Hospital Mergers

and the Threat to Women's Reproductive Health Services

Using Charitable Assets Laws to Fight Back

NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

The National Women's Law Center is a nonprofit organization that has been working since 1972 to advance and protect women's legal rights. The Center focuses on major policy areas of importance to women and their families, including health and reproductive rights, employment, education, and family economic security. The authors of this report are Senior Counsel in the health and reproductive rights department of the Center.

Hospital Mergers and the Threat to Women's Reproductive Health Services

Using Charitable Assets Laws to Fight Back

Elena N. Cohen
Jill C. Morrison

June, 2001

NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

Acknowledgments

The development and production of this report would not have been possible without the contributions of a number of members of the National Women's Law Center staff, including Marcia D. Greenberger, Judith C. Appelbaum, Margot Friedman, Dina R. Lassow, Regan Ralph, Lela Shepard, and health fellows Susannah Voigt and Abby Bowles. Justin Haynes also provided invaluable production assistance.

The authors are also grateful for assistance from the following individuals and organizations, who provided helpful input to this report: Collette Goodman (Shea & Gardner), Renee Markus Hodin (Community Catalyst), Pamela A. Mann (Law Offices of Pamela A. Mann LLC, formerly Chief of the Charities Bureau in the Office of the New York Attorney General), Dina Moss, Chris Nierman (Shea & Gardner), Ronnie Pawelko (MergerWatch), Mark I. Siman (Office of the New Jersey Attorney General), Renee Steinhagen (Public Interest Law Center of New Jersey), and Lois Uttley (MergerWatch).

This report was made possible by grants specifically for this project from the Dyson Foundation, General Service Foundation, Wallace Alexander Gerbode Foundation, and The Westport Fund. Additional support was provided by the Robert Sterling Clark Foundation, Ford Foundation, Richard and Rhoda Goldman Fund, George Gund Foundation, Huber Foundation, Moriah Fund, Open Society Institute, David and Lucile Packard Foundation, and Turner Foundation.

Disclaimer

The statements and opinions expressed in this report are solely the responsibility of the National Women's Law Center, and do not necessarily represent the views of the Center's funders or draft report reviewers. Although text and citations are, to the best of the authors' knowledge, current as of the date this report went to press, there may be subsequent developments that could alter the governing legal principles. This report does not constitute legal advice; individuals and organizations considering legal action should consult with their own counsel before deciding on a course of action.

Table of Contents

Page

Introduction and Executive Summary

An alarming trend that began in the 1990s has continued in the new millennium: as religious health care providers merge, purchase, or otherwise affiliate with secular ones, they impose religious restrictions on the health care services of their new partners. The most significant bans are imposed through the National Conference of Catholic Bishops' *Ethical and Religious Directives for Catholic Health Care Services* ("the *Directives*"), which provide guidance to Catholic health care institutions and professionals. Nowhere are these limits more keenly felt than in the arena of women's reproductive health.

The spread of such health care bans through mergers and other affiliations ultimately hurts women. The restrictions violate a number of laws at the state and federal level that can be used to protect women as health care consumers and as members of the public at large. This report focuses on one potentially powerful weapon in the legal arsenal against these religiously based restrictions on health services: the body of state law requiring that assets held by nonprofit charities be used to advance their charitable missions (collectively referred to in this report as "charitable assets" laws).

A.

Charitable Assets Laws and How Advocates Can Use Them

When a secular hospital affiliates with a religious one, and then agrees to abide by religious restrictions that will eliminate previously provided health care services, this conduct can constitute a legally impermissible change in the secular hospital's charitable mission. This change in the hospital's mission can be based on the very fact that the hospital was supposed to be secular but is now religious in character. Or, it can be based on the fact that a key aspect of the mission included the provision of the terminated services. By changing the character of the institution to one that is religious and/or eliminating key health services, the changed mission can run afoul of the charitable assets laws that require institutions to adhere to their charitable missions.

The requirement under charitable assets laws that nonprofit charities use their assets to further their charitable missions is based on their special status under the law. Charitable institutions receive tax benefits and other advantages because they serve the public and often provide services that governments would otherwise provide. As such, they also have certain obligations that for-profits do not. Specifically, nonprofit charities have a duty to uphold their charitable missions and to use their assets to further those missions. Nonprofit charities also have obligations to donors who base their contributions on the entities' representations that the entities will perform certain functions or services.

With the force of charitable assets laws behind them, advocates can argue that a hospital whose mission was to provide secular health care, a full range of health care services to the community, or reproductive health services may not change that mission to providing only those more limited services authorized by religious doctrine. As described in the case studies in Section III. of this report, state attorneys general and trial court judges have endorsed the view that such changes are significant and must be carefully reviewed to determine whether they are legally authorized. Indeed, even the *Directives* acknowledge the unique mission of Catholic health care.

One potentially powerful weapon being used to preserve diminishing reproductive health services is charitable assets law.

Charitable assets laws include:

- *nonprofit corporation law;*
- *"charitable trust" laws; and*
- *nonprofit-to-nonprofit hospital "conversion" statutes*

There are three main types of charitable assets laws that can be used by themselves or in combination to mount a successful challenge: nonprofit corporation law, "charitable trust" law, and nonprofit-to-nonprofit hospital "conversion" statutes (governing transactions in which a nonprofit hospital "converts" into another type of nonprofit).

Advocates should evaluate each of these three types of laws when seeking to challenge a particular transaction, since each offers different protections, depending on the facts surrounding the transaction and the law in a particular state. Many states do not have all of the laws. Other states may have a law, but it may not cover the transaction at issue. States also vary in the resources and effort devoted to enforcing these laws. The types of laws themselves also have different benefits and disadvantages. For example, it might be easier under nonprofit corporation law than under charitable trust law for advocates to be heard in court, but the likelihood that a court will reject a hospital's decision to modify its original mission is greater under charitable trust law than under nonprofit corporation law.

Advocates can use charitable assets laws to protect reproductive health services by emphasizing to hospital officials, the media, and the state attorney general that the hospital has violated or is about to violate its mission to provide vital community services. Communities express their commitment to hospitals by providing financial and volunteer support; hospitals, in turn, have a duty to maintain the mission that has drawn and encouraged community support. Advocates must emphasize that abandoning the institution's charitable mission makes bad medicine, bad community relations and most importantly, may violate the law. Advocates can also use the laws to urge state attorneys general, as representatives of the public's interest in charitable nonprofit organizations, to ensure that a secular hospital's charitable mission is upheld by thoroughly investigating the transaction and opposing it in court if necessary. Sometimes these charitable assets laws can also be used by community members, patients, donors, or other interested people to bring their own lawsuits (e.g., to stop the transaction or require provision of services).

Although courts have not yet definitively ruled on whether a secular hospital that eliminates services based on religious restrictions violates charitable assets laws, attorneys general and advocates have successfully used these charitable assets laws to prevent an impending affiliation, to create an alternative that allows the affiliation to proceed while still preserving services, or even to dismantle one that has already occurred. However, it is generally more effective to halt a transaction before it is consummated rather than undo an already existing arrangement in which services have already been banned. Dismantling is not only more legally complicated than stopping a transaction, but also is more difficult on a practical level, since it often requires untangling merged services and business practices. Nonetheless, charitable assets laws have been used to provide a range of remedies, including to:

- dismantle a merger of a secular and religious hospital in Manchester, New Hampshire and restore reproductive health services at the secular facility;
- modify a proposed consolidation of two hospitals in Elizabeth, New Jersey – one secular, the other religious – by requiring that, before the consolidation occurred, the secular hospital set aside funds to pay for abortion and tubal ligations at another location, and assist patients with transportation to providers offering these services;

- require a Catholic health system to sell both its Catholic and secular hospitals in West Palm Beach, Florida, releasing the secular hospital from the *Directives*;
- require a secular hospital in Smithtown, New York that was being sold to a Catholic health care system to notify the community of the planned reduction in services and provide a toll-free hotline informing consumers about where the eliminated services could be obtained; and
- require a Catholic hospital in Merced, California, that was going to operate a secular hospital to continue there the current levels of reproductive health services and to submit for attorney general approval a plan to ensure reproductive health care access if the *Directives* became more restrictive.

B.

The Structure of the Report

This report begins by examining the nature and scope of the problems created by the spread of religious restrictions to once secular institutions (Section I.). It then outlines the three types of laws governing the use of charitable assets that can be used to challenge transactions that might limit women's reproductive health services (Section II.), for each describing:

- the general scope and purpose of the law;
- the standards used in determining whether a charitable mission will continue to be fulfilled following the transaction;
- the procedures for reviewing a transaction;
- individuals or entities who have the legal authority to challenge the transaction at issue (e.g., who have standing to bring a lawsuit); and
- available remedies (e.g., stopping the transaction from occurring, imposing certain conditions on the transaction, or actually undoing the transaction if it is already completed).

The report then presents five case studies describing specific hospital transactions in which these legal tools have either helped to prevent the harmful practices from actually being implemented or otherwise limited their negative impact (Section III.). Finally, the report summarizes factors to consider in mounting a challenge to a transaction based on charitable assets laws (Section IV.). The appendices include a glossary of some terms used in this report (Appendix A); a guide to help advocates gather relevant information when trying to make a charitable assets challenge (Appendix B); a list of state agencies that enforce charitable assets laws or maintain important documents that could help mount a charitable assets challenge (Appendix C); a sample letter alerting an enforcement agency of a possible violation of charitable assets laws (Appendix D); a sample newspaper op-ed expressing community concerns (Appendix E); and helpful resources (Appendix F).

It is better to stop a transaction before it is completed than to dismantle an already existing arrangement.

Section I

The Problem: Religious Restrictions Severely Reduce Women's Reproductive Health Services

Certain religiously sponsored health care institutions have long prohibited the provision of key health care services based on religious or "moral" principles. Catholic providers have generally imposed the most rigid restrictions, but other providers also impose such limits.[1] A recent trend of affiliations between religiously sponsored and secular institutions has resulted in the spread of these bans to growing numbers and types of health care providers. The report refers to providers with such bans as "restricted" or "religiously affiliated" providers, and those without bans as "unrestricted" or "secular" providers.

Despite the pervasiveness of these health care restrictions, the public remains largely unaware of their impact. Indeed, in a nationwide survey of 1,000 women in early 2000, almost half said that if they were admitted to a Catholic hospital, they believed they would be able to get medical services that may go against Catholic teaching. While 62 percent identified abortion when asked to name services that are contrary to Catholic teaching, only 43 percent named birth control, and less than seven percent were able to identify any other restricted services, including the "morning-after" pill, sterilization, or infertility treatment.[2] Three out of four of all women responding in this same survey said that they would oppose the merger of a Catholic and a non-Catholic hospital if it would mean that women were denied reproductive health services.[3] These statistics clearly indicate that there is a need for increased education about these restrictions and their impact.

This section of the report describes the types of services that may be restricted, the trends causing the spread of these bans, and the range of health care providers that may be affected by them.

A.

The *Ethical and Religious Directives for Catholic Health Care Services* and Other Policies Impose Severe Restrictions

Nationwide, the most widespread limitations on women's reproductive health services result from restrictions developed to govern the delivery of care at Catholic health care institutions. The National Conference of Catholic Bishops' *Ethical and Religious Directives for Catholic Health Care Services* ("the *Directives*") provide guidance to Catholic health care institutions and professionals on standards of behavior that flow from church doctrine.[4]

Almost half of the women in a nationwide survey incorrectly believed that, if they were admitted to a Catholic hospital, they would be able to get medical services that conflicted with Catholic teaching.

Although Catholic hospitals often provide needed health care, Catholic Directives *prohibit vital services, including:*

- *abortion*
- *emergency contraception*
- *sterilization*
- *contraceptive services*
- *counseling on condom use to reduce the risk of HIV/AIDS*
- *infertility treatments*
- *research and therapy using fetal tissue or stem cells*
- *certain end-of-life care*

According to the *Directives*, "Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition of medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel."[5] Instruction on, and compliance with, the *Directives* is guided by authorities within the Church. Each Catholic hospital is within a particular geographic jurisdiction called a diocese, which is supervised by a bishop. The bishop oversees the functioning of, and compliance with, the *Directives* of the hospitals within his diocese, and interprets the *Directives*.[6]

The *Directives* include extensive guidance on health care provided both at the beginning and end of life. They explicitly and implicitly prohibit several specific services and treatments, including: medical and surgical abortions;[7] emergency contraception (the "morning-after" pill), even in cases of rape;[8] sterilization, the most commonly used form of contraception;[9] contraceptive services (including contraceptive prescriptions) or counseling;[10] counseling about the use of condoms by HIV-positive patients to prevent the transmission of HIV/AIDS;[11] infertility treatments;[12] and research or therapy using fetal tissue or stem cells.[13] The *Directives* also affect end-of-life care[14] and generally limit practitioners' ability to act solely based on appropriate standards of medical practice and in consideration of their patients' needs.[15] The teachings of the Catholic church also affect health care for homosexuals.[16]

B.

The Catholic Health Care Industry, a Major Health Care Force, is Expanding Through Mergers, Purchases, and Other Affiliations

The impact of the *Directives* is far-reaching, due to the strong presence of Catholic and Catholic-affiliated health care providers in the U.S. health care market. Of the ten largest nonprofit systems nationwide, four are Catholic-owned.[17] Catholic hospitals are the largest single group of nonprofit hospitals, constituting 11 percent of all community hospitals and approximately 16 percent of all community hospital admissions.[18] Moreover, in many rural areas, a Catholic hospital is the only hospital for many miles around.[19] There are also widespread Catholic-sponsored outpatient clinics (including the type of facilities that customarily provide reproductive health care)[20] and Catholic-sponsored managed care plans, including many Medicaid managed care plans.[21]

Yet it is not just Catholic health care providers that are constrained by the *Directives*. Non-Catholic entities that have affiliated with Catholic providers also have had to comply with them, often eliminating key women's reproductive health services.[22] Some non-Catholic hospitals in these affiliations have managed to retain some services, often due to community resistance to restrictions and hospitals' recognition of the importance of these services to community health.[23] Nonetheless, as this report went to press, the Catholic leadership began to consider seriously

whether the *Directives* should become more restrictive for the non-Catholic partners than they have been until now, especially concerning the provision of tubal ligations.[24]

The spread of religious restrictions to secular institutions is the result of the growth of mergers and affiliations among competing health care providers as they responded to pressures to cut costs (especially as managed care reduced and shortened hospital stays), consolidate resources, and enhance their market power.[25]

Religiously sponsored hospitals were by no means immune from this "merger mania." Catholic health care institutions, which had historically affiliated only with one another, rarely "'marrying' outside the church," began to merge and affiliate with non-Catholic institutions in response to market pressures and the need for patient volume.[26] Over the last decade, almost 170 non-Catholic hospitals have merged or otherwise affiliated with Catholic health care entities.[27] These transactions, in many instances, have failed to produce the expected savings, stability and hospital capacities, causing a rash of sales and closings in recent years. This development has raised the issue of whether non-Catholic entities that adopted the *Directives* as part of Catholic affiliations could once again provide comprehensive health care if they are later sold to entities that do not impose religious restrictions (see, for example, the Florida case described in Section III.C. of this report).[28]

Merger activity slowed in absolute numbers at the close of the 1990s and into 2000, in part simply because there were fewer partners from which to choose due to the immense activity of the 1990s.[29] However, in an effort to further secure their market power, Catholic hospitals and health systems began to merge with one another, creating large and powerful entities.[30] The growth of these Catholic health care "mega-systems," which operate multiple hospitals across several states, provide a large amount of bargaining power and a competitive advantage for Catholic hospitals, leaving others vulnerable to being pushed out of the market and further endangering access to services.

The growing influence of Catholic health care institutions has, as previously noted, had a direct effect on the provision of services at many previously unrestricted, secular institutions. As a result of mergers, sales, and other affiliations, some providers may be ceasing to provide certain services to their communities. As such, they may be failing to fulfill their charitable purpose, and thus failing to comply with the body of law governing charitable, nonprofit health care institutions. The following section of this report describes these laws and their potential application to protect women's access to reproductive health services.

Nationwide, over the last decade, almost 170 non-Catholic hospitals have merged or otherwise affiliated with Catholic health care entities.

Section II

A Solution: Charitable Assets Laws Can Challenge Transactions that Violate Hospitals' Charitable Missions

Because most transactions resulting in the imposition of religious restrictions involve charitable nonprofit health care providers (e.g., a nonprofit secular hospital merging with a nonprofit Catholic hospital),[31] charitable assets laws can be an important tool to challenge transactions that limit services. While several different types of state charitable assets statutes, judicial opinions, and other legal authority may be used to challenge a transaction, this report refers to them collectively as "charitable assets laws" and describes any activity with the courts, state attorneys general or other authorities as a "charitable assets challenge." Leading journals have recently featured stories highlighting the increasing reliance of state attorneys general on these types of laws to challenge health care transactions that may affect charitable assets and access to health care.[32]

Under charitable assets laws, a nonprofit charity cannot enter into a transaction that would result in the use of its assets for purposes inconsistent with its originally stated mission. If an affiliation that reduces or eliminates women's health services is inconsistent with the secular health care provider's charitable mission, it can be legally impermissible for that entity to complete the transaction. In fact, the *Directives* themselves are clear in stating that the mission of Catholic health care is unique and easily distinguished from all non-Catholic health care.[33] It can therefore be argued that any time the *Directives* are imposed at a formerly non-Catholic hospital, that hospital has experienced a change in its mission.

The success of a legal challenge under charitable assets laws hinges on how the mission of the particular charitable organization is defined. Charitable missions range from the very broad to the very specific.[34] Clearly, a charitable assets challenge would be most effective if a hospital specifically stated that its mission included the provision of a full range of women's reproductive services.[35] However, evidence that a hospital is committed to providing *secular* health care (i.e., where religion plays no part in the nature or scope of services), or providing *comprehensive services to the local community* can also be extremely helpful.[36] Evidence of mission can be found in a hospital's charter, articles of incorporation or other legal documents; in representations made to the public in soliciting donations; in the actual services provided; and the hospital's reputation in the community it serves.[37] Appendices B and C describe in greater detail how evidence of mission can be obtained.[38]

Charitable nonprofit corporations are governed by a maze of federal, state, and local rules, including special rules for religious corporations that should be consulted when researching the law on a transaction in a particular state. This

Advocates can argue that an affiliation that reduces or eliminates women's health services, based on religious restrictions, is inconsistent with the mission of a secular hospital.

report focuses on three types of state laws that can serve as a basis for challenging transactions that would eliminate a secular hospital's women's reproductive health services when it affiliates with a religious entity:

- nonprofit corporation laws;
- charitable trust laws; and
- nonprofit-to-nonprofit hospital conversion statutes (laws governing transactions that result in the conversion of one nonprofit to another type of nonprofit).[39]

Other legal tools can be used to challenge health care restrictions, including: antitrust, constitutional, consumer protection, licensing, accreditation, informed consent, and tax laws.

Each of these tools can be used by itself or with others to mount a successful challenge, depending on the facts surrounding the transaction and the law in a particular state. For example, nonprofit conversion statutes offer the strongest ammunition, but frequently are not applicable either because the state does not have such a law or the transaction at issue does not fall under the law's coverage. Under these circumstances, the first two legal tools may be more useful.

State officials, including state attorneys general, health departments, and licensing agencies, have the authority to review transactions and disapprove them if they violate state laws, or require that the parties take certain steps to comply with state law before the transaction can be approved. These laws have even been used to undo a completed transaction, although preventing the harm beforehand is a better solution for both communities and hospitals.[40] As illustrated in Section III. of this report, state attorneys general have stopped some transactions from taking place or imposed conditions on transactions, sometimes without ever going to court. Several legal tools, in addition to those described in this report, that can be used to challenge these restrictions include: antitrust, constitutional, consumer protection, licensing (e.g., certificate of need), accreditation, informed consent, and tax laws.[41]

A.

Nonprofit Corporation Law is One Effective Tool for Challenging Transactions

1. The Standards for Reviewing Transactions Vary by State and by Type of Transaction

Every state has laws governing fundamental changes in the structure or functioning of a nonprofit charitable corporation, but their scope varies. These state statutes often address the following categories of transactions:

- Mergers and consolidations;[42]
- The sale, lease, exchange, or other disposal of all or substantially all corporate assets;[43]
- Amendments to certificates of incorporation;[44] and
- Dissolutions.[45]

Most states also have statutes specifically addressing situations where there is an identifiable donor who makes a gift in writing and imposes a specific limitation on the donation's use, or when an institution solicits funds for a specific purpose.[46] However, since these statutes only apply to specifically restricted funds and not to an entire transaction, violation of these statutory provisions usually does not form the sole basis of a lawsuit challenging the use of a hospital's charitable assets. Nonetheless, such laws are used to provide additional support when restricted assets are involved.

Each state has developed its own standards for determining whether a transaction that causes a change in the functioning of a charity will be subject to review and approved. These standards might vary depending on the nature of

the transaction (e.g., sale, merger, or dissolution) as well. This section outlines some of the more common approaches that states may take in evaluating changes in nonprofit corporations.

The nonprofit corporation standards are used in a variety of combinations, depending on state law, case precedent within the state, and the challenged transaction. An important component of the success of any challenge is the standard that is applied, either by the attorney general or by a court, to determine whether the changes resulting from the transaction are legally permissible. It is important for advocates to remember to look beyond the label that the hospitals place on the transaction to see if the transaction should be subject to review under the state nonprofit law. Health care providers are becoming more creative in structuring transactions in an attempt to avoid attorney general review and court approval under the nonprofit corporation laws.[47]

a. The "Substantial Similarity" Test

Some states, either through statute or case law, will only allow a nonprofit to change its purpose if the new purpose is "substantially similar" to the original one.[48] In states where this standard applies, advocates can argue that by no longer offering reproductive health services, or by complying with the *Directives*, a provider has changed its purpose to one that is not substantially similar to its original purpose. This analysis would serve as the basis of their request to the court and/or attorney general that the transaction should not be approved. Courts may consider the following five factors in determining whether the substantially similar test is met:

- the source of the nonprofit's assets, such as whether funds were received through solicitations or under the provision of a will or other trust instrument;
- the corporate mission and corporate powers, as enumerated in the nonprofit's certificate of incorporation;
- the activities the nonprofit actually carried out, and the services it actually provided prior to the transaction;
- whether there is any similarity between the activities and purposes of the nonprofit and the entity (if any) receiving its assets; and
- the basis of the board of directors' decision to recommend the changed mission.[49]

The factors should be considered as a whole. No one factor should necessarily outweigh all of the others, and the entire situation should be considered in determining whether or not the new purpose meets the substantial similarity test.

b. Evaluating the Duties of Nonprofit Directors

In addition to considering the similarity of a hospital's new and original missions, courts will also examine decisions that directors of nonprofits make to ensure that the directors have fulfilled their duties of "obedience," "care," or "loyalty."[50] Each of these duties is briefly examined below.

The duty of obedience requires that the directors implement the organization's purpose, and limits the ways directors can modify the organization's activities.[51] This duty is premised on the fact that donors rely on an organization to fulfill its purpose, and that an organization cannot, therefore, modify its activities without some consideration of the public interest.[52] Advocates could therefore argue that a director's decision to enter into a transaction that eliminates reproductive health services has failed to uphold obediently the purpose of the nonprofit hospital, and has failed to consider the impact on the public.

Applying funds to another charitable purpose, no matter how worthy, may still be inconsistent with a hospital's charitable mission.

The duty of care generally requires that directors must discharge their duties (1) in good faith, (2) with the care an "ordinarily prudent person in a like position" would exercise under similar circumstances, and (3) in a manner the director reasonably believes is in the corporation's best interest.[53] Failure to consider adequately the impact of a transaction between a secular and religious hospital may very well amount to a failure to fulfill this duty. This conclusion is bolstered by recent industry commentary on how these mergers often collapse due to religious and philosophical differences, thus making the failure to consider these differences and potential problems arising therefrom a failure to act in the corporation's best interest.[54]

The duty of loyalty requires the director to further the organization's goals, and not his or her own self interest.[55] Most importantly, this duty requires "an undivided allegiance to an organization's mission" in making decisions regarding the organization's assets.[56] In attempting to prove a violation of this duty, advocates might allege, for example, that a director put his or her own interest in providing restrictive Catholic health care, and eliminating reproductive health services, before the interest of the corporation in remaining secular and meeting the needs of the community.[57] It is important to note that while these duties may limit the ways the directors can modify the nonprofit's activities, the courts generally will not interfere with business judgments entered into in good faith, even if the decisions are erroneous or cause the corporation harm.[58]

c. Other Standards

In some states, there are more specific statutory standards for evaluating specific transactions. In New York, for example, a court may refuse to approve a *merger* or *consolidation* if it determines that the transaction will adversely affect either the public interest or the interests of constituent corporations.[59] New York also requires court approval (with notice to the attorney general) of *sales, leases, and exchanges of all (or substantially all) corporate assets*. New York further prohibits a court from granting approval for this second group of transactions unless it determines that: (1) the transaction is "fair and reasonable" to the corporation; and (2) the corporate mission is promoted.[60]

To argue that a transaction is not "fair and reasonable," advocates could try to find evidence that: the sale price was below fair market value; the seller did not exercise "due diligence" in deciding to sell, selecting the purchaser, and negotiating the terms and conditions of the sale (e.g., that the seller was not diligent in seeking other potential buyers or did not use its bargaining power during negotiations to require the buyer to maintain the corporate purpose, including preservation of women's health services); the entire transaction (not merely the valuation) was not fair and reasonable; or that the seller did not sufficiently consider or preserve other valuable aspects of the business, such as its name and reputation.[61]

To argue that a transaction does not promote the seller's corporate mission, advocates could assert that: (1) the seller does not plan to use the sale proceeds to uphold its charitable mission; and (2) the purchaser does not plan to uphold the seller's charitable mission. In the first case, as previously noted, a nonprofit that collects funds representing that those funds will be used to further the nonprofit's purposes has a continuing duty to use those funds to support those purposes, even upon the sale of the nonprofit. If the use of those funds is no longer consistent with the seller's original charitable mission, a court may forbid the sale.

Advocates could support their argument that the seller does not plan to use proceeds to uphold its charitable mission by showing that the seller intends to use the sale proceeds for other, dissimilar

purposes.[62] It is important to remember that applying the funds to other charitable purposes, no matter how worthy (e.g., to make other hospitals in the system stronger or to provide a different type of needed health care) may still constitute a violation of the seller's charitable mission.[63] This conclusion is based on the community's reliance on a specific service; replacing it with another service does not, therefore, fulfill that hospital's obligations to that community.

