REQUISITE

XI The GENEROSITY Edition

WILLIAMS PARKER
HARRISON DIETZ & GETZEN
ATTORNEYS AT LAW
EST. 1925

Sarasota benefits from its philanthropic residents, both newly welcomed and established. A vibrant array of arts, healthcare, environmental, educational, and human services organizations are thriving due to the loyal patrons who give back to our community each year.

We are a firm that takes pride in being a part of leaving a lasting impact on the community by helping our clients create strategies unique to their goals, with sophisticated legal insight and trusted counsel.

Charitable giving rings through several editions of *Requisite*. In *Requisite X*, we concentrated on the operation, management, and sustainability of nonprofit organizations. In this edition, we focus on the protection and benefits of patronage. To that end, we have included articles regarding joining a nonprofit board, gifting strategies, preserving individual assets, leaving a legacy, and tax benefits. We also touch on important intellectual property protection for nonprofits.

We are pleased to feature an interview with Lynn Susman, president and chief development officer of Boston Children's Hospital Trust, the philanthropic resource for Boston Children's Hospital. Lynn shares her experience in the successful philanthropic fundraising of the Trust's seven-year, $1.3 billion capital campaign: "Dream, Dare, Deliver."

We, as Sarasotans, are honored to assist in continuing to build our city's lasting legacy. We hope with this edition of *Requisite*, you find something not only to preserve and shape your powerful legacy, but to share insight we have accrued over nearly 100 years participating in and helping to craft artful giving.

Ric Gregoria

President

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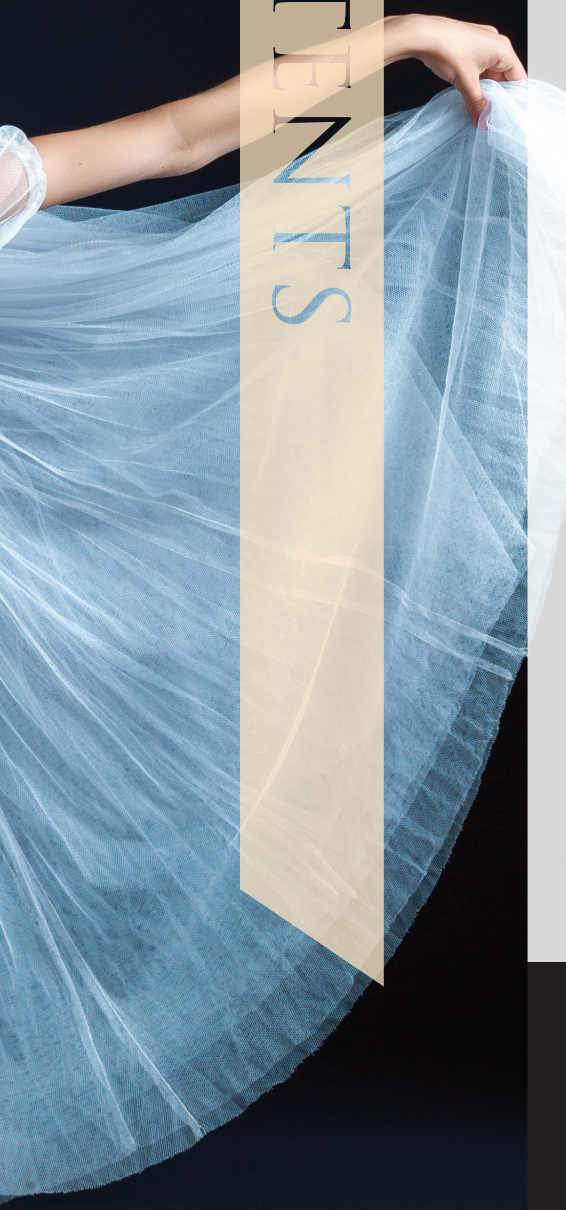

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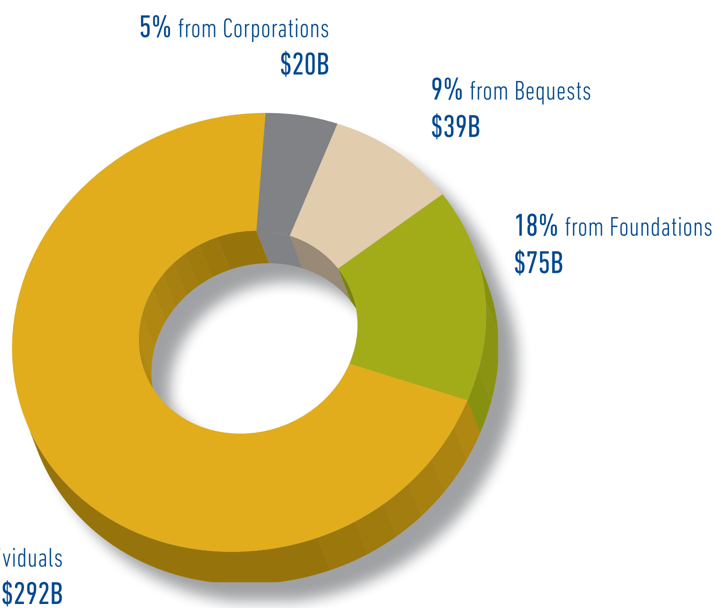
GENEROSITY

National charitable giving in 2018 reached $427B, a .07 percent annual increase.*

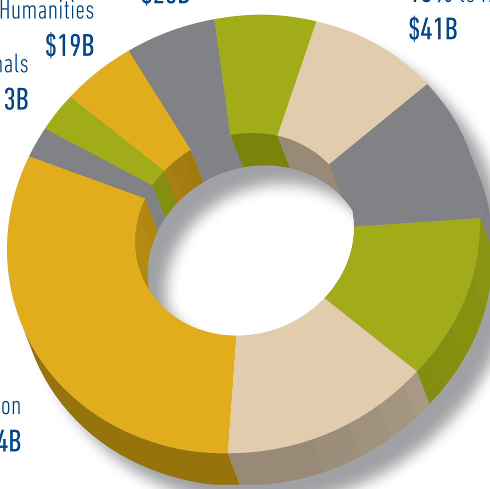
2018 Charitable Contributions by Source*
(all figures are rounded)



- Giving by corporations increased by 5.4 percent.
- Giving by bequest remained flat at 0 percent.
- Giving by foundations increased by 7.3 percent.
- Giving by individuals decreased, comprising less than 70 percent of overall giving for the first time in at least 50 years.

Where are all the charitable dollars going?

2018 Charitable Contributions by Recipient Category*
(all figures are rounded)



- Giving to international affairs increased 9.6 percent, the largest growth of all subsectors.
- Giving to foundations decreased 6.9 percent, the largest decline of all subsectors, after experiencing strong double-digit growth in the prior year.

* This data is drawn from Giving USA 2019: *The Annual Report on Philanthropy for the Year 2018*, which is published by Giving USA Foundation and researched and written by the Indiana University Lilly Family School of Philanthropy. Available at www.givingUSA.org.

INTERVIEW

Lest we forget, generosity is a core and guiding principle of our culture. The wonderful nature of generosity is that it comes in myriad forms, anyone may practice it—grand or small—and its beneficiaries include everyone involved in its two-way transaction, both givers and receivers. Our generosity is expressed when we care for our partners and children, when we meet friends and neighbors and truly listen to them, when we work and give our best to our teammates, when we volunteer, and when we write philanthropic checks. Whatever form of generosity we are able to practice, generosity ultimately benefits us all.

