such documents may result in the forfeiture of the corporation's right to do business in

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[25] TEX. HEALTH & SAFETY CODE ANN. §311.041, *et seq.* (Vernon 2001 & Supp. 2007)

[26] A hospital's admissions policy must provide for the admission of financially indigent and medically indigent persons, §311.043(d), and each hospital shall provide to each person who seeks any health care service at the hospital notice in appropriate languages about the charity care program and how to apply for charity care. Such notice shall also be conspicuously posted in the waiting area. §311.046(d).

[27] *Id.* §311.045(b)(1)(A)(B)(C).

[28] *Id.* §311.045(e).

[29] TEX.BUS.ORG.CODE § 1.001 *et. seq.* (Vernon Supp. 2006 & 2008[2008 Supp. not yet distributed]; see also, West's Texas Statutes and Codes, Corporation and Partnership Laws, 2008))

[30] Id. §§ 402.001-402.006.

[31] TEX. REV. CIV. STAT. ANN. Article 1302-5.01 *et seq.* (Vernon 2003),

[32] Tex. Bus. Org. Code §12.151

[33] TEX. REV. CIV. STAT. ANN. Article 1302-5.02; and TEX. BUS. ORG. CODE § 12.152.

Texas,[34] and imposition of a fine on the officers. There is also the potential of criminal liability.[35] The Attorney General may use the authority of the MCLA or TBOC to inquire into the activities of nonprofit corporations to ensure that their operations and assets truly serve the mission of the nonprofit and to ensure that the operations and assets are not used to provide private inurement (improper personal benefit).

b. Attorney General Investigatory Authority over Nonprofit Corporations[36]

The Attorney General has various powers and investigatory authority over nonprofit corporations, as provided in the Texas Non-Profit Corporation Act (TNPCA) and the TBOC. Many of these powers are implied from provisions of the Act or Code. For example, nonprofit corporations must keep accurate and complete books, records, and financial statements in accordance with generally accepted accounting practices.[37] As mentioned, under common law, the MCLA, and the TBOC, the Attorney General has access to such corporate records.

The affairs of a corporation must be managed by a board of directors. Directors need not be residents of this State or members of the corporation unless the articles of incorporation[38] or the by-laws require. There can not be not less than three directors.[39]

The officers must consist of a president and a secretary, and may consist of other officers.[40] In the discharge of a duty imposed or power conferred on an officer of a corporation, the officer may in good faith and with ordinary care rely on information, opinions, reports, or statements, including financial data, concerning the corporation or another person, that were prepared or presented by:

1) officers or employees of the corporation; 2) legal counsel, accountants, etc.; 3) in the case of officers of religious corporations, religious authorities and ministers, priests, rabbis, and others believed to be reliable in the matters presented; 4) however, an officer is not relying in good faith, as required, if the officer has knowledge concerning the matter in question that makes reliance otherwise permitted unwarranted.[41]

A director must discharge his or her duties in good faith, exercising ordinary care, and in a manner the director reasonably believes to be in the best interest of the corporation.[42] (These are basically the duties of obedience, care, and loyalty established by the common law.)

The Attorney General can seek to involuntarily dissolve the corporation under certain conditions, including transacting business beyond the scope of its corporate purposes.[43] When an action has been filed by the Attorney General for dissolution, the Attorney General may seek prior liquidation of the corporation's assets.[44]

The Attorney General may seek the appointment of a receiver to take over a nonprofit

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[34] TEX. REV. CIV. STAT. ANN. Articles 1302-5.02; 5.05a; TEX. BUS. ORG. CODE § 12.155.

[35] TEX. REV. CIV. STAT. ANN. Article 1302-5.05b; TEX. BUS. ORG. CODE § 12.156.

[36] The Texas Uniform Unincorporated Nonprofit Association Act, Article 1396-70.01 *et seq.*(Vernon 2003), governs nonprofit associations and provides similar authority to the Attorney General, and parallels the Non-Profit Corporation Act in many respects. As mentioned it has now been incorporated in the TBOC, ***See*** TEX. BUS. ORG. CODE § 252.001 *et.seq.*

[37] TEX. REV. CIV. STAT. ANN. Articles 1396-2.23,2.23A (Vernon 2003); TEX. BUS. ORG. CODE §§3.151, 22.352; However, the statute does not expressly require that contributors' identities be made available to the public. ***In Re: Bay Area Citizens Against Lawsuit Abuse, Relator***, 982 S.W.2d 371 (Tex. 1998).