In questioning a seller's commitment to upholding its mission, advocates could further ask whether another arrangement, such as an another type of affiliation with a secular entity, would better enable the seller to fulfill its corporate purpose. In the context of the sale of a secular hospital to a religious one, especially one that limits services based on religious rules, it can be argued that selling to an entity that complies with the *Directives* does not advance the seller's secular charitable mission. These arguments are especially strong where there is evidence that the seller had options to sell to or otherwise affiliate with an entity with a more consistent mission.

2. Procedures for Review Vary by State Depending on the Degree of State Regulation

States statutes range from providing extensive to minimal governmental oversight of transactions affecting the functioning of a nonprofit corporation.[64] It is important to note that even when there are not extensive procedures governing particular types of transactions, most state attorneys general can use their general authority granted in the state's nonprofit corporation statutes to proceed. [65] This section outlines three basic models of statutory oversight, and identifies the possible opportunities for advocates' input in each.

a. Extensive Oversight

The most extensive regulation of the conduct of nonprofit corporations generally occurs in the larger, more populous states. These states recognize in their statutes that nonprofit corporations have an obligation to maintain their charitable purposes, and therefore require the attorney general or a court to examine whether a merger, sale, or dissolution will change the nonprofit corporation's purpose.[66] Many of these states also typically require that the state attorney general and/or a court approve of a transaction before it is completed. Under these circumstances, even when advocates do not themselves have the legal authority to challenge a nonprofit's action in court, it is important that they weigh in as early as possible with the attorney general (see Appendix C for attorney general contact information and Appendix D for a sample letter to the state attorney general).

Some states have customs where the attorney general reviews certain transactions before required to by state statute. In New York, for example, where attorney general input and court approval are required for many types of transactions, the practice is that, rather than have the attorney general review the terms and conditions of the transaction when it is filed with the court, corporations provide the attorney general with this information in advance.[67] Therefore, when a nonprofit organization submits a transaction for judicial approval, the attorney general's office can communicate its views (e.g., no objection, endorse, or file an objection) without additional delay, leaving no time for advocates to express their concerns. The custom, however, can also be used to allow the attorney general to identify possible charitable assets concerns and enlist advocates in developing a challenge.

Even when advocates cannot challenge the proposed transaction in court, they should weigh in early with the state attorney general with concerns about the proposal.

Generally, the greater the state oversight of nonprofits, the more likely it is that there will be a forum for advocates to advance their concerns.

States that extensively regulate nonprofit organizations sometimes also require that, if the resulting entity is one that would have required approval or consent of any governmental body, that governmental body will also need to approve the transaction. For example, since significant changes in hospital structure often require approval by a state health department, provisions like this can provide an additional forum for advocates to air their concerns.[68] Some of these related health department regulations require that the merging parties hold a public meeting, providing an excellent opportunity for community education, organizing and resistance.[69]

b. Moderate Oversight

Some states have adopted an intermediate "notice without prior approval" approach: state authorities responsible for ensuring that charities fulfill their corporate purpose or mission must be advised of a proposed transaction and have an opportunity to take some action if they conclude that the nonprofit directors are not fulfilling this mission.[70] These statutes presume that nonprofit directors are acting in the best interest of the nonprofit corporation, and allow attorneys general and courts to take a more "hands-off" approach, rather than vigorously protecting charitable assets and their use.[71]

The primary concern expressed in this intermediate approach is that transactions between nonprofit corporations not be allowed to cause the diversion of assets to for-profit corporations or private hands.[72] A lesser concern is how transactions will affect the charitable mission of the nonprofit. This approach makes certain information that may reveal a change in a nonprofit corporation's charitable purpose optional, rather than mandatory. For example, under the Revised Model Nonprofit Corporation Act, which many states have used as a model for statutes with this intermediate approach, it is optional that the merging parties submit information on how the merger will affect the parties' articles of incorporation or by-laws.[73]

In states that take this approach, advocates are largely dependent on attorneys general to protect the public interest vigorously in the course of a merger. Advocates need to ensure that the appropriate officials are made aware of how the transaction will affect the mission of the nonprofit, and urge the attorney general to raise these concerns to the court with the authority to approve the transaction.

c. Minimal Oversight

Finally, there are states with minimal rules and procedural safeguards (e.g., Illinois), where the goal is to provide consistency with the for-profit business corporation law.[74] These statutes do not require immediate notice, review or supervision of the proposed transaction. They therefore do not consider the unique role of nonprofit corporations, nor their obligation to carry out their stated missions in service to the public. These statutes generally do little to prevent a change in the purpose of a nonprofit corporation.

The Illinois statute, for example, allows a nonprofit corporation to amend its articles of incorporation "to add a new provision or to change or remove an existing provision" without review or approval by the attorney general or a court as to how such an amendment might change the corporation's purpose.[75] States with minimal statutory oversight offer fewer opportunities to initiate a pre-transaction challenge, as well as fewer legal grounds for attorneys general to challenge a transaction. Nonetheless, advocates are encouraged to present their concerns to the attorney general, reminding the attorney general's office of its historic role in overseeing the major activities of nonprofit charitable institutions. Even the Illinois statute, which has few substantive or procedural protections for charitable

assets, has useful language on the nature of charitable assets and the role of the attorney general in protecting the public interest.[76]

Generally, the greater the oversight, the more likely it is that there will be a forum for advocates to communicate their concerns about religious restrictions, and for their concerns to be addressed.

3. State Attorneys General Have Standing to File Lawsuits, and Other Individuals and Groups May Also Have Recourse

The state attorney general usually has standing to enforce the nonprofit corporation law, and he or she may be considered a "necessary party" (also referred to as "indispensable party") to any lawsuit challenging a nonprofit's change in mission.[77] In some states, the attorney general may be required to file suit in some situations. In Florida, for example, a court found that the attorney general must file an action if presented with evidence that a nonprofit's assets are being used for purposes that are inconsistent with its mission as stated in its articles of incorporation.[78]

Attorney general involvement in suits under the nonprofit corporation law is presumed because the attorney general acts on the public's behalf, and any significant change in the operation of a nonprofit is presumed to affect how that nonprofit serves the public. Because the attorney general can bring the resources of the state to bear, and often has experience in these cases, he or she is often best suited to bring a challenge. If the attorney general does not wish to get involved, or does not think that the transaction violates the law, it may become necessary for advocates to identify other individuals or organizations that have the right to challenge in court the proposed action.

The laws governing nonprofit corporations may be especially helpful to individuals and organizations attempting to change the course of a transaction because they provide an opportunity for input where other charitable assets tools discussed later in this report may not. Sometimes an individual or group might not have legal standing to bring a suit (or to join as a party in currently existing suit), but might have other rights under nonprofit corporation laws. For example, New York requires that "interested persons" be notified of and allowed input in court proceedings to determine if a merger should be permitted under the state's nonprofit corporation law.[79] While the New York sale statute does not have a similar notice requirement, it does allow "interested persons" to be heard at the hearing, whether or not they were formally notified of it.[80]

These options may not be as effective for advocates as having standing to become actual parties in a case (since, for example, becoming parties entitles them to discovery of documents), but they provide an important opportunity for input that could affect the outcome (see the New York example in Section III.D. of this report). It is, therefore, very important that advocates make their concerns known to both the court and the attorney general early in the process to ensure that they are notified and able to present their concerns where possible under state nonprofit corporation statutes.

The ability of a particular person or group to participate as a party in a legal action depends on their stake in the outcome, the jurisdiction, the type of transaction at issue, and other factors. The following are possible persons or groups, other than the attorney general, who might be entitled to participate as a party in a legal action under nonprofit corporation law:[81]

Being a party in a lawsuit entitles advocates to discovery of certain documents that could help prove their case.

Hospital donors, former patients, employees, taxpayers, municipalities, other reproductive health service providers, and community members may also be able to challenge the transaction in court.

- **Corporate fiduciaries such as hospital board of directors or officers:** These individuals or groups usually have standing to enforce nonprofit corporation law in matters involving their own corporations.[82]
- **Members of membership corporations:** These individuals or groups usually have standing to enforce nonprofit corporation law in matters involving their own corporations.[83]
- **Groups or individuals with a "special interest" in the corporation,** including donors, patients, former patients, employees, taxpayers, towns and cities (on behalf of the residents), other reproductive health service providers, community members in the hospital's service district, and other beneficiaries: Although "special interest" standing is difficult to gain, courts have granted it in several instances.[84] Furthermore, experts on nonprofit corporations have recommended expanding standing to donors and beneficiaries, given the limited resources of some state attorneys general.[85]

4. Several Types of Remedies are Available for a Nonprofit's Failure to Fulfill its Charitable Mission

The following are remedies that may be available under nonprofit statutes or cases interpreting them:

- In states in which pre-transaction court approval is required, a court could disapprove a transaction in its entirety before it is completed.[86] In states in which no such approval is required, a court could stop (enjoin) the transaction from being completed on the grounds that the transaction violates the nonprofit corporation statute.
- In states in which pre-transaction court approval is required, a court could condition approval of a transaction that otherwise does not advance a secular hospital's corporate purpose on that hospital setting aside funds to maintain its corporate purpose in the community. Such a set-aside could be used, for example, to provide transportation, pay for services at alternative sites, and inform the community that the *Directives* will now apply at the formerly secular institution (see the New York example in Section III.D. of this report).
- If the transaction has already occurred, a court may require payment of restitution and damages to the hospital or a fund established to carry out the now-defunct mission by directors and officers. A court may also remove directors and officers, based on their failure to fulfill their duties of obedience, loyalty, and care, or other violation of the state's nonprofit corporation law.[87]
- If the transaction has occurred, a court may impose modifications to remedy any breach of duty or violation of the nonprofit corporation's mission.
- If the transaction has occurred, a court could void it because it was not submitted for review. A court might invoke this remedy even if the transaction would have been approved had it been reviewed.[88]

B.

Charitable Trust Law Offers Another Basis for a Challenge

1. Charitable Trust Law May Apply to Nonprofit Hospitals

In addition to nonprofit corporation law, charitable trust law may also be used to help advocates protect women's access to reproductive health services. Charitable trust law has the potential to be a very powerful tool in protecting charitable assets: it mandates procedural review, imposes strict limitations on trustees' ability to change a charity's purpose, and provides remedies that may be difficult to gain under the other laws.[89] However, this body of law only applies if the hospital is formally organized as a charitable trust or if courts find that a hospital that is organized as a nonprofit corporation is, under the law, a charitable trust.

The relevant legal question thus becomes: to what extent is a charitable nonprofit hospital corporation a charitable trust? Some authorities have concluded that a hospital that is a nonprofit charitable corporation is also a charitable trust, even if it is not formally organized as a charitable trust.[90] Others assert that it remains unclear whether nonprofit hospitals should be treated identically to charitable trusts when not formally organized as such.[91]

Traditionally, a "trust" is defined as a relationship in which one person or entity manages property for the benefit of another person or entity (the "beneficiary"). The charitable trust is created by a legal document, a trust instrument, which names the director of the trust (the "trustee"), the property, and the purpose for which it is to be used.[92] In the case of a charitable trust, the trustee has a "fiduciary duty" (i.e., a legal responsibility) to use the "corpus" of the trust (e.g., the charity's assets) to help the beneficiaries and carry out the charitable mission.[93] The issue is whether a hospital that is a nonprofit corporation should be treated in the same manner as a charitable trust in this technical sense.

As with any nonprofit charity, a charitable trust is intended to benefit the community at large or some specified portion of the community, not the charitable entity itself, and not specifically named beneficiaries.[94] Because of the similarities between charitable trusts and nonprofit organizations generally, there is support for the argument that any nonprofit charitable organizations, including nonprofit corporations, as holders of assets for the public good, function and should be treated as charitable trusts.[95]

One California case, *Queen of Angels Hospital v. Younger*, has been cited by courts and attorneys general throughout the nation (including in legal arguments in several cases cited in Section III. of this report) in support of the proposition that hospitals that are nonprofit corporations are indeed charitable trusts even when they do not fulfill all the technical requirements of a charitable trust.[96] In *Queen of Angels*, a Catholic nonprofit corporation asked the court to determine whether a long-term lease of hospital facilities to another nonprofit would violate the charitable trust. The hospital's articles of incorporation stated that the corporate purpose was, among other things, establishing ownership, maintaining, and operating a hospital in Los Angeles, California.

The main controversy was whether the hospital could rent out the facility and use the proceeds to establish and operate an outpatient medical clinic to serve the poor and needy, instead of operating a hospital or using these proceeds to operate a hospital. The court held that, since the "primary charitable purpose" was the operation of a hospital, the corporation could not, "consistent with trust imposed upon it, abandon the operation of the hospital business in favor of clinics."[97]

Special protections can apply when a nonprofit hospital that is a charitable corporation *is also found to be a* charitable trust.

Trustees of charitable trusts have very limited discretion to change the purpose for which the assets are used.

This case can be extremely useful in asserting a charitable trust argument in the course of a transaction that threatens women's reproductive health services. Once a nonprofit hospital is treated as a charitable trust, the general argument is twofold: (1) that providing reproductive health services is within the corporate purposes of a nonprofit hospital, and that eliminating these services violates charitable trust laws; and (2) imposing the *Directives* at a non-Catholic or formerly non-Catholic hospital violates the secular or nondenominational corporate purpose of the hospital in violation of charitable trust laws.

2. Standards for Approving a Change in the Mission of a Charitable Trust are Generally Higher Than for a Nonprofit Corporation

A charitable trust must use its assets in a way that is consistent with the restrictions imposed by the governing instrument. Generally, trustees of charitable trusts have very limited discretion in using charitable assets for purposes beyond those specifically mentioned in a trust instrument or articles of incorporation, and any changes in the use of charitable assets need court approval.[98]

Any change in the use of a charitable trust assets must comply with the "*cy pres*" standard. *Cy pres* is Latin for "as near as possible." Under the *cy pres* standard, a charity cannot use its assets for any purpose other than to fulfill its original mission, unless that mission becomes "illegal," "impossible," or "impractical." Once a charitable trust has proven that it can no longer fulfill its mission, it may not use its assets for other purposes, or transfer those assets to another charity, unless that purpose is *as near as possible* to the original purpose.[99] The *cy pres* standard has been recognized by courts for some time, and is now reflected in many statutes that govern charitable trusts.[100]

In some jurisdictions in which courts have determined that nonprofit hospitals are charitable trusts, they have used a slightly different standard than the strict *cy pres* standard. Under a "substantial departure from dominant purpose" or "substantial similarity" test, transactions are not permissible if they result in a hospital substantially departing from its dominant charitable purpose (or if the new purpose is not substantially similar to the original purpose). Some authorities also refer to this test as the *cy pres* standard,[101] while others view it as granting nonprofit corporations more leeway than does the traditional *cy pres* standard.[102] Under this less restrictive standard of *cy pres*, as long as the new purpose is *sufficiently* similar, courts will approve the change, even if it is not the *most similar* of options. Under this test, a court can even approve a change when it has only been shown that it is no longer *appropriate* (not *impossible, illegal* or *impractical*) to fulfill the original mission, which would not be sufficient under the stricter standard.

Even this lesser standard of *cy pres* potentially offers more protection if applied to a charitable trust, as opposed to a nonprofit corporation. The "substantially similar" test might be used under both nonprofit corporation law and charitable trust laws, but because trustees of charitable trusts have less leeway to change the mission of charitable trusts than do boards of directors of nonprofit corporations, a court might apply the "substantially similar" standard more strictly if a hospital is deemed to be a charitable trust than if it is considered to be a nonprofit corporation.

For example, under nonprofit corporation laws, a court may find that a sale of one nonprofit hospital to another nonprofit hospital meets the standard of the nonprofit corporation statute because the purchaser intends to operate a hospital, which is found to be both in the public interest and in the seller's

interest – all that is required under the state nonprofit corporation law. Under charitable trust law, however, a court must take a closer look. The court must first examine the mission of the hospital, and determine if this mission is illegal, impossible, or impractical. If it is not, then the transaction that causes the change in mission will be rejected. If the mission is illegal, impossible, or impractical, the court will determine if this transaction is either as near as possible to the original mission (under the more restrictive *cy pres* standard), or substantially similar to the original mission (under the less restrictive *cy pres* standard). This analysis might include a review of other options the hospital had in attempting to maintain its mission, including other partners or buyers, or alternatives to preserve that mission. A court, finding that the seller had other options, is more likely to impose mission-preserving conditions on the sale, or disapprove it altogether, than if these options did not exist.

3. State Attorneys General Have Standing to File Lawsuits, and Other Individuals and Groups May Also Have Recourse

As a general matter, it is undisputed that state attorneys general, as representatives and protectors of the public, have standing to enforce charitable trusts, and are often required by statute to do so.[103] The main questions, therefore, are: (1) how much discretion do attorneys general have in investigating and enforcing a charitable trust; and (2) can other individuals or other entities also sue to enforce a charitable trust?

While some states' statutes require that the attorney general be involved in any proceeding involving a charitable trust,[104] statutes do not typically require any particular level of involvement or investigative activity. Furthermore, even when the attorney general is involved, that does not mean that he or she will necessarily support an advocate's view. Some attorneys general are significantly more active and interested than others in carrying out their enforcement duties.[105] In fact, the attorney general's lack of interest or resources may make it easier for other groups of individuals to get standing.[106]

As with standing under the nonprofit corporation law, jurisdictions vary, but members of the board of directors (or any other governing body of the charity)[107] or members of the hospital (in the case of membership organizations) usually have standing.[108] Statutes and courts also may grant standing to "any interested party,"[109] or anyone having a "special interest"[110] in the charity, which may include people in the community served by the charity,[111] and donors.[112] Other beneficiaries may also have standing to bring a lawsuit.[113]

Private parties are more likely to gain standing based on having a special interest in a charitable trust if: (1) the disputed actions are extremely harmful to the goal or existence of the charity, and the remedy requested is to address that harm, rather than for money damages; (2) the charity's trustees acted in bad faith, committed fraud, or engaged in other misconduct; (3) the attorney general has failed to protect actively and effectively the public interest; (4) the potential plaintiffs bear a close relationship to the charity, and represent a well defined and limited class of beneficiaries; and (5) there is some "social desirability" in allowing standing.[114]

As with nonprofit corporation law, even in states where only the attorney general has standing, state residents or other individuals or groups are not powerless because they can bring the issue to the attorney general's attention and urge action (see Appendix C for attorney general contact information and Appendix D for sample letter).[115]

4. Stronger Remedies are More Likely Under Charitable Trust Law Than Under Nonprofit Corporation Law

Stronger remedies are more likely under charitable trust law than under nonprofit corporation law. If advocates can successfully argue that a hospital should be governed by strict charitable trust rules, a court may be required to review the hospital's changed circumstances. This strategy is important because in some states, such court review is not required under the nonprofit corporation statutes. Additionally, the court may be more likely under charitable trust laws than under nonprofit corporation laws to disapprove a change in mission that reduces women's access to reproductive health care, if it can successfully be argued that providing those services was central to the hospital's mission. Strict application of charitable trust laws could thus result in the following remedies:

- If a hospital does not seek the required court approval for a change in mission and unilaterally alters its mission, the attorney general may sue to enjoin the act resulting in the changed mission.[116]
- If a court does not approve the changed use in its entirety, the hospital may have to return the donation or set it aside to be used consistent with the original intent.[117]
- Trustees of charitable trusts may be held liable for money damages ("restitution") to the hospital, or to third parties (e.g., some of the "interested parties" described above) under tort or contract claims if they violate their fiduciary duties.[118] Trustees of charitable trusts may be subject under such claims to a higher standard of fiduciary conduct than are nonprofit corporate directors.[119]

Although hospital "conversion" statutes focus primarily on nonprofit hospitals "converting" to for-profits, *many of these statutes also govern nonprofits converting to* other nonprofits.

C.

Nonprofit-to-Nonprofit Hospital "Conversion" Statutes Can Be Very Effective

1. Conversion Statutes Vary in the Type of Transactions They Cover

In the 1990s, there was a wave of takeovers of nonprofit hospitals by for-profit entities, often referred to as nonprofit hospitals "converting" to for-profit status, i.e., where a nonprofit is purchased by, or otherwise transfers some or all of its assets or control to, a for-profit hospital or system.[120] States were concerned that the already existing nonprofit corporation statutes and judicial interpretations of the *cy pres* rule did not sufficiently ensure that the for-profit entity would fulfill the nonprofit's charitable mission. Accordingly, states began enacting laws basically codifying the *cy pres* proceedings and standards specifically for health care entities (as opposed to other nonprofits) to address conversions of nonprofit health care entities to for-profit entities.

Although these laws focus primarily on nonprofit hospitals "converting" to *for-profits*, many of these laws also govern a nonprofit affiliating with *other nonprofits*.[121] As one commentator observed, conversions between nonprofit hospitals raise a similar question to that posed by conversions between nonprofit hospitals and for-profit entities: will the new owner uphold the charitable mission of the original owner?[122]

Since most religiously owned hospitals are nonprofits, these *nonprofit-to-nonprofit* conversion provisions are extreme-

ly important tools because they offer extensive protection for maintaining nonprofit hospitals' corporate missions (see the California example in Section III.E. of this report). This section summarizes some of the most helpful provisions of these conversion statutes for protecting women's access to health services.

Conversion statutes[123] cover a wide range of transactions, including: the sale, transfer, lease, exchange, option, conveyance, gift, merger, joint venture or other disposal of a substantial amount of assets or control. Some conversion laws cover transactions only when a substantial amount (typically a minimum of 20 percent) of ownership or control is transferred to another entity. Some conversion statutes apply to nonprofit health care plans and HMOs as well.

It is always important to review the conversion statutes carefully for the scope of coverage, since some statutes may have different requirements when the hospital is being converted into a *nonprofit* than when it is being converted into a *for-profit* entity. Furthermore, different rules may apply depending on the type of nonprofit being converted. For example, Florida, Indiana, Kansas, North Carolina, and Nevada only cover transactions involving the conversion of a *public* hospital (i.e., their conversion laws do not cover *private* nonprofit conversions to either for-profit or nonprofit entities), while Oregon's statute explicitly excludes review of *public* hospital conversions from its nonprofit-to-nonprofit conversion law.[124] Other states (e.g., Nebraska and Wisconsin) exempt transactions in which the overtaking nonprofit shares certain characteristics with the hospital being converted (e.g., both entities have substantially similar purposes).[125]

2. Standards For Approving a Change in Charitable Mission Under Hospital Conversion Laws Are Generally Similar to the Charitable Trust Standards

Some conversion statutes generally state that assets must be used in a manner consistent with the seller's purpose,[126] which some authorities consider to be a general codification of the *cy pres* standard (explained in this report in Section II.B.2.). Some also require that hospital trustees conduct an assessment of "community needs," or "community benefits"[127] and/or the impact on access for underserved populations,[128] which may be especially useful to advocates trying to preserve reproductive health services. Most laws require the "appropriate" use of sale proceeds, and some require a public hearing to determine how sale proceeds will be used. Some laws require that the transaction support and promote health care in the community. These provisions are often more rigorous when the overtaking entity is for-profit than when it is nonprofit (e.g., requiring that foundations be created with funds to be set aside for charitable purposes).

3. Conversion Statutes Create Procedures for Review of Proposed Transactions and Penalties for Violations[129]

Most nonprofit conversion laws require some form of public disclosure of a proposed transfer. Disclosure may vary from newspaper notices to the submission of official transaction documents to the attorney general for inclusion in the public record. Some laws require a public hearing prior to the consummation of a conversion transaction for the

Conversion statutes often require extensive public disclosure of a proposed conversion.

Conversion laws often require the hospital to provide assurances that underinsured and uninsured people will continue to have access to health care after the transaction.

purpose of informing the community of the conversion plan, or allowing public comment by affected community members.

Most laws require the state attorney general to review the terms of the transaction, the bidding process, and the identity of the parties to ensure that the transaction is fair and in the community interest, prior to giving approval. In these states, the attorney general usually reviews an independent expert's evaluation of whether the entity with the assets is receiving "fair market value" for the converted assets, in addition to reviewing the transaction to make sure that the entity with the assets has demonstrated due diligence in entering the transaction, and has acted without a "conflict of interest." The attorney general's office or other approving state agency (e.g., health department) often must evaluate whether there are adequate assurances that under-insured and uninsured individuals will continue to have access to care at the hospital after the transaction is completed.

Conversion laws also usually require that a state official or agency continually monitor the hospital after the transaction is completed to ensure compliance with all agreements concerning access to care. These agreements typically require that a certain level of charity care or certain specified services are maintained.

Rather than providing a basis for a lawsuit, conversion laws typically focus more on procedural mechanisms for review of a proposed transaction and on administrative remedies. Yet some grant standing to appeal a regulatory decision to any person who was a "party" to an administrative decision regarding a conversion and was aggrieved.[130]

Some laws impose fines for failure to notify the attorney general or to any other appropriate state agency that a conversion transaction is taking place. Some also impose fines for failure to comply with the agreements mentioned above (regarding access or charity care). And some also give the attorney general the power to suspend or revoke a hospital's license and void a transaction if it was made without permission, or if the agreements mentioned above were not honored. Many laws require that money be set aside to support the charitable purposes of the entity being converted.

Section III

Five Case Studies: How Charitable Assets Laws Can Prevent, Modify, or Dismantle a Transaction

The following case studies show how the tools described in Section II. have been used to help preserve access to women's reproductive health services. Each provides its own unique lesson on working with state attorneys general and/or courts, community organizing, and using charitable assets laws.

A.

Dismantling the Merger of Elliot Hospital and Catholic Medical Center (Optima) (Manchester, New Hampshire)

This case study illustrates that charitable assets laws can be successfully applied even after the completion of a merger. Due in part to community and physician concerns regarding one merger partner's abortion policy, the Attorney General stepped in to require both the secular and Catholic hospitals to consider how the merger affected the charitable mission of each – ultimately resulting in a rare "divorce." The Attorney General also held the hospitals to the same *cy pres* standard as would apply to a formal charitable trust.