Lynn Susman knows firsthand just how important is generosity in the building of a successful, multiyear, major fundraising campaign. Born in New York and raised outside Boston, Susman earned a BA in music at Connecticut's Trinity College. There, she studied music and entertained thoughts of becoming an arts administrator or journalist. Following her graduation, she received a Music Program Fellowship from the National Endowment for the Arts, worked briefly at a nonprofit arts agency in New York City, then returned to Boston and took a position at the New England Conservatory of Music, where she became director of development. That led to a vertical move as senior director, major and principal gifts, at Boston Children's Hospital Trust in 1989.

Susman is now celebrating her 30th year at Boston Children's Hospital Trust, the philanthropic resource for Boston Children's Hospital (BCH). The hospital itself, founded in 1869 by Civil War surgeon Dr. Francis Henry Brown, is celebrating its 150th anniversary this year. It boasts two Nobel Prizes in Physiology or Medicine, one for culturing the polio virus (Dr. John Enders and team, 1954) and another for immunosuppression organ and cell transplantation (Dr. Joseph Murray, 1990), as well as numerous Lasker Awards. It has been named the top pediatric hospital by *US News & World Report* for the sixth year running and is considered the leading pediatric research hospital in the world.

For the past eight years, Susman has served as the Trust's president and chief development officer. Modest, carefully spoken, thoughtful, and passionate about her work, Susman and her teams have raised nearly $2 billion over the course of her four-decade career in fundraising. In September, Boston Children's Hospital Trust will complete its $1.3 billion "Dream, Dare, Deliver" fundraising campaign begun in 2012 under Susman's leadership, exceeding its goal by $200 million. Susman recently—and generously—made time to speak with Williams Parker's *Requisite* about her career, her fundraising strategies, her core principles and guiding visions, and why she has loved helming Boston Children's Hospital Trust. For Susman, her efforts there have never really been work at all; rather, they have been an expression of her own desire to see generosity enacted in the world and, in her case, for the benefit of sick and suffering children and their families.

This interview has been edited for clarity.

WP You are such a successful fundraiser. How did you become involved in philanthropic fundraising?

Susman

Right after college, I thought I would end up on the business side of the arts, that one day I'd run a symphony orchestra. Very few people say, as children, 'I want to be a fundraiser when I grow up.' Fundraising is something people fall into from other fields. That was certainly the case with me.

Lynn Susman

WP Yet your whole career has been in fundraising. Now you supervise a staff of 145. What has that journey been like, and what has kept you motivated?

Susman

It's all about the mission. Boston Children's Hospital is an amazing place. There's incredible research and work being done here that benefit children and adults everywhere. Being at Boston Children's is a privilege. I'm not at all unusual in feeling this way. Many leaders and staff have been here for decades, and everyone is here to help sick children and their families. That's very powerful. By all measures, we are the largest and best pediatric research program in the world. Our caregivers, scientists, and patients truly inspire our work in philanthropy.

WP Your giving numbers have grown dramatically since you first started at Boston Children's Hospital. Can you give us an overview of how much you have grown?

Susman

This year is the 20th anniversary of the Trust. It was started by my predecessor, Jan Cady. She's now retired but continues as a fundraising consultant. Jan came to BCH with a mandate to grow the hospital's philanthropic program. In 1989, when I first started here, we were raising about $10 million a year. I was Jan's number two officer for about a decade. We worked closely together, and I learned a great deal from her. Currently, we raise about $160 million annually, more than a tenfold increase in fundraising.

WP Was Jan Cady's mentorship an important part of your development? Is having a mentor important?

Susman

Absolutely. Jan had a lot of faith in me. She inspired me to see a bigger, broader path of how I could have an impact and encouraged me to 'try on' roles I might not have otherwise. She helped me see that I could lead this organization before I could see that myself. I was a really successful gift officer but wasn't thinking much beyond that at the time. Jan asked me to step in and be her number two. It was a pivotal moment for me, being promoted out of a very talented peer group. I draw on lessons learned from her almost every day. Fundraising is the ultimate team sport, and staff development is essential. I try to mentor others the way she mentored me. Development definitely needs more strong leaders.

WP After Jan left, how did you make the transition to overall leader, and how did you find your focus?

Susman

It was beyond tough to follow in her shoes. The importance of this work was always crystal clear to me. I could only be a successful fundraiser for an organization where I truly felt passionate about the mission. That's never been a question at Boston Children's Hospital. For someone to become a successful fundraiser, the mission must be fully internalized. One of the exciting things about philanthropy is to have a role in helping shape great institutions. Helping organizations realize where they want to go becomes the guiding principle.

WP How connected is the Trust to the hospital? Are you located on the same campus?

Susman

The Trust is a short walk from the hospital, which makes it easy to get a frequent 'dose' of the mission. In the children's hospital world, many development offices are truly separate foundations. Our situation is unique. We are part of the hospital, but we are distinct in many ways, especially in having a phenomenal Trust board completely dedicated to the philanthropic mission. Even though we're not technically a separate foundation, we were created to be an 'all-in' enterprise, which enables us to be nimble and seize opportunities. Of course, everything we do is aligned with and in support of Boston Children's.

WP Your board has 40 members. Why such a large board?

Susman

Some foundation boards are a lot bigger than that. Forty is actually manageable. These are very busy people. It's a rare moment where we have all 40 people in the boardroom at one time, even though we have strong attendance. Board members help guide and provide oversight of the fundraising mission. Most importantly, they are also our high-level ambassadors. They open doors, advise, and collectively are incredibly generous. It's an honor to partner with them in support of the hospital.

WP Is it important to have a diverse board?

Susman

Diversity is important in every way. That's a challenge for any philanthropic board in all the ways we talk about diversity today: gender, race, background, all of it. When we're talking about fundraising, it's also key to cultivate diversity in circles of influence. Board members are often our best connectors to new donor communities. Diversity offers us more opportunities to build the biggest umbrella we can and to draw the most people into what we are trying to achieve.

WP Tell us about the major fundraising campaign you are completing now.

Susman

Our campaign is called 'Dream, Dare, Deliver.' It began in the fall of 2012 and is scheduled to end in September. The goal was $1.3 billion. We're going to exceed that and reach $1.5 billion.

WP In terms of your 'Dream, Dare, Deliver' campaign, how do you determine the needs of a fundraising campaign and define its goals?

Susman

Everything starts with the institution's goals. Everything we do is in support of the hospital. So we start by asking, 'What are the needs of the institution?' Major campaigns are typically tied to an institution's strategic plans. Every part of the institution, from CEO to caregivers to scientists, needs to give input. It's a team vision and team effort. You have to ask, 'What is your institution uniquely able to tackle?' That's how you start thinking about a campaign.

WP Does the hospital come to you and say, 'Lynn, this is what we need, this is what you need to do?'

Susman

It's an ongoing conversation, a back and forth. The institution has a mission, and we need to be laser-focused on that. As chief development officer, you are a partner with the institution's leadership. It's a balance between the hospital's needs and opportunities, and where donors want to have an impact. We have this challenge in fundraising all the time. The campaign we are wrapping up was very large. It was a comprehensive campaign, which meant we were fundraising across all of the mission areas. We worked hard to be aligned with the hospital's highest priorities. In many ways, we are like matchmakers. More than half of what we raised is donor-designated for research, which is wonderful for a place like BCH.

WP How important is it to know the community in which you're fundraising?

Susman

You must get to know the community and its culture. For example, in Boston, naming buildings is not as relevant to donors as in other cities. Many people here are not moved by giving to buildings, but it's obviously a challenge since hospitals are capital-intensive places. How you design a campaign is a fluid conversation that starts with the needs of the institution and then matches the giving nature and desires of the philanthropic community.

WP After you have defined your goals, how do you roll out a major campaign?