[38] The Certificate of Formation under the TBOC. ***See*** TEX. BUS. ORG. CODE § 1.101.

[39] TEX. REV. CIV. STAT. ANN. Articles 1396-2.14 A, B,1396-2.15 A; TEX. BUS. ORG. CODE §§3.101, 22.201, 22.203, 22.207, 22.204.

[40] TEX. REV. CIV. STAT. ANN. Article 1396-2.20A, TEX. BUS. ORG. CODE §§ 3.103, 22.231, 22.232.

[41] TEX. REV. CIV. STAT. ANN. Articles 1396-2.20D, 2.28 C; TEX. BUS. ORG. CODE §§ 3.105, 22.234, 3.102.

[42] TEX. REV. CIV. STAT. ANN. Article 1396-2.28.A; TEX. BUS. ORG. CODE §22.221.

[43] TEX. REV. CIV. STAT. ANN. Article 1396-7.01A(3); TEX. BUS. ORG. CODE §§ 11.051, 11.301, 11.303.

[44] TEX. REV. CIV. STAT. ANN. Article 1396-7.06A(1); TEX. BUS. ORG. CODE §§ 11.402, 11.405.

corporation and rehabilitate its operations, to conserve its assets and affairs and to avoid damage to the public interest. The court-appointed receiver assumes total control of the management and finances of the corporation until the court determines the future course of the corporation (i.e., whether to dissolve it or continue its operations and mission in some new form or under new direction).[45] Often, receivership courts will appoint a new board of directors to run the nonprofit corporation in accordance with Texas law, the corporation's articles, and by-laws.[46]

The TNPCA and TBOC also provide for the disposition of corporate assets of nonprofit corporations contemplating dissolution (or which are subject to involuntary dissolution).[47] In the case of charitable, nonprofit corporations, the dissolution provisions reflect the application of the common law doctrine of *cy pres*. Cy pres, in this scenario, requires that the assets of a dissolving charity devolve to another charitable entity with a mission substantially similar to that of the dissolving entity, or that the assets continue to be used for the same general purpose of the dissolving entity. In fact, any distribution by the court shall be made in such a manner to, in the judgment of the court, best accomplish the general purpose for which the corporation was organized.[48]

4. The Texas Deceptive Trade Practices--Consumer Protection Act,[49] known as the DTPA, also provides the Attorney General with authority to investigate and take actions against charities violating its provisions.

a. False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful and are subject to action by the Consumer Protection Division.[50] [The Charitable Trusts Section is part of the Consumer Protection-Public Health Division].

b. The DTPA applies to nonprofit organizations even if they provide their goods or services at no charge.[51]

c. The DTPA applies to an action by the Attorney General against a charity (or an organization which holds itself out to be a charity) or a professional fundraiser which engages in false, misleading or deceptive acts, such as fraudulent solicitations, whether or not goods or services are offered as part of the solicitation.[52]

d. The DTPA authorizes the Consumer Protection Division of the Attorney General's office to conduct certain pre-suit investigations, including sending civil investigative demands requiring the production of documents for inspection and copying[53], and taking sworn written and/or oral statements,[54] when the Attorney General has reason to believe that a person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by the DTPA or when it reasonably believes it to be in the public interest to conduct an investigation to ascertain whether any person is engaging in, has engaged in, or is about to engage in any such act or practice. The DPTA also has penalties for failure to comply.[55]

e. The DPTA contains an enhanced penalty provision in the event that the Consumer Protection Division determines that the act or practice in question was

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[45] TEX. REV. CIV. STAT. ANN. Articles 1396-7.04 *et. seq.*, 7.05; TEX. BUS. ORG. CODE §§ 11.402-11.404.

[46] ***See Greater Fort Worth v. Mims***, 574 S.W.2d 870 (Tex. Civ. App.–Fort Worth, 1978, writ dism'd).

[47] TEX. REV. CIV. STAT. ANN. Articles 1396-6.01, *et seq.*; TEX. BUS. ORG. CODE §§ 11.051, 22.164, 22.302, 22.303.

[48] TEX. REV. CIV. STAT. ANN Article 1396-6.02; TEX. BUS. ORG. CODE §§11.053, 11.054, 22.304; ***see Blocker v. State, supra; In re Bishop College***, 151 B.R. 394, 398 (Bankr. N.D. Tex. 1993)

[49] TEX. BUS. & COM. CODE ANN. §§ 17.41 *et seq.*(Vernon 2002 & Supp. 2008 [Supp. 2008 is not yet distributed]; see also, O'Connor's Business and Commerce Code *plus*, 2007-2008).