In September 1994, the supporting organizations of two community hospitals in Manchester, New Hampshire – Elliot Hospital ("Elliot") and Catholic Medical Center ("CMC") – merged to form Optima Health, Inc. ("Optima").[131] Elliott was a nonprofit public secular institution,[132] while CMC was a nonprofit private Catholic institution.[133] Optima was to operate both facilities, with technically separate, yet identical, Boards of Trustees ("the Board") to govern both Elliot and CMC and set policies for the institutions, without being under the auspices of any religious group.[134]

In 1996, the Board discovered that physicians at Elliot were performing elective abortions in cases of fetal abnormalities, as had been the practice prior to the merger.[135] The diocese that controlled CMC had been told prior to the affiliation that Elliot's practices were consistent with CMC's, and threatened to pull out of Optima.[136] In response, in November 1997, the Board adopted a policy that complied with the *Directives*, banning all abortions at all Optima hospitals, including Elliot, except where necessary to save the life of the pregnant woman.[137] Elliot's staff members and the community expressed their displeasure with this new policy, and brought the matter to the attention of the New Hampshire Attorney General.[138]

In 1998, four years after the merger, the Attorney General issued a report based on an investigation of these concerns.[139] The Attorney General found authority under New Hampshire statutory and common law to oversee charitable trusts (defined broadly to

"[A] public charity must deal with its community honestly and is required to fully and completely disclose facts relevant to it charitable mission."

Optima Report

include nonprofit charities) and ensure that they are operating in accordance with their purposes (the approach outlined in Section II.B. of this report).[140] New Hampshire's nonprofit corporation statute did not require attorney general review (making it a minimal review state as described in Section II.A.), and the state did not have a conversion statute (described in Section II.C.) in effect at the time.[141] The Attorney General, however, cited the historic role of his office in protecting the public's interest in matters concerning nonprofit corporations.[142]

Citing precedent from around the nation, the Attorney General noted that while a charitable corporation is not identical to an actual trust in its governance, it, like a trust, is required to use its assets to further its corporate purposes.[143] He also noted that the doctrine of *cy pres*, which forbids a charity from changing its purpose or mission except in certain circumstances, has been applied to charitable hospitals, even when they are corporations and not trusts in the technical sense.[144] The Attorney General further noted that a charity is required to seek court permission to change its mission and that a court must ensure that the overall purpose of the charity is fulfilled if the mission does change, despite its inability to carry out its specific purpose.[145]

The Attorney General first explained some of the underlying duties that charities have when interacting with those they serve – the public – based on the favored status that charities receive from the state:

> [Nonprofit charitable institutions] are bound by a social contract to the local community. Through their trustees and management, Elliot and CMC have a fiduciary duty to preserve and to protect their charitable assets and to ensure that those assets are used for purposes consistent with the fundamental charitable missions of the respective institutions.
>
> . . .
>
> Stated simply, this means that a public charity must deal with its community honestly and is required to fully and completely disclose facts relevant to its charitable mission. A charitable institution may not properly exclude the community, or the Director of Charitable Trusts, either by design or inadvertence, from having a voice in the fundamental decisions affecting the continuing capacity of the institution to fulfill its historic charitable mission.[146]

The Attorney General found that Optima failed to uphold the respective charitable missions of the two hospitals because it failed to define the fundamental mission of the entity resulting from their affiliation. The key indication of this failure was Optima's attempt to apply the *Directives* to its secular facility.[147] The Attorney General went on to note that no court would have authorized such changes on the record before it because nothing in the record established that it was "impossible, impracticable, illegal, obsolete or ineffective, or prejudicial to the public interest" for the institutions to maintain their charitable missions.[148] In other words, the strict *cy pres* requirements would not have been met.

The Attorney General next addressed Optima's failure to inform, and receive input from, the public regarding the potential impact of the transaction on each hospital and the community. The Attorney General asserted that important information was withheld

from the public, and that community input and discussion were not sought. The Attorney General further found that certain representations were made by Optima as to how the hospitals were to be run, and were then flouted.

The Attorney General listed six areas which strongly merited community input: consolidation and elimination of services; the transfer of corporate authority to Optima (a regionally based entity) and removal of local control; the impact of the transaction on the governance, structure and control of the hospitals; the impact of the application of the *Directives* on abortion policies, and confusion regarding the application of the other *Directives* restricting other services such as family planning and surgical sterilization; failure to consider how the affiliation of a secular and religious hospital under the control of one entity affects the traditional respective missions of each; and clinical and ethical implications resulting from the affiliation, since Elliot clearly had practices in conflict with the *Directives*.[149]

According to the Attorney General, this failure to consider the impact of the *Directives* on Elliot and Optima as a whole resulted in "the formation – without any public examination – of a successor entity whose attributes [were] defined on an ad hoc basis, without any consideration of the fundamental and distinct charitable missions of either hospital."[150] While commending its service to the Manchester community, the Attorney General nonetheless condemned Optima for its failure to consider the community it serves in its decisions regarding the affiliation of CMC and Elliot, as well as its failure to identify in the intervening four years since the transaction "the 'shared values' which supposedly unify" the organizations.[151] The Attorney General determined that Optima's actions resulted in confusion over governance and policies related to the *Directives*, therefore casting serious doubt as to whether Elliot and CMC's relationship with Optima furthered the respective institutional missions.[152]

Optima's failure to consider community concerns regarding the merger resulted in "seeming disregard for the preservation of CMC's traditional commitment to religious health care" and the "vague and ad hoc application of the Catholic ethical doctrines to the delivery of health care services – including certain abortion procedures – at Elliot Hospital."[153] Optima's actions effectively transformed CMC from an acute care religious hospital with a "unique spiritual mission to provide health care" to the "non-acute care element of a larger secular hospital organization."[154]

The attempt to restrict abortions at Elliot based on the *Directives* was characterized as expressing "a fundamental lack of understanding and respect for the totality of the *Ethical Directives* as a guide to the religious underpinnings of Catholic health care."[155] The Attorney General noted that Optima's policy prohibiting abortion at Elliot was insufficient to fulfill CMC's unique Catholic mission, and at the same time sacrificed Elliot's "traditionally secular approach to medicine."[156] Calling the existing status of Optima "not sustainable," the Attorney General concluded that Optima's actions had to be reviewed "in and by the public" and by the Probate Court.[157]

In response to the Attorney General's report, Optima created two separate "special" boards to review independently the hospitals' respective missions, and to determine whether these missions could be fulfilled by this affiliation, or by an affiliation with another hospital in the area.[158] Optima's plan also directed that these boards include public representatives and seek community input.[159] After the boards made some attempt to identify how they could maintain their independent identities, they ultimately decided

Optima's policy prohibiting abortion at Elliot sacrificed Elliot's "traditionally secular approach to medicine."

Elliot and CMC are now separate; Elliot is once again a secular facility and is free from religious restrictions.

to dissolve Optima and disentangle the consolidated hospital operations. Elliot is once again a secular facility, and is free from religious restrictions.[160]

There are some especially noteworthy features of this case:

- The case involved protection of charitable assets, with one of the main issues being the religious nature of one institution and application of the *Directives* to a second, secular institution after the merger, especially as related to women's reproductive health services;
- Community advocacy directed at the Attorney General resulted in a positive result without the Attorney General ever going into court to ask the court to address whether the merger should have been allowed. Likewise, there was no need for a private lawsuit, and therefore no need for anyone in the community to try to gain standing;
- The Attorney General argued that a strict *cy pres* standard should be applied to nonprofit hospital corporations, even when there is no formal charitable trust; and
- The hospitals decided to "divorce" (an unusual result especially because of its difficulty in implementation, but increasingly common[161]).

B.

Modifying the Proposed Consolidation of Elizabeth General Medical Center and St. Elizabeth Hospital (Elizabeth, New Jersey)

This case shows how a group of advocates can gain standing in a case by alerting an attorney general of their concerns. It also shows that hospitals may be willing to work with advocates to achieve a satisfactory result, even when an attorney general is not aggressively pursuing a remedy. It further establishes the principle that the application of the *Directives* at a formerly secular hospital can change the mission of the hospital.

In 1998, two nonprofit hospitals in Elizabeth, New Jersey – one secular (Elizabeth General Medical Center ("EGMC")) and one Catholic (St. Elizabeth Hospital ("St. Elizabeth")) – took formal steps to consolidate into a single hospital. This hospital was to be Catholic and operated under the *Directives*.[162] As a result, tubal ligations and abortions, once provided at EGMC, would no longer be available.[163] In March 1999, EGMC agreed to pay two million dollars to a local Planned Parenthood clinic to provide tubal ligation counseling (but not tubal ligations themselves) and to support other family planning services already provided by Planned Parenthood.[164]

New Jersey's nonprofit corporation statutes allow for consolidations without any prior judicial review or notice to the attorney general (and is therefore considered a state with minimal statutory oversight, as described in Section II.A.).[165] Nevertheless, the New Jersey Attorney General's office has often acted to pro-

tect charitable assets even without such statutory mandates, acknowledging its duty to oversee both strict charitable trusts (discussed in Section II.B.) and charitable corporations, specifically to protect the assets of charitable corporations in the course of consolidations.[166]

The Attorney General began investigating the proposed transaction, requiring the hospitals to submit documentation pertaining to: whether the consolidation would result in a substantial departure from the charitable purposes of either or both of the two hospitals; whether the hospitals' boards of directors exercised "reasonable care" in performing their fiduciary duties and deciding to consolidate; whether assets exchanged by the hospitals were fairly valued; how the hospitals would account for any restricted assets held by the hospitals; and whether these restricted assets would be used in accordance with their restrictions after the consolidation.[167]

Shortly thereafter, a coalition of women's rights groups (including the American Civil Liberties Union of New Jersey, New Jersey Right to Choose, and the New Jersey Religious Coalition for Reproductive Choice) became aware of the proposed consolidation through a publication that catalogued potential transactions that posed threats to women's reproductive health services.[168] The coalition contacted the Attorney General and the hospitals, expressing concern that the consolidation would result in a loss of EGMC's assets that were used to provide abortions and tubal ligations and that the set-aside for Planned Parenthood was inadequate.[169]

Several months later, the Attorney General's office concluded its review of the proposed consolidation and determined that it would not object to the consolidation, provided that: (1) the hospitals ask the court to determine whether the two hospitals' charitable missions were adequately served under the proposed plan; (2) the hospitals send copies of the papers the hospitals filed with the court to any "interested persons" who had previously objected to the consolidation in writing; (3) these "interested persons" be given an opportunity to present their concerns in writing to the court; and (4) the court review the consolidation pursuant to the appropriate legal standard.[170]

Based on this position, the hospitals sought court authorization to proceed with the consolidation.[171] In August 1999, a state court judge directed the Attorney General to respond to the hospitals' Application to Consolidate, also ordering that interested parties receive the papers that the hospitals filed with the court and have an opportunity to express to the court the reasons for their opposition to the consolidation.[172]

Having received notice of the court proceeding, the women's rights coalition members chose not merely to respond in writing. Instead, they, along with individually named plaintiffs ("interveners"), officially moved to "intervene" in the court review of the consolidation.[173] The interveners alleged standing to intervene on the basis of having a "special interest" in the matter.[174] The organizations had members who lived in Elizabeth and who wanted their community to have access to reproductive health services, methods to prevent HIV, and self-determination in end-of-life decisions. Individual interveners included the Chair of the Department of Obstetrics and Gynecology at EGMC, whose practice would be affected by the consolidation, and Elizabeth residents of childbearing age who had used, or planned to use, reproductive health services provided by EGMC.[175]

The ultimate goal of the interveners was to stop the consolidation, but that appeared unlikely. The interveners' claims, therefore, included remedies that presumed that the consolidation would be approved, yet attempted to lessen the impact on women's access to reproductive health services. Urging the applica-

In New Jersey, a women's rights coalition joined with other individuals to become actual interveners in the lawsuit.

A New Jersey court found that the women's rights advocates had standing and that the court had to determine whether the secular hospital adequately provided for the reproductive health services that were going to be lost pursuant to the Directives.

tion of the strict *cy pres* standard, the interveners petitioned the court for an order requiring: (1) that EGMC provide information to the interveners regarding its decision to become Catholic (i.e., why it was impossible for it to remain secular); (2) that EGMC account for the value of the charitable assets of EGMC devoted to the provision of secular health care, especially concerning the services (e.g., tubal ligations and abortions) that were no longer to be provided; and (3) that EGMC set aside a certain portion of those assets appropriately reflecting their value to enable those secular services to proceed elsewhere.[176]

The hospitals and the Attorney General's office opposed the intervention. The Attorney General asserted that the submission of written comments was sufficient, and that formal intervention would unnecessarily burden an already lengthy, major financial transaction.[177] The Attorney General further claimed that it had adequately protected the public's rights, because it had carefully reviewed the facts of the case and had found that "the public interest with regard to the charitable assets of these corporations [would] not be adversely affected."[178]

The Court nevertheless found that the interveners had standing, and that the Court had to determine whether the hospital had adequately provided for reproductive health services that were going to be lost pursuant to the *Directives*.[179] The Court also chastised the Attorney General for his failure to be more involved in overseeing the consolidation, stating that the consolidation "was being dumped in the court's lap for the court to hear from people the Attorney General's office didn't want to deal with."[180]

The Attorney General, the interveners, and the hospitals appeared to agree with the general principle that a charitable corporation must use its assets to fulfill its charitable mission, and that the Attorney General has an obligation to review a transaction to ensure that this use of assets occurs. The parties disagreed however, on four issues arising from the application of the nonprofit corporation law and the strict charitable trust analysis (Sections II.A. and II.B. of this report) to this case.

The first point of disagreement among the parties concerned EGMC's charitable mission. The interveners asserted that EGMC's purpose was to be a secular hospital that provided all health services needed by the community, including a certain level of reproductive health services.[181] The Attorney General and the hospitals argued that EGMC's mission was generally to operate an acute care hospital. The Attorney General claimed that in the absence of language in the hospital's article of incorporation (or other governing document such as a trust) regarding the specific services the hospital was to provide, the services to be provided should be reviewed by the state health department, not the attorney general.[182] The hospitals asserted that EGMC's set-aside funds for Planned Parenthood fulfilled its purpose of serving certain reproductive health needs, and in making this assertion, admitted that EGMC did, in fact, have a purpose that encompasses providing reproductive health services.[183]

A second point of contention among the parties concerned the appropriateness of judicial review. The Attorney General and the interveners agreed that court review was appropriate.[184] The hospitals, however, claimed that court review was not necessary, contending that because the hospitals are nonprofit corporations, and not charitable trusts, judicial review was unnecessary as long as the hospitals followed nonprofit corporation law.[185]

The third point of disagreement concerned the appropriate standard by which the transaction was to be judged. The interveners argued for strict application of the charitable trust law and its *cy pres* standard.[186] The Attorney General and the hospitals instead urged the court

to hold the hospitals to a lesser standard than that typically applied to trustees of charitable trusts.[187] The interveners argued that: (1) a valid charitable trust was created when EGMC delineated certain charitable purposes in its certificate of incorporation (e.g., to be a secular hospital) and the state authorized EGMC to operate for those purposes; (2) it would be " impossible" for the new consolidated entity to satisfy these secular purposes; and (3) EGMC's certificate of incorporation indicated an intent to provide all health services needed by community members.[188] The Attorney General and the hospitals, meanwhile, asserted that the only issue was whether the hospital directors fulfilled their duties of care and loyalty to the corporation under New Jersey's nonprofit corporation law.[189] According to them, the standard applied to charitable trusts did not apply here.

The final and ultimate point of disagreement was whether or not the court should approve the consolidation. The interveners obviously opposed it, asserting that it resulted in "a significant change of [EGMC's] charitable identity and mission as a secular institution" in violation of New Jersey law.[190] The enforcement of the *Directive*s, leaving Elizabeth residents without access to certain reproductive health services, was of special concern.[191] The interveners also alleged that the Planned Parenthood set-aside for the eliminated services was not enough to fulfill EGMC's charitable mission.[192]

The Attorney General and the hospitals contended that the consolidation should be approved.[193] The Attorney General neither supported nor opposed the interveners' request that additional funds be reserved for direct services and transportation, but stated that the standard did not require the payment because the consolidated entity would carry on the respective missions of both St. Elizabeth's and EGMC – the operation of an acute care hospital.[194]

Late in 1999, before the court ruled on all these issues, the hospitals settled with the interveners under the following terms: (1) EGMC created an additional trust of $400,000[195] that was to be used to fund abortion and tubal ligation services and assist patients with transportation to providers offering these services; (2) EGMC strengthened the contract with Planned Parenthood to state explicitly that these trust funds may be used for abortion counseling; and (3) payment of attorneys' fees to interveners' counsel.[196] In the final order approving the settlement terms, the court recognized that the "the proposed transaction constitutes a change of charitable mission for EGMC," but nonetheless approved the settlement; this judgment implied that, even though the EGMC mission had changed, the court approved the deal only because the original Planned Parenthood deal and settlement with the interveners addressed some of the lost services.[197]

This case is a useful model for advocates because it shows that:

- The attorney general can protect charitable assets under his or her common law authority by: (1) reviewing the transaction; and (2) having a court review the transaction, even when no such procedure is required under the state's nonprofit corporation statute. Furthermore, this court encouraged attorney general oversight of the assets of nonprofit hospitals to protect the public, and expressed harsh disapproval when the Attorney General did not do this job adequately;
- Advocates should initiate early contact with the attorney general's office because it may encourage the attorney general to seek court involvement. In this case, early involvement also resulted in the Attorney General asking the court

In approving the final settlement, the New Jersey court recognized that "the proposed transaction constitutes a change of charitable mission" for the secular hospital.

Advocates can gain an increase in funds set aside for reproductive health services and attorneys' fees even without court resolution of all legal issues.

(and the court ordering) that the advocates receive notice of court proceedings and have an opportunity to be heard, even when there was no explicit statutory authority for those steps;[198]

- A court can allow advocates to intervene formally, even when their request is opposed by the hospitals and the Attorney General. This opportunity is especially important because it can give advocates access to documents to support their arguments and a role in the settlement discussions;
- A hospital's change from secular to religious is significant enough to change its charitable mission, thus warranting attorney general and court review, and some action by the secular hospital to ensure that its mission is preserved before a court approves a transaction;[199]
- Advocates can gain an increase in funds set aside for reproductive health services and attorneys' fees even without court resolution of all legal issues; and
- The experience in this case prompted a quicker and positive resolution in two subsequent cases. An attorney at the law firm that represented St. Elizabeth in the EGMC case was also involved on behalf of two secular hospitals in these two religious-secular transactions. A coalition interested in preserving women's rights wrote to the CEOs of those two hospitals expressing concern about service elimination. These attorneys then contacted the coalition and they all agreed on a proposed settlement to help ensure that the services would be available elsewhere to women in their communities.[200] Though as a result of these mergers the hospitals themselves are no longer allowed to provide women's health services forbidden by the *Directives*, funds set aside by these court-approved agreements helped to ensure that the services would be available elsewhere to women in their communities.[201] The hospitals did not even go into court to get approval until they already had the coalition's commitment that the coalition would not oppose the transaction and would write letters representing that commitment to the court. Without opposition from the coalition or the Attorney General, court approval of the transactions were granted.[202]

It is important to note that after this case, New Jersey enacted a nonprofit-to-nonprofit conversion law, which will facilitate appropriate pre-transaction review of changes in charitable missions if similar situations arise in that state in the future.[203] It requires: notice to the attorney general and health department, court approval, along with the right to appear in court for everyone who participates in public hearing and access to all documents filed with the attorney general and health commissioner.

C.

Preventing the Proposed Service Consolidation at Good Samaritan Hospital and St. Mary's Hospital (West Palm Beach, Florida)

As this transaction shows, even years after a merger, charitable assets laws can be used to free a hospital from the *Directives*. After a merger between a Catholic and a non-Catholic hospital, the Catholic-controlled entity managing the Catholic hospital decided to eliminate

inpatient services at the Catholic hospital. A proactive Attorney General argued that this elimination of services violated the Catholic hospital's charitable mission, resulting in a court review of the missions of both hospitals. The review resulted in approval of the sale of both hospitals to a secular for-profit corporation that will likely restore reproductive health services at the secular one.

In 1994, St. Mary's Hospital (Catholic) and Good Samaritan Hospital (secular) merged under the management of Catholic-controlled Intracoastal Health Systems, Inc. ("IHS").[204] As a condition of the merger, Good Samaritan agreed to be bound by the *Directives*. Before the merger, Good Samaritan provided inpatient tubal ligations, and to ensure that this important service continued after the merger, a separate nonprofit subsidiary was created that allowed physicians to continue to perform tubal ligations at Good Samaritan.[205] In October of 1999, however, maternity services were consolidated at St. Mary's, which did not allow tubal ligations.[206] Accordingly, postpartum tubal ligations were no longer available, even though non-postpartum tubal ligations continued at Good Samaritan through the subsidiary.

In 2000, citing financial necessity, IHS announced its intent to eliminate all acute care services at St. Mary's (the largest charity care provider in the county), and consolidate them at Good Samaritan.[207] This type of change was not governed by Florida's conversion statute (the statutes discussed in Section II.C. of this report), nor by any procedural requirements under Florida's nonprofit corporation statute (i.e., as discussed in Section II.A.).[208] This proposal was met with serious opposition from the Florida Attorney General's office and members of the public, who were concerned that IHS' decision was inconsistent with St. Mary's mission to serve the poor.[209]

As a result, the Attorney General's office launched an extensive investigation, resulting in a voluminous report issued in December 2000.[210] During this period, both hospitals sought alternative buyers and/or financial support.[211] In January 2001, when these attempts appeared futile, the Attorney General filed a complaint against the hospitals, IHS, and others, asking the court to keep St. Mary's open as a full-service independent hospital, as it had been before it had merged with Good Samaritan.[212]

In his complaint, the Attorney General asserted that the consolidation plan resulted in a change in corporate mission; therefore, the Attorney General was required to ensure that the new mission would be consistent with the hospitals' previous missions and that court review of the plan was appropriate.[213] The Attorney General argued that the hospitals were both charitable corporations and charitable trusts. He asserted his authority to enforce the charitable trust to represent the interest of Palm Beach County citizens.[214]

The Attorney General asked the court to apply a strict *cy pres* analysis – allowing modification of the trust only if it became *impossible* for the hospital to fulfill its mission; he further asked the court to ensure that the hospitals' assets be used in a manner that "most closely accomplishes" that mission or purpose.[215] Additionally, the Attorney General asked the court to revoke IHS's articles of incorporation and charter, since the decision to close St. Mary's was inconsistent with IHS's mission to further St. Mary's charitable mission of serving the poor.[216] In addition, the Attorney General sought dissolution of IHS, alleging that the IHS trustees caused the assets of the hospitals to be dissipated by failing to exercise honest judgment, good faith and ordinary business care (care an "ordinarily prudent person" in a similar position would use)

The Florida Attorney General asserted that the proposed consolidation required court review and approval.

Under the settlement, the secular hospital no longer needed to be bound by the Directives.

in performance of their duties, thus also invoking arguments described in Section II.A.1.b. of this report.[217]

The hospitals asserted (as did some of the hospitals in the other case studies in this section of this report) that they were not charitable trusts.[218] They sought a court declaration that the Attorney General lacked authority to bring these claims, and sought an injunction prohibiting the Attorney General from interfering with the execution of the consolidation plan.[219] The court, however, ruled in favor of the Attorney General, finding that the alleged facts were sufficient to support his claims.[220] This ruling meant that the Attorney General could continue to present his case, not that the judge ultimately agreed with the Attorney General's position.

In early March 2001, as part of court-ordered pretrial mediation, the Attorney General and the hospitals reached a settlement in which IHS agreed to sell both hospitals to one of two for-profit companies.[221] Under the terms of the settlement, both hospitals agreed to maintain their existing programs and services for ten years. In addition, while the new owner was required to adhere to the *Directives* at St. Mary's, it did not need to apply them at Good Samaritan.[222]

As this report went to press, the implementation of the agreement was still undergoing legally mandated governmental review (e.g., federal antitrust clearance, license transfer, etc.), and supervision by the Attorney General to ensure that the charitable missions of both hospitals were being followed. One modification to the current practice is that the proposed purchaser intends to return maternity services to the secular hospital thus reinstating post-partum tubal ligations.[223] Women's rights advocates are working to ensure that reproductive health services are provided, especially for poor women, in West Palm Beach.[224]

This case is interesting for advocates on several levels:

- The Attorney General relied on charitable trust and general nonprofit corporate law arguments, even though there were no specific nonprofit corporation procedural requirements or conversion statutes that applied to the facts of the case;
- Transactions that appear to affect only Catholic facilities may ultimately affect their non-Catholic partners; ironically, the attempt to close a Catholic hospital resulted in the pending sale of its formerly secular partner, thus freeing the secular hospital from the *Directives*;
- A proactive Attorney General, along with the efforts of community activists, helped motivate a Catholic-controlled health care system to search for appropriate buyers, rather than allowing the hospital that served the poor to stop providing inpatient services; and
- A secular nonprofit's mission to provide women's reproductive health services may be better served by a secular *for-profit* than a religious *nonprofit*.

D.

Modifying the Proposed Sale of St. John's Hospital by Episcopal Health Services to Catholic Health Services (Smithtown, New York)

This case illustrates how an established working relationship with enforcement authorities can increase the effectiveness of advocacy groups. In this case, advocates were in a position to reduce the potential harm to women's reproductive

health services in the course of a proposed sale because of their ongoing relationship with the attorney general's office.