Susman

There is a lot of upfront investment and ramp-up time in setting priorities, testing them with donors, and messaging. Once the institution is decided on its high-level objectives, we need to understand how those things resonate with potential donors, how best to communicate those ideas. There's also a deeper relationship-building component. Before a launch, we test the message with donors and potential donors. Many organizations do campaign feasibility studies with outside consultants. You want a high-level working draft of what the campaign will be. You test that thesis with key donors to get a sense of the donor-market response. You don't know what that is when you start.

WP How long does the early testing last before the real campaign rolls out?

Susman

On this campaign, it was a year. We didn't do a full-blown feasibility study because we had a good sense of the market. So we did a mini-version of interest and feasibility. In most cases for major campaigns, it's a year to two of testing and planning.

WP What are the differences between reaching out to individuals and reaching out to corporations?

Susman

It's ultimately all about people. That said, corporate philanthropy tends to be focused on where companies are headquartered. So it's the luck of the draw. Boston doesn't have as many major corporations as other cities. You build your relationships and try to optimize all the possibilities, near and far.

WP How do you keep a long campaign motivated?

Susman

Fundraising in a major campaign is not a straight line from year to year. You hit peaks and valleys. It's not unusual to have some very large early gifts. Then there could be a decline of one or two years, and then revenue climbs back up. Sometimes, a major donor or a small group of donors can offer a giving challenge to reinvigorate the campaign, or a new giving opportunity can spark renewed interest.

WP What innovative techniques have you used in your campaigns?

Susman

We're always open to new ventures, especially new events. We have a process around new initiatives—they have a set period of time to show strong results or we stop doing them and move on. I think it's a healthy process. For the most part, campaigns are about securing very large gifts from a small number of very generous donors. It's always about relationships.

WP Is reaching the campaign goal the only measure of success?

Susman

It's certainly good if you can check off your boxes. It's certainly about dollars. But I always come back to relationships. Have we strengthened the institution beyond the money? How many more donors and potential donors have we engaged? What does the pipeline look like for the future? How many leaders have we brought on to the Trust board and hospital board? Those individuals are going to steward this place for decades to come.

WP How do you end a major campaign? Do you immediately begin thinking about the next campaign?

Susman

You need to celebrate with all of your key stakeholders, to thank the people who have been your partners. I'm laughing right now because for this past year, we have been going through a rigorous strategic planning process for what happens next. We're busier than ever. We never want to rest. We've engaged our staff and our partners. We've formed a task force of the Trust board. 'How do we think innovatively about the next five years and grow support?' We want to be ready when this fiscal year ends with a new plan. That said, donors do need a rest. A campaign should not be endless.

WP Thank you so much, Lynn! Any last comments?

Susman

I feel so fortunate to do this work at Boston Children's. I never envisioned staying at one organization for so long, but the work that happens here impacts children everywhere. I truly believe in this mission.

What Is a Gifting Strategy and Why Do You Need One?

~ Elizabeth C. Marshall

When making charitable gifts, it helps to plan ahead.

Making a charitable gift can be as simple as writing and delivering a check to a delighted charitable recipient. It can be as complex and interesting as establishing and operating a private foundation to last through multiple generations of giving. Selecting the right assets to give and timing the transfer of those assets through the preferred gifting strategy benefit both the donor and the recipient charity.

What Kinds of Assets Can You Give? What Are the Benefits to You?

Gifts of cash entitle you to an immediate income tax deduction and enable the charity you select to put the gifts directly to use. Gifts of appreciated stock are often better, since you can take an immediate income tax deduction based on the market value of the stock without paying tax on the appreciation. Your favorite charities can immediately sell the stock tax-free and put the entire sales proceeds to use.

Gifts of assets from your IRA or other retirement accounts can be even better. In recent years, a transfer from an IRA custodian made directly to your charity of choice during your lifetime (without going through your account) is permitted in an amount up to $100,000 each calendar year, as long as you are at least 70 ½ years old at the time of the transfer. The distribution is not included in your income (and no charitable deduction can be taken), but the gift counts toward your required IRA minimum distribution without increasing your taxable income for that year. The charity can put the gift to immediate use without paying income taxes on the gift. Another important aspect of this kind of gift is that upon your death, a charity that receives the IRA proceeds by beneficiary designation can put the gift to immediate use without paying income taxes on the gift. Your estate can take an estate tax charitable deduction for the value of the gift. You can leave other assets to family members and friends—assets that do not carry an income tax liability (in contrast to distributions from an IRA, which trigger an income tax liability to the individual beneficiary). The availability of this gifting technique was extended by Congress each year for several years but is now a permanent part of the law.

Gifts of real estate, artwork, treasured collections, and more unusual types of assets can, if planned and executed properly, benefit both you and the recipient charities. In these cases, prior communication with the recipient charities regarding their gift acceptance policies is an essential part of the planning. Gifts of life insurance, designating charitable beneficiaries, are an easy way to complete a lifetime of giving by making a generous testamentary gift. Your estate can take an estate tax charitable deduction, and the charity can put the proceeds to immediate use.

Timing Your Gifts

The timing of a gift is also important. Making a gift early in the calendar year secures the income tax benefit to you. Also, in the event of your death during the year, there would be a reduction in your estate tax liability. On the other hand, if you make a gift late in the year, it can allow you to review your income tax exposure and plan an offsetting gift. You can also work closely with your tax advisors to time a charitable gift so that you make it within the same calendar year as a major income-producing event, such as the sale of your business or other significant asset.

The year in which you make charitable donations may also affect your income tax consequences due to recent tax law changes. The income tax deduction for charitable donations is an itemized deduction on your individual income tax return. With a larger standard deduction under the new tax law, many taxpayers are less likely to itemize their deductions. To help increase itemized deductions, you may consider "bunching" several years of charitable donations into one year. Contributing the bunched distributions to a donor advised fund, instead of giving directly to charity, is a convenient way to retain control of when the funds are contributed to charity.

Many Floridians who update their estate plans during the winter and spring make gifts during these months to secure these benefits for themselves and to meet their philanthropic goals. The Sarasota community benefits tremendously from the generosity of many of these gifts from both identified and anonymous donors. Developing an effective gifting strategy can make a positive and significant impact for all of us.

Betsy is a partner with Williams Parker.

She counsels individuals in estate planning and its related areas of estate and gift taxation. Personal representatives and trustees responsible for settling estates and trusts also engage her to guide them through the complexities of modern-day estate and trust administration. She earned her JD from the University of Florida and is certified by The Florida Bar as an expert in wills, trusts, and estates.

Contributing Your Art to Charity: The Tax Benefits May Surprise You

~ Ric Gregoria & Elizabeth P. Diaz

Donate Your Art in Lieu of Cash

Sarasota has grown into a nationally recognized center for the visual arts. This has been achieved through the commitment and generosity of individuals and organizations that have made charitable donations of time, money, and even works of art from their own collections. Most donors understand the tax implications of a charitable donation when it takes the form of cash or check, but many do not fully understand the tax implications of donating works of art in lieu of cash. If you want to make a donation of art, you need to consider many factors—and your donation must meet several requirements—to maximize the benefits of donating art during your lifetime. The tax consequences of your gift change, depending on the property's past ownership, the gift's intended use, and the charity's structure.

Capital Gain vs. Ordinary Income Property

The income tax benefits to you, the donor, depend on how long you have owned the artwork before you make the gift. To maximize the tax deduction for art donations, the art must be long-term capital gain property. This generally means you have held the property for more than one year and it has appreciated in value during that time. A donation of long-term capital gain property has the potential to create a deduction equal to your property's fair market value at the date you make the gift.