[50] ***Id.*** § 17.46(a)

[51] ***Mother and Unborn Baby Care of North Texas, Inc. v. State***, 749 S.W.2d 533, 538 (Tex. App.–Fort Worth 1988, writ denied).

[52] ***See Id.; and Commonwealth by Preate v. Watson & Hughey Co.***, 128 Pa.Cmwlth. 484, 563 A.2d 1276 (1989).

[53] TEX. BUS. & COM. CODE ANN. § 17.61 (Vernon 2002 & Supp. 2008 [Supp. 2008 is not yet distributed]; see also, O'Connor's Business and Commerce Code *plus*, 2007-2008).

[54] ***Id.*** § 17.60

[55] ***Id.*** § 17.62

calculated to acquire or deprive money or other property from a consumer 65 years of age or older.[56]

IV. CAUSES OF ACTION AVAILABLE TO THE TEXAS ATTORNEY GENERAL

A. Common law and statutory breaches of fiduciary duties

The directors of a nonprofit corporation are fiduciaries in charge of managing the corporation's business. Under the common law, they owe the duties of obedience, care, and loyalty to the corporation.[57] Directors are, however, not held to the "trustee standard."[58] Under the provisions of the TNPCA and TBOC "[a] director shall discharge the director's duties in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interest of the corporation."[59] This includes a duty to protect the assets through prudent investment practices and reasonable business judgment and to maximize the use of those assets for the charitable purposes of the charity. It also includes a duty to exercise common sense in monitoring the actions of employees of the corporation who are given fiscal responsibility.

Note that the nonprofit, charitable corporation itself also is a fiduciary to the public of the state and holds its assets in trust for the public.

A board member may generally not derive a personal benefit in dealing with the nonprofit corporation's funds or its property.[60] Nonetheless, a contract or transaction between a nonprofit, charitable corporation and an interested director may not be void or voidable for that reason alone if the material facts are properly disclosed and the transaction is "fair" to the corporation.[61] However, a corporate officer, who diverts funds of the nonprofit corporation for his/her own benefit in violation of his/her fiduciary relationship, is personally liable to the corporation for such unauthorized use of corporate funds.[62] For trustees of charitable trusts, the prohibitions are broader[63] and the duties of loyalty, due care, and obedience are more stringent, in accordance with the duties imposed on trustees by the common law.

B. Violations of the DTPA, the Miscellaneous Corporation Laws Act, the Texas Non-Profit Corporation Act and the Business Organizations Code

Some of the relevant substantive provisions of these statutes and code are discussed above. Each contains various enforcement provisions which may be applied by or used as authority for legal or equitable relief sought by the Attorney General.

C. Negligence and Misapplication of Charitable Assets

Although the actions of directors and officers may not result from intentional wrongdoing, such actions may, in fact, cause harm to the nonprofit corporation. A common example of such an action is use of funds for a charitable purpose that does not follow a donor restriction, or use of funds for a purpose wholly outside the purposes delineated in the Articles of Incorporation. The Attorney General may pursue actions for restitution to the corporation under such facts.

D. Fraud

Common law fraud causes of action may be asserted by the Attorney General in the proper circumstances, usually involving misappropriation of charity assets for noncharitable purposes.

V. REMEDIES AVAILABLE TO THE ATTORNEY GENERAL (IN ADDITION TO SPECIFIC STATUTORY REMEDIES AVAILABLE)

A. Constructive trust

1. Gifts given for a particular charitable purpose constitute a charitable trust and must be used for the

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[56] *Id.* §17.47(c)(2))

[57] ***See International Bankers Life Ins. Co. v. Holloway***, 368 S.W.2d 567, 577 (Tex. 1963) and ***Texas Society v. Fort Bend Chapter***, 590 S.W.2d 156 (Tex.Civ.App. –Texarkana 1979, writ refused n.r.e.)

[58] TEX. REV. CIV. STAT. ANN. Articles 1396-2.28(E)and comment 1, 2.30 (Vernon 2003);TEX. BUS. ORG. CODE §§ 22.223, 22.230.

[59] TEX. REV. CIV. STAT. ANN. Article 1396-2.28(A);TEX. BUS. ORG. CODE § 22.221.

[60] ***Texas Society v. Fort Bend Chapter***, 590 S.W.2d 156, 164 (Tex.Civ.App.– Texarkana 1979, writ ref'd n.r.e.)

[61] TEX. REV. CIV. STAT. ANN. Article 1396-2.30; TEX. BUS. ORG. CODE § 22.230.

