

Important New Law Resource for Philanthropy

10.21.22 | Linda J. Rosenthal, JD



At long last, the philanthropy community in the United States has its own comprehensive compendium of law.

Upon the culmination of a multi-year project, the prestigious American Law Institute (ALI) published the Restatement of the Law, Charitable Nonprofit Organizations in 2021. “Restatements are treatises that inform readers about the black-letter law that underpins foundational topics...” of law.

According to Professor Jill Horwitz of the UCLA School of Law, it “... stands to have a profound impact on the more than one million charities in the United States, which range from hospital systems and universities to local theater groups and community food banks.” *Nonprofit Nation: Horwitz Steers Restatement of Charities to Final Approval* (May 23, 2019), law.ucla.edu. “This restatement represents a once-in-a-generation opportunity to clarify a complex and poorly understood area of the law.”

“Charities law is so difficult,” Professor Horwitz elaborated, “because it is based on such a wide range of sources — federal and state, common law and statute, English statutes from the 17th century and contemporary tax law — and many courts and lawyers have only passing familiarity with some of these sources.”

Indeed, wrote ALI Director Richard L. Revesz in the Forward of Tentative Draft No. 2, this project was “... designed to fill an important gap.” The “... institutions that are the subject of this Restatement” control a “great deal of wealth in our society.” Yet, the “...rules governing these institutions have traditionally received less scrutiny than those governing for-profit corporations. And volunteer nonprofit boards are often much less knowledgeable about their responsibilities than their paid, for-profit counterparts.”

A Long Road

It's certainly long overdue and very much needed.

The American Law Institute is “the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law....ALI drafts, discusses, revises, and publishes Restatements of the Law, Model Codes, and Principles of Law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education.”

It was one hundred years ago – in 1923 – that work began on the first four Restatements, covering the subjects of Agency, Conflict of Laws, Contracts, and Torts. Since then, there have been multiple updates on these four core topics: at present, Contracts is on its second version; Agency is on its third; and Torts and Conflict of Laws are at the tentative approval stages for the third restatements.

Over the decades, other subjects have been added. But it wasn't until fairly recently – in 2016 – that ALI greenlighted the very first project on charitable nonprofit organizations. Leading the effort were: the late Professor Marion R. Fremont-Smith of the Harvard University, Kennedy School of Government along with UCLA's Professor Horwitz (Reporters) and Professor Nancy A. McLaughlin, University of Utah, S.J. Quinney College of Law (Associate Reporter).

Professor Jill Horwitz wrote a few years ago that she couldn't “... imagine a better subject for a Restatement It's very hard for somebody who hasn't worked in the field to draw from all these sources. The law in this area is so hard to manage. In addition to the many substantive areas that nonprofit law draws from, you have to be an expert in state law and federal law, and even English common law. You need to be comfortable managing source to source. I think when you put together the different levels of authority, the different sources of substantive law, it can be quite a tricky area.”

Design and Purpose

“In drafting a restatement, reporters examine court decisions, statutes, regulations and other primary authorities to compile an authoritative and exhaustive summary of the state of the law. The restatements are meant to address the law at its best.”

The Reporters designed this Restatement “to mirror ... the life cycle of a nonprofit organization. The treatise traces the birth, life and death of a charity. The final project includes sections on the definition of charity and choice of form; governance; changes to purpose and organization; dissolution, restrictions on charitable assets and enforcement of pledges; and standing of private parties Their hope was that this compendium would be used by a wide audience: judges, lawyers, board members, and “students of charitable law.”

The American Law Institute's official description of the 500+ pages treatise dated 2021 indicates that it is ... “ALI's first project restating the law of charities. This area of the law implicates many subjects, including the laws of trusts, corporations, property, and state and federal constitutions. Although some of our projects, most notably the Restatements of Trusts, include Sections that address charities or mention nonprofits generally, none addresses the topic in a comprehensive manner.

“To the extent possible,” ALI explains, “this Restatement sets forth a single law for charities regardless of whether they are corporations, unincorporated associations, or charitable trusts, or whether they take some other legal form that a charity may adopt.”

There are six chapters:

- Definition and Choice of Form
- Governance and Management of Assets
- Changes to Purposes and Organization
- Restrictions on Assets; Pledges; Solicitations
- Government Regulation of Charities
- Standing of Private Parties

“The importance of the charitable sector to the U.S. economy, the civic life of its residents, and the aspirations of its people make it critically important to provide comprehensive legal guidance to the people who donate to, benefit from, govern, and regulate charities.”

Conclusion

Restatement of the Law, Charitable Nonprofit Organizations is available on the ALI website for \$266 and an additional \$76 for the 2022 pocket part.

In *Restatement of the Law, Charitable Nonprofit Organizations* (June 30, 2022) Gene Takagi, Esq., *NEO Law Blog*, quoted the Introduction: “... This Restatement focuses on the duties of those governing charities, the manner in which charitable assets must be protected, and the powers of public officers and private parties seeking to protect charitable assets...”

In September 2022, Attorney Takagi and others presented papers at and participated in a “Symposium on the Restatement” sponsored in part by the UCLA School of Law’s Program on Philanthropy and Nonprofits just launched in 2021. See his blog post on that event: *UCLA Law Symposium on The Restatement of The Law, Charities* (October 1, 2022) *NEO Law Blog*.

– Linda J. Rosenthal, J.D., FPLG Information & Research Director