A donation of ordinary income property may result in a smaller income tax deduction than a gift of long-term capital gain property. Ordinary income property is property that (i) you held for less than one year, (ii) you created, (iii) you received from the creator, or (iv) you, as an art dealer, held as inventory. A donation of ordinary income property generally results in a tax deduction equal to the property's fair market value less the amount ordinarily taxable to you if you were to sell the property at fair market value. This rule normally limits your charitable deduction to your tax basis in the property (or its original cost).

Structure of the Donee Organization Matters

When you decide to donate a work of art, you should also consider which charitable organization will receive the artwork, because the structure of the organization governs your tax deduction. Generally, there are three types of charitable organizations: public charities, private operating foundations, and private non-operating foundations.

Public charities generally receive broad support from the general public and include churches, schools, hospitals, museums, and nonprofit groups that are religious, educational, scientific, or literary in purpose. Private foundations, on the other hand, both operating and non-operating, are not funded by the general public but instead are funded by one source, such as a family or a single donor. A private operating foundation invests and uses most of its assets directly for the active conduct of its own exempt purposes, while a private non-operating foundation uses most of its assets for other charitable organizations. You can confirm the type of the organization (i.e., public charity, private operating foundation, or private non-operating foundation) and its current exempt status through the online search engine Exempt Organizations Select Check on the IRS website (www.irs.gov).

In order to maximize your income tax charitable deduction, typically you should donate works of art to public charities or private operating foundations rather than to private non-operating foundations. Generally, when you donate cash to a public charity or a private operating foundation, you may deduct the full fair market value of your donation (up to 50 percent of your adjusted gross income). However, when you donate a work of art to a public charity or private operating foundation, you have two options: (i) you may deduct the fair market value less your tax basis in the work of art (up to 50 percent of your adjusted gross income) or (ii) you may elect to deduct the full fair market value of the work of art (but your deduction is limited to 30 percent of your adjusted gross income). When you make a gift of art to a private non-operating foundation, the deduction is limited to your tax basis in the artwork (and further capped by 20 percent of your adjusted gross income).

Use of the Property by the Charity

You must also consider how the recipient charity intends to use the work of art. To maximize your income tax charitable deduction, the gift must pass the "related use" test. The related use test requires that the charitable organization use the artwork in a manner that is related to the organization's charitable purposes. For example, if you contribute a painting to Ringling College of Art and Design to be used by the institution for educational purposes by being displayed in its library to be studied by art students, then the use is a related use. However, if your painting is sold by Ringling College and the proceeds are used by the organization for educational purposes, its use is an "unrelated use."

If the charitable organization uses your work of art for an unrelated use, your income tax charitable deduction is limited to your tax basis in the art (or its cost), even if the charitable organization is a public charity or a private operating foundation. Accordingly, we recommend that you work with qualified legal counsel to draft a gifting agreement before making any gifts. The agreement should include provisions covering the donee's charitable status, the donee's intended use of the property at the time of the contribution, and your intent for the contribution. This type of agreement can help you maximize your tax benefits from making a charitable gift of art.

What if You Want to Continue to Enjoy Your Art?

Rather than donate your painting so that it is on permanent display in Ringling College's library, you may want to donate your painting for a portion of the year and retain the right to use the painting for the remainder of the year. This is known as a "fractional contribution" to charity. As with an outright contribution to charity, your charitable deduction for a fractional contribution to charity is based on the fair market value of the painting at the time of the contribution, taking into account whether the use of the painting will be related to the charitable organization's exempt purpose. For example, let's assume your painting is worth $200,000 at the time you wish to donate it. If you were to donate an undivided one-quarter interest in your painting to Ringling College, you may be eligible for a $50,000 ($200,000 x ¼) income tax charitable deduction for the year of donation, assuming all of the other requirements are met, and you would still be able to enjoy your painting in your home for nine months of each year.

While fractional gifting presents an attractive charitable option that benefits you, the charitable organization, and the viewing public, it requires careful planning in order to ensure that you maximize your income tax charitable deduction and avoid any potential problems. Such problems may include:

- Who will pay for insurance on the work of art?
- Who will pay for the cost of transportation?
- What happens if the work of art is damaged?
- Which months will the charity be entitled to possession and which will be reserved for your use and enjoyment?

Don't Forget to Keep Records

You must complete IRS Form 8283 if the amount of your deduction for non-cash gifts is more than $500. As with other non-cash donations, donations of art do not require a qualified appraisal unless the income tax charitable deduction is greater than $5,000. If your deduction is more than $5,000, you should obtain a qualified appraisal of your work of art by an unrelated qualified appraiser no earlier than 60 days prior to the gift date. The cost of an appraisal is not included as part of your charitable donation, but it may qualify as a miscellaneous deduction, subject to the 2 percent limit of your adjusted gross income. In addition, you may also request a Statement of Value from the Internal Revenue

Service's Art Appraisal Service, which you can rely on in filing your federal income and gift tax returns to substantiate the value of your work of art and the amount of your income tax charitable deduction. The request costs approximately $5,400 for one to three items ($270 for each additional item) and generally applies to a work of art that has been appraised at $50,000 or more. Each Statement of Value is binding on the IRS but not on you, unless you agree to use it.

While gifting a work of art requires more careful consideration than does a cash contribution, a donation of this kind can provide not only an immediate income tax charitable deduction and the avoidance of capital gains tax, but it can also provide a lasting legacy for a charitable organization of your choice.

Ric is a partner with Williams Parker.

He focuses his practice on counseling high net worth individuals, families, and business owners regarding complex intergenerational wealth transfers, business succession matters, and charitable planning. He is certified by The Florida Bar as an expert in wills, trusts, and estates. He earned his JD from the University of Virginia and was previously employed as a CPA with PriceWaterhouse (now known as PwC).

Liz is a partner with Williams Parker.

She practices in the areas of taxation, estate planning, and estate administration. Liz earned an LLM in Taxation from the University of Florida and earned her JD and her MBA from Stetson. In addition to her LLM and JD, Liz is a Florida-licensed CPA.

Getting the Most Out of Your Charitable Gift

~ Jeffrey T. Troiano

There's more to making a charitable gift than writing a check. Do your research and plan ahead to make sure your gift has a big impact.

You have decided to contribute some of your hard-earned money to a charitable organization where it can do some good. You have looked around and selected a charity that you feel passionate about. Now you are ready to make a sizable gift that will help the organization in carrying out its important mission, but have you done enough due diligence and prepared adequately?

Doing Your Research: A Step-by-Step Guide

Making a charitable contribution should be an easy thing to do. Generally, it is. However, it is wise to invest time up front doing some detective work to ensure your contribution will be used by the charity in the way you expect. Up-front planning will also help to maximize the benefits to you and your family.

So, what steps should you take before making a charitable gift? First, you should understand the organization's mission and purpose to ensure that they align with your personal views and reasons for donating. One of the best ways to familiarize yourself with an organization is to visit it in person. This will give you a glimpse into how the charity operates and how the employees interact with the public and with each other. Moreover, it will provide an opportunity to ask direct questions about how the organization functions. Sometimes there is no substitute for seeing something with your own eyes.

In addition to the site visit, it is wise to conduct some independent research regarding the organization. You can do this by using a variety of online resources. The first and most important question you want to answer is whether the organization has qualified as a tax-exempt organization with the IRS. This is crucial to ensure that your charitable gift will qualify for an income tax deduction. The IRS website (www.irs.gov) provides a comprehensive search tool called "Exempt Organizations Select Check," where you can find information about an organization's federal tax filings and can confirm its exempt status.

You can also conduct research about a prospective charitable recipient at www.GuideStar.org and www.CharityNavigator.org. These sites offer free search tools, with information about IRS-registered organizations. They also provide resources to help you choose among different organizations when making a charitable gift. You can use these online tools to look up an organization and get ratings related to the organization's transparency, financials, and accountability. You can also learn about the organization's mission statement, impact reports, and whether the organization audits its financial statements.