[62] ***See International Bankers Life Ins. Co. v. Holloway***, 368 S.W.2d 567, 577 (Tex. 1963)

[63] ***See the Restatement of Trusts*** (3rd), § 170 and statutory duties in the TEX. PROPERTY CODE ANN. §§ 113.051, *et seq.*(Vernon 2007 & Supp. 2008 [Supp. 2008 is not yet distributed]; see also, West's Texas Statutes and Codes, Texas Property Code, 2008).

purpose for which they were given.[64] The court will impose a constructive trust on such assets. Thus, a gift to a nonprofit corporation is restricted to the stated purposes of the corporation at the time of the gift, and/or specifically stated restrictions imposed by the donor.

2. When a donor responds to a solicitation, the funds must be used according to the representations made in the solicitation. Failure to use donations accordingly constitutes a breach of the fiduciary duty of the charity to the public. In the case of a professional fund raiser, such failure may constitute a breach of the fundraiser's fiduciary duty to the charity as well as to the donating public.

B. Removal of board members and officers.

If an officer, fiduciary agent or board member is found to have violated his or her duty to the charitable organization, a court may remove such member.[65] It is common practice for the Attorney General to reconstitute the board of directors and replace the executive director as a negotiated term in the resolution of matters without litigation.

C. Appointment of a receiver.

The Attorney General may seek the appointment of a receiver to manage the affairs of the nonprofit entity and to provide an accounting. Receivers are often empowered to take charge of all property and assets and conduct its business, pending a determination of whether to liquidate, rehabilitate and reorganize, or conserve the affairs of the nonprofit.[66]

D. Injunctive Relief.

Injunctions against the alleged wrongdoers on a temporary basis, pending the outcome of the lawsuit, as well as on a permanent basis, may be obtained.

E. Obtaining temporary restraining orders, asset freezes, or orders of attachment.

Such remedies may be obtained against the corporation and/or individuals, pending a final, permanent injunction. In cases of extreme wrongdoing, the Attorney General is frequently successful in obtaining ex parte temporary injunctions.

F. Monetary damages/Restitution.

The Attorney General may seek monetary damages on behalf of the charity to recover amounts improperly used, or wrongfully applied. Damages are often sought from individuals for harm to the corporation, most frequently in the form of restitution but damages beyond mere restitution may also be sought, both actual and exemplary.

G. Termination (Dissolution) and Winding Up.

The Attorney General may seek involuntary dissolution of the corporation for failing to properly expend its assets for its stated charitable mission,[67] or if the public interest requires it due to felonious conduct on the part of the corporation or a high managerial agent. In the event that the corporation is solvent, the Attorney General will seek transfer of the assets to another same or similar purpose entity under the authority of Section 112.054 of the Texas Property Code.

H. Attorneys' Fees. The Attorney General may seek reasonable attorneys' fees as are equitable and just under Section 123.005 Texas Property Code, Section 114.064 Texas Property Code, Section 402.006 Texas Government Code, and under the Declaratory Judgments Act, as applicable.

VI. NONPROFIT ORGANIZATION/HOSPITAL MERGERS, ACQUISITIONS, AND CONVERSIONS

Of great concern to the Attorney General is the conversion of nonprofit, charitable organizations to for profit status. This is accomplished through unilateral conversion to for profit status, outright sales to existing for profit entities, and through other means such as partnering with for profit entities. The conversion issue has arisen most dramatically in the area of health care. Since the early 90's, there has been a frenzy of outright sales, joint venturing transactions, and other conversions of hospitals, HMOs, and other health care organizations in Texas and around the country. It is expected that such conversions will continue and in view of the potential problems inherent in such transactions, close scrutiny is warranted.

The concern of the Attorney General regarding such conversions relates to the protection of charitable trust assets. The Attorney General has long been the protector of such assets and his duty involves ensuring that such

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[64] TEX. PROP. CODE ANN. § 123.001(2); ***Blocker v. State***, *supra.*

[65] ***Moody v. Haas***, 493 S.W.2d 555 (Tex.Civ.App.– Houston [14th Dist.] 1973, writ ref'd).