In 1999, citing long-standing financial difficulties, Episcopal Health Services ("EHS") announced its intention to sell one of its two hospitals (St. John's Hospital), located in Smithtown, New York, to Catholic Health Services ("CHS"), a New York based regional operator.[225] St. John's Hospital had no religious restrictions on the delivery of health care. Community advocates expressed concern that the sale would leave Smithtown with no hospital-based reproductive health services.[226]

As required under New York's nonprofit corporation sale statute, EHS notified the Attorney General of the sale, which was subject to court approval and attorney general review.[227] Under this law, a court may approve the sale of "all, or substantially all," of a nonprofit corporation's assets if it is satisfied: (1) that the consideration and terms of the transaction are fair and reasonable to the corporation, and (2) that the purposes of the corporation or the interests of the members will be promoted by the sale.[228] New York courts had previously rejected using a strict common law *cy pres* analysis in the face of this statutory language granting more leeway to corporate directors to approve a sale that changes a corporation's mission. Hence the arguments in Section II.B. of this report could not be used here.[229]

In 1999, the Attorney General's office created a reproductive rights unit, increasing cooperation and communication between the Attorney General and advocates.[230] At the request of this office, Family Planning Advocates of New York State ("FPA"), with assistance from the National Women's Law Center, submitted a letter expressing its concerns about the loss of reproductive services and urging the Attorney General to take these concerns into account in its review of the sale.[231]

The FPA letter cited New York precedent that provided guidance in evaluating the role of the attorney general and the court in protecting charitable assets. The FPA letter focused largely on an earlier state trial court decision finding that a nonprofit hospital seller has a duty to select the purchaser who could best uphold the seller's charitable mission and should abandon its mission *only* when it has no alternatives, noting also that the seller must exercise due diligence in deciding to sell, selecting the purchaser, and negotiating the sale terms.[232] The FPA letter also cited precedent that merely using sale proceeds to provide other health care is not necessarily adequate to fulfill a hospital's charitable mission.[233]

Noting EHS's failure to find a better alternative purchaser and its elimination of services, FPA urged the Attorney General to investigate these concerns and to require EHS to protect the community from some of the harmful effects of the sale.[234] FPA requested that EHS be required to create a trust to pay for the services that would be eliminated, transportation to those services, and the dissemination of information regarding the impact of the sale. The Attorney General conditioned its approval of the sale on EHS's agreement to notify the community of the reduction of services, and provide a toll-free hotline informing consumers about where these services could be obtained.[235] The Court approved the sale with those conditions.[236]

This case is helpful to advocates because it shows that:

- The advocates' input to the Attorney General on the impact of the transaction on reproductive health services helped form the Attorney General's position in the court process; and

The New York Attorney General required the secular hospital to notify the community of the service reduction and provide a toll-free hotline informing consumers about where the services could be obtained.

The California proposed conversion regulations specifically require an assessment of the proposed transaction's effect on access to reproductive health services.

- The court used its interpretation of the nonprofit corporation law, rather than applying a strict *cy pres* standard, to require the secular hospital to take some steps to reduce the negative impact of the service restrictions.

E.

Modifying the Proposed Operation of Sutter Merced Medical Center by Mercy Hospital and Health Services (Merced, California)

This case illustrates how women's health advocates used a nonprofit-to-nonprofit conversion statute to encourage the California Attorney General to preserve women's reproductive health services. The Attorney General approved the transaction only on the conditions that: (1) current reproductive health services were maintained; and (2) any proposed service reductions due to religious bans be subject to attorney general approval to ensure the continued availability of reproductive health services elsewhere.

California is one of the states with a strong nonprofit-to-nonprofit conversion statute (see Section II.C. of this report).[237] New conversion regulations require that the mandated attorney general pre-transaction review and approval specifically include an assessment of the proposed transaction's effect on access to reproductive health services.[238]

The first Catholic hospital transaction completed under the statute involved a Catholic hospital (Mercy) seeking to take over the lease and business operations of a county-owned hospital (Sutter). Under the proposed transaction, Sutter would be allowed to continue providing tubal ligations, contraceptive services, family planning, and emergency contraception.[239]

Advocates (including the California Women's Law Center and Consumer's Union) used the community public hearings required under the statute and regulations to gain assurances that these services would not be eliminated at either hospital in the future.[240] Mercy officials felt they could not make these promises because proposed changes in the *Directives* could result in service elimination.[241]

The Attorney General conditioned his consent to the transaction on Mercy agreeing to submit a plan for his review that would "ensure the continued availability of any such reproductive health service" if a change in the *Directives* resulted in a reduction in reproductive health services.[242]

This case is significant because:

- It is one of the first transactions threatening women's reproductive health services that has been subject to review under a nonprofit-to-nonprofit conversion statute;
- California's new regulation specifically requires the pre-transaction review process to consider the effect of a transaction on access to women's reproductive health services. Advocates can use these California provisions as a model for proposed statutes and regulations in their own states; and
- The case underscores the uncertainty that many Catholic hospitals currently face in light of the possible tightening of rules in the *Directives* concerning sterilizations and other services (as discussed in Section I. of this report).

Section IV

Key Factors in Determining the Success of Possible Challenges

In evaluating the likelihood of success of a particular challenge to a specific transaction, there are several factors to consider, including:

- Changes in the day-to-day operation or overall management of the institutions. The more significant the change, the more likely will be the success of an argument that there is a change in purpose. Key factors that could affect daily operations or management include:
  - A shift in *power and control* over the institution to a nationally based hospital system (for example, the sale of a local hospital, resulting in reduced community representation or decision-making);
  - A significant change in the *scope of services* to be offered by the institution (for example, an affiliation of two hospitals that results in one facility terminating acute care inpatient services and becoming an outpatient facility, or an affiliation that results in the closing of one hospital's obstetrics/gynecology unit or emergency room); and
  - A change in the *location* of the hospital that affects the community it serves (for example, the closing of one campus or branch of a hospital to keep another campus or branch in a different location open).
- The history of the hospital, and whether it was opened for a particular purpose (for example, to fill a need in a certain community or area of care);
- Whether there are large donors to the hospital who gave with a particular goal in mind or restricted the use of their funds;
- Whether major fund-raising drives included any statements that indicated that the funds solicited would be used to provide reproductive health services or comprehensive health services;
- Whether any assurances were made to government officials before the transaction to secure its approval. Mergers, consolidations, sales, additions or eliminations of services, often require pre-approval from state health departments, state and federal antitrust agencies, and other governmental authorities. To obtain approval, a hospital may have to assert that it plans to maintain the purpose and mission of the hospital after the transaction;
- Whether hospital policies and missions were clearly communicated to staff and/or whether there is a record of staff confusion over policies;

A shift in the hospital's power and control from the local community to a national or regional system may result in a change in mission.

- Whether the hospital has provided any forum for community input to address the institutional changes;
- The strength of the state's statutes, as well as any cases or other legal authorities (e.g., attorney general opinions, law review articles) interpreting those laws (as described in Section II.);
- The likelihood of the state attorney general's involvement in investigating or challenging a transaction, or seeking to undo a completed transaction, as indicated by the office's legal protection of access to reproductive health care, or past level of activity on issues involving charities, health care or patients' rights;[243] and
- Hospital staff and community resistance to the transaction, which can be crucial in building support for the idea that the hospital belongs to the community, and has a duty to provide for the entire community's health needs.

Section V

Conclusion

State laws governing charitable assets serve as useful weapons in challenging transactions that restrict women's reproductive health services. When a hospital changes its mission and eliminates women's reproductive health services, advocates are encouraged to raise their concerns to their state authorities as early as possible. As the case studies illustrate, success can be achieved by strong advocacy and knowledge of these legal tools. Raising these issues and creating checkpoints to a transaction may derail it entirely, or result in modifications that will preserve or protect women's reproductive health services.

Appendix A

Glossary

Note: This glossary defines terms as they are used in this report. It is always important, however, to check a jurisdiction's statutes, case law and other authority to determine whether that jurisdiction has its own definition for a particular term. Unless otherwise indicated (e.g., "as used in this report"), the definitions are paraphrases from Black's law dictionary, *available at www.westlaw.com.*

affiliation: As used in this report, affiliation is a general term describing any formal relationship or integration among health care providers.

assets (used interchangeably with property, unless otherwise indicated): Assets are property. A person's or corporation's assets would include anything that person or corporation owns, including stocks, bonds, real estate, furnishings, equipment, intellectual property rights, legal claims or causes of action, etc.

board of directors: See **corporate fiduciaries.**

business corporation: A corporation organized for the purpose of carrying on a business for profit.

by-laws, corporate: Rules that corporations or other entities adopt for their internal governance. Corporate by-laws define the powers and obligations of various officers, persons, or groups within the corporate structure and provide rules for how corporate decisions are made and how business must be conducted. Most state statutes require that every corporation adopt by-laws. Compare with **by-laws, medical staff.**

by-laws, medical staff: Written by-laws approved by the governing authority of a hospital, which are generally required by state statutes, federal regulations, and the national organization that accredits hospitals. The medical staff by-laws generally must define the organizational structure of the hospital's medical staff and its relationship to the governing body; give criteria for admission, reappointment, and advancement of the medical staff; and generally provide rules governing the rights and responsibilities of the medical staff.

certificate of incorporation: See **corporate articles of incorporation.**

charitable assets laws: As used in this report, state statutes, cases, or other legal authority requiring that charitable institutions use their assets to fulfill their charitable missions.

charitable corporation: A type of nonprofit corporation that is formed for charitable purposes.

charitable trust: As traditionally defined, a trust is a legal entity in which one person or entity (the "trustee") manages property for the benefit of another person or entity (the "beneficiary"). In the case of a charitable trust, the trustee has a "fiduciary duty" (i.e., a legal responsibility) to use the corpus of the trust, e.g., the assets of the charity, to help the beneficiaries and carry out the charitable mission. In the case of a charitable trust, the intended beneficiaries are the community at large or some specified portion of the community, but not

specifically named persons. Because of the similarities between charitable trusts and nonprofit organizations generally, there is support for the argument, as discussed in the report, that nonprofit charitable organizations, as holders of assets for public good, function and should be treated legally as charitable trusts, even if they do not fulfill all of the technical requirements of a charitable trust (e.g., are organized as a corporation and not a trust, and are not created with a trust instrument).

common law: Used to describe legal principles developed from custom, usage, and case law, as opposed to those found in statutes.

consolidation: The combination of two or more corporations into a new corporation. The two or more consolidating corporations cease to exist, and the new corporation takes on the assets, powers, and liabilities of the original corporations. In the Florida case in Section III. of this report, however, consolidation refers to consolidation of services at one hospital, not this definition. Compare to **merger**.

conversion: As used in this report, refers to a transaction in which a nonprofit hospital is purchased by, or otherwise transfers some or all of its assets or control to, either a different type of nonprofit entity (a nonprofit-to-nonprofit conversion) or a for-profit one (a nonprofit to for-profit conversion).

corporate articles of incorporation, articles of incorporation (used interchangeably with certificates of incorporation): The basic set of documents filed with the appropriate government agency, usually the secretary of state, regarding the incorporation of a business or organization; sometimes also called "certificates of incorporation," "articles of organization," "articles of association," "corporate charter," or other similar names. The content of these documents varies according to state law, but they usually include the corporation's name, the period of existence, the purpose and powers of the corporation, and other conditions of operation. In most jurisdictions, corporate existence begins with the filing of the articles of incorporation with the secretary of state.

corporate charter: A document issued by a state agency or authority, commonly the secretary of state, granting a corporation legal existence and right to function as a corporation; or may mean document filed with the secretary of state on incorporation of a business (e.g., those documents described in **corporate articles of incorporation).**

corporate fiduciaries (used interchangeably with governing body, board of directors, or trustees of a charity): People or entities who govern a charity, manage its assets, and who must exercise a standard of care and loyalty in such management activity imposed by law.

***cy pres*:** Latin meaning "as near as possible." Under the *cy pres* standard for interpreting whether a change in charitable mission is legally permissible, a charity cannot use its assets for any purpose other than to fulfill its original mission, unless that mission becomes "illegal," "impossible," or "impractical."

Directives (used interchangeably in this report with Ethical and Religious Directives): As used in this report, the *Directives* are rules created by the National Conference of Catholic Bishops to provide guidance to Catholic health care institutions and professionals. The *Directives* forbid Catholic health care institutions and professionals from providing treatment that is at odds with Catholic doctrine and give a detailed delineation of what health care is prohibited.

director: As used in this report, a corporate fiduciary or member of a nonprofit governing body (e.g., board of directors, which is sometimes referred to as board of trustees).

dissolution: The ending of a corporation's legal existence. Procedures for corporate dissolution are provided for in state statutes.

enjoin: Use a court order called a writ of injunction to require a person to perform, or to prevent or stop from performing, some act.

hospital: For convenience, "hospital" in this report may sometimes include other types of health care entities, e.g., managed care companies.

interveners (or intervenors): A person or entity who is not originally a party to a legal proceeding or suit who voluntarily comes into the case with the permission of the court.

inter vivos trust: A trust created by an instrument that becomes operative during the lifetime of the person creating the trust, as opposed to a testamentary trust, which would only take effect on that person's death.

joint venture: A legal entity, a partnership, engaged in a particular commercial enterprise. In general, the parties to a joint venture all contribute assets and all share risks. The purpose of a joint venture is limited and the creation of the joint venture does not mean that there is a continuing relationship among the parties in activities beyond the specific commercial enterprise (e.g., sharing an MRI machine).

membership organization or corporation: A form of nonprofit organization in which the members have jurisdiction over certain corporate acts.[245]

merger: A transaction in which one corporation is absorbed into the other. The absorbed corporation loses its legal identity and ceases to exist, while the surviving corporation retains its name and identity and acquires the assets, powers, liabilities, and franchises of the absorbed corporation.

nonprofit corporation (synonymous with "not-for-profit corporation"): A corporation organized for a purpose besides making profits that does not distribute any of its income to its members, directors, or officers. In the context of hospitals, most nonprofit charitable corporations are also tax exempt under Section 501(c)(3) of the Internal Revenue Code.

quasi cy pres*:** A term used in New York cases, meaning that when a nonprofit corporation undergoes a fundamental corporate change, the corporation's assets may only be transferred to entities engaged in "substantially similar activities" to those of the corporation transferring the assets.[246] Compare to ***cy pres.

registration: As used in this report, registration means providing state officials with information about a charitable organization. Most states require charities that intend to solicit donations within the state to register with a state agency that regulates charitable organizations.

religious corporation: A nonprofit corporation formed for the purpose of maintaining or propagating religion or of supporting religious services in a particular religious tradition, and owning and administering real and personal property for religious uses. In many jurisdictions, there are special rules for religious corporations.[247]

secular: For convenience, the term is used in this report to refer to the health care entity that does not impose religious restrictions, even though some of these entities may have a religious affiliation.

sponsor: Entities that have the authority to approve the sale, merger, or dissolution of the sponsored corporation; to select and remove the board of directors; to adopt an institutional philosophy and mission; to approve the sale, mortgage, or encumbrance of property; and to control amendments of the articles of incorporation and corporate by-laws.[248] The sponsor of a Catholic entity is a religious community, diocese, or religious lay body that has a canonical, legal, ethical and moral relationship with a Catholic ministry.[249]

standing: A concept used to determine whether or not people or entities are sufficiently affected by a controversy that is properly resolved by a court; if these people or entities are sufficiently affected, they are said to "have standing."

tax-exempt organization: An organization exempt from federal income tax under Section 501 of the Internal Revenue Code. A corporation may be exempt from tax under Section 501(c)(3) if it is organized and operated exclusively for one or more of the following purposes: religious, charitable, scientific, testing for public safety, literary, educational, prevention of cruelty to children or animals, or to foster national or international sports. If a hospital is formed as a formal charitable trust (as opposed to a nonprofit corporation), it could also be exempt under 501(c). See also **nonprofit corporation.**

trustees, board of trustees: see **corporate fiduciaries.**

trust instrument: The formal document that creates a trust and contains the powers of the trustees and the rights of the beneficiaries.

Appendix B

Information to Gather for Presentation to the Charities Enforcement Agencies

Listed below are the types of documents that contain information that may be relevant in assessing the viability of a challenge to a health care provider transaction based on a charity's misuse of charitable assets. The relevance of these documents will, of course, vary from case to case. Also included is guidance concerning where to find these documents. Federal and state freedom of information laws allow advocates and others access to government documents that could help mount a charitable assets challenge. For specific federal and state freedom of information provisions, see the website of the National Freedom of Information Coalition (NFOIC), at http://www.nfoic.org/web/index.htm. This appendix is largely based on a memorandum prepared for the National Women's Law Center by Pamela A. Mann (Pamela A. Mann, LLC), formerly Chief of the Charities Bureau in the Office of the New York Attorney General.

I. Governing documents

These documents state the hospital's purpose and describe its organizational and financial structure.

A. Types of documents

1. **Nonprofit Corporation Documents:**
   a. **Certificate of incorporation/articles of incorporation/ corporate charter, plus any amendments:** The secretary of state will usually be the agency that holds these public documents, which can be obtained by contacting that office (see Appendix C). In some states, these documents may be available online. Alternatively, the documents may be obtained through a corporate service. In states in which hospitals must report to an agency with oversight of health care institutions, it is likely that the hospital's governing documents will also be available from that agency as well.

   b. **Registration and annual financial statement:** Approximately 40 jurisdictions require nonprofits and/or their fund-raisers to submit reports to the attorney general (or other state regulatory authority) before operating in that state. Hospitals may be exempt from these requirements if they file extensive reports with another state agency, such as the department of health. Hospitals that are required to register with the attorney general will usually have to submit their governing documents as part of the original registration and annual financial statement. Some states also publish reports based on data in annual filings.[250]

2. **For entities organized as trusts:** In the case of an entity organized as an actual trust, the trust indenture (i.e., the document establishing the trust) will be the governing document. Any amendments usually need to be made with court approval. A charitable trust in this strict sense will normally be available as part of a hospital's registration with the attorney general or the health department.

3. **Entities established by state legislative action:** Some hospitals are established by acts of the state legislature. In such cases, the charters are usually available in legislative records. In addition, information about the hospital's corporate purposes may be gleaned from any legislative debate or other legislative history.

B. Information contained in governing documents that will help determine whether there has been a violation of laws governing charitable assets

1. **The purposes clause** will define the scope of the organization's powers and the purposes for which it was incorporated. As discussed in this report, it will usually be broadly cast. The purposes clause will be the foundation of any argument that the transaction should be disapproved because it does not benefit the corporation (a phrase generally interpreted to mean "not furthering the purposes of the corporation").
2. **Limitations on the trustees' power** (for example to alter the purpose of the organization) will be contained in the governing documents.
3. **The state of incorporation,** which determines the body of law governing the transaction. Usually the state of incorporation is held to govern corporate changes, even if the hospital facility is in another state.

II. Financial information

These documents describe how the hospital gets and spends its funds. In addition to providing information on whether the hospital is using its funds as it has represented to the public, the documents provide information on the financial health of an institution. This information may be very important if hospital officials claim that they need to enter into a transaction that may change their secular mission based on the hospital's poor financial status. Actual records may be able to be used to show that the hospital is in sufficiently strong financial condition that it does not need to enter into the transaction. Advocates should check reports for the three previous years and track changes; losses could be explained by accounting tricks, e.g., writing off three years of bad debt in one year. These records may also be important evidence that although the secular hospital is soliciting contributions based on claims that it is going to continue to be a viable independent hospital, hospital officials know, based on this financial information, that the hospital will need to close or affiliate. These documents may also show conflicts of interest, indicating that hospital officials were not acting in consideration of the charity's best interest and the community served.

A. Types of documents

1. **Informational tax returns.** Every nonprofit secular hospital must file a yearly tax return with the IRS, called Federal Form 990, or in the case of a private foundation, Federal Form 990PF. Some returns are now available on the IRS's website (http://www.irs.ustreas.gov) or on a website called guidestar (www.guidestar.com). They are also on file with the attorney general or, if the hospital is exempt from filing with the attorney general, they may be on file with the state health department. Hospitals must provide copies of some of these forms on request.
2. **Audited financial reports.** These documents are required as part of state financial filings, in the case of larger hospitals. Depending on the registration requirements and exemptions found in particular state laws, these will be on file with the attorney general or the health department.
3. **Particular financial analyses required of hospitals.** In some states that highly regulate hospitals (e.g., New York), various summaries, projections, and audit results will be part of a hospital's ongoing reporting obligation. The health department will do periodic reports to assess whether the hospital's ability to continue delivering adequate medical services has been, or is likely to be, jeopardized by financial problems, particularly where the hospital has been experiencing financial difficulties.

4. **Annual reports.** Most nonprofit organizations, including hospitals, produce annual reports of their accomplishments and finances for their donors, foundation funders, and the general public. These typically contain some financial information in summary form. These reports are likely to be self-serving.

5. **Public statements may also contain information concerning the hospitals' financial health, planned construction, etc.** Newspaper articles, as well as news releases and the hospital's own website may provide a wealth of information.

B. Information contained in financial documents

1. **Restricted fund balances.** Gifts received for restricted purposes (grants, endowment funds, and private gifts for particular purposes) as well as expenditures for restricted purposes must be accounted for separately in the hospital's financial records. These restricted funds may be specifically limited to use for reproductive health services, serving community needs, or may include any restriction that arguably prohibits it from use in connection with the new transaction.

2. **The financial health of the hospital.** As previously noted in this report, the financial health of each hospital is likely to be relevant. Revenues from particular programs, comparative data over the years, etc. should be available in the IRS Form 990 for successive years.

3. **The names and addresses of members of the board of directors** of the hospital must be included in the IRS Form 990, as well as compensation received by any member of the board of directors. Knowing who is on the board may help determine if any private interests are being served by the transaction, e.g., if a member of the board of directors is connected to a business that will benefit by the transaction or if the two hospitals have directors in common. Also, the notes to audited financial statements should identify any transactions that involve individuals or groups that may have an interest in the transactions (and therefore should be examined to see whether there are any conflicts of interests that could be used to support a challenge that the assets were being used to benefit those individuals or groups rather than the charitable mission). In addition, advocates may recognize the name of an individual who is particularly sympathetic to women's health issues whom they may want to enlist in protecting women's reproductive health services.

4. **Salary information and outside consultant information.** Nonprofit organizations must list the compensation of the five most highly paid employees and the five most highly paid independent contractors. Here again, this information may be useful in disclosing the existence of any private motives for a proposed transaction.

III. Programmatic information

Information concerning specific services that the hospital claims it provides may be helpful in a challenge to a health care transaction. When a hospital represents to the public that it will fulfill a certain role in the community, and gains advantage based on those representations (grants, individual donations, or other community support), failure to fulfill that role may violate the laws governing charitable assets.

A. Sources of information

1. **Charitable solicitations to the public,** whether via direct mail, advertisements, or the hospital website, will often contain information about the hospital programs. Similarly, newspaper articles, press releases, and reports made to state and federal funding sources will all contain information about the hospital programs. These should be available from the hospital public information office, the state or federal agency and/or the Internet.

2. **The application for tax-exempt status of the hospital (known as the Form 1023)** will contain a list of planned and current programs. The disclosure provisions of the Internal Revenue Code require that a public charity provide the 1023 application to any member of the public upon request; failure to do so subjects the public charity to fine.

B. Information contained in programmatic documents and other hospital communications with the public

1. **References in charitable solicitations to programs relating to reproductive health** will strengthen the argument that the hospital has promised to provide such services. It will also strengthen the argument that funds donated in response to such a solicitation were given for the purposes of providing reproductive health services.

2. **Public statements concerning the hospitals' programs, merger plans, etc.** will be useful in assessing the need for the transaction and whether the hospitals have been straightforward in their public representations concerning the transaction, as noted in the case studies described in Section III. of this report, especially the Optima report (relying on such statements in charging the participants in the Optima merger with a breach of their "duty of candor"). Hospitals may also disclose other alternatives that they considered and rejected, without good cause, that *would* have furthered its charitable purpose.

3. **Statements or policies by hospital officials concerning the purpose and mission of the hospital** may also be found in hospital corporate by-laws, hospital medical staff by-laws, hospital operating or administrative manuals, and specific departmental (e.g., obstetrics/gynecology) manuals. Sometimes the very name of the institution establishes its mission in the eyes of the public, for example, "The Kensington Women's Hospital."

4. **"Patient rights" brochures and other information provided to patients and prospective patients.** There are federal and state laws requiring that patients be informed about certain aspects of the way the hospital provides services, including: the right to be informed about alternatives to treatment, emergency care, some obstetrical care, and end-of-life issues, and any institutional religious or ethical objections to providing certain types of care. This information is often provided directly to patients as part of their admissions material, or is available to prospective patients and is posted in various locations throughout the hospital.

5. **The hospitals' representations to the IRS** in their applications for tax-exempt status may be useful in strengthening the argument that the hospitals are obligated to continue providing certain services, since the IRS relies on this information in determining whether an entity is entitled to exemption from tax.

IV. Miscellaneous sources of information

A. Investigative files at federal or state agencies

As noted at the beginning of the appendix, the federal and state "freedom of information" acts allow public access to a wide variety of documents maintained by state and federal agencies concerning hospitals. Some of these laws preclude disclosure when an investigation is open, but will allow it when the investigation is completed. Among the state and federal agencies that might have files on hospitals are: agencies administering Medicaid and Medicare, the state attorney general and the state health department.

B. Court files relating to claims against hospitals, or prior actions of hospitals subject to court approval

Such documents may include financial information, representations about past and projected programs, accreditation, etc.

C. Statements made in other public forums

Hospital brochures, speeches by hospital administrators, anniversary commemorations, dedications and statements at other types of ceremonies should also be consulted. The goal is to show that the institution made representations and promises to the public and that the public supported the institution based on those promises.

D. Independent investigative reports (e.g., newspaper, advocacy groups)

Several advocacy groups also issue helpful reports.[251]

Appendix C

State Charities Enforcement and Information Agencies

The following list includes contact information concerning state agencies responsible for oversight of charities, including nonprofit hospitals and other health care entities. The left-hand column on the list below identifies offices to contact to report possible problems with the conduct of a charity, for example, if a hospital whose mission is to provide a full range of health services to the community stops providing reproductive health services. The right-hand column identifies offices to contact for publicly available documents about the charity's business practices. The National Women's Law Center gathered this contact information in November, 2000 from three websites: www.naag.org, a website maintained by the National Association of Attorneys General; www.nonprofits.org/library/gov/urs/o_appndx.htm, an appendix of www.nonprofits.org, which is maintained by the Evergreen State Society; and www.sos.state.md.us/sos/charity/html/otstates.html, a list of state charities contacts collected by the Maryland Office of the Secretary of State. More updated information can be obtained from these websites directly.

