

Charities in the Courtroom, Pt 16: Charity Wins Subpoena Challenge

12.21.17 | Linda J. Rosenthal, JD



Around the nation, attorneys general are the chief law enforcement officers of their states. They have wide-ranging areas of responsibility; that has become clear in national news reports recently of coalitions of these top cops banding together, for instance, to oppose new federal executive orders and regulations or to fight interstate drug and human trafficking. There have also been successful, multi-state coordinated actions to stop charity frauds that have nationwide tentacles.

More quietly, each state attorney general acts on crime in the home jurisdiction and takes care of additional legal oversight responsibilities. Historically, the state AG monitors and regulates charities and property held in charitable trust. While the Internal Revenue Service takes the lead on matters relating specifically to the federal tax exemption and charitable deduction, in recent years, certain state regulators have emerged as a major force in the philanthropic arena. California has been active and aggressive on charity investigation and enforcement, particularly in the last decade or so. The current attorney general, Javier Becerra, continues that trend demonstrated by predecessors Jerry Brown (now governor) and Kamala Harris (now senator). In New York, high-profile attorney general Eric Schneiderman also regularly takes on charity scams and scammers.

While these officials have a high rate of success, that doesn't always happen. Just recently, the New York Attorney General suffered a setback – on constitutional grounds, no less.

Subpoena Ruled Too Broad

Evergreen Associates, Inc. is a nonprofit operator of unplanned pregnancy centers in New York. It has been under investigation by the AG Eric Schneiderman as part of a probe into whether the organization violates that state's statutes that prohibit the unauthorized practice of medicine. The Attorney General's office issued a subpoena to Evergreen Associates asking for a wide range of

information and documents. Evergreen objected with a motion to quash the subpoena, arguing that it – and its staff members’ – First Amendment rights of free association were being violated by the demand. A trial judge denied Evergreen’s motion which included a request for a protective order. On June 21, 2017, an appellate court in New York overturned the trial judge’s denial of relief for Evergreen. *In the Matter of Evergreen Assoc., Inc.*, 54 N.Y.S.2d. 135 (App. Div. 2017). It quashed the Attorney General’s subpoena and modified the denial of Evergreen’s motion for a protective order against the subpoena.

In its decision, the appeals court ruled that some parts of the AG’s subpoena should be fully denied on the grounds that these demands violated the First Amendment rights asserted by Evergreen on behalf of the organization and its staff. As to other requests, the subpoena was not quashed, but instead, there was a condition imposed that Evergreen was to produce any “responsive documents” to the trial judge for a private “in camera” review to “determine which were sufficiently related to the subject of the Attorney General’s investigation.” In the opinion of the appellate judges, AG Schneiderman’s subpoena was not narrow enough to avoid trampling Evergreen’s and its personnel’s constitutional rights.

In the Matter of Evergreen Assoc., Inc. is the first and only reported ruling by a New York court that sustains a motion to quash by the receiver of an investigative subpoena based on a constitutional challenge. It is a “reminder that however broad the authority of the Attorney General, it is, ... not limitless.”

Conclusion

While this is a New York decision dealing with New York law and the power of that state’s attorney general, the principle applies in other jurisdictions as well. A person or entity receiving “investigative demands should consider a motion to quash on substantive or procedural grounds, including raising constitutional challenges if warranted, should efforts to negotiate appropriately tailored requests prove unsuccessful.”

Of course, any such action must be promptly considered and taken. Ordinarily, a motion to quash a subpoena must be made on or before the subpoena deadline date.