[66] TEX. CIV. PRAC. & REM. CODE ANN. § 64.001 *et seq.* (Vernon 2008); TEX. REV. CIV. STAT. ANN. Article 1396-7.05; TEX. BUS. ORG. CODE §§ 11.402, 11.405.; *See generally,* ***Nacol v. State***, 792 S.W.2d 810 (Tex.App --Houston [14th Dist.] 1990, writ denied); ***Greater Fort Worth v. Mims***, *supra.*

[67] TEX. REV. CIV. STAT. ANN. Article 1396-7.01; TEX. BUS. ORG. CODE §§ 11.051, 11.301, 11.303.

assets remain available for charitable purposes in perpetuity. Private parties or interests may never reap any benefit from such charitable assets (this of course excludes reasonable salaries to employees, etc.). In a conversion transaction, there is the potential for such private inurement by undervaluing the charity assets, provision of bonuses to the employees and/or board members of the charity, and other similar improper diversion of charity assets.

The Office of the Attorney General must review each transaction to ensure that the public interest in the charitable assets of the nonprofit organization is fully protected. Consequently, to review each transaction, the Office of the Attorney General must be provided relevant financial, corporate, and transactional information. Only after such a thorough review can the OAG decide whether or not to object to the transaction.

A nonprofit health care entity contemplating dissolution or conversion of its operations to that of a for profit or mutual corporation would be wise to seek prior judicial approval to enter into the transaction. Once a court proceeding is initiated, the Attorney General is entitled to receive notice of the judicial proceeding, pursuant to Chapter 123 of the Texas Property Code. It is in the best interests of nonprofit, health care organizations to notify the Attorney General in advance of the proposed transaction. By doing so, the review process conducted by the Attorney General can be initiated and delay avoided. Issues such as determining the fair market value and preparation or review of valuation data can then be addressed in a timely manner. The Attorney General may also investigate and take appropriate action pertaining to any such transaction, even after consummation of the conversion deal.

The enforcement mechanism most often used by the Attorney General to ensure that boards of directors of nonprofit organizations follow the law is an action for breach of fiduciary duty. Such an action could be filed against an organization if a conversion were determined to violate common law charitable trust principles or if the conversion were determined not to be in the public interest because of a misapplication or undervaluation of charitable trust assets.

Finally, conflicts of interest may also present serious problems in a conversion transaction. Conflicts can arise if the same board of directors or upper management employees who are involved in the initial transaction are subsequently deeply involved with the resulting for profit entity. Close scrutiny of such potential problems is also warranted.

VII. INTERVENTION CRITERIA IN CHARITABLE TRUST CASES

A. Standard Procedure

As discussed above, the Texas Property Code provides the Attorney General with standing to intervene in any proceeding involving a charitable trust. Thus, the Attorney General is a proper party and may intervene once notice is received, should the Attorney General determine that intervention is warranted. As notice only is required, it is improper to serve the Attorney General as a party. The determination as to whether the Attorney General should intervene is solely his.

The definition of a "proceeding involving a charitable trust" encompasses all varieties of proceedings involving charitable entities[68] Once notice is received by the Charitable Trusts Section and the case assigned to an attorney in the section, a letter is sent to the clerk of the court with a copy to all known counsel of record notifying the court that the Attorney General has received notice of the action pursuant to Chapter 123 of the Texas Property Code and requesting that the Attorney General be advised of any reason to expedite review of the matter or of the scheduling of any hearings or other settings.

B. Documents Helpful to Review

When providing notice of a charitable trust proceeding, it is appreciated and most helpful to provide all relevant documents; this helps our attorneys expedite their review of the pending action. In addition to the pleading, include any and all attachments to the pleading which initiates the action. Examples of documents which may not be attached to the pleading but are also helpful in our review include (but are not limited to) the following:

1. The articles of incorporation & bylaws for nonprofit corporate entities;
2. The trust documents affected by the proceeding;
3. The will(s) and any codicils if the case involves a charitable bequest;
4. Any documents containing restrictions affecting the trust/non-profit entity(ies);
5. Documents relevant to the charitable mission of the entities involved;
6. Copies of notice to all charitable entities interested in the proceeding with copies of any pleadings/waivers/agreements filed by any charitable entities involved;

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[68] TEX. PROP. CODE § 123.001(3)(Vernon 2007 & Supp. 2008 [Supp. 2008 is not yet distributed]; see also, West's Texas Statutes and Codes, Texas Property Code, 2008).

7. Copies of all pleadings relevant to the proceeding and to our review;
8. Any information regarding the value of the estate/trust that is the subject of the proceeding.

C. Determination to Intervene

Although each proceeding is unique and requires individual consideration, there are principles that are common to all reviews. Several factors are considered in determining whether intervention in a particular charitable trust proceeding is warranted by the Attorney General. The following is a list of questions/criteria commonly considered by assistant attorneys general in their reviews.