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable Bill Pryor Attorney General of Alabama Alabama State House 11 South Union Street, Third Floor Montgomery, AL 36130 tel: 334-242-7300 website: www.ago.state.al.us charities contact: Rhonda Lee Barber, Consumer Affairs Division tel: 334-242-7320	Consumer Affairs Division, Rhonda Lee Barber (see left)
Honorable Bruce M. Botelho Attorney General of Alaska P.O. Box 110300 Diamond Courthouse Juneau, AK 99811-0300 tel: 907-465-3500 website: www.law.state.ak.us charities contact: Daveed Schwartz tel: 907-276-8554	Daveed Schwartz (see left)

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable Janet Napolitano Attorney General of Arizona 1275 West Washington Street Phoenix, AZ 85007 tel: 602-542-5025 website: www.attorneygeneral.state.az.us	Secretary of State Charitable Organizations 1700 West Washington Street, 7th Floor Phoenix, AZ 85007 tel: 602-542-6670 contact: Karie Rae Pesserillo
Honorable Mark Pryor Attorney General of Arkansas 200 Tower Building 323 Center Street Little Rock, AR 72201-2610 tel: 800-482-8982 website: www.ag.state.ar.us charities contact: Office of the Attorney General Consumer Protection Division tel: 501-682-6150 contact: Shellie L. Wallace, Assistant Attorney General	Consumer Protection Division, Shellie L. Wallace (see left)
Honorable Bill Lockyer Attorney General of California P.O. Box 944255 Sacramento, CA 94244-2550 tel: 916-445-9555 website:www.caag.state.ca.us	Registry of Charitable Trusts Office of the Attorney General P.O. Box 903447 Sacramento, CA 94203-4470 tel: 916-445-2021 email: caag.state.ca.us/charities
Honorable Ken Salazar Attorney General of Colorado Department of Law 1525 Sherman Street, 7th Floor Denver, CO 80203 tel: 303-866-4500 fax: 303-866-5691 website: www.ago.state.co.us	Secretary of State 1560 Broadway, 2nd Floor Denver, CO 80202 tel: 303-894-2200
Richard Blumenthal Attorney General of Connecticut P.O. Box 120 Hartford, CT 06141-0120 tel: 860-808-5318 fax: 860-808-5387 website: www.cslnet.ctstateu.edu/attygenl David Ormstedt Public Charities Unit Assistant Attorney General tel: 860-808-5030	

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable M. Jane Brady Attorney General of Delaware Carvel State Office Building 820 North French Street Wilmington, DE 19801 tel: 302-577-8400 website: www.state.de.us/attgen Attorney General Civil Division The Wilmington Tower Wilmington, DE 19899 tel: 302-577-2500	Office of the Attorney General, Civil Division (see left)
Robert Rigsby District of Columbia Corporation Counsel 441 4th Street, NW Washington, DC 20001 tel: 202-724-1526	Department of Consumer and Regulatory Affairs 941 N. Capital Street, NE Washington, DC 20002-4259 tel: 202-442-4513
Honorable Robert A. Butterworth Attorney General of Florida The Capitol Tallahassee, FL 32399-1050 tel: 850-487-1963 fax: 850-487-2564 website: legal.firn.edu charities contact: Ronnie Greenmen tel: 850-410-3705 fax: 850-487-4177	Florida Dept. of Agriculture and Consumer Services 407 South Calhoun Tallahassee, FL 32399-0800 tel: 850-922-2972 contact: Rudy Hamrick
Honorable Thurbert E. Baker Attorney General of Georgia 40 Capitol Square, SW Atlanta, GA 30334-1300 tel: 404-656-4585 fax: 404-657-8733 website: www.ganet.org/ago/	Securities and Business Regulation 2 Martin Luther King, Jr. Drive #802 West Tower Atlanta, GA 30334 tel: 404-656-4910 contact: Lori Young
Honorable Earl I. Anzai Acting Attorney General of Hawaii 425 Queen Street Honolulu, HI 96813 tel: 808-587-3100 website: www.state.hi.us/ag/	Dept. of Commerce & Consumer Affairs P.O. Box 40 Honolulu, HI 96810 tel: 808-586-2727

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable Alan G. Lance Attorney General of Idaho 700 W. Jefferson Street P.O. Box 83720 Boise, ID 83720-0010 tel: 208-334-2400 fax: 208-334-2530 website: www2.state.id.us/ag charities contact: Attorney General of Idaho Business Regulation Division Statehouse, Room 210 Boise, ID 83720 tel: 208-334-2400	Office of the Attorney General, Business Regulation Division (see left)
Honorable Jim Ryan Attorney General of Illinois James R. Thompson Center 100 West Randolph Street Chicago, IL 60601 tel: 217-785-2771 website: www.ag.state.il.us charities contact: Office of the Illinois Attorney General Charitable Trust and Solicitations Bureau tel: 312-814-2595	Office of the Attorney General, Charitable Trust and Solicitations Bureau (see left)
Honorable Steve Carter Attorney General of Indiana Indiana Government Center South Fifth Floor 402 West Washington Street Indianapolis, IN 46204 tel: 317-232-6201 fax: 317-232-7979 website: www.state.in.us/attorneygeneral charities contact: Office of the Indiana Attorney General Consumer Protection Division tel: 317-232-6201	Office of the Attorney General, Consumer Protection Division (see left)

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable Tom Miller Attorney General of Iowa 1305 East Walnut Street Des Moines, IA 50319 tel: 515-281-5164 fax: 515-281-4209 website: www.state.ia.us/government/ag Office of the Iowa Attorney General Consumer Protection Division 1300 East Walnut Street Hoover State Office Building Des Moines, IA 50319 tel: 515-281-5926	Office of the Attorney General, Consumer Protection Division (see left)
Honorable Carla J. Stovall Attorney General of Kansas 120 SW 10th Avenue, 2nd Floor Topeka, KS 66612 tel: 785-296-2215 fax: 785-296-6296 website: www.ink.org/public/ksag	Ron Thornburgh Secretary of State First Floor, Memorial Hall 120 SW 10th Avenue Topeka, KS 66612
Honorable Albert Benjamin Chandler III Attorney General of Kentucky 1024 Capital Center Drive Frankfort, KY 40601 tel: 502-696-5300 website: www.law.state.ky.us email: attorney.general@law.state.ky.us charities contact: Office of the Attorney General Consumer Protection Division tel: 502-696-5396 contact: Mary Daily	Office of the Attorney General, Consumer Protection Division (see left)

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable Richard P. Ieyoub Attorney General of Louisiana State of Louisiana State Capitol, 22nd Floor Baton Rouge, LA 70804-9005 tel: 225-342-7013 fax: 225-342-7335 website: www.ag.state.la.us charities contact: Department of Justice 301 Main Street #1250 Baton Rouge, LA 70801 tel: 225-342-2753 contact: Sonja Anderson	Sonja Anderson, Department of Justice (see left)
Honorable G. Steven Rowe Attorney General of Maine 6 State House Station Augusta, ME 04333 tel: 207-626-8800 website: www.state.me.us/ag	Department of Professional and Financial Regulation Charitable Solicitation Registration 35 State House Station Augusta, ME 04333-0007 tel: 207-624-8624 contact: Marlene McFadden email: marlene.m.mcfadden@state.me.us
Honorable J. Joseph Curran Jr. Attorney General of Maryland 200 Saint Paul Place Baltimore, MD 21202-2202 tel: 410-576-6300 email: OAG@oag.state.md.us website: www.oag.state.md.us	Office of the Secretary of State Charitable Organizations Division State House Annapolis, MD 21401 tel: 410-974-5534
Honorable Tom Reilly Attorney General of Massachusetts One Ashburton Place Boston, MA 02108-1698 tel: 617-727-2200 website: www.ago.state.ma.us charities contact: Richard Allen, Assistant Attorney General, Public Charities Division tel: 617-727-2200	Richard Allen, Public Charities Division (see left)

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable Jennifer Granholm Attorney General of Michigan G. Mennen Williams Bldg., 7th Floor P.O. Box 30212 525 West Ottawa Street Lansing, MI 48909-0212 tel: 517-373-1110 fax: 517-373-3042 email: miag@ag.state.mi.us website: www.ag.state.mi.us charities contact: Attorney General Charitable Trust Section P.O. Box 30214 Lansing, MI 48909 tel: 517-373-1152 contact: Marion Gorton, Administrator	Marion Gorton, Charitable Trust Section (see left)
Honorable Mike Hatch Attorney General of Minnesota State Capitol, Suite 102 St. Paul, MN 55155 tel: 651-296-6196 fax: 651-296-9663 email: attorney.general@state.mn.us website: www.ag.state.mn.us charities contact: Office of the Attorney General Charities Division 445 Minnesota Street, #1200 NCL Tower St. Paul, MN 55101-2130 tel: 651-296-6172 contact: Cyndi Nelson	Cyndi Nelson, Charities Division (see left)
Honorable Mike Moore Attorney General of Mississippi Department of Justice P.O. Box 220 Jackson, MS 39201-0220 tel: 601-359-3680 website: www.ago.state.ms.us	Mississippi Secretary of State Charities Registration P.O. Box 136 Jackson, MS 39205-01366 tel: 601-359-1633 or (toll free) 888-236-6167 contact: Kathy French

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable Jeremiah W. Nixon Attorney General of Missouri Supreme Court Building 207 West High Street P.O. Box 899 Jefferson City, MO 65102 tel: 573-751-3321 fax: 573-751-0774 website: www.ago.state.mo.us charities contact: Missouri Attorney General tel: 573-751-1197 contact: Kimberly Haddix	Kimberly Haddix (see left)
Honorable Mike McGrath Attorney General of Montana P.O. Box 201401 Helena, MT 59620-1401 tel: 406-444-2026 fax: 406-444-3549 website: www.doj.state.mt.us/ago	Secretary of State Room 225 Capitol Station Helena, MT 59620 tel: 406-444-3665
Honorable Don Stenberg Attorney General of Nebraska 2115 State Capitol Post Office Box 98920 Lincoln, NE 68509-8920 tel: 402-471-2682 fax: 402-471-3297 website: www.nol.org/home/ago	Secretary of State 2300 State Capitol Lincoln, NE 68509-4608 tel: 402-471-2554
Honorable Frankie Sue Del Papa Attorney General of Nevada 100 North Carson Street Carson City, NV 89701-4717 tel: 775-684-1100 website: ag.state.nv.us	Secretary of State Capitol Complex Carson City, NV 89710 tel: 775-687-5708

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable Philip T. McLaughlin Attorney General of New Hampshire State House Annex 25 Capitol Street Concord, NH 03301-6397 tel: 603-271-3658 fax: 603-271-2110 website: webster.state.nh.us/nhdoj Department of Justice Charitable Trust Division 33 Capitol Street Concord, NH 03301-6397 tel: 603-271-3591 contact: Terry Knowles, Registrar	Department of Justice, Charitable Trust Division (see left)
Honorable John Farmer Attorney General of New Jersey Richard J. Hughes Justice Complex 25 Market Street P.O. Box 080 Trenton, NJ 08625 tel: 609-292-8740 fax: 609-292-3508 website: www.state.nj.us/lps	New Jersey Division of Consumer Affairs Charities Registration Section 124 Halsey Street, 7th Floor P.O. Box 45028 Newark, NJ 07101 tel: 973-504-6529
Honorable Patricia Madrid Attorney General of New Mexico P.O. Drawer 1508 Santa Fe, NM 87504-1508 tel: 505-827-6000 fax: 505-827-5826 website: www.ago.state.nm.us	transfer of hospitals to private entities tel: 505-827-6010 Charitable Organizations Registry Office of the Attorney General P.O. Drawer 1508 Santa Fe, NM 87504-1508 tel: 505-827-6693 contact : Daniel Moore
Honorable Eliot Spitzer Attorney General of New York Department of Law The Capitol 2nd Floor Albany, NY 12224 tel: 518-474-7330 website: www.oag.state.ny.us charities contact: Department of Law Charities Bureau 120 Broadway, 3rd Floor New York, NY 10271 tel: 212-416-8400 contact: Karin K. Goldman	Karin K. Goldman, Charities Bureau (see left)

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable Roy Cooper Attorney General of North Carolina Department of Justice P.O. Box 629 Raleigh, NC 27602-0629 tel: 919-716-6400 fax: 919-716-6750 email: agjus@mail.jus.state.nc.us website: www.jus.state.nc.us	Department of the Secretary of State Division of Facility Services/ Solicitation Licensing Section 2 S. Alisbury St. P.O. Box 29633 Raleigh, NC 27626-0622 tel: 919-807-2214 fax: 919-807-0220 contact: Lionel Randolph
Honorable Wayne Stenehjem Attorney General of North Dakota State Capitol 600 East Boulevard Avenue, Dept. 125 Bismarck, ND 58505 tel: 701-328-2210 fax: 701-328-2226 website: www.ag.state.nd.us/ndag/default.htm	Secretary of State State of North Dakota 600 East Boulevard Avenue Bismarck, ND 58505 tel: 701-328-3665 or 800-352-0867, ext. 83665
Honorable Betty D. Montgomery Attorney General of Ohio State Office Tower 30 East Broad Street Columbus, OH 43215-3428 tel: 614-466-4320 website: www.ag.state.oh.us charities contact: Office of the Attorney General Charitable Foundation Section 101 E. Town Street, 4th Floor Columbus, OH 43215 tel: 614-466-4188 contact: Kathy Spang	Kathy Spang, Charitable Foundation Section (see left)
Honorable W. A. Drew Edmondson Attorney General of Oklahoma 2300 North Lincoln Boulevard, Suite 112 Oklahoma City, OK 73105 tel: 405-521-3921 website: www.oag.state.ok.us	Office of the Secretary of State 2300 North Lincoln Boulevard, Suite 101 Oklahoma City, OK 73105-4897 tel: 405-521-3049 contact: Darlene Adams
Honorable Hardy Myers Attorney General of Oregon Justice Building 1162 Court Street NE Salem, OR 97310 tel: 503-378-4400 website: www.doj.state.or.us	Oregon Department of Justice Charitable Activities Section 1515 SW 5th Avenue #410 Portland, OR 97201 tel: 503-229-5725 fax: 503-229-5120 email: charitable.activities@doj.state.or.us

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable Mike Fisher Attorney General of Pennsylvania 16th Floor Strawberry Square Harrisburg, PA 17120 tel: 717-787-3391 email: info@attorneygeneral.gov website: www.attorneygeneral.gov	Charitable Trusts and Organizations tel: 717-783-2853 fax: 717-787-1190 email: charities@attorneygeneral.gov Department of State Bureau of Charitable Organizations 124 Pine Street, Third Floor P.O. Box 8723 Harrisburg, PA 17105 tel: 717-783-1720 contact: Karl Emerson, Director
Honorable Sheldon Whitehouse Attorney General of Rhode Island 150 South Main Street Providence, RI 02903 tel: 401-274-4400 fax: 401-222-1331 website: www.riag.state.ri.us charities contact: John Murphy Special Assistant Attorney General ext. 2357	Department of Business Regulation Securities Division 233 Richmond St. #232 Providence, RI 02903-4232 tel: 401-222-3048 contact: Martha McVeigh
Honorable Charles M. Condon Attorney General of South Carolina Rembert Dennis Building P.O. Box 11549 Columbia, SC 29211-2549 tel: 803-734-3970 fax: 803-734-4323 email: info@scattorneygeneral.org website: www.scattorneygeneral.org	Office of the Secretary of State P.O. Box 11350 Columbia, SC 29211 tel: 803-734-1790
Honorable Mark Barnett Attorney General of South Dakota 500 East Capitol Avenue Pierre, SD 57501-5070 tel: 605-773-3215 fax: 605-773-4106 email: help@state.sd.us website:www.state.sd.us/state/executive/attorney/attorney.html	
Honorable Paul D. Summers Attorney General of Tennessee 425 Fifth Avenue North Nashville, TN 37243 tel: 615-741-5860 website: www.attorneygeneral.state.tn.us	Secretary of State James K. Polk Building, Suite 500 Nashville, TN 37243-0308 tel: 615-741-2555

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable John Cornyn Attorney General of Texas Capitol Station P.O. Box 12548 Austin, TX 78711 tel: 512-463-2100 website: www.oag.state.tx.us email: cac@oag.state.tx.us charities contact: Attorney General Charitable Trust Section P.O. Box 12548 Austin, TX 78711 tel: 512-463-2185	Attorney General, Charitable Trust Section (see left)
Honorable Mike Shurtleff Attorney General of Utah State Capitol, Room 236 Salt Lake City, Utah 84114-0810 tel: 801-538-9600 fax: 801-538-1121 email: uag@state.ut.us website: www.attygen.state.ut.us	Department of Commerce Division of Consumer Protection 160 East 300 South Box 146704 Salt Lake City, UT 84114-6704 tel: 801-530-6601 contact: Francine Giani
Honorable William H. Sorrell Attorney General of Vermont 109 State Street Montpelier, VT 05609-1001 tel: 802-828-3171 fax: 802-828-2154; 802-828-3187 email: aginfo@atg.state.vt.us website: www.state.vt.us/atg	
Honorable Mark L. Earley Attorney General of Virginia 900 East Main Street Richmond, VA 23219 tel: 804-786-2071 email: mail@oag.state.va.us website: www.oag.state.va.us	Division of Consumer Affairs Virginia Department of Agriculture and Consumer Services P.O. Box 1163 Richmond, VA 23218-0526 tel: 804-786-1343 contact: J. Michael Wright, Manager of Regulatory Programs

Contacts for Reporting Problems with Charities	Contacts for Requesting Information About Charities
Honorable Christine O. Gregoire Attorney General of Washington P.O. Box 40100 1125 Washington Street, SE Olympia, WA 98504-0100 tel: 360-753-6200 fax: 360-664-0988 website: www.wa.gov/ago email: ago@atg.wa.go	Corporations Division Secretary of State P.O. Box 40234 505 E. Union Olympia, WA 98504-0234 tel: 800-332-4488 or 360-753-0863 email: charities@secstate.wa.gov
Honorable Darrell V. McGraw Jr. Attorney General of West Virginia State Capitol, Room 26E 1900 Kanawha Boulevard Charleston, WV 25305-9924 tel: 304-558-2021 website: www.state.wv.us/wvag	Secretary of State State Capitol Room 157-K Charleston, WV 25305 tel: 305-556-6000 contact: Catherine Frerotte
Honorable James E. Doyle Attorney General of Wisconsin P.O. Box 7857 Madison, WI 53707-7857 tel: 608-266-1221 website: www.doj.state.wi.us	Department of Regulation and Licensing Charitable Organizations P.O. Box 8935 Madison, WI 53708-8935 tel: 608-266-5511, ext. 441 email: dorl@drl.state.wi.us
Honorable Gay Woodhouse Attorney General of Wyoming 123 Capitol Building 200 W. 24th Street Cheyenne, WY 82002 tel: 307-777-7841 fax: 307-777-6869 website: www.state.wy.us/~ag	Secretary of State Capitol Building 200 W. 24th Street Cheyenne, WY 82002 tel: 307-777-7378

Appendix D

Sample Letter to the Charities Enforcement Agencies

[charity enforcement agency in your state: see Appendix C for contact information]

Dear _____:

We are [describe your organization or who you are and whom else you represent]. We are writing to bring to your attention our concerns about a [describe transaction (e.g., proposed or already existing; if already existing, change tenses as appropriate), type of health care provider (e.g., hospital, HMO), type of transaction (e.g., merger, sale, consolidation)] that we believe will have a harmful impact on the delivery of health care in our community and the charitable mission of [name of health care provider].

We have learned that [religious entity with restriction e.g., religious hospital] in [city, state] is planning to merge with [(modify as appropriate to reflect whatever is known about the nature of the anticipated transaction) with the entity without restriction (e.g., secular hospital)] in [city, state]. We are concerned that this [transaction] will result in a loss of services and that [entity without restriction] will cease to fulfill its charitable purpose and mission [describe, e.g., as a secular, community, etc... hospital].

We are particularly concerned about the impact that this [transaction] will have on the availability of reproductive health and other health services in our community. [Restricted entity] is affiliated with the Catholic church and is governed by the Ethical and Religious Directives for Catholic Health Care Services, which prohibit abortion, contraceptive services and counseling, sterilization procedures, infertility treatments, and emergency contraceptives (the "morning-after pill"). [Modify as appropriate if other religious restrictions are at issue.] We understand that after the transaction, if it is allowed to go forward, [secular provider] would also be governed by these prohibitions. [Cite and enclose documentation of this intention.]

[secular provider] currently provides the following services that would be banned under the Directives: [list the affected services]. The elimination of these services will have serious repercussions in our community. [Quantify the loss of services to the extent possible, e.g., number of tubal ligations the unrestricted entity performed in the past year] [unrestricted entity] historically provided these services; our community has come to depend on them and their established reputation for a full range of care [add descriptions of community support, financially and otherwise for unrestricted entity; add any other pertinent information that is readily available – see Appendix B for additional suggestions.]

As it is your role to ensure that charitable entities fulfill their charitable missions, we urge you take full account of the harmful consequences of this transaction as you carry out your legal responsibilities in reviewing it. Further, we respectfully request the opportunity to meet with you or the relevant investigatory staff to discuss the matter with you – and to do so before your office reaches a conclusion about the likely impact of the transaction and makes a recommendation on whether to challenge it.

We will call you shortly to follow up, if we do not hear from you. Thank you for your consideration.

Sincerely,

[signature and title]

[List enclosures]

cc: [advocacy groups, including the National Women's Law Center]

Appendix E

Sample Newspaper Op-Ed

[Merger, Affiliation, Sale] Threatens To Leave Town Without Reproductive Health Services & Local Control

This community has lent its support to [unrestricted hospital] since its inception in [year], volunteering both time and money to sustain an institution that has served our health care needs so well. People in this community have come to rely on this hospital, and have expected that any significant change in how it is run, or the services it provides would be made with the community's needs in mind. Yet this [merger, affiliation, sale] with [restricted hospital] would put a stop to not only serving the needs of the entire community, but change the charitable mission and role of this hospital.

[Restricted purchaser/partner] follows the *Ethical and Religious Directives for Catholic Health Care*, guidelines on how Catholic and Catholic-affiliated hospitals should be run to comply with religious doctrine. While we respect the right of religious institutions to function in accordance with their beliefs, we are concerned about the impact that this transaction will have on [unrestricted hospital]. [Unrestricted hospital] will function as a religious hospital in compliance with the *Directives* and eliminate women's reproductive health services, such as [describe services that were provided and will be eliminated]. These are critically needed services. In [year of information], [number] women received [name particular service] from [unrestricted hospital].

The hospital will no longer be controlled by a local governing body. [Name of system] in [city and state of corporate headquarters] would dictate hospital policies. This new governing body cannot adequately protect the concerns of the residents of this town. Decisions about our "local" hospital will no longer be made with just our community in mind; they will be made in consideration of what is best for the entire system, which includes [number of hospitals, in number of states].

In addition to losing services and local control, if this [merger, affiliation, sale] is finalized, the hospital will adopt a new mission: following the religious dictates expressed in the *Directives*. The abandonment of one mission and adoption of another may violate the law. State nonprofit corporation laws, charitable trusts laws, and/or hospital conversion laws have been applied in several states including New Hampshire, Florida, New Jersey, California and New York to prevent such transactions from occurring, undoing completed transactions, or requiring certain conditions to preserve the historic charitable mission of this hospital. The Board of Directors of [unrestricted hospital], at the very least, owes the community answers to the following questions:

- Are there other ways to achieve savings that would make this [merger, affiliation, sale] unnecessary?
- Have they considered other options that will preserve services and maintain local control, such as a [partnership/affiliation/sale with/to alternative partner/purchaser] that would allow it to maintain its historic role in the community?
- If this transaction must take place, have the hospitals considered how they can preserve services that the community needs from [unrestricted hospital]? Other hospitals in this situation have structured their agreements to segregate prohibited services from the Catholic entity, with patients suffering no inconvenience.

As [name of restricted and unrestricted hospitals] in [city] move closer to completing their [merger/affiliation/sale], we urge the Board of Directors of [unrestricted hospital] to consider the impact this [merger/affiliation/sale] will have on the community and act in the best interest of the health care needs and wants of its citizens.

Appendix F

Helpful Resources

In addition to the sources cited in the notes to this report (The National Women's Law Center has all such sources on file), the following are also especially useful for charitable assets challenges:

National Women's Law Center, 11 Dupont Circle, NW, Suite 800, Washington, DC, 20036; (202) 588-5180; www.nwlc.org; info@nwlc.org. The Center's Health Care Provider Merger Project is an ongoing campaign to develop and apply creative legal strategies to challenge specific transactions that threaten women's health services. Project staff members offer assistance to attorneys, community activists, health care providers, legislators, governmental agencies, media, and health care consumers who seek to protect women's reproductive health services.

MergerWatch, 17 Elk Street, Albany, NY 12207; (518) 436-8408; www.mergerwatch.org; info@mergerwatch.org, a project of Family Planning Advocates of New York State, provides community organizing assistance to individuals or groups nationwide who seek to challenge transactions that threaten women's reproductive health services. MergerWatch closely monitors religious and secular mergers nationwide and maintains a website with current information on pending transactions. MergerWatch also produced a video documenting how a group of advocates organized to resist a merger: *Stand Up! Speak Out! How One Community Stopped a Hospital Merger* (2000). The video can be ordered on the MergerWatch website.

Catholics for a Free Choice, 1436 U Street NW, Suite 301, Washington, DC 20009; (202) 986-6093; www.catholicsforchoice.org; cffc@catholicsforchoice.org issues periodic reports on the problem of religious restrictions in health care, including a listing of pending Catholic-non-Catholic transactions. The organization also provides current information on Catholic health care and the *Directives*.

***ProChoice Ideas!*, a newsletter published by ProChoice Resource Center, Inc., 16 Willet Avenue, Port Chester, NY 10573; (800) 733-1973; (914) 690-0598; www.prochoiceresource.org; info@prochoiceresource.org,** often has a feature article describing recent cases involving hospital transactions that limit women's reproductive health services.

Community Catalyst, 30 Winter Street, 10th Floor, Boston, MA 02108; (617) 338-6035; www.communitycat.org, a national advocacy organization that builds consumer and community participation in helping to ensure quality affordable health care. Through its Community Health Assets project, a joint effort with Consumers Union, Community Catalyst provides technical assistance in restructuring within the health sector. Community Catalyst also tracks state statutes regulating hospitals and other health care entities.