The Sarasota community also offers helpful resources for prospective donors, including an online research tool called "The Giving Partner" (www.TheGivingPartner.org). This website provides a wealth of in-depth information about more than 700 charitable organizations serving Charlotte, DeSoto, Manatee, and Sarasota counties. The Giving Partner is a collaborative effort by community organizations, including the Community Foundation of Sarasota County, the Gulf Coast Community Foundation, the Patterson Foundation, and the Manatee Community Foundation. If you haven't yet narrowed down your pool of prospective charitable recipients, you may also want to contact one of the local community foundations directly to ask about the specific philanthropic needs of the Sarasota community and to get further assistance in selecting a worthy organization.

When it comes to researching charitable organizations, there is ample information available if you know where to look. Just as you would spend time researching the purchase of a car or a home, it is wise to spend time "kicking the tires" on your potential charitable organization.

Structuring Your Charitable Gifts

Making an Immediate Contribution. Once you have selected the recipient organization(s), the next step is to decide how you would like to structure your gift. Different structures can provide different benefits for both you and the charity. First, you must consider whether you want to provide funds to the charity now or at some point in the future. If you want to provide the funds immediately, then your gift can be effected by simply writing a check to the charity.

Another option you should consider if you want to make a current gift is to do a charitable IRA rollover. This technique allows you to transfer funds from an IRA to a charitable organization without recognizing any income or paying taxes on the IRA withdrawal. This option is only available to persons who are age 70 ½ or older and is limited to $100,000 per year.

A more complicated technique for making a current gift involves utilizing a charitable lead trust. In this arrangement, you make a gift into the trust, and the trust then makes contributions to the charity over a designated period. At the end of this period, the remaining trust funds revert to a non-charitable beneficiary whom you designate.

Postponing Your Gift. If you want to postpone your gift to the charitable organization(s) of your choice until a later date, there are various methods available to you. The simplest option is to include a gift to the charitable organization in your will or in your revocable trust. However, if you have tax-deferred retirement funds (such as an IRA), then it is generally more tax-efficient to use these assets to satisfy your charitable bequest rather than include a devise in your testamentary documents. This is because tax-deferred retirement funds are generally taxable to the designated beneficiaries following the death of the account holder. However, since qualifying charitable organizations are not subject to income tax, you can eliminate some of this tax liability by leaving all or a portion of your IRA to a charitable organization. The devises that are typically tax-free to the beneficiary (such as distributions under a will or a trust) should be reserved for your non-charitable beneficiaries. This planning opportunity is a great example of how proper gift planning can have a tremendous financial impact on both the charity and on your family.

There are two other gifting techniques that can provide funds to the charitable organization at some future date. The first involves the use of a charitable remainder trust that you can establish. Under this structure, the trust makes payments to a non-charitable beneficiary (such as you, your spouse, or another family member) over a period of time. At the end of this period, the remaining funds pass to the charitable organization. An alternative technique involves the use of a charitable gift annuity where this option is offered by the charitable organization. Instead of utilizing a trust to hold the funds, you can use this gifting technique to give funds directly to the charitable organization. The charity then makes payments back to you for the remainder of your lifetime. At the time of your death, the assets remain with the charitable organization. The main benefit of using a charitable remainder trust or a charitable gift annuity is that you are entitled to claim a current income tax deduction even though the funds do not pass to the charitable organization until some time in the future. If you are considering a charitable gift annuity, then it is even more important that you engage in the diligence items discussed in the first half of this article. You need assurance that the charity is in a comfortable financial position and that it will be able to make the expected payments for the remainder of your lifetime.

Depending on the form of your gift, you should consider signing a pledge agreement with the organization, setting forth your incentives for making the donation and asking the organization to use the funds responsibly. The pledge agreement must be carefully drafted in order to ensure that you do not jeopardize your income tax deduction, especially if you plan to impose restrictions on how the money will be used.

Conclusion

Your gift to a charitable organization has the potential to make an important and meaningful difference in your community. It is up to you to ensure that you perform the research and diligence to ensure that your generous donation ends up in the hands of a responsible and effective charity and that both you and the charity enjoy the maximum benefits of your gift. It is smart and savvy donors like you who help make Sarasota such a vibrant and philanthropic community.

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Want to Join a Nonprofit Board and Have a Rewarding Experience? Increase Your Odds with Due Diligence

~ Michael J. Wilson

Membership on a nonprofit board can require a big investment of both time and money, so make sure you are a good fit with the organization.

Our clients join nonprofit boards for a variety of excellent and well-intentioned reasons. They are passionate about a particular cause, type of art, or the school that their children or grandchildren attend. They want to do good and give back. They want to become involved in their communities and connect with their peers. However, sometimes the expectations of a board member are significantly different from what he or she experiences, and this can lead to a very disappointing board experience. So how does a prospective board member know if a particular nonprofit organization will be a good fit?

Let's assume that an organization in which you have an abiding interest has asked you to join its board. If you are thinking about accepting a position as a member of a nonprofit board, before taking the plunge, you should consider several issues and ask yourself and the nonprofit organization a number of questions to ensure that your board service will be as rewarding and fulfilling as you hope, as well as beneficial to the organization. In short, you should conduct due diligence not unlike what you would do if you were switching employers or making an investment. After all, the nonprofit organization will require a significant investment of your time—and usually of your money.

Size and Structure

Not all nonprofit organizations and boards are alike. They have different resources and structures and make different demands on their board members. For example, larger nonprofit organizations typically have a large professional staff; therefore, as a board member, you may have less control and less direct involvement, and you may be relied upon more for fundraising and more detached oversight. On the other hand, smaller nonprofit organizations may require you and their other board members to roll up your sleeves and take on functions and activities that would otherwise be handled by staff in the larger nonprofit organizations. While this may not be appealing to some, others may relish a more "hands-on" role. Neither structure is right or wrong, but one may appeal to you more than the other.

Some boards have a large number of board members and are unwieldy as a consequence. This may result in a feeling of detachment and the sense that you don't have enough impact on the organization. In an attempt to remedy the unwieldiness of a large board, the members may choose to serve on an executive or other subcommittee that can reach consensus more readily. Although this approach may streamline decision-making, if not handled appropriately, you and other board members who are not part of the executive or other subcommittee may feel even more detached from the organization than before.

The Board's Role in Fundraising

Securing donations is an integral part of board service. From a board recruitment standpoint, in addition to having board members who are good stewards for the organization, recruiting board members with access to funding can be a top priority. To quote the CEO of a large, local nonprofit organization, "no money, no mission." The nonprofit's CEO or executive director can often provide the best insight into the fundraising expectations placed on board members, including how much you are expected to donate individually.

As a prospective board member, you should consider how much of an impact your donations will have on the organization. A $5,000 gift to a smaller nonprofit organization is certainly going to have a much greater impact on that organization than an identical gift to a much larger nonprofit organization. It may come down to the question of whether you want to be the "big fish in a small pond" or whether you prefer not to draw the attention of a "big donor," contributing to an organization where your donation will be relatively modest. How you view this issue may be a significant factor in whether you seek to join a smaller organization or a larger one.

It is also a good idea to attend at least one of the nonprofit organization's fundraising events before joining the board. This can better illustrate the nature of the organization's fundraising efforts and your expected role as a board member, both as a donor and as a solicitor of donations, in fundraising activities.

Time Commitment

As a prospective board member, you should attempt to understand how much of a time commitment board service will require. How long are the board terms? How often are board meetings held? Are they held every month or every other month, with committee meetings in between? How many committees are board members expected to join? Are there annual board retreats and, if so, when are they usually held and for how long?

