

## New York State Ethics Commission

### Advisory Opinion No. 06-06

Whether the Attorney General's service as one of the four trustees of his family's charitable trust regulated by the Charities Bureau is a conflict of interest or creates the appearance of such a conflict under Public Officers Law §74.

---

## INTRODUCTION

The following advisory opinion is issued in response to a request submitted by the Attorney General, who asks whether he may continue to serve as one of the four trustees of the Bernard and Anne Spitzer Charitable Trust ("Trust").

Pursuant to its authority under Executive Law §94(15), the New York State Ethics Commission ("Commission") concludes that the Attorney General may continue to serve as one of the four trustees of the Trust, provided that he and all persons in the Office of the Attorney General ("OAG") adhere to the strict recusal guidelines established herein.

## BACKGROUND

### The Trust

On July 11, 2001, the Attorney General and certain members of his family created the Trust for the purpose of making distributions "for charitable, religious, scientific, literary or educational purposes, or for the prevention of cruelty to children."<sup>1</sup> The Trust has four trustees – the Attorney General's father, mother and brother, and the Attorney General. The Attorney General's father has four votes on Trust matters, and each of the other trustees has one vote, for a total of seven votes.

According to the Trust agreement, the trustees maintain full investment control of the assets of the Trust and make distributions from income or principal, or both, exclusively for charitable purposes. All Trust assets will pass to those charities named in the surviving trustee's last will and testament. None of the trustees is compensated for his or her services.

The OAG has advised the Commission that the Trust does not solicit funds from the public. The Trust's only assets are funds contributed by the Attorney General's parents. The Trust makes distributions to various museums, libraries, schools, and other not-for-profit organizations.

The Trust is exempt from federal income tax under Internal Revenue Code §501(c)(3).

### The Regulatory Role of the IRS Over Charitable Trusts

Charitable trusts, such as this Trust, are exempt from federal income tax and must file an annual information return with the Internal Revenue Service ("IRS") [Form 990-PF].<sup>2</sup> This form is available for public inspection and serves as the main source of information for federal and State regulators and the public about the Trust's finances and governance.<sup>3</sup> The Trust's Form 990-PF lists the Trust's assets, receipts, expenditures, and grants made during the year.<sup>4</sup> We understand that the IRS audits these forms for evidence of inflated compensation packages, insider-dealing, and other irregular transactions. The IRS can impose excise taxes on a trust for failing to make minimum distributions each year, engaging in acts of self-dealing, retaining any excess business holdings, making investments

which jeopardize charitable purposes and making any taxable expenditures.<sup>5</sup> The IRS also can revoke a trust's tax exempt status.

The IRS's oversight responsibility is shared with state attorneys general.

### The Regulatory Role of the OAG

The OAG role is to represent all public beneficiaries of charitable organizations who cannot sue in their own right (See Estates, Powers and Trusts Law ("EPTL") §8-1.1(c)(2)(i), (f) and (h) and §8.1-4).<sup>6</sup> Pursuant to State law, the OAG has the authority to regulate not-for-profit organizations and charitable trusts and to commence law enforcement investigations and legal actions to protect the public interest. This statutory mandate is derived from Article 7-A of the Executive Law governing charitable entities that solicit contributions from New Yorkers, and Article 8 of the EPTL governing entities that administer charitable assets in the State.

Within the OAG, a specialized unit, the Charities Bureau, carries out the Attorney General's responsibilities with respect to charities. In addition to the above, the Charities Bureau maintains records pertaining to charities. Charitable trusts must register and file annual IRS Form 990 with the Charities Bureau. The public may inspect all registrations and annual filings submitted to the Charities Bureau (See EPTL §8-1.4 [I]).