1. What/Who is/are the charitable entity(ies)? Are the charitable beneficiaries specifically named or generally described? (i.e., "The Austin Humane Society" or "the dogs and cats of Austin, Texas")

Keep in mind that the Attorney General, in carrying out his duty to protect the public interest in charity, does not represent any specific, individual charity. As a result, the Attorney General may be more inclined to intervene where no specific charity is named that can represent its own charitable interests in the proceeding.

2. Is the charity a Texas charity, national charity with a Texas office or an out-of-state charity?

The Texas Attorney General is less likely to intervene in a proceeding that does not directly affect the interests of the public of Texas.

3. Is the notice timely? The Property Code mandates that a copy of the Petition be forwarded to the Attorney General within 30 days of the date it is filed with the court, but not less than 25 days prior to any hearing.[69]

The consequence for failing to provide the Attorney General with the requisite notice is that any settlement, final judgment or other dispositive order may be voidable by the Attorney General.

4. What *type* of charitable entity is named? Is it a non-profit corporation, a foundation, an existing trust or one to be created pursuant to the terms of a testamentary bequest? Is it a state university system or other state agency?

5. Is the charitable entity adequately represented by private legal counsel? Does the charity have resources to obtain legal counsel? Are the named charitable beneficiaries aware of their interests so they may make an informed decision on whether their own participation in the proceeding is warranted?

6. Are the charitable interests represented by another party to the litigation with similar duties/interests? It is possible that the charitable interest is effectively represented by the executor of the estate or by another similarly situated party.

7. Does the value of the bequest(s)/trust(s) warrant intervention?

8. Are there several charities which individually have relatively small amounts at stake but whose combined interests may justify intervention by the Attorney General?

9. Are the charitable bequests contingent on a condition precedent/prior event?

10. If the proceeding seeks to apply the *cy pres* doctrine, does the relief sought comply with the requirements of the Texas Trust Code §112.054 and the common law *cy pres* doctrine?

11. Is the relief sought helpful/detrimental to the charitable sector? Is there potential for establishing/altering existing law which could be beneficial/harmful to the public interest in charity?

12. Are there public policy issues that warrant intervention by the Attorney General?

D. Contact with the Charitable Trusts Section

Once a case is assigned to a particular attorney, contact with our office should be made to that specific assistant attorney general. If you have questions regarding whether our office should receive notice of a proceeding, please feel free to call. In general, our recommendation will be to send the notice if you are in doubt. Also, if you have sent notice and have not received a written acknowledgment from the Charitable Trusts Section, please do not hesitate to call to inquire as to the status of our review.

If an Assistant Attorney General recommends intervention in a charitable trust case, the approval of the Deputy Attorney General for Litigation must first be obtained. Likewise, all settlements to which we are a party are subject to First Assistant Attorney General approval. As a result, if you have a case that appears to be ripe for settlement discussions and we have yet to receive notice or our intervention is pending approval, be aware that the approval process takes time. Providing the

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[69] Tex. Prop. Code Ann. § 123.003(b)(Vernon 2007 & Supp. 2008 [Supp. 2008 is not yet distributed]; see also, West's Texas Statutes and Codes, Texas Property Code, 2008).

Charitable Trusts Section with appropriate pleadings, supporting documents and timelines/deadlines concerning your case helps tremendously to expedite reviews and recommendations by the assistant attorneys general involved.

VIII. CONCLUSION

It is a rapidly changing world with an increasing focus on charitable organizations, including trusts and nonprofit corporations. Since the tragic events of September 11, 2001, the eye of the public, facilitated by the media, has turned with great scrutiny on the charities and the individuals who compose their management teams. The concepts of integrity, transparency and accuracy are paramount as charitable organizations move forward. As is continuously evidenced, the integrity of the organization is first and foremost a reflection of the integrity of the individuals who are responsible for its management and who oversee its operations. A nonprofit organization's business will be subject to constant and increasing scrutiny from not only the state attorney general, but from state and national legislators, the Internal Revenue Service and the enforcers of our criminal laws. Now, more than ever, it is important that an organization's financial affairs and operational safeguards be accurately documented and shared with the public.

The Charitable Trusts Section has seen an incredible increase in the number of open records requests being made for information regarding pending investigations and private foundation filings with our office. Such requests obviously draw our attention to the matter, whether we previously knew of a potential problem or not.

The point? Scrutiny will serve a nonprofit organization well if it conducts its business in accordance with the law and with the additional integrity, transparency and accuracy that the public demands from its charitable institutions.