Participation on a board committee can have a significant impact on your time commitment, and the time commitment for committee members is rarely smooth throughout the year. For example, a marketing or gala committee is generally going to be busiest during the season and less busy during the summer months. Likewise, an audit committee will be busiest after the organization's fiscal year-end, because that's when the annual audit will be conducted and the organization's income tax return will be prepared and filed. Since staff is busy during the season with marketing and fundraising efforts, the fiscal year-end is often June 30 or September 30.

If you expect to be absent from Florida for all or large parts of the summer, you should inquire as to whether board and committee meetings are regularly held during the summer months. Another good question is whether participation by telephone is permitted.

Financial Information

You should always conduct some financial due diligence regarding the organization. A first step is to review the most recent copy of the organization's audit report, including the financial statements (income statement, balance sheet, and cash flow statement) and "management letter." Be sure not to overlook the notes to the financial statements, as these are oftentimes a critical component of the financial statements. The notes often address issues that are not obvious from the figures in the main portion of the financial statements.

The management letter identifies those areas of operations or procedures that the auditor believes could be improved. The most common issues raised in a management letter deal with internal controls, which are the processes, systems, and internal procedures that help to ensure that all financial transactions are recorded properly. An important question is whether the nonprofit organization has implemented the suggested improvements contained in the previous management letter. If it has not, you should understand the reasons.

Although sometimes not legally required, most nonprofit organizations obtain an independent audit of their annual financial statements. A small nonprofit organization may not obtain an independent audit because of the cost and the scarcity of the nonprofit's resources. If a nonprofit organization does not have an independent audit, a prospective board member should ask why and understand the reasons for such a decision.

Other items you should examine are the recent annual income tax returns of the nonprofit organization. These returns can provide information not found in the financial statements. Nonprofit tax returns and other information can be found at www.guidestar.org.

Legal Obligations of a Nonprofit Board Member

As a prospective board member, you should understand the legal obligations of being a board member of a nonprofit organization. Under Florida law, directors of a nonprofit organization serve in a fiduciary capacity and have two primary fiduciary duties that they owe to the organization.

The first fiduciary duty is the duty of loyalty. This duty requires you to act in the best interests of the organization rather than out of self-interest or self-dealing. You should inquire as to whether a nonprofit organization has a conflict of interest policy regarding transactions between the nonprofit organization and the organization's directors and officers and other key employees. The conflict of interest policy should require these insiders of the organization to annually certify their compliance with the policy. The Florida Charitable Solicitations Act requires most nonprofit organizations to have a conflict of interest policy with an annual certification requirement.

The second fiduciary duty is the duty of care. When voting on issues or otherwise making decisions as stewards of a nonprofit organization, the duty of care requires that you make decisions in good faith, with the level of care that an ordinarily prudent person in a like position would exercise under similar circumstances. Therefore, before voting on an issue, you should always obtain adequate information in order to make a reasonably informed decision. In discharging the duty of care, you are entitled to rely upon information prepared or presented by (i) the officers or employees of the organization; (ii) legal counsel, accountants, and other advisors to the organization; and (iii) other board members. As long as you are well-informed, without exhaustingly researching every issue, you will not be liable for an honest and reasonable decision.

You also have a legal obligation to make sure the nonprofit organization complies with applicable law, its mission, and the terms of its articles of incorporation and bylaws. This obligation is sometimes referred to as the "duty of obedience." Careful review of the organization's articles and bylaws should be part of your due diligence activities.

Insurance

It is important for you to inquire about whether the nonprofit organization has directors and officers ("D&O") insurance coverage, the type of coverage, and the coverage amount. D&O policies generally cover actual and alleged wrongful acts that constitute a breach of fiduciary duty, including employment-related claims (such as discrimination, harassment, and wrongful termination), mismanagement of assets, and misuse of grant funding (i.e., using grants inconsistently with the grant requirements). D&O insurance generally does not cover bodily injury or property damage. Generally, your personal liability insurance, including umbrella coverage, is not going to cover the types of claims covered by a nonprofit organization's D&O insurance policy.

There are no standard D&O insurance policies, so you must evaluate each one separately. A few of the many issues to be considered are:

Claims-Made Coverage. D&O insurance policies are typically "claims-made" policies, which means they cover lawsuits filed or claims made during the policy period, regardless of when in the past the alleged wrongful act occurred. This is generally different from other types of insurance policies, such as general liability, automobile, or workers' compensation insurance, which cover alleged wrongful acts incurred during the policy period, regardless of when the subsequent lawsuit is filed.

Tail Coverage Issues. Because most D&O policies are claims-made policies, if the policy is canceled or not renewed and a lawsuit is subsequently filed, the policy will not cover the lawsuit. Therefore, when considering the impact of cancellation or nonrenewal of a D&O insurance policy, the analysis should consider whether tail coverage (also known as "extended reporting period") can be purchased and, if so, for what period of time. Because the organization's claims history can impact policy renewal, you should ask whether claims have been made under the D&O policy and how those claims have been resolved.

Coverage Amount. You should give careful consideration to the insurance policy coverage amount. Most D&O insurance policies include the cost of defending a claim (which includes attorneys' fees) within the coverage amount. This means that the defense costs will reduce the amount of coverage available to settle the claim. Also, if more than one director is sued and directors start pointing their fingers at each other, then each director may need his or her own attorney, which can quickly dwindle the coverage amount available to settle the claim.

Conclusion

The purpose of this article is not to scare you away from joining a nonprofit board. Instead, we hope it helps you make a better-informed decision and pick the best nonprofit organization for you. We hope your board service is a rewarding and fulfilling experience for you.

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Structuring Your Charitable Gift to Leave a Lasting Impact

~ Elizabeth P. Diaz

Lifetime giving by individuals makes up the vast majority of charitable contributions to nonprofit organizations. In fact, individual giving generally makes up between 70 percent and 80 percent of such charitable donations and has been on an upward trend since the end of our most recent recession. However, with the passing of the Tax Cuts and Jobs Act, as it is commonly called, many nonprofit organizations are now concerned about how the law may impact both lifetime individual giving and giving by bequests (gifts from a decedent through a will or trust). It is estimated that the law's doubling of the standard deduction and estate and gift tax exemptions and its lowering of the marginal income tax rates will result in an almost 5 percent reduction in overall charitable giving. This is thought to be largely attributable to the decrease in the number of individuals who receive benefits from itemizing their income tax deductions. Prior to 2018, almost 30 percent of Americans itemized their income tax deductions, meaning that they could deduct (up to a certain limit) their charitable donations from their taxable income. However, it is estimated that that number could now drop to as low as 5 percent of American taxpayers. While tax incentives are certainly not the only reason to give to charity, many donors are now, in response to the new law, looking for more creative ways to structure their charitable gifts.

The structure of a charitable gift can be as simple as writing a one-time check or as complex as establishing a private foundation. Regardless of the complexity, spending some time determining how to structure your gift (and what asset is best to gift) will ensure that you maximize the benefits of your hard-earned money, both to you and to the charity of your choice.

Outright Gifts

Outright gifts can comprise simple assets, such as cash or marketable securities, or complex assets, such as commercial or residential real estate, artwork, or closely held business interests. Gifts of cash enable the charity to put your gift to immediate use and should entitle you to an immediate income tax deduction if you itemize. If your income tax deductions are not large enough to itemize every year due to the higher standard deduction, you may wish to consider bundling your charitable donations in alternating years so that you can still take advantage of the income tax deduction.