The Charities Bureau has 22 Assistant Attorneys General ("AAG") and three accountants who audit IRS Form 990's. In addition to IRS review, we have been advised that State auditors review the Form 990's for evidence of irregularities, including excessive compensation and self-dealing. According to the Bureau Chief of the Charities Bureau, accountants review the Form against standard criteria to identify Forms requiring further scrutiny. Forms with issues or questions then are referred to an AAG. The Commission has been advised that, in the past, any such issues and questions have been resolved through discussion and negotiations between counsel for the charitable trust and the Charities Bureau without the filing of formal objections and litigation. In appropriate cases, the Attorney General has issued "no action" letters or letter agreements seeking restitution. The Attorney General's Executive staff reviews these "no action" letters and letter agreements.

The Charities Bureau is also responsible for overseeing the management of the assets of charitable trusts. Under the EPTL §8-1.4, the OAG may investigate transactions and relationships of trustees for the purpose of determining whether or not property held for charitable purposes has been properly administered and may institute appropriate proceedings to secure compliance with this section (See EPTL §8-1.4[i] and [m]). The OAG may seek to remove a trustee who authorizes, or acquiesces in, inappropriate payments or other benefits to fellow trustees and may seek restitution to the charitable organization (See EPTL §8-1.4[m]; Not-For-Profit Corporation Law §715).

The Charities Bureau may refer a matter to the IRS.<sup>7</sup>

### The Attorney General's Disclosure and Recusal with Respect to the Trust

Since the Trust's creation in 2001, the Attorney General has disclosed his position as a trustee on his financial disclosure statements filed with the Commission, and, according to Deputy Attorney General Richard Rifkin, the Attorney General has recused himself from any matters involving the Trust.

Rifkin states that David Nocenti, Counsel to the Attorney General, sent senior staff a memorandum setting forth the procedure to ensure that the Attorney General is properly screened from involvement in, or knowledge of, those legal matters involving certain specified individuals and entities.<sup>8</sup> The Trust is listed as an entity subject to recusal.

The memorandum states in pertinent part:

All matters involving the individuals, entities, lawsuits and investigations listed on [the attachment] should be handled in the same manner and through the same supervisory process as all other Department of Law matters.

However, if an issue arises that would otherwise require the attention of the Attorney General, that issue should instead be discussed with [First Deputy Attorney General], who will determine whether the Attorney General can participate, and will make any and all decisions on behalf of the Attorney General if it is determined that the Attorney General should continue to be screened from the matter.

Rifkin states that, since the Trust's creation, no investigations or inquiries involving the Trust have arisen in the OAG.

### **APPLICABLE STATUTES**

Public Officers Law §74(2), the rule with respect to conflicts of interest, provides:

No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

Following the rule with respect to conflicts of interest, Public Officers Law §74(3) recites the standards of conduct which address actual as well as apparent conflicts of interest. Relevant to this discussion are the following subsections:

d. No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

e. No officer or employee of a state agency . . . should engage in any transaction as representative or agent of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.

g. An officer or employee of a state agency . . . should abstain from making personal investments in enterprises which he has reason to believe may be directly involved in decisions to be made by him or which will otherwise create substantial conflict between his duty in the public interest and his private interest.

h. An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

### **DISCUSSION**

In its early opinions applying §74 of the Public Officers Law, the Commission employed a broad rule that precluded all policymaking employees of an agency from serving on the board of directors of an entity regulated or funded by the agency (See Advisory Opinion Nos. 90-25, 92-04, and 92-18). The Commission's application of Public Officers Law §74 to the outside activities of State employees was later modified following the Supreme Court, Appellate Division decision in *Matter of Hancox v. Bress*, 208 A.D.2d 1031 (3d Dept. 1994), which held that an employee's status as a policymaker did not, by itself, create the appearance of a conflict of interest.

In the wake of this Appellate Division decision, the Commission has considered several factors in evaluating outside activity, including (i) the official's duties on behalf of the State; (ii) the relationship of the agency and the official to the proposed outside activity; (iii) whether the official would be in a position to secure unwarranted privileges; (iv) whether the outside activity would impair the independence of judgment in the exercise of official duties; and (v)

whether the principles of disclosure and recusal remedy any appearance of impropriety (See Public Officers Law §74 (3)[c], [d] and [h]; Advisory Opinions Nos. 95-09, 97-25 and 03-09).