Notes

1. The Problem: Religious Restrictions Severely Reduce Women's Reproductive Health Services

[1]*See, e.g.*, Lois Uttley, *How Merging Religious and Secular Hospitals Can Threaten Health Care Services*, 30 Soc. Pol'y 413 (2000) (Seventh Day Adventists hospitals also restrict abortion); Diane Levick, *HealthSouth Centers Resume Abortions: Controversy Blamed on Confusion*, HARTFORD COURANT, Dec. 24, 1998, at A1 (a for-profit corporation with no religious affiliation had banned abortions; the corporation reversed its policy after the state attorney general threatened action); *Columbia To Do No Abortions in Georgia*, Courier-J. (Louisville, Ky.), May 18, 1995, at 1C (Georgia Baptist Convention, which owns a health care system that includes the Georgia Baptist Medical Center, bans abortions). Not all religiously affiliated hospitals restrict services. *See* New York case study in Section III.D. of this report (Episcopalian hospital provided full range of reproductive health services).

[2]CATHOLICS FOR A FREE CHOICE, RELIGION, REPRODUCTIVE HEALTH AND ACCESS TO SERVICES: A NATIONAL SURVEY OF WOMEN 1, 9, 14 (Conducted by Belden, Russonello & Stewart, Apr. 2000).

[3]*Id.* at 9.

[4]NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (1995), *available at* http://www.usc.edu/hsc/info/newman/resources/chc/titlepage.html [hereinafter DIRECTIVES].

[5]DIRECTIVES, at Directive 5.

[6]DIRECTIVES, at General Introduction ("As teacher, the diocesan bishop ensures the moral and religious identity of the health care ministry in whatever setting it is carried out in the diocese.").

[7]DIRECTIVES, at Directive 45 (abortion is defined as "the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus."). The growth of religious hospitals also affects women's ability to have a medical abortion with the drug Mifepristone ("RU-486"), recently approved by the FDA. U.S. FOOD AND DRUG ADMINISTRATION, CENTER FOR DRUG EVALUATION AND RESEARCH, DRUG INFORMATION, MIFEPRISTONE INFORMATION, *available at* http://www.fda.gov/cder/drug/infopage/mifepristone/default.htm. *See also* Gina Kolata, *U.S. Approves Abortion Pill; Drug Offers More Privacy, and Could Reshape Debate*, N.Y. TIMES, Sept. 29, 2000, at A1. Proposed legislation requires that physicians who prescribe RU-486 have predetermined hospital back-up within one hour's drive in case of an emergency. *RU-486 Patient Health and Safety Protection Act*, H.R. 482, 107th Cong. § 2(5) (2001). Hospitals bound by the *Directives* most likely will not agree to serve as this back-up, thus making RU-486 less accessible to women in these areas than women served by non-restrictive providers. It is important to note that all hospitals must accept emergencies under the *Emergency Medical Treatment and Labor Act*, 42 U.S.C. § 1395dd. Restrictive hospital practices therefore would not have as significant an impact on the provision of RU-486 if the legislation requiring back-up does not become law.

[8]DIRECTIVES, at Directive 45 (abortion includes termination of pregnancy in the "interval between conception and implantation of the embryo"). Although Directive 36 permits the dispensation of emergency contraception to rape victims if they test negative for pregnancy, it recommends that "a sexually assaulted woman be advised of the ethical restrictions which prevent Catholic hospitals from using abortifacient procedures." The actual meaning of this Directive is unclear because, as a practical matter, blood tests cannot detect pregnancy within 72 hours after conception – the effective period for emergency contraception (blood tests can only detect pregnancy as early as seven days after conception). Furthermore, the regimen would not be effective if the fertilized egg had already been implanted in the uterus. *See generally* Steven S. Smugar, Bernadette J. Spina & Jon F. Merz, *Informed Consent for Emergency Contraception: Variability in Hospital Care of Rape Victims*, 90 AM. J. PUB. HEALTH 1372, 1375 (2000) (reporting "lack of consensus" in emergency contraception policies in Catholic hospitals); CATHOLICS FOR A FREE CHOICE, CAUTION: CATHOLIC HEALTH RESTRICTIONS MAY BE HAZARDOUS TO YOUR HEALTH 7, 10 (1999) [hereinafter CFFC, HAZARDOUS] (nationwide telephone survey of 589 Catholic hospital emergency rooms, 82 percent said that they would not provide emergency contraception, with no exceptions made in cases of rape). For more information on emergency contraception and how to obtain it, see http://www.not-2-late.com.

[9]DIRECTIVES, at Directive 53 ("Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution." Procedures that result in sterility but are intended to cure an illness are permitted, presuming no other cure is available.). Tubal ligations (surgical "sterilization") are often provided in hospitals. CENTERS FOR DISEASE CONTROL AND PREVENTION/ NATIONAL CENTER FOR HEALTH STATISTICS, VITAL AND HEALTH STATISTICS, SURGICAL STERILIZATION IN THE UNITED STATES: PREVALENCE AND CHARACTERISTICS, 1965-95 2 (June 1998). Indeed, many women choose postpartum tubal ligation because it is safer and less costly to have the sterilization procedure while in the hospital for childbirth than to undergo two separate hospitalizations. Over half of all female sterilizations take place shortly after childbirth or abortion. JAMA, FACT SHEET, ALL ABOUT TUBAL STERILIZATION (July 1998).

[10]DIRECTIVES, at Directive 52 ("Catholic health institutions may not promote or condone contraceptive practices" other than counseling in methods of natural family planning for married couples). By extension, women also could not participate in research or clinical trials requiring subjects to take contraceptive precautions to avoid unknown harm to fetuses caused by the treatment under investigation, thus hindering women's access to new treatments and the advancement of medical research.

[11]*Id.; see also* NATIONAL CONFERENCE OF CATHOLIC BISHOPS, CALLED TO COMPASSION AND RESPONSIBILITY: A RESPONSE TO THE HIV/AIDS Crisis 20 (3d prtg. 1997) (stating that encouraging condom use to prevent HIV is "in effect, promoting behavior that is morally unacceptable").

[12]DIRECTIVES, at Directives 38-41 (prohibiting assisted conception that "substitutes for the marital act," including methods of "artificial fertilization" – which would include both in vitro fertilization and artificial insemination).

[13]DIRECTIVES, at Directive 51 (prohibiting "nontherapeutic experiments on a living embryo"); *see also* Vincent Branick & M. Therese Lysaught, *Stem Cell Research: Licit or Complicit?,* HEALTH PROGRESS (Catholic Health Association), Sept.-Oct. 1999 (doctrine of "complicity" would forbid research using fetal tissue or embryos derived from abortion or in vitro fertilization).

[14]*See generally* DIRECTIVES, at Part Five. The *Directives* define euthanasia as "an action or omission that of itself or by intention causes death in order to alleviate suffering." DIRECTIVES, at Directive 60. Catholic hospitals will not honor a patient's instructions about end-of-life care that are "contrary to Catholic moral teaching." DIRECTIVES, at Directive 59. The *Directives* allow a person to reject "life-prolonging procedures that are insufficiently beneficial or excessively burdensome." DIRECTIVES, at Part Five, Introduction. Accordingly, there may be situations where it is legally permissible to honor patient end-of-life preferences, but impermissible according to Catholic doctrine, for example forgoing artificial nutrition and hydration in certain circumstances (e.g., some patients in persistent vegetative states, or Alzheimer's patients); *see also In re* Requena, 517 A.2d 886 (N.J. Super. Ct. Ch. Div.), *aff'd*, 517 A.2d 869 (N.J. Super. Ct. App. Div. 1986) (case involved artificial feeding restriction after secular hospital merged with Catholic hospital; court held patient had a right to refuse artificial feeding, notwithstanding change in policy). For a discussion of the Catholic perspective on artificial nutrition and hydration, see National Conference of Catholic Bishops Committee for Pro-Life Activities, *Nutrition and Hydration: Moral and Pastoral Reflections*, 15 J. CONTEMP. HEALTH L. & POL'Y 455 (1999).

[15]The *Directives* obviously affect physicians' and other medical professionals' ability to serve their patients' needs. For example, a doctor may identify a treatment or counseling that runs counter to the *Directives*, and therefore cannot give what that provider considers to be optimal care or provide the opportunity for informed consent (which typically requires a discussion of risks, benefits, and *alternatives* to a particular course of treatment). Other areas of practice may also be affected (e.g., admitting privileges may be contingent on signing an agreement to adhere to the *Directives*, both within the facility, and sometimes even in the physician's own private practice). *See, e.g.*, Watkins v. Mercy Med. Ctr., 364 F. Supp. 799 (D. Idaho 1973). Physicians may suffer dire consequences for expressing their views or attempting to preserve women's access to services. Ian Fisher, *Casualty of the Abortion Debate: A Doctor, Aiming at Conciliation, Instead Loses a Post*, N.Y. TIMES, Mar. 24, 1998, at B2 (physician fired from position as chair at Catholic-affiliated medical school after leasing space to abortion provider and making public statements on legality of abortion).

[16]Catholic teachings on the immorality of homosexuality could also affect access to health care and patients' rights for gays and lesbians. While the *Directives* do not expressly forbid decision-making or visitation by homosexual partners in Catholic health care institutions, church leaders have been vocal opponents of state legislation (e.g., Vt. Stat. Ann. tit. 15, § 1204(e)(10)-(11)) allowing homosexual partners these rights. Matt Kantz, *Bishop Calls for Stand Against Same Sex Marriages*, NAT'L CATH. REP., Feb. 4, 2000, at 13.

[17]*10 Largest Not-For-Profit Healthcare Systems*, MOD. HEALTHCARE, July 31, 2000, at 41.

[18]CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, FACTS ABOUT THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES (2001), *available at* http://www.chausa.org/aboutcha/chafacts.asp (last modified Jan. 31, 2001).

[19]CATHOLICS FOR A FREE CHOICE, HEALTH CARE LIMITED: CATHOLIC INSTITUTIONS AND HEALTH CARE IN THE UNITED STATES 7 (1994, rev. 1995).

[20]*See, e.g.*, Complaint, Amelia E. v. Public Health Council (N.Y. Supreme Ct., Albany Cty., 1994) (7062-94) (secular Leonard Hospital and Catholic St. Mary's Hospital merged into Seton Health Systems and eliminated contraceptive services at an affiliated outpatient clinic). Settlement of this suit required the clinic to give patients a detailed and current list of reproductive health service providers. Memorandum of Understanding Between Seton Health Systems, Inc. and The New York State Department of Health (May 14, 1996); *see also* Steve Nelson, *Cutting Family Service Hurts, Poor, Says Client*, TROY DAILY REC., May 16, 1996, at C1.

[21]More than half of all Medicaid recipients are enrolled in a managed care plan, and this proportion is even higher among low-income families – those most in need of reproductive health services. INSTITUTE FOR REPRODUCTIVE HEALTH ACCESS, NARAL/NY, RESHAPING REPRODUCTIVE HEALTH: A STATE-BY-STATE EXAMINATION OF FAMILY PLANNING UNDER MEDICAID MANAGED CARE 1 (2000). Fidelis Care New York, a Catholic HMO, for example, purchased Better Health Plan of New York, gaining 40,000 enrollees, 7,700 physicians, and 100 hospitals and other providers, becoming the second largest plan in the state. Both serve only Medicaid patients, and Fidelis immediately eliminated family planning services for its members. Karen Pallarito, *Unafraid of Medicaid: Catholic Sponsored HMO Buys For-Profit Rival, Expanding New York Network*, MOD. HEALTHCARE, Sept. 1, 1997, at 33.

[22]One survey revealed that reproductive health services were discontinued in 48 percent of the 1998 completed mergers and affiliations involving Catholic entities on which the surveyors were able to obtain information. CFFC, HAZARDOUS, *supra* note 8, at 5.

[23]*See, e.g.*, MERGERWATCH, RELIGIOUS HOSPITAL MERGERS & HMOS: THE HIDDEN CRISIS FOR REPRODUCTIVE HEALTH CARE 19-21 (1997-1998 ed.). The *Directives* permit affiliations, but caution a Catholic entity in such an arrangement to "limit its involvement" in activities that contradict Church teaching. DIRECTIVES, at Directive 69. *See also* DIRECTIVES, Appendix, The Principles Governing Cooperation.

[24]The National Conference of Catholic Bishops announced their intention to revise the *Directives* in November 2000 to make them even more restrictive, especially concerning sterilization services at Catholic-affiliated hospitals. Deanna Bellandi, *Changing Directives: Catholic Church Mulls New Rules That Could Limit Partnerships*, MOD. HEALTHCARE, Nov. 6, 2000, at 54. The Bishops then retreated from their original proposal, stating that they would like to consider modifications to the proposed revisions. *News at a Deadline*, MOD. HEALTHCARE, Nov. 13, 2000, at 4. The matter will be considered at their June 2001 national meeting. Bellandi, *Changing Directives, id*. For updates on the status of the revisions, *see* http://www.catholicsforchoice.org.

[25]*See, e.g.*, Alex Pham, *Jobs Shift From Hospitals to "Health Care Systems,"* BOSTON GLOBE, Oct. 18, 1998, Spec. Sec., at 4; Michele Bitoun Blecher, *Size Does Matter*, HOSPS. & HEALTH NETWORKS, June 20, 1998, at 28.

[26]CATHOLICS FOR A FREE CHOICE, RISKY BUSINESS: THE COMMUNITY IMPACT OF CATHOLIC HEALTH CARE EXPANSION 2 (1995).

[27]CATHOLICS FOR A FREE CHOICE, REPRODUCTIVE HEALTH AT RISK: A REPORT ON MERGERS AND AFFILIATIONS IN THE CATHOLIC HEALTH CARE SYSTEM: 1990-1995 5-6 (1995)(in a study of hospital consolidation agreements between 1990 and 1995, Catholics for a Free Choice identified 57 mergers and affiliations between Catholic and non-Catholic hospitals). According to the definitions used by CFFC, although institutions often use inconsistent terms, a merger generally involves "the establishment of shared assets, liabilities, and administrative functions" while an affiliation is "distinguished by the development of cooperative or joint purchasing arrangements, apportionment of medical specialties among the participating facilities, shared laboratory and other ancillary services, etc." *Id.* From 1996 to 1998, CFFC documented another 81 mergers and affiliations. CFFC, HAZARDOUS, *supra* note 8, at 5. CFFC reports an additional total of 29 mergers and affiliations in 1999 and 2000. E-mail from Patricia Miller, Director, Writing and Research, Catholics for a Free Choice, to Elena N. Cohen, Senior Counsel, National Women's Law Center (Feb. 21, 2001).

[28]See Mary Chris Jaklevic, *Trouble in the City: Mergers, Medicare and Managed Care Combine to Force Closing of 38 Urban Hospitals*, MOD. HEALTHCARE, Jan. 8, 2001, at 52; Deanna Bellandi, *Spinoffs, Big Deals Dominate in '99*, MOD. HEALTHCARE, Jan. 10, 2000, at 36.

[29]See Deanna Bellandi, *The Deals Are Off: Number of Hospitals in Mergers, Acquisitions Dropped for Second Straight Year in 2000*, MOD. HEALTHCARE, Jan. 8, 2001, at 42 (reporting second straight year of decreased activity). Still, while hospital mergers slowed throughout the late 1990s, Catholic hospitals continued to merge with a greater frequency than did other hospitals. *Compare* Deanna Bellandi, *Levin: Mergers Fell Sharply in '98*, MOD. HEALTHCARE, Jan. 25, 1999, at 8 (publicly announced deals dropped from 199 in 1997 to 146 in 1998), *with* Deanna Bellandi, *Catholic Deals with Non-Catholics Grow*, MOD. HEALTHCARE, Mar. 15, 1999, at 24 (mergers between Catholic and non-Catholic hospitals tripled from 14 in 1997 to 43 in 1998).

[30]Deanna Bellandi, *Sizing Up Systems: Catholic Consolidations, Such as Ascension Health, Create Industry Giants and Take on Multiple Religious Sponsors*, MOD. HEALTHCARE, Nov. 1, 1999, at 38.

II. A Solution: Charitable Assets Laws Can Challenge Transactions that Violate Hospitals' Charitable Missions

[31]This report, therefore, does not generally address transactions involving for-profit entities (e.g., through for-profit conversions), but there are religiously affiliated health care providers that are for-profit entities (e.g., certain Catholic HMOs). *See* CATHOLICS FOR A FREE CHOICE, CATHOLIC HMOS AND REPRODUCTIVE HEALTH CARE 10 (2000). For more information on nonprofit to *for-profit* conversions, *see* THE SALE AND CONVERSION OF NOT-FOR-PROFIT HOSPITALS: A STATE-BY-STATE ANALYSIS OF NEW LEGISLATION, VOLUNTEER TRUSTEES FOUNDATION (1998), *also available at* http://www.volunteertrustees.org [hereinafter SALE AND CONVERSION]; NATALIE SETO, KATHY COLLINS & BESS KARGER WEISKOPF, COMMUNITY CATALYST, PROTECTING HEALTH, PRESERVING ASSETS: A COMPREHENSIVE STUDY OF LAWS GOVERNING CONVERSIONS, MERGERS AND ACQUISITIONS AMONG HEALTH CARE ENTITIES (1997) (chart updated Nov. 2000), *available at* http://www.communitycat.org [hereinafter PROTECTING HEALTH]; Kevin F. Donohue, *Crossroads in Hospital Conversions – A Survey of Nonprofit Hospital Conversion Legislation*, 8 ANNALS HEALTH L. 39 (1999).

[32]See Deanna Bellandi, *The Watchdogs Are Biting: State Attorneys General Asserting Authority Over Not-For-Profit Hospitals*, MOD. HEALTHCARE, Jan. 29, 2001, at 22; Michael Peregrine, *Nonprofit Biz Decisions Become State AG's Biz, Too*, NAT'L L. J., Jan. 8, 2001, at B11.

[33]DIRECTIVES, at Preamble ("Now, with American health care facing even more dramatic changes, we reaffirm the Church's commitment to health care ministry and the distinctive Catholic identity of the Church's institutional health care services.").

[34]*Compare* Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 488 (N.J. Super. Ct. Ch. Div. 1967)(mission is "to maintain a Hospital for the care of persons of any creed, nationality or color, suffering from illnesses or disabilities which require that the patients receive hospital care"), *with In re* Kensington Hosp. for Women, 58 A.2d 154, 156 (Pa. 1948) (mission is "to afford gratuitous aid and proper surgical treatment to women without distinction of age or color suffering from diseases of the rectum and of the genitourinary organs").

[35]See, e.g., *In re* Kensington Hosp. for Women, 58 A.2d at 156 (court awarded assets of closing secular hospital with mission to provide women's services to a religious hospital, with condition that assets be used to provide women's health care; religious affiliation did not affect hospital's services).

[36]The change in control of a hospital from a local entity to a regional one was a key issue in the New Hampshire case described in Section III.A. of this report.

[37]Lawrence E. Singer, *Realigning Catholic Health Care: Bridging Legal and Church Control in a Consolidating Market*, 72 TUL. L. REV. 159, 195 (1997) (mission in articles of incorporation and by-laws, but noting that by-laws are not always a matter of public record); Daniel W. Coyne & Kathleen Russell Kas, *The Not-For-Profit Hospital as a Charitable Trust: To Whom Does its Value Belong?*, 24 J. HEALTH & HOSP. L. 48, 49 (1991). *See also* Queen of Angels Hosp. v. Younger, 136 Cal. Rptr. 36, 41 (Cal. Ct. App. 1977).

[38]For example, in most states, charitable nonprofit organizations that solicit contributions must register and file reports with the attorney general or some other state agency. *See, e.g.*, N.Y. Exec. Law Art. 7-A. Jurisdictions vary in specific requirements, but reporting statutes typically require registration and filing of annual financial reports. For more information on reporting requirements, see Uniform Registration Statement website, at http://www.nonprofits.org/library/gov/urs, and Appendix C of this report.

[39]Other laws, including tax laws and licensing requirements, also require a nonprofit hospital to use its assets in certain ways, but are beyond the scope of this report. The three categories of laws examined in this report also address matters beyond how a charity uses its assets. For more information on the full scope of these laws, *see generally* GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES (2d ed. rev. 1991 & supps.); WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (perm. ed. rev. vol. 1999 & supps.) [hereinafter FLETCHER].

[40]See New Hampshire case study in Section III.A. of this report.

[41]See e.g., NATIONAL WOMEN'S LAW CENTER, HOSPITAL MERGERS AND THE THREAT TO WOMEN'S REPRODUCTIVE HEALTH SERVICES: USING ANTITRUST LAWS TO FIGHT BACK (1998) and 2001 Update, *available at* www.nwlc.org; Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703 (1999); Lisa Ikemoto, *Rural Health Care Symposium: When a Hospital Becomes Catholic*, 47 MERCER L. REV. 1087 (1996); Internal Revenue Service, National Field Service Advice, Exempt Hospitals' Compliance with Treas. Reg. § 1.501(c)(3)-1(c) (Mar. 9, 2001) (regarding charity care and tax-exempt status).

[42]See Daniel W. Coyne & Kathleen Russell Kas, *The Not-For-Profit Hospital as a Charitable Trust: To Whom Does its Value Belong?*, 24 J. HEALTH & HOSP. L. 48, 53-54 (1991) [hereinafter Coyne].

[43]See *id.* at 52; *see also* FLETCHER, *supra* note 39, § 2949.20.20 (Transfer of All Property, Nonprofit Corporations) (noting that in some states, test of whether sale is of "all or substantially all" of a nonprofit corporation's assets is whether corporation is able to fulfill its corporate purposes).

[44]See Coyne, *supra* note 42, at 53.

[45]See *id.* at 54; *see also* FLETCHER, *supra* note 39, § 7979 (Methods of Dissolution, Nonprofit Corporations).

[46]NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT, § 1(6), *available at* http://www.nccusl.org [hereinafter UMIFA]. UMIFA includes a listing of states that have adopted some or all of its provisions and an analysis of how each state's law differs from UMIFA. UMIFA allows a restriction to be released if the institution gets the written permission of the donor. If the institution cannot get this permission because the donor is dead, impossible to identify, or otherwise unavailable, the institution's board must get court approval. The attorney general is notified of this application. If the court finds that the restriction is "obsolete, inappropriate or impracticable," it may release the restriction. Even if the restriction is released, the funds must still be used for the charitable purposes of the institution. UMIFA, § 7(a)-(d).

[47]See, e.g., Karen Pallarito, *OK, We're Not-For-Profit, But . . .*, MOD. HEALTHCARE, Nov. 9, 1998, at 82-83 (noting that deals are often structured to evade attorney general review under merger and sale statutes).

[48]See, e.g., N.Y. Not-for-Profit Corp. Law §§ 1005(a)(3)(A), 1008(a)(15) (dissolution); *In re* Multiple Sclerosis Service Org. of New York, Inc., 496 N.E.2d 861, 867 (N.Y. 1986) (requiring that nonprofit charitable organization distribute its assets to another nonprofit with substantially similar activities upon dissolution) [hereinafter MSSO]. While this test is most commonly used in state statutes regarding dissolutions, at least one state uses a comparable standard in evaluating certain mergers (N.Y. Not-for-Profit Corp. Law § 907(c)), and amendments to certificates of incorporation (N.Y. Not-for-Profit Corp. Law § 804). *See, e.g.*, Alco Gravure, Inc. v. Knapp Found., 479 N.E.2d 752, 757-58 (N.Y. 1985) (holding that an amendment to a certificate of incorporation had to comply with *quasi cy pres* principles expressed in N.Y. Not-for-Profit Corp. Law Articles 5 (regarding sales and transfers of assets) and 10 (regarding dissolution)). For a description of *quasi cy pres* standard, see Section II.B.2. and note 102 of this report.

[49]MSSO, 496 N.E.2d at 862.

[50]For a further discussion of these duties, see Naomi Ono, *Boards of Directors Under Fire: An Examination of Nonprofit Board Duties in the Health Care Environment*, 7 ANNALS HEALTH L. 107 (1998) [hereinafter Ono]; Daniel L. Kurtz, *Safeguarding the Mission: The Duties and Liabilities of Officers and Directors of Nonprofit Organizations*, C726 ALI-ABA 15 (1992) [hereinafter Kurtz]; and Elizabeth M. Guggenheimer, *The Attorney General's Role in Supervising Not-For-Profit Organizations*, 34 PRACTICING LAW INSTITUTE/NEW YORK 135, 148-49 (1998) [hereinafter Guggenheimer]. The Revised Model Nonprofit Corporation Act also follows these standards. Revised Model Nonprofit Corporation Act (adopted in 1987 by the American Bar Association's Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section), *reprinted in* FLETCHER, *supra* note 39, § 2.75.10. *See also* Lizabeth A. Moody, *The Who, What, and How of the Revised Model Nonprofit Corporation Act*, 16 N. KY L. REV. 251, 275 (1989) [hereinafter Moody].

[51]Ono, *supra* note 50, at 107; Kurtz, *supra* note 50, at 17-18.

[52]Kurtz, *supra* note 50, at 18.

[53]Ono, *supra*, note 50, at 111.

[54]*See, e.g.,* J. Duncan Moore, Jr., *Special Report, System Divorces on Rise: Unscrambling Deals is Messy and Contentious*, MOD. HEALTHCARE, May 29, 2000, at 24 (attributing some break-ups to religious differences and discussing legal economic and public relations fall out). *See also* New Hampshire case study in Section III.A. of this report.

[55]Kurtz, *supra* note 50, at 33.

[56]*Id.*, at 32.

[57]*See* Lawrence E. Singer, *Realigning Catholic Health Care: Bridging Legal and Church Control in a Consolidating Market*, 72 TUL. L. REV. 159, 190-91 (1997) (challenges under nonprofit corporation law are likely to allege actions taken for reasons other than the corporation's best interest) [hereinafter Singer].

[58]Michael W. Peregrine & James R. Schwartz, *The Business Judgment Rule and Other Protections for the Conduct of Not-for-Profit Directors*, 33 J. HEALTH L. 455, 459-64 (2000).

[59]*See, e.g.*, N.Y. Not-for-Profit Corp. Law § 907(e)(court shall approve a merger between nonprofit corporations if it is demonstrated that "the interests of the constituent corporations and the public interest will not be adversely affected by the merger. . . ."). Generally, New York Not-for-Profit Corporations Law, Article 9, governs the merger of nonprofit corporations.

[60]*See, e.g.*, N.Y. Not-for-Profit Corp. Law §§ 510-511 (covering sale, lease, exchange, or other disposal of "all or substantially all" of nonprofit's assets), *as discussed in* Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575 (N.Y. Sup. Ct. 1999); Guggenheimer, *supra* note 50, at 143-44. Even though the statutory language or case law may vary from state to state, many states apply the "fair and reasonable" standard and/or require that the corporate mission is promoted (with the first component being especially important in the sale context).