Gifts of long-term, highly appreciated securities (those held more than one year) are often even better than cash, as charities are exempt from the capital gains tax when they sell the donated securities, and you should receive the benefit of the income tax deduction based on the full, appreciated fair market value of the donated securities. This can be especially useful if you have long-term, highly appreciated securities with an unknown (or difficult to determine) original value or tax cost basis. If you have highly appreciated securities that you still wish to maintain in your portfolio, you can donate the securities to charity and then immediately repurchase the same securities for your portfolio. Because the securities would have resulted in a gain, the wash sale rules are not applicable, and you have essentially given yourself a step-up in basis while maintaining the same assets in your portfolio, all without having to recognize the gain or pay capital gains tax. Alternatively, if you have securities in your portfolio with a high basis (and thus are looking to deduct the capital loss), you will likely be in a better position if you first sell the securities and then donate the proceeds to charity. This should allow you to deduct the capital loss and receive a charitable income tax deduction for the amount of the donated proceeds. Note that if you wish to repurchase the high-basis securities to maintain them in your portfolio, you will need to wait at least 30 days, or else the wash sale rules would prevent you from being able to deduct the loss.

When determining what assets to donate, one thing you should consider is that the more appreciated the asset, the greater the tax efficiency of your gift. Accordingly, while there are outright gifts of many types of complex assets, such as the donation of artwork to charity (see "Contributing Your Art to Charity," page 16), gifts of closely held business interests to charity are quickly becoming more commonplace, due to the entrepreneurial success of retiring baby boomers. For many of you, gifts of your closely held business interests may be the best assets to gift to charity, as they are likely the most appreciated assets in your portfolios. This is especially true for those of you who have founded companies, as your basis in the donated interests may be effectively zero. Similar to gifting long-term, highly appreciated securities, gifts of these business interests may achieve the best tax results, as charities would be exempt from the otherwise large capital gains tax that would have been due, and you should receive an income tax deduction based on the full fair market value of the gifted interest.

While the tax efficiency of gifting a business interest may be greater, gifts of these interests typically require more thought and planning. For example, gifting a business interest will generally require a qualified appraisal to determine its fair market value. Additionally, you will need to consult with your advisors to determine how to best transfer the interests (e.g., a bargain sale to the charity or sale of the interest to a third party, followed by a gift of the proceeds, may sometimes be a better option than an outright gift). You will also need to communicate with the charity in advance to determine its gift acceptance policies, as many smaller charities do not have the resources to handle receiving gifts of complex assets, such as business interests.

Retirement Assets

As is true for many people, some of your biggest assets may be your retirement accounts, such as your individual retirement account (IRA) or 401(k). Making a charitable gift of these assets can be very tax-efficient because charities are not subject to income tax, as your family members or other beneficiaries would be. If you are at least age 70 ½, you can make a charitable gift of up to $100,000 directly from your IRA to a charity of your choice each calendar year. The gift not only satisfies the required minimum distribution (RMD), but it also avoids the inclusion of such amount in your taxable income, lowering your adjusted gross income (AGI) for the year. Because the charity is not subject to income tax, it will get the full benefit of your gift and can put it to immediate use. Alternatively, you may designate the charity to receive your IRA or 401(k) upon your death. Making such a charitable gift is relatively easy, as you simply need to complete the designated beneficiary form available from the plan administrator. Once you complete the form, the charity will receive the assets (free of accrued federal income tax) immediately upon your death, without having the amount of that bequest go through a probate administration. If your gross estate is in excess of the new exemption equivalents, you may also benefit from a charitable federal estate tax deduction for your gift.

Charitable Trusts

What if you want to provide for both charitable and noncharitable beneficiaries? Charitable trusts allow you to set aside assets for charity while still retaining some rights. There are two types of charitable trusts: a charitable remainder trust and a charitable lead trust.

Charitable remainder trusts (CRTs) allow you or a designee to receive either a fixed annual annuity payment or a payment that is based upon the value of the trust assets, either for life or for a term of years. Upon the expiration of the trust term, the remaining assets are distributed to the charity you designate. Like making a charitable gift of long-term, highly appreciated assets outright to charity, you can use such assets to fund the CRT and sell them within the CRT, generally without paying capital gains tax. This allows the CRT to get the full benefit of the gifted assets, which means more for both the noncharitable designee and the charity, and you should get the immediate income tax deduction. (Of course, with any transaction, there are nuances in the tax law that may restrict this benefit. For example, you should not donate property to a CRT or charity after you have entered into a binding agreement to sell the property.)

A charitable lead trust (CLT), on the other hand, first provides the annual payments to the charity of your choice for a term of years, with the balance of the trust assets going to your designee upon the expiration of the term. A CLT may be an appropriate vehicle for those who would like to gift assets to loved ones but who want to defer the date that beneficiaries, such as minors or beneficiaries who are not yet fiscally responsible to handle the assets, receive and control the property. You can create both CRTs and CLTs during life or at death, as part of your overall estate plan.

Charitable Gift Annuity

A similar but alternative technique to a charitable trust is a charitable gift annuity, if the charitable organization you choose offers such a technique. Rather than utilize a trust to hold the funds, a charitable gift annuity involves making a gift directly to the charity. The charity then makes payments back to you or your designee for a designated term, with the remainder staying with the charity upon the charitable gift annuity's expiration. This can be useful if you would like to increase your cash flow from fixed-income investments that have declined in value or if you want to sell some of your highly appreciated stock to reinvest in assets that will produce more income, but you don't want to pay tax on capital gains. Please note that charitable gift annuities can carry a component of risk that other charitable giving vehicles do not. For example, if the charitable organization files for bankruptcy, you could lose your asset and your income stream. Accordingly, you should always exercise due diligence and review the financial stability of the charitable organization before entering into a charitable gift annuity.

Private Foundation

You or your family can establish a private foundation by funding a new, freestanding nonprofit organization. As with many other giving vehicles, you receive a current income tax deduction for your contributions to the foundation. However, unlike the other giving vehicles, you get to retain complete legal and financial control over the entity and the contributed assets, including how they are invested and spent over the lifetime of the foundation. You are also in control of appointing the board of directors and deciding whether to hire or compensate staff (including family members). Private foundations can be structured either as a trust or a not-for-profit corporation (see "Philanthropy as a Family Affair," *Requisite VII*). To maintain its tax-exempt status, a private foundation must make qualifying distributions during the year or incur an excise tax. In general, the qualifying distributions must equal 5 percent of the average fair market value of the foundation's assets and must be made to individuals or organizations for charitable purposes.

Donor-Advised Fund

A donor-advised Fund (DAF) is an account that you establish with a sponsoring public charity, such as your local community foundation, to support a charitable cause or causes. Similar to a private foundation, a DAF allows you to remain involved by retaining advisory privileges, such as the ability to recommend how and where the funds are distributed or invested. (Of course, the sponsoring public charity has the ultimate authority to either accept or reject your recommendation.) You are entitled to an immediate tax deduction (subject to the higher limitations, since the community foundation is a public charity) each time you contribute assets to the DAF and pay no tax on its future earnings. Unlike funds in a private foundation, the funds in a DAF are allowed to sit and grow tax-free in the fund until you are ready to make distributions. There are also no required filings for which you are responsible.

One difference you should consider when determining whether to create a private foundation or a DAF at a sponsoring public charity is the limitations that are imposed on charitable deductions. Contributions of cash to a private foundation are generally limited to 30 percent of your adjusted gross income (as opposed to 60 percent of your adjusted gross income under the new law for contributions to a public charity). Additionally, contributions of appreciated illiquid assets (such as a closely held business interest) to a private foundation are generally only deductible to the extent of your tax basis in the property, regardless of the fair market value of those assets. Finally, another thing to note is that the creation of a private foundation and the creation of a DAF are not mutually exclusive. In fact, many times, creating a private foundation and a DAF together can produce the best result when you are trying to maintain control and achieve the largest philanthropic impact of your gift. You should explore the mechanics and the benefits of creating both with your advisors.