In Advisory Opinion No. 95-18, the Commission addressed the application of Public Officers Law §74 to a member of the Board of Regents (“Regents”) and his service as a compensated trustee of a private foundation that was chartered by the Regents and provided grants to institutions of higher learning in the State.

The foundation was a trust that had, as its sole purpose, the provision of grants to advance education and training in hotel management. The Regent was one of twelve trustees, and each trustee had one vote on foundation matters. Pursuant to Education Law §216, educational trusts, such as the foundation and all institutions of higher learning in the State, must receive a charter from the Regents. In addition, the State Education Department performs periodic programmatic reviews of the curriculum of institutions of higher learning and their financial aid and admission criteria.

On these facts, the Commission concluded that the service of the Regent as one of twelve trustees of a foundation that made grants to institutions chartered by the Regents was insufficient to create a conflict or the appearance of a conflict with his position as a Regent. The Commission stressed that the Regent “would have to disclose his service as a trustee of the [f]oundation to the Regents and recuse himself from any decision that might come before the Regents regarding the [f]oundation’s charter or its activities, including a review of any matters relating to its grants.” In addition, the Commission noted that “there is nothing to indicate that [the Regent] would be in a position to disclose confidential information to the [f]oundation or any of the recipient institutions, or otherwise use his position as a [Regent] to benefit the [f]oundation or these institutions, or to advance his personal interests.”

This same analysis should be applied in determining whether the Attorney General may continue his service to his family’s charitable trust. The Commission recognizes at the outset that creating and participating in a family charitable trust serves a broad public purpose and is a practice that society and the government should encourage.

Accordingly, unless necessary, we should not construe Public Officers Law §74 to bar the Attorney General, solely by virtue of his office, from service as a trustee of a charitable trust or even from setting up such a trust. These rights are available to every qualified citizen of this State, and our task here is to determine whether strict recusal requirements can address any potential or actual conflict from the Attorney General’s service as one of the four trustees of the Trust.

Moreover, in interpreting the ethics law, the Commission must consider that governmental officials often interact in their private lives with government agencies in which they may have official duties. To cite just two examples, the Commissioner of the Department of Tax and Finance files a State income tax return with the Department, and all Public Service Commission Commissioners receive gas, electric and/or telecommunications services from regulated entities.

Because the OAG is charged with supervision of charitable assets and has enforcement responsibilities under the EPTL, the question presented is whether the Attorney General’s recusal is sufficient under Public Officers Law §74 to remove any conflict or the appearance of a conflict of interest created by his service as one of four trustees of the Trust.

In answering this question, the Commission believes that the following factors substantially mitigate against the existence of a conflict with respect to the Attorney General’s service as one of the four trustees of the Trust.

First, the OAG does not license the Trust and did not provide prior regulatory approval for the Trust to commence its operations.

Second, the IRS and the OAG have overlapping roles in the regulation of charitable trusts. For example, both agencies can impose penalties for mismanagement of investments and overcompensation. Because the IRS has

jurisdiction and resources to address a matter involving the Trust, we believe the risk of a conflict arising from the Attorney General's service as a trustee is reduced.

Third, we have been advised that the Trust is a family charitable trust that does not receive or solicit funds from the public. Instead, the Trust is an entity through which the Attorney General's parents make charitable contributions with their own funds. Thus, the OAG's regulatory concern that public donations would be misspent by a not-for-profit entity is not present with respect to its oversight of the Trust.

Fourth, we have been advised that the Attorney General's primary role as one of the four trustees is to assist in determining the Trust's donations to qualified not-for-profit organizations. As noted above, the Attorney General has only one of seven votes with respect to Trust matters, including donations. In any event, the OAG does not review the donations of the charitable trusts as long as those donations are made to qualified not-for-profit organizations.