[61]*See, e.g.*, Manhattan Eye, Ear & Throat Hosp., 715 N.Y.S.2d at 591-92 (court disapproved sale of specialty hospital, finding that plan to use sale proceeds to run diagnostic centers did not adequately promote purposes of the corporation and terms of sale failed to adequately consider historic role of corporation in selection of seller).

[62]*See, e.g., id.* at 595 (court failed to approve sale of teaching specialty hospital when proceeds were going to be used for free-standing diagnostic and treatment center in underserved areas, and hospital decided to change purpose without adequate consideration of options allowing it to maintain its original mission; "Embarkation upon a course of conduct which turns it away from the charity's central and well-understood mission should be a carefully chosen option of last resort.").

[63]*See, e.g., id.* at 593 (court should consider whether selling to that particular purchaser advances the seller's mission and is "faithful to the purposes and goals of the corporation;" in evaluating potential buyers, court noted that it is not enough that they have a charitable purpose, e.g., operating a breast cancer center, but need a purpose in keeping with the hospital's historic mission of operating a teaching hospital with a focus on eye, ear, and throat disorders).

[64]For statutes with different levels of governmental oversight for these transactions, *see, e.g.*, Coyne, *supra* note 42, at 49 (1991) (comparing Revised Model Nonprofit Corporation Act; N.Y. Not-for-Profit Corp. Law; 805 Ill. Comp. Stat. Ann. 105 (General Not For Profit Corporation Act of 1986)).

[65]*See, e.g.*, Minn. Stat. § 317A.813 (giving attorney general powers to supervise and investigate nonprofit corporations); 805 Ill. Comp. Stat. Ann. 105/101.35 (allowing attorney general action based on information reported to the secretary of state as required by the statute).

[66]Coyne, *supra* note 42, at 52.

[67]Guggenheimer, *supra* note 50, at 141.

[68]*See, e.g.*, N.Y. Not-for-Profit Corp. Law § 404(o) (requires that organizations whose purposes include establishment or maintenance of a hospital must obtain approval of the Public Health Council).

[69]See, e.g., 20 Ill. Comp. Stat. Ann. 3960/8 (Health Facilities Planning Act).

[70]This approach is reflected in the Revised Model Nonprofit Corporation Act. See *supra* note 50. Some states, including Mississippi and Tennessee, have adopted the RMNCA (in whole or in part). The RMNCA is discussed in Coyne, *supra* note 42, at 52-54, and Moody, *supra* note 50.

[71]See Moody, *supra*, note 50, at 263-64 n.68 (noting that committee drafting the RMNCA unanimously voted to remove provision in first Model Act stating that "corporations formed for charitable purposes hold their assets in trust for the stated purposes at the time of the acquisition of the respective assets and that the directors are trustees thereto," and that this elimination allowed nonprofit corporations greater leeway to take actions that changed the purpose to which assets were used, such as merging or amending their articles of incorporation).

[72]See Coyne, *supra* note 42, at 53.

[73]RMNCA, § 11.01(c)(1) (approval of plan of merger).

[74]See, e.g., 805 Ill. Comp. Stat. Ann. 105 (General Not For Profit Corporation Act of 1986), *as discussed* in Coyne, *supra* note 42, at 52 nn.64-67.

[75]805 Ill. Comp. Stat. Ann. 105/110.05.

[76]See Coyne, *supra* note 42, at 52 n.65 (even though the Act is based on the Business Corporation Act, it nonetheless states that its goal is to protect the public interest in charitable nonprofit organizations and acknowledges the attorney general's role in representing this interest).

[77]Guggenheimer, *supra* note 50, at 141-45 (the attorney general is a necessary party to court proceedings involving fundamental changes in the functioning of a nonprofit organization). *See also* Mary Grace Blasko, Curt S. Crossley & David Lloyd, *Symposium, Nonprofit Organizations: Standing to Sue in the Charitable Sector*, 28 U.S.F. L. Rev. 37, 46 (1993) [hereinafter Blasko].

[78]See, e.g., Florida v. Anclote, 566 So. 2d 296, 298 (Fla. Dist. Ct. App. 1990).

[79]See, e.g., N.Y. Not-for-Profit Corp. Law § 907(b) ("Upon filing of the application the court shall fix a time for hearing thereof, and shall direct that notice thereof be given to such persons as may be interested. . . ."), and ("any person interested" in a merger may appear in a court proceeding seeking approval of that merger and to argue against the grant of the application).

[80]N.Y. Not-for-Profit Corp. Law § 511(b) ("Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.").

[81]The Revised Model Nonprofit Corporation Act does not state who, other than members of a corporation, may sue for a breach of the act. *Developments in the Law – Nonprofit Corporations, The Fiduciary Duties of Directors*, 105 Harv. L. Rev. 1590, 1594-95 n.28 (1992) [hereinafter *Developments in the Law*].

[82]*Id.* at 1594.

[83]*Id.*

[84]Alco Gravure, Inc., v. Knapp Found., 479 N.E.2d 752, 755 (N.Y. 1985) (beneficiaries of nonprofit corporation's employee fund had standing to challenge amendment of charter under Not-For-Profit Corporations Law); Stern v. Lucy Webb Hayes Nat'l Training Sch. For Deaconesses and Missionaries, 367 F. Supp. 536, 540-41 (D.D.C. 1973) (patients could sue to prevent further loss to hospital due to mismanagement by hospital trustees; patients could sue for repayment of losses to the hospital, but could not be personally compensated for acts), supplemented by 381 F. Supp. 1003, 1015-16 (D.D.C. 1974) (holding that board of charitable corporation engaged in self-dealing and mismanagement); Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 495 (N.J. Super. St. Ch. Div. 1967)(city residents and taxpayers had standing to compel performance of charitable corporation), *aff'd*, 250 A.2d 427 (N.J. Super. Ct. App. Div. 1969). Other providers of reproductive health services in the area could assert a special interest because they would have an increased patient load if services were no longer available at a local hospital.

[85]*Developments in the Law, supra* note 81, at 1597-98; Harvey J. Goldschmid, *Nonprofit Symposium Issue, The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. Corp. L. 631, 652 (1998).

[86]See, e.g., Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575 (N.Y. Sup. Ct. 1999) (denying petition for sale under N.Y. Not-for-Profit Corp. Law §§ 510, 511).

[87]Guggenheimer, *supra* note 50, at 146, 150-52 (attorney general may have a cause of action against directors for breach of fiduciary duty, mismanagement or waste of corporate assets under N.Y. Exec. Law § 175 and N.Y. Not-for-Profit Corp. Law §§ 719, 720).

[88]See, e.g., Rose Ocko Found. v. Lebovits, 686 N.Y.S.2d 861, 864 (2d Dept. 1999) (court set aside sale on grounds that sale had not been submitted to court for approval and interfered with nonprofit foundation's ability to carry out its charitable purpose).

[89]See *generally* GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES, Chapter 19 (The Charitable Trust-Purposes and Beneficiaries) (2d ed. rev. 1991 & supps.), and Chapter 17, § 322 n.54 (The Creation of Charitable Trusts, History and Basis of Charitable Trusts in the United States) (listing state statutes) [hereinafter BOGERT].

[90]*See, e.g.*, Singer, *supra* note 57, at 194 ("The law can be simply stated: hospital assets constitute a 'charitable trust with unnamed beneficiaries' and are required to be used solely for corporate purposes."); Coyne, *supra* note 42, at 50 (the hospital corporation holds its assets "subject to a charitable trust, which is defined by its basic corporate documents and its practice"); ATTORNEY GENERAL OF NEW HAMPSHIRE, REPORT ON OPTIMA HEALTH (1998) at 9, *available at* http://www.state.nh.us/nhdoj/CHARITABLE/optima1.html. (under New Hampshire law, a charitable trust is any organization, including a nonprofit corporation, that holds property for charitable purposes), *citing* N.H. Rev. Stat. Ann. § 7:21 II(a).

[91]Michael Peregrine, *Charitable Trust Laws and the Evolving Nature of the Nonprofit Hospital Corporation*, 30 J. HEALTH & HOSP. L. 11, 11-12 (1997)(it cannot be stated with absolute certainty whether or not a charitable corporation is a trustee, but there is little doubt that charitable trust principles can be applied to prevent a nonprofit board from effecting a substantial departure from the dominant purpose of the organizations) [hereinafter Peregrine, *Charitable Trust Laws*]; Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 489 (N.J. Super. St. Ch. Div. 1967)(while a hospital is not, "strictly speaking, a charitable trust," it is a charitable corporation, and subject in some degree to the laws of both trusts and corporations; "To what extent a charitable corporation is to be governed by laws applicable to charitable trusts is a vexed question to which the authorities give irreconcilable answers."), *aff'd*, 250 A.2d 427 (N.J. Super. Ct. App. Div. 1969); Holt v. College of Osteopathic Physicians and Surgeons, 394 P.2d 932, 937 (Cal. 1964) (while trustees of charitable corporations and charitable trusts are not identical, "[r]ules governing charitable trusts ordinarily apply to charitable corporations").

[92]See BOGERT, *supra* note 89, § 1 (Terminology and Classification).

[93]See BOGERT, *supra* note 89, § 1 (Terminology and Classification). An often-cited, but rather technical definition of a "charitable trust" is: "a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held [that is, the trustee] to equitable duties to deal with the property for a charitable purpose." RESTATEMENT (SECOND) OF TRUSTS § 348 (1999) (Definition of Charitable Trust) [hereinafter RESTATEMENT].

[94]A trust with no identifiable beneficiary is also called a "public trust." A trust that benefits named individuals is a "private trust." *See* BOGERT, *supra* note 89, § 1 (Terminology and Classification).

[95]*See* authorities, *supra* note 91.

[96]Queen of Angels Hosp. v. Younger, 136 Cal. Rptr. 36 (Cal. Ct. App. 1977), *examined in* Singer, *supra* note 57, at 194; Peregrine, *Charitable Trust Laws, supra* note 91, at 13; and Coyne, *supra* note 42, at 50.

[97]Queen of Angels, 136 Cal. Rptr. at 41. Ultimately, the Queen of Angels assets were held in trust for the operation of hospital business in Los Angeles, but the corporation itself was not required to continue directly operating Queen of Angels Hospital to fulfill its articles of incorporation, and could use some of its assets for several activities involving nonprofits in Los Angeles County. *See* Coyne, *supra* note 42, at 50-51, *citing* Queen of Angels Hosp. v. Younger, No. C 6823 (Cal. 1977)(judgment).

[98]Bogert, *supra* note 89, § 393 (Powers of Settlor and Trustees as to Purposes and Methods).

[99]*Id.* § 431 (Origin and General Meaning of Cy Pres), and § 437 (General or Special Charitable Intent-Construction); Vanessa Laird, *Phantom Selves: The Search for a General Charitable Intent in the Application of the Cy Pres Doctrine*, 40 STAN. L. REV. 973, 979 (1988); Peregrine, *Charitable Trust Laws, supra* note 91, at 12. For example, a gift to a particular hospital may be interpreted as having a special intent of helping that hospital, or a general intent of helping to further health care generally. If a gift is deemed to have a special intent, if the objective of that gift becomes impossible or impractical, the gift is returned to the successors (heirs of the donor) if made by a testamentary trust (a will), or to the donor if made by a inter vivos trust (a gift given during the life of the donor).

[100]BOGERT, *supra* note 89, § 431 n.30 (Origin and General Meaning of Cy Pres). Some examples of statutes codifying the *cy pres* standard are N.Y. Est. Powers & Trusts Law § 8-1.1(c); Md. Est. & Trusts Law § 14-302(a); Cal. Probate Code § 15409; Vt. St. Ann. § 2328; Ga. Wills, Trusts and Administration of Estates § 53-12-113.

[101]See Peregrine, *Charitable Trust Laws, supra* note 91, at 13; Queens of Angels, 136 Cal. Rptr. at 41 (hospital could not lease facility and use proceeds to operate health clinics); Holt v. College of Osteopathic Physicians and Surgeons, 394 P.2d 932, 939 (Cal. 1964) (remanded as to whether teaching of allopathic medicine was contrary to charitable purpose of teaching osteopathic medicine); Taylor v. Baldwin, 247 S.W.2d 741, 756 (Mo. 1952)(noting that affiliation resulting in relocation of hospital within same city conformed with hospital's mission, so the court did not have to apply the *cy pres* doctrine).

[102]For example, in *In re Multiple Sclerosis Service Organization of New York*, New York's highest court concluded that the legislature did not intend for the same high standard of *cy pres* to apply to corporate dissolutions as it does to distributions of charitable assets explicitly restricted by a trust instrument. 496 N.E.2d 861, 865 (N.Y. 1986). The court termed this "substantially similar" standard *"quasi cy pres." Id.* at 867.

[103]See, *e.g.*, Blasko, *supra* note 77, at 42-44 (it is the duty of the attorney general to supervise charities to protect the public and represent the interests of state citizens, whether or not the state has an explicit statute). For more on the role of the attorney general and enforcing charitable trusts, *see* BOGERT, *supra* note 89, § 411 (The Attorney General as the Protector, Supervisor and Enforcer of Charitable Trusts); and RESTATEMENT, *supra* note 92, § 391 (Who Can Enforce a Charitable Trust).

[104]Blasko, *supra* note 77, at 44 (statutes make attorney general an "indispensable party" who must have an opportunity to consider the impact on the public in suit involving a charity).

[105]Blasko, *supra* note 77, at 42-43 (while some states are very active in supervising charities, other offices appear to have virtually no interest).

[106]Blasko, *supra* note 77, at 69; Kapiolani Park Preservation Soc'y v. Honolulu, 751 P.2d 1022, 1025 (Haw. 1988) (members of the public, as beneficiaries of park, had standing to challenge proposed restaurant operation in park, alleging charitable trust violation; attorney general actively supported proposal).

[107]See, *e.g.,* Holt v. College of Osteopathic Physicians and Surgeons, 394 P.2d 932, 938 (Cal. 1964) (trustees had standing).

[108]BOGERT, *supra* note 89, § 414 n.14 (May Actual or Prospective "Beneficiaries" Sue to Enforce?); Blasko, *supra* note 77, at 57-58.

[109]See *e.g.,* Md. Code Ann., Est. & Trusts § 14-302 (Uniform Charitable Trust Administration Act).

[110]See *generally* Blasko, *supra* note 77, at 59 (on evolution of the "special interest" doctrine and courts' increasing tendency to grant standing to parties other than the attorney general). *See infra*, note 84 and accompanying text on who may have a "special interest."

[111]See Young Men's Christian Ass'n of the City of Washington v. Covington, 484 A.2d 589, 591-92 (D.C. 1984) (dues paying members received a particular benefit from facility, and could therefore challenge its closing); Grabowski v. City of Bristol, No. CV950468889S, 1997 WL 375596, at *4-5 (Conn. Super. June 3, 1997) (residents of land directly next to park had special interest standing not shared by the general public). *See also* New Jersey case study in Section III.B. of this report. *But see* BOGERT, *supra* note 89, § 414 n.13 (May Actual or Prospective "Beneficiaries" Sue to Enforce?) (noting that this is not the majority view).

[112]See Smithers v. St. Luke's-Roosevelt Hosp. Ctr., No. 543, slip op. (N.Y. App. Div. Apr. 5, 2001), 2001 WL 331963, at *9 (spouse of deceased donor had standing to enforce terms of trust); John T. Gaubatz, *Grantor Enforcement of Trusts: Standing in One Private Law Setting*, 62 N.C. L. REV. 905, 922 (1984), *citing* Woman's Hosp. League v. City of Paducah, 223 S.W. 159 (Ky. Ct. App. 1920) (group contributed to trust to erect a building with condition that it be used as a hospital; contributors were granted standing to challenge building's use as a dormitory for nursing students); *see also, e.g.,* Cal. Corp. Code § 5142 (granting standing to enforce a charitable trust to "a person with a reversionary, contractual, or property interest in the assets subject to such charitable trust").

[113]Jones v. Grant, 344 So. 2d 1210, 1212 (Ala. 1977) (students, as beneficiaries of a charitable institution, given standing to sue college and its board of directors for misuse of charitable funds).

[114]Blasko, *supra* note 77, at 61-79 (noting that presence of any one of these elements can be determinative).

[115]BOGERT, *supra* note 89, § 411 (The Attorney General as the Protector, Supervisor and Enforcer of Charitable Trusts). *See generally* case studies cited in Section III. of this report.

[116]Queen of Angels Hosp. v. Younger, 136 Cal. Rptr. 36 (Cal. Ct. App. 1977) (corporation could not abandon operation of hospital and instead lease facility and use proceeds to operate clinics).

[117]See, *e.g.*, Kerner v. Thompson, 13 N.E.2d 110 (App. Ct. Ill. 1938) (funds solicited for trust devoted to help flood victims could not be used for flood prevention; court awarded fund to relief organization).

[118]BOGERT, *supra* note 89, § 394 n.4 (Duties of Charitable Trustees-Standard of Care-Liabilities for Breach) (noting in a charitable corporation, directors have a duty to use assets for purposes set forth in the articles of incorporation).

[119]*Id.* (noting differences in duties and standards of care between trustees for charities and directors of nonprofit corporations).

[120]As noted earlier, this report only focuses on nonprofit-to-nonprofit conversions, since most of the religious restrictions are imposed by nonprofit entities, although clearly the issue of nonprofit to for-profit conversions is the topic for its own report. *See infra* note 31 and accompanying text.

[121]Ariz. Rev. Stat. Ann. §§ 10-11251 to 10-11254; Cal. Corp. Code §§ 5914 to 5925; Cal. Code Regs. tit. 11, § 999.5; Colo. Rev. Stat. Ann. §§ 6-19-201 to 6-19-203; Fla. Stat. Ann. §§ 155.40, 155.41; Ga. Code Ann. §§ 31-7-400 to 31-7-412; Ind. Code Ann. §§ 16-22-3-1 to 16-22-3-30; Kan. Stat. Ann. §§ 19-4601 to 19-4626; La. Rev. Stat. Ann. §§ 40:2115.11 to 40:2115.23; Neb. Rev. Stat. Ann. §§ 71-20,102 to 71-20,114; Nev. Rev. Stat. Ann. §§ 450.490 to 450.510; N.H. Rev. Stat. Ann. §§ 7:19-b, 7-21; N.J. Rev. Stat. Ann. §§ C.26:2H-7.10 to C.26:2H-7.14; N.C. Gen. Stat. §§ 131E-5 to 131E-14.1; Ohio Rev. Code Ann. §§ 109.34, 109.35; Or. Rev. Stat. Ann. §§ 65-800 to 65-815; R.I. Gen. Laws §§ 23-17.14-1 to 23-17.14-33; Va. Code Ann. §§ 55-531 to 55-533; Wis. Stat. Ann. §165.40.

[122]See *generally* Rachel B. Rubin, *Nonprofit Hospital Conversions in Kansas: The Kansas Attorney General Should Regulate All Nonprofit Hospital Sales*, 47 U. KAN. L. REV. 521 (1999) (noting potential of conversions between nonprofits to change the mission of a hospital and urging expansion of coverage of conversion laws to address these concerns).

[123]See *supra* note 121 for statutory cites to those covering nonprofit-to-nonprofit conversions. For an overview of conversion laws, see *supra* note 31.

[124]See *supra* note 121 for statutory cites.

[125]See *supra* note 121 for statutory cites.

[126]PROTECTING HEALTH, *supra* note 31, at 15-17 n.52, *citing* statutes in California, Connecticut, District of Columbia, Louisiana, Nebraska, New Hampshire, Rhode Island, and Washington.

[127]*Id.* at 6 n.21, *citing* Washington statute; COMMUNITY CATALYST, SUMMARY OF COMMUNITY BENEFITS LAWS, *available at* http://www.communitycat.org.

[128]PROTECTING HEALTH, *supra* note 31, at 6 n.22, *citing* R.I. Gen. Laws § 23-17.14-8(c)(3).

[129]See *generally* SALE AND CONVERSION, *supra* note 31, at 3-4; PROTECTING HEALTH, *supra* note 31, at 17-19 (describing enforcement provisions of various state laws).

[130]See, *e.g.*, N.J. Stat. Ann. § 26:2H-7.11.l.

III. Five Case Studies: How Charitable Assets Laws Can Prevent, Modify, or Dismantle a Transaction

[131]ATTORNEY GENERAL OF NEW HAMPSHIRE, REPORT ON OPTIMA HEALTH (1998) at 13-15 [hereinafter OPTIMA], *available at* http://www.state.nh.us/nhdoj/CHARITABLE/optimal.html (page numbers may differ in version on website). The merger came after many years of competition and each institution saw the merger as a way to cut operating costs, keep the institutions viable and maintain their distinct identities in the Manchester community. OPTIMA, at 15. *Live Free or Die* (2000) is a video about the merger and one of the doctors who was instrumental in resisting the abortion restriction. Copies may be ordered through Transit Media at (800) 343-5540.

[132]Elliot Hospital, while having ties to Protestant denominations, was a secular organization. OPTIMA, at 13.

[133]OPTIMA, at 14. Articles of Agreement (the term in New Hampshire for articles of incorporation) are filed with the state to establish an entity's corporate existence. CMC's Articles of Agreement identified the mission was "to maintain its identity as a Catholic Hospital" and identifies CMC as an "official agency of the Roman Catholic Church" and therefore bound by the *Directives*.

[134]OPTIMA, at 17 n.46 (Optima was to be "the head of a community based health care system . . . [w]hich has both Catholic and non-Catholic elements. . . . Optima will not be identified as operated under the auspices or control of any particular religious denomination of any other group.).

[135]OPTIMA, at 40.

[136]OPTIMA, at 18; Ralph Jimenez, *N.H. Hospital Merger Fails Over Ethics Impasse: Catholic, Nonsectarian Facilities Clash Over Abortion, Other Issues*, BOSTON GLOBE, Feb. 16, 1999, at B1.

[137]OPTIMA, at 40 n.92.

[138]OPTIMA, at 18.

[139]OPTIMA, at 1.

[140]OPTIMA, at 9 n.8, 11, *citing* N.H. Rev. Stat. Ann. §§ 7:19, 7:20, 7:21 ("any fiduciary relationship with respect to property arising . . . as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property . . . for any charitable, nonprofit, educational, or community purpose"). The definition of charitable trusts in § 7:21 is similar to other states' statutory definitions of charitable trusts. The Report also cited *Attorney General v. Rochester Trust Co.*, 113 N.H. 74, 76 (1975)(regarding Attorney General's participation in matter involving administration of charitable trusts). New Hampshire has a long history of leadership and innovation in its protection of charitable assets. *See* George Gleason Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633, 641 (1954) (noting "pioneer work" in supervision and enforcement of charitable trusts).

[141]New Hampshire's nonprofit corporation statute (see Section II.A. of this report) did not require attorney general notice and/or court approval for mergers between nonprofit entities. *See* N.H. Rev. Stat. Ann. § 292. New Hampshire had no statutory provisions governing nonprofit-to-nonprofit hospital conversions (see Section II.C. of this report) in effect when the original merger occurred. The decision, however, did refer to N.H. Rev. Stat. Ann. §§ 7:19-b, 7:21, which had relevant language about charitable trust and also clarified that it did not limit in any way attorney general or judicial authority pursuant to the common law.

[142]OPTIMA, at 13, *citing* Chwalek v. Dover Sch. Comm., 120 N.H. 864 (1980).

[143]OPTIMA, at 10 n.10, *citing* Queen of Angels Hosp. v. Younger, 136 Cal. Rptr. 36 (Cal. Ct. App. 1977); Holt v. College of Osteopathic Physicians and Surgeons, 61 Cal. 2d 750, 754 (1964); Attorney Gen. v. Hahnemann Hosp., 494 N.E.2d 1011, 397 Mass. 820, 835-36 (1986); Greil Mem'l Hosp. v. First Alabama Bank of Montgomery, 387 So. 2d 778, 781 (Ala. 1980); Riverton Area Fire Protection Dist. v. Riverton Volunteer Fire Dep't, 566 N.E.2d 1015 (Ill. App. 1991); Bosson v. Women's Christian Nat'l Library Ass'n, 225 S.W.2d 336 (Ark. 1949).

[144]OPTIMA, at 11-12 (*cy pres* applies to charitable hospitals, regardless of their organizational form).

[145]OPTIMA, at 12-13, *citing* N.H. Rev. Stat. Ann. § 547:3-d; *In re* Certain Scholarship Funds, 133 N.H. 227, 240 (1990) (Brock, C.J. dissenting, and citing Jacobs v. Bean, 99 N.H. 239, 241-42 (1954)). The Attorney General also relied on the common law doctrine of *quo warranto*, which prohibits a corporation from abusing its corporate powers. The Attorney General noted this doctrine's prior use in cases involving hospital mergers between for-profit and nonprofit entities. OPTIMA, at 13.

[146]OPTIMA, at 1-2. The Director of Charitable Trust is a state governmental official with authority to supervise, administer, and enforce charitable trusts, charitable solicitations, and charitable sales promotions. N.H. Rev. Stat. Ann. § 7:20.

[147]OPTIMA, at 4.

[148]OPTIMA, at 3, *citing* N.H. Rev. Stat. Ann. § 547:3-d. The Attorney General noted that if Optima met this first requirement, *cy pres* would further require Optima to use the charitable assets from Elliot and CMC to fulfill their respective charitable missions "as closely as possible." *See also* OPTIMA, at 25, 32-38.

[149]OPTIMA, at 24-32.

[150]OPTIMA, at 5.

[151]OPTIMA, at 8, 17.

[152]OPTIMA, at 18.

[153]OPTIMA, at 38.

[154]OPTIMA, at 38-39.

[155]OPTIMA, at 39. The Attorney General's Report also cites other evidence of Optima's failure to address the importance of CMC's Catholic-based health care mission, including statements of physicians concerning the different cultures of the two hospitals that were brushed aside by Optima's CEO. OPTIMA, at 39-40.

[156]OPTIMA, at 42.

[157]OPTIMA, at 6. The Attorney General also questioned the validity of the formation of Optima, based on "defects in corporate documentation, and the sequence of events" by which authority was transferred to Optima, and its failure to provide evidence of savings produced by the merger. OPTIMA, at 22, 42.

[158]*Special Optima Boards to Address Attorney General's Report*, NEW HAMPSHIRE BUS. REV., June 5, 1998, at 19.