Fifth, the issue of whether trustees are overcompensated is not a concern here, because none of the trustees, including the Attorney General, is compensated for his/her service to the Trust.

Finally, the Trust is subject to public accountability, because its annual filings are available for public inspection.

Although we believe that these circumstances substantially mitigate against the risk of any conflict, there may be circumstances where a conflict may exist from the Attorney General's service as one of the four trustees of the Trust. In rendering this opinion, we are mindful of the Attorney General's role as one of the four statewide elected officials in the State, and his special responsibilities for law enforcement.

Accordingly, if an internal review by the Charities Bureau of the Trust's IRS Form 990 identifies a question or issue, the Attorney General's recusal policy must be invoked: the Attorney General must not participate in the matter or be advised, directly or indirectly, that the Trust is under review. If further action is required, the OAG must refer the matter to the IRS and, if a criminal violation is involved, to the Governor for appointment of a special prosecutor. Similarly, if the OAG receives a credible, bona fide complaint alleging a violation of law involving the Trust, the OAG must refer the complaint to the IRS and, if the situation raises a possible criminal violation, to the Governor for appointment of a special prosecutor.

All members of the OAG, including the Attorney General, must abide strictly by the Attorney General's recusal policy at all times, and the Attorney General must have no role whatsoever in any OAG matters involving the Trust. In addition, no member of the OAG may inform the Attorney General, directly or indirectly, of any matter involving the Trust, including any review of the Trust. The OAG should address any issue or question concerning the application of the Attorney General's recusal policy, or any other issue under Public Officers Law §§73, 73-a and 74 with regard to the Attorney General's service as a trustee of the Trust, to the Commission.

The Commission notes that the Attorney General's present screening arrangement, which designates an official to act in lieu of the Attorney General and to whom all covered matters are to be referred, is similar to the federal guidelines for governmental employees' recusal obligations (See United States Office of Government Ethics ("OGE") DAEOgram DO-04-012).

The Commission believes that the Attorney General's recusal guidelines, as modified by the additional requirements specified in this opinion, are sufficient to remedy any actual or apparent conflicts of interest by the Attorney General's service to his family's charitable trust.

## **CONCLUSION**

Pursuant to its authority under Executive Law §94(15), the New York State Ethics Commission (“Commission”) concludes that the Attorney General may continue to serve as one of the four trustees of the Trust, provided that he and the OAG staff adhere to the strict recusal guidelines established herein.

This opinion, unless and until amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion or related supporting documentation

All Concur:

Robert J. Giuffra, Jr.

Lynn Millane

Susan E. Shepard

Members

Chair Shechtman and Commissioner Loewenson took no part in the consideration of this matter.

Dated: August 28, 2006

-----

1. A trust is defined as “any arrangement whereby property is transferred with intention that it be administered by a trustee for another’s benefit.” (See Black’s Law Dictionary [5th ed 1979].
2. Internal Revenue Code §6033(a).
3. Internal Revenue Code §6104(b).
4. Part VIII of the Trust’s Form 990-PF, which provides information regarding compensation of officers, directors, or trustees, reflects that no compensation was received by any of the trustees, including the Attorney General.
5. See Internal Revenue Code §§4942, 4941[d], 4943[c], 4944, and 4945[d].
6. Both the New York State Supreme Court and the Surrogate’s Court have jurisdiction over matters relating to charitable trusts.
7. “Internal Revenue Code 26 U.S.C §§2055 and 2522, govern the deductibility of charitable gifts, and the legislature designed Article 8 of the EPTL, in part, to conform with the tax laws.” (Turano, Practice Commentaries, McKinney’s Cons Laws of NY, Book 17B, EPTL §8-1.1, at 67) .
8. This memorandum was originally created in 1999 when the Attorney General took office and has been periodically updated through 2003.