[159]*Id.*; Scott Hensley, *Optima Forms Boards to Review Consolidation*, MOD. HEALTHCARE, June 8, 1998, at 14.

[160]Julia L. Eberhart, *Merger Failure: A Five-Year Journey Examined*, 55 HEALTHCARE FIN. MGMT. 3739 (2001); Cinda Becker, *Meet the New Boss: Same as the Old Boss, in Some Cases, As Ownership Changes Crash Over Hospital Industry*, MOD. HEALTHCARE, July 10, 2000, at 2; Scott Hensley, *N.H. System Folds, Bows to Local Opposition*, MOD. HEALTHCARE, Mar. 1, 1999, at 4.

[161]See Eberhart, *supra* note 160 (describing Optima and process of separating jointly owned assets, information systems and laboratory services costing a reported ten million dollars and taking over one year); J. Duncan Moore, Jr., *System Divorces on Rise: Unscrambling Deals is Messy and Contentious*, MOD. HEALTHCARE, May 29, 2000, at 24.

[162]See letter from Len Fishman, Commissioner of New Jersey Department of Health and Senior Services to Sister Elizabeth Ann Maloney and David Fletcher, dated July 7, 1998 (approving hospitals' certificate of need application to consolidate); Verified Complaint, ¶ 11, *In re* Application of Elizabeth General Medical Center & St. Elizabeth Hospital for Approval of Consolidation (N.J. Super. Ct. Ch. Div. 1999)(No. UNN-C-97-99) [hereinafter Verified Complaint].

[163]Certification of Renee Steinhagen, *In re* Application of Elizabeth General Medical Center & St. Elizabeth Hospital for Approval of Consolidation (N.J. Super. Ct. Ch. Div. 1999)(No. UNN-C-97-99).

[164]Verified Complaint, ¶ 12, Exhibit D.

[165]See N.J. Stat. Ann. §§ 15A:10-1 to 15A:10-11, especially § 15A:10-2.

[166]Letter from John J. Farmer, Attorney General of New Jersey, by Allison E. Accurso, Assistant Attorney General, to Honorable Miriam N. Span, J.S.C., Union County Superior Court, Chancery Division 2-3 (Sept. 30, 1999) [hereinafter Attorney General Sept. 30, 1999 letter].

[167]Letter from Peter Verniero, Attorney General of New Jersey, by Mark I. Siman, Deputy Attorney General, to Richard Width, Esq., Lindabury, McCormick & Estabrook (Mar. 23, 1999).

[168]Members of the coalition read about the pending merger in a report published by Catholics for a Free Choice. CATHOLICS FOR A FREE CHOICE, WHEN CATHOLIC AND NON-CATHOLIC HOSPITALS MERGE: REPRODUCTIVE HEALTH COMPROMISED 55 (1998). Telephone Interview with Renee Steinhagen, Executive Director, Public Interest Law Center of New Jersey (Mar. 20, 2001) (Ms. Steinhagen served as Special Project Counsel to the Rutgers Women's Rights Litigation Clinic in the Elizabeth case).

[169]Letter from Renee Steinhagen, Special Project Counsel, Rutgers Women's Rights Litigation Clinic, to John Farmer, Attorney General of New Jersey (June 23, 1999).

[170]Attorney General Sept. 30, 1999 letter. The Attorney General submitted this letter in lieu of formal response to the court's request for the Attorney General's position on the Attorney General's and court's role in this transaction, the Attorney General's review of the proposed consolidation, and the Attorney General's reason for not opposing the hospital's application.

[171]Verified Complaint, at 12.

[172]*In re* Application of Elizabeth General Medical Center & St. Elizabeth Hospital for Approval of Consolidation, No. UNN-C-97-99 (N.J. Super. Ct. Ch. Div. Aug. 12, 1999)(order to show cause) [hereinafter Order to Show Cause].

[173]Notice of Motion to Intervene as Defendants, *In re* Application of Elizabeth General Medical Center & St. Elizabeth Hospital for Approval of Consolidation (N.J. Super. Ct. Ch. Div. 1999) (No. UNN-C-97-99) [hereinafter Notice of Intervention], *citing* R. 4:33-1 or R. 4:33-2 (intervention rules).

[174]Applicant-Interveners' Memorandum of Law in Support of Their Motion to Intervene, *In re* Application of Elizabeth General Medical Center & St. Elizabeth Hospital for Approval of Consolidation (N.J. Super. Ct. Ch. Div. 1999) (No. UNN-C-97-99) 6 (citing cases) [hereinafter Interveners' Memorandum].

[175]See *generally* Interveners' Memorandum, at 7-15, 24-26. Citing the standards governing intervention, the coalition asserted: their interests were not adequately represented by the Attorney General, who did not oppose the consolidation plan; these interests would be impaired if they were not permitted to intervene; and the intervention was timely, based on the court's issuance of an "Order to Show Cause" why the petition for consolidation should not be granted.

[176]Interveners' Memorandum, at 20-24.

[177]*See generally* Brief of Elizabeth General Medical Center and St. Elizabeth Hospital in Opposition to Motion to Intervene and in Response to Concerns of Objectors, at 16-38, *In re* Application of Elizabeth General Medical Center & St. Elizabeth Hospital for Approval of Consolidation (N.J. Super. Ct. Ch. Div. 1999) (No. UNN-C-97-99) [hereinafter Opposition to Intervention]; Letter from John J. Farmer, Attorney General of New Jersey, by Mark I. Siman, Deputy Attorney General, to Honorable Miriam N. Span, Judge, Union County Superior Court 1 (Sept. 10, 1999) [hereinafter Attorney General Sept. 10, 1999 letter].

[178]Attorney General Sept. 10, 1999 letter, at 2, noting that letter was instead of formal response to the intervention motion.

[179]*In re* Application of Elizabeth General Medical Center and St. Elizabeth Hospital for Approval of Consolidation, No. UNN-C-97-99, Final Judgment (N.J. Super. Ct. Ch. Div. Oct. 21, 1999); Mary Ann Spoto, *Pro-Choice Groups Get Voice in Merger: Intervention Granted in Hospital Changes*, STAR-LEDGER (Newark, N.J.), Sept. 14, 1999, at 39.

[180]Mary Ann Spoto, *Pro-Choice Groups Get Voice in Merger: Intervention Granted in Hospital Changes*, STAR-LEDGER (Newark, N.J.), Sept. 14, 1999, at 39.

[181]Interveners' Memorandum, at 22-24.

[182]Attorney General Sept. 30, 1999 letter, at 8.

[183]Attorney General Sept. 30, 1999 letter, at 6-9; Opposition to Intervention, at 46-48.

[184]Attorney General Sept. 30, 1999 letter, at 3-4 (citing for the proposition that the court has an oversight duty independent of the Attorney General's duty: Township of Cinnaminson v. First Camden Nat'l Bank & Trust, 99 N.J. Super. 115, 127-29 (Ch. Div. 1968); Frank v. Clover Leaf Park Cemetery Ass'n, 29 N.J. 193, 208 (1959); Moore v. Fairview Mausoleum Co., 39 N.J. Super. 309, 316 (App. Div. 1956); New Jersey Div., Horsemen's Benevolent Protective Ass'n v. New Racing Comm'n, 251 N.J. Super. 589-603 (App. Div. 1991)). The Attorney General also noted that a charitable corporation, while not a charitable trust in a strict sense, indeed holds its property to implement a charitable purpose. Attorney General Sept. 30, 1999 letter, at 3, *citing* Paterson v. Paterson Gen. Hosp., 97 N.J. Super. 514, 518-19 (Ch. Div. 1967), *aff'd*, 104 N.J. Super. 472 (App. Div. 1969). The Attorney General also noted that his office had reviewed five other similar transactions in recent years and that all also involved court approval (except one where the Attorney General had obtained an injunction to halt the transaction until the Attorney General could review). Attorney General Sept. 30, 1999 letter, at 9-10 (citing specific transactions).

[185]Opposition to Intervention, at 39-48.

[186]In this case, all three parties referred to the court review as a *"cy pres"* proceeding, insofar as the court was exercising its jurisdiction over charitable institutions. The Attorney General indicated that using the *cy pres* standard would be proper by claiming that the entities were ceasing to exist. Attorney General Sept. 30, 1999 letter at 4-6, 8-9 ("*Cy pres* doctrine provides that when a *charitable trust* [emphasis added] can no longer carry out its intended purpose, the funds will be applied to a similar purpose."), *citing* Sharpless v. Medford Monthly Meeting of Religious Soc'y of Friends, 228 N.J. Super. 68, 74 (App. Div. 1988), and A. Clapp & D. Black, *New Jersey Practice, Wills and Administration* § 524 (rev. 3rd ed. 1984). As noted earlier in the report, the strict *cy pres* standard is usually only used when the entity involved is treated as a "charitable trust." The Attorney General nonetheless argued that the transaction should be evaluated not by trust standards, but by nonprofit corporations standards. Attorney General Sept. 30, 1999 letter, at 4-5 (trend is to apply corporate fiduciary duties to directors of nonprofit corporations, not stricter charitable trustee duties; here, directors are required to employ reasonable decision-making to ensure the transaction is in the corporation's best interest, *citing* N.J. Stat. Ann. § 15A:6-14).

[187]Opposition to Intervention, at 39-41.

[188]Interveners' Memorandum, at 22-23.

[189]Attorney General Sept. 30, 1999 letter, at 4-6, *citing* N.J. Stat. Ann. § 15A:6-14 (other citations omitted); Opposition to Intervention, at 42-48.

[190]Interveners' Memorandum, at 3.

[191]Interveners' Memorandum, at 11.

[192]Notice of Intervention, at 3.

[193]Attorney General Sept. 30, 1999 letter, *citing In re* Katz Estate, 40 N.J. Super. 103, 107 (Ch. Div. 1956); Trustees of Rutgers College v. Richman, 41 N.J. Super. 259, 283 (Ch. Div. 1956). *See also* Attorney General Sept. 10, 1999 letter, *citing* Hagaman v. Bd. of Educ. of Woodbridge Tp., 117 N.J. Super. 446, 454 (App. Div. 1971); Passaic Nat. Bank v. East Ridgelawn Cemetery, 137 N.J. Eq. 603, 608 (N.J. 1946); Opposition to Intervention, at 40-42.

[194]Attorney General Sept. 30, 1999 letter, at 7-8.

[195]While this amount appears modest, it must be noted that New Jersey's Medicaid program covers abortion, leaving a small non-eligible low-income population still needing assistance. Telephone interview with Renee Steinhagen, Executive Director, Public Interest Law Center of New Jersey (Mar. 20, 2001).

[196]Charitable Assets Settlement Agreement, by and between Elizabeth General Medical Center and The American Civil Liberties Union of New Jersey, the New Jersey Religious Coalition for Reproductive Choice, New Jersey Right to Choose, Dr. Martin C. Hyman, Mary Roche and Lizette Higgins (Oct. 1999), at 2 (agreement resolving interveners' concerns in *In re* Elizabeth General Medical Center & St. Elizabeth Hospital for Approval of Consolidation).

[197]*In re* the Application of Elizabeth General Medical Center and St. Elizabeth Hospital for Approval of Consolidation, No. UNN-C-97-99, Final Judgment (N.J. Super. Ct. Ch. Div. Oct. 21, 1999).

[198]Indeed, the Attorney General noted that this was the first proceeding in which he had specifically required a charitable corporation to notify interested parties. Attorney General Sept. 30, 1999 letter, at 10-11.

[199]It is worth noting the judge determined that the proposed transaction constituted a change in mission for EGMC, but did not make a similar finding for St. Elizabeth's, thus impliedly accepting Interveners' assessment of what constituted mission.

[200]E-mail from Renee Steinhagen, Executive Director, Public Interest Law Center of New Jersey, to Elena N. Cohen, Senior Counsel, National Women's Law Center (Apr. 27, 2001)(confirming sequence of events).

[201]Lindy Washburn, *Accords Assure Abortion Access, Hospitals Join Catholic Plans*, THE RECORD (Bergen County, NJ), Mar. 4, 2001, at N-1.

[202]*In re* Application of Christ Hosp., St. Francis Hosp., St. Mary Hosp., & Franciscan Home & Rehab. Center, No. C-43-01, Final Judgment (N.J. Super. Ct. Ch. Div. Feb. 28, 2001); Verified Complaint, *In re* Application of Christ Hosp., St. Francis Hosp., St. Mary Hosp., & Franciscan Home & Rehab. Center (N.J. Super. Ct. Ch. Div. 2001) (No. C-43-01), ¶ 54-57 (secular hospital made charitable asset payment in the form of a women's health clinic and paid two million dollars to operate a women's health clinic that will provide a broad range of women's health services, including abortion and family planning); *In re* Application of St. Barnabas Corp. Relating to the Transfer of Membership of Wayne Gen. Hosp. and Wayne Gen. Hosp. Found. to St. Joseph's Healthcare System, No. C-19-01 (N.J. Super. Ct. Ch. Div. Feb. 27, 2001) (order approving transfer in conjunction with charitable asset payment); *see also* Verified Complaint, *In re* Application of St. Barnabas Corp. Relating to the Transfer of Membership of Wayne General Hosp. and Wayne Gen. Hosp. Foundation to St. Joseph Healthcare System (N.J. Super. Ct. Ch. Div. 2001), ¶¶ 3, 48, 49 (secular hospital's owner agreed to make a restricted gift to a local Planned Parenthood to provide family planning counseling and contraceptive distribution, case management services for abortions and tubal ligations, and women's reproductive health services that may become available in the future).

[203]Mark I. Siman, *The Community Health Care Asset Protection Act—An Analysis*, THE GARDEN STATE FOCUS, Feb. 2001, at 6-9.

[204]State *ex rel.* Butterworth v. Intracoastal Health Sys., Inc., No. CL 01-0068 AB, at 2 (Fla. Cir. Ct., Feb. 27, 2001) (order denying defendants' motion for judgment on the pleadings)[hereinafter IHS Order]; OFFICE OF THE FLORIDA ATTORNEY GENERAL, REPORT: INTRACOASTAL HEALTH SYSTEMS, INC. (2000)[hereinafter IHS ATTORNEY GENERAL REPORT]. The report can be obtained by writing to: Office of the Attorney General, 110 Southeast 6th Street, 10th Floor, Ft. Lauderdale, FL 33301.

[205]IHS ATTORNEY GENERAL REPORT, at 11-12.

[206]Phil Galewitz, *Good Sam Maternity Ward May Be Reborn*, THE PALM BEACH POST, Apr. 12, 2001, at 1B.

[207]IHS ATTORNEY GENERAL REPORT, at 1.

[208]Florida's nonprofit-to-nonprofit conversion law does not cover this kind of transaction; the only type of nonprofit to nonprofit transaction covered in Florida law is the sale of a public nonprofit hospital to a private nonprofit corporation. Fla. Stat. Ann. § 155.40.

[209]IHS ATTORNEY GENERAL REPORT, at 9-10; Phil Galewitz, *Judge Splits St. Mary's Trial Into Two Phases*, THE PALM BEACH POST, Feb. 22, 2001, at 3B.

[210]IHS ATTORNEY GENERAL REPORT, at 1.

[211]Louis J. Salome, *St. Mary's, Good Sam for Sale, Intracoastal Looking for a Buyer; State Says It'll Fight to Save St. Mary's*, THE PALM BEACH POST, Dec. 20, 2000, at 1A.

[212]IHS Complaint, ¶ 40, Complaint for Declaratory Relief (Jan. 3, 2001).

[213]The Attorney General asserted that court approval is required whenever there are deviations of a trust. IHS ATTORNEY GENERAL REPORT, at 2-3 (noting that Florida courts have jurisdiction to address such fundamental changes in corporate charitable purposes, *citing* Hillsborough Co. T & H Ass'n v. Florida T. & H. Ass'n, 196 So. 2d 203 (Fla. Dist. Ct. App. 1967), with potential equitable remedies including, but not limited to, injunctive relief to correct or present actions that might endanger trust purpose or property, *citing* People v. Orange County Charitable Servs., 87 Cal. Rptr. 2d 253 (Cal. Ct. App. 1999)).

[214]IHS Complaint at, 2-4, *citing* Art. IV, sec. 4(c), Fla. Constitution, and Fla. Stat. §§16.01, 617.1430, and 617.2003.

[215]IHS ATTORNEY GENERAL REPORT, at 2-4, *citing* Fla. Stat. § 737.4031 (judicial modification of trusts; codification of *cy pres* standard); Hegan v. Netherland, 133 S.W. 546 (Ky. Ct. App. 1911); Harwood v. Dick, 150 S.W.2d 704 (Ky. Ct. App. 1941); Riverton Area Fire Protection Dist. v. Riverton Volunteer Fire Dep't, 566 N.E.2d 1015 (Ill. App. 1991); St. Louis v. Inst. of Med. Educ. & Research, 786 S.W.2d 885 (Mo. Ct. App. 1990).

[216]IHS Complaint, at 14-15; Phil Galewitz & Louis Salome, *St. Mary's Stays Open; Intracoastal Sale OK'D, Tenet, HCA Will Bid for Hospitals*, PALM BEACH POST, Mar. 9, 2001, at 1A (noting that St. Mary's is the largest charity care provider in the county).

[217]IHS Complaint, at 15.

[218]IHS Order, at 5.

[219]IHS Order, at 3.

[220]IHS Order, at 5-8.

[221]Office of the Florida Attorney General, Press Release, Mar. 8, 2001; Agreement entered into by State of Florida Attorney General Robert Butterworth, by Cecile Dykas, Intracoastal Health Systems, Catholic Health East, Good Samaritan Health Systems, Inc.; St. Mary's Hospital, Inc.; Good Samaritan Hospital, Inc.; St. Mary's Hospital Foundation; St. Mary's Foundation of Palm County; Intracoastal Health Foundation (Mar. 4, 2001).

[222]See Settlement, at 1.

[223]Phil Galewitz, *Good Sam Maternity Ward May Be Reborn*, THE PALM BEACH Post, Apr. 12, 2001, at 1B.

[224]Editorial, *St. Mary's Prognosis: Full Recovery Possible*, PALM BEACH POST, Mar. 10, 2001, at 12A ("Thursday's settlement also requires that 430-bed St. Mary's be operated according to the Ethical and Religious Directives for Catholic Health Care Services. That presents a problem for poor, pregnant women, most of whom give birth at St. Mary's. Women who want no more children and request a tubal ligation should get it without any hassle. Whichever company seals the deal should pledge to make comprehensive reproductive health services as accessible to the poor as to the affluent.").

[225]See Carol Eisenberg, *Salvation or Insult? Episcopal Eyes Sale to Catholic Health System - Sparking Fears on Women's Care,* NEWSDAY, May 23, 1999, at A7.

[226]See *id.*

[227]N.Y. Not-for-Profit Corp. Law §§ 510, 511.

[228]N.Y. Not-for-Profit Corp. Law § 511(d).

[229]See *generally In re* Multiple Sclerosis Service Org. of New York, 496 N.E.2d 861 (N.Y. 1986).

[230]*Anti-Abortion Acts Targets*, NEWSDAY, Jan. 22, 1999, at A42 (unit created to enforce clinic violence law and monitor "access to women's services").

[231]Letter from JoAnn Smith, Executive Director, Family Planning Advocates of New York State; Rose Brown, Executive Vice President, Planned Parenthood Hudson-Peconic and Save Our Services-Long Island; and Karen Pearl, CEO, Planned Parenthood Nassau County and Save Our Services-Long Island, to Jennifer Brown, Director of the Reproductive Rights Unit, Office of the New York State Attorney General (Dec. 29, 1999) [hereinafter FPA Letter]. The role of the attorney general in this type of proceeding is "to ensure that the interests of the ultimate beneficiaries of the corporation, the public, are adequately represented and protected from improvident transactions." Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575, 592 (N.Y. Sup. Ct. 1999).

[232]FPA Letter at 4 n.13, 5, *citing* Manhattan Eye, Ear & Throat Hosp., 715 N.Y.S.2d at 593, 595.

[233]FPA Letter at 7 n.27, *citing* Queen of Angels Hosp. v. Younger, 136 Cal. Rptr. 36 (Cal. Ct. App. 1977); Attorney Gen. v. Hahnemann Hosp., 494 N.E.2d 1011 (1986).

[234]*See, e.g.,* Carol Eisenberg, *Reviving St. John's,* NEWSDAY, Oct. 21, 1998, at A26 (discussing EHS Chief Executive Officer's efforts to enter joint venture or affiliation between EHS and North Shore-Long Island Jewish Health System, Mount Sinai-NYU Health System and Winthrop).

[235]Notice of Appearance and Affidavit of Attorney General at 2-3, *In re* Application of Episcopal Health Services, Church Charity Corp. Community Hosp. of Smithtown, & Health Services at Home (N.Y. Sup. Ct. 2000) (No. 2000-3327). Note, however, that the Attorney General did not take the position that the sale caused a change in mission.

[236]*In re* Application of Episcopal Health Services, Church Charity Corp., Community Hosp. of Smithtown, & Health Services at Home, No. 2000-3327, at 3-4 (N.Y. Sup. Ct. Feb. 18, 2000) (order authorizing sale of hospital).

[237]Cal. Corp. Code §§ 5914 to 5925.

[238]Cal. Code Regs. tit. 11, § 999.5(e)(6)(A). These regulations had not yet been formally adopted when the Attorney General was reviewing the transaction.

[239]Deanna Bellandi, *Reproductive Services Kept in CHW Deal in California*, MOD. HEALTHCARE, Apr. 23, 2001, at 4.

[240]See Memorandum from Susan Berke Fogel, Legal Director of the California Women's Law Center; Lourdes A. Rivera, Managing Attorney, NHeLP & Mara Youdelman, Staff Attorney, NHeLP to Women's and Health Advocates (Apr. 16, 2001).

[241]*Id.*

[242]Letter from Bill Lockyer, Attorney General of California, by Mark J. Urban, Deputy Attorney General, to Laurence Dempsey, Assistant General Counsel, Sutter Health (Mar. 30, 2001).

IV. Key Factors in Determining the Success of Possible Challenges

[243]See NARAL, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS (10th ed. 2001)(updated yearly, this publication provides information on each state attorney general and stance on reproductive rights). State attorney general websites sometimes indicate whether an attorney general is especially active in certain areas of enforcement. For a listing of websites, see Appendix C of this report and http://www.NAAG.org.

APPENDICES

[244]1 MATTHEW BENDER TREATISE ON HEALTH CARE LAW § 6.01[3] (Michael G. MacDonald et al. eds. 2000).

[245]Lawrence E. Singer, *Realigning Catholic Health Care: Bridging Legal and Church Control in a Consolidating Market,* 72 TUL. L. REV. 159, 181 (1997) [hereinafter Singer].

[246]Elizabeth M. Guggenheimer, *The Attorney General's Role in Supervising Not-For-Profit Organizations,* 34 PRACTICING LAW INSTITUTE/NEW YORK 135, at 141 (1998).

[247]See *e.g.*, N.Y. Relig. Corp. Law; N.Y. Not-for-Profit Corp. Law § 910; N.Y. Exec. Law § 172-a; GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES, Chapter 17 § 322 n.54 (2d ed. rev. 1991 & supps.)(citing state statutes).

[248]Singer, *supra* note 245, at 181.

[249]Lawrence E. Singer & Elizabeth Johnson Lantz, *The Coming Millennium: Enduring Issues Confronting Catholic Health Care*, 8 ANNALS HEALTH L. 299, 330 n.19 (1999).

[250]New York, for example, publishes one such report and posts it online. *See* http://www.oag.state.ny.us.

[251]See *e.g.,* EDUCATION FUND OF FAMILY PLANNING ADVOCATES OF NEW YORK STATE, NO STRINGS ATTACHED: PUBLIC FUNDING OF RELIGIOUS HOSPITALS (2001); SERVICE EMPLOYEES INTERNATIONAL UNION, BROKEN PROMISES: HOW DECLINING CHARITY CARE AT CATHOLIC HEALTHCARE WEST IS COSTING ALL CALIFORNIANS (June 1999).

Hospital Mergers and the Threat to Women's Reproductive Health Services

Using Charitable Assets Laws to Fight Back

NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

11 Dupont Circle, NW • Suite 800
Washington, DC 20036
(202) 588-5180 • FAX (202) 588-5185
www.nwlc.org info@nwlc.org

The increasing frequency of mergers and other affiliations involving religiously sponsored hospitals represents a growing threat to the availability of women's reproductive health services. When hospitals governed by religious restrictions on abortion and other reproductive health services affiliate with other institutions that provide these services, needed health care services are often discontinued and members of the community lose access to them. One way in which those concerned about the erosion of services can take action to stop it is by using charitable assets laws, which are aimed at ensuring that nonprofit hospitals used their assets to further their charitable mission.

Hospital Mergers and the Threat to Women's Reproductive Health Services: Using Charitable Assets Laws to Fight Back is a useful resource guide, designed to provide health care advocates and other seeking to preserve access to reproductive health services with an understanding of how to use the nation's charitable assets laws to challenge proposed hospital mergers and other transactions that threaten to reduce or eliminate these services. Section I of the report provides information on the underlying problem–the diminishing availability of abortion and other women's reproductive health services–and the way in which mergers between secular and religiously sponsored hospitals are making it worse. Section II explains how charitable assets laws apply to transactions that threaten to eliminate women's reproductive health services. Section III describes actual case studies in which charitable assets laws have been used to prevent the transactions or reduce their harmful impact. Section IV outlines the factors charitable assets enforcement authorities consider in analyzing these transactions. The report also contains practical tools, such as a sample letter to the enforcement agencies, to assist advocates in making their case.

Name _____

(Order must be pre-paid, we cannot bill.)

Organization _____

Address _____

_____

_____

Daytime Telephone ( ) _____

Call for information about bulk orders.

Please make checks payable to the **National Women's Law Center** and mail to:

National Women's Law Center
11 Dupont Circle, NW • Suite 800
Washington, DC 20036
(202) 588-5180 • FAX (202) 588-5185
www.nwlc.org info@nwlc.org

Item	Price	Quantity	Amount
Hospital Mergers and the Threat to Women's Reproductive Health Services: Using Charitable Assets Laws to Fight Back	$15		
		(D.C. residents add 5.75% sales tax)	
		Total	

11 Dupont Circle, NW • Suite 800
Washington, DC 20036
(202) 588-5180 • FAX (202) 588-5185
www.nwlc.org info@nwlc.org