Structured properly, your gift has the potential to not only provide you with tremendous benefits, but also to provide your charity with an opportunity to make an important and meaningful difference in the lives of others.

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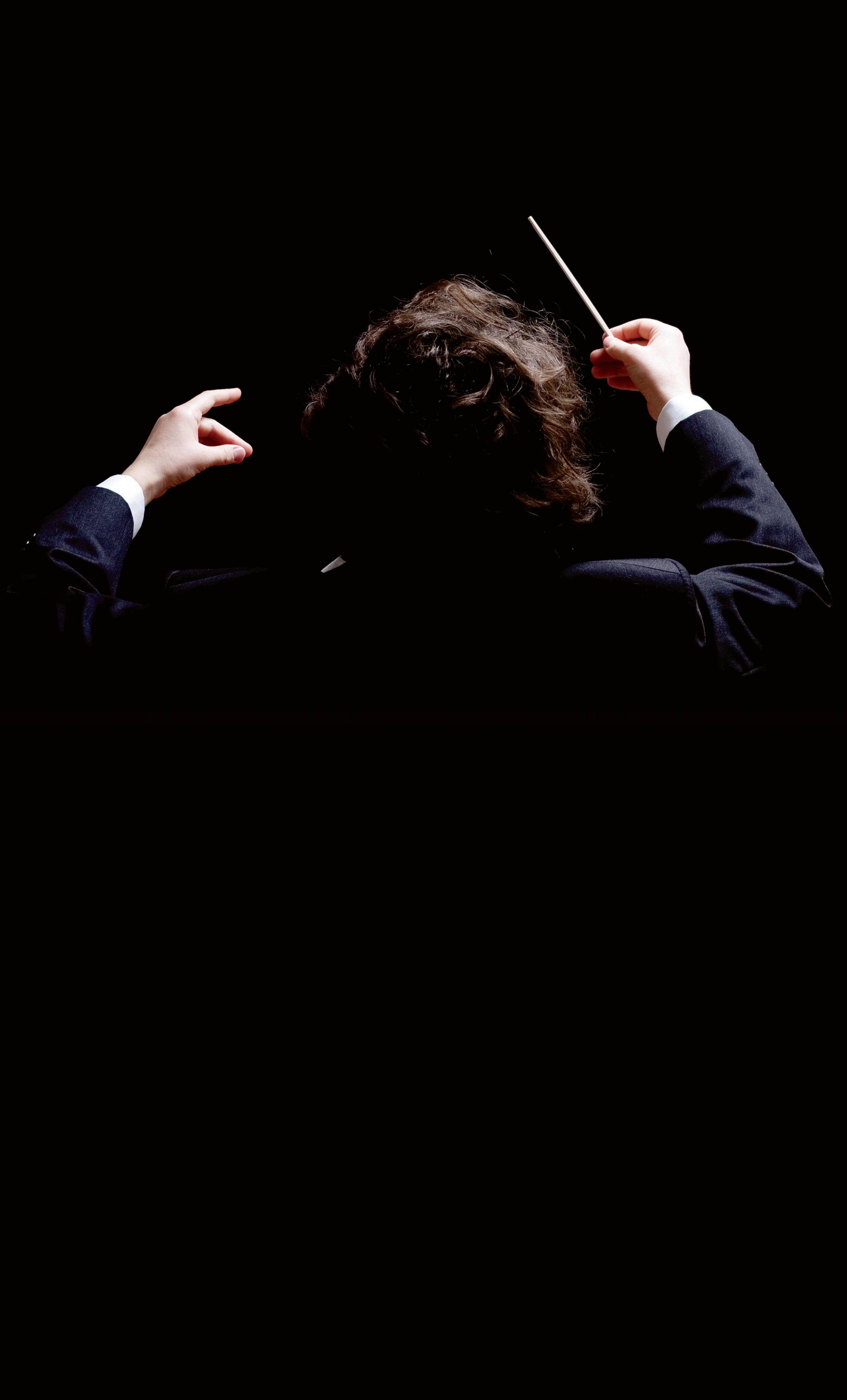

Managing Risk: Building and Preserving Wealth

~ James-Allen McPheeters

Though admittedly an oversimplification, from a particular angle, we can view life as an exercise in recognizing and effectively managing risk. On some level, we all understand this, whether the risks that we are managing are known risks—either known opportunities or known problems—or the unknown risks of unexpected occurrences. Much of what we do as attorneys and counselors of law is to help clients understand and manage risk.

A number of previous *Requisite* articles have focused on managing and addressing risks in specific situations. For example, John Wagner's article, "Real Estate Joint Ventures: Considerations for Passive Investors" in *Requisite II*, considered the risks faced by passive investors in real estate; Lewis Hall's article, "Protecting Your Interests in a Deadlocked or Mismanaged LLC" in *Requisite III*, addressed risks faced by an owner of a business entity when disputes with other owners occur; and Elizabeth Stamoulis's article, "Intellectual Property Protection Abroad: What You Don't Know Can Hurt You" in *Requisite V*, discussed the risks associated with a business's protection of its intellectual property. While these articles and others in our *Requisite* series focus on managing risk in specific situations in which our clients often find themselves, it is worthwhile to consider broadly how to structure assets to manage risks as one builds and preserves wealth.

The phrase that may come to mind at this point is "asset protection." But all too often, the concept of asset protection is something to which people cast their minds only when they are about to be sued or when a judgment against them is imminent. Those situations, which, as discussed below, may raise fraudulent transfer issues, require special thought and consideration that is beyond the scope of this article. Because the concepts involved in managing risks to build and preserve wealth span a number of areas of law—real estate, business, tax, estate planning, and debtor-creditor issues—the purpose of this article is to broadly identify issues to consider as you build and preserve wealth.

Take Stock of and Understand Your Assets and Your Risk

The first step in managing risk in this context is taking the time to list your assets and consider what known risks you face, or what unknown risks you might face, by virtue of your assets or your lifestyle. Look at how your assets are titled or owned. Do you have assets that inherently carry a greater amount of risk than others? Does either your lifestyle or your occupation subject you to a high level of risk? When considering the risks associated with your assets, be realistic not only about the probability that a risk will become a problem, but also about the actual impact that any problem may have on you and your assets.

Lawsuits and Judgments

The main concern people articulate in considering known and unknown risks to their assets is what happens if they get sued or if a judgment is entered against them or a business in which they have an ownership interest. In the context of an actual lawsuit, the answers to those questions depend on a number of very specific facts. However, in the absence of the specific facts of an actual lawsuit, there are a number of concepts you should keep in mind when evaluating general concerns regarding lawsuits and judgments.

Among the first steps you should follow after identifying a specific risk or concern is identifying (1) who would be the defendant in the event of a lawsuit and (2) what would be the reason or basis of the lawsuit. Once you identity the defendant and the basis of the hypothetical lawsuit, you will be able to walk through a series of questions to start evaluating your risk. For example: Would you be sued individually, such that some of your personal assets may be at risk? Would the lawsuit be against only a company owned by you where corporate formalities have been properly observed, such that only the company's assets are vulnerable to a judgment? Is there insurance that would cover any judgment or loss incurred by you or your company? Are there indemnifications in place that would compensate you or your company for any judgment or loss that may occur?

When asking yourself these questions and considering potential risks to your assets in the event of a lawsuit or judgment, it is helpful to keep in mind the practical and legal process through which a risk turns into a problem and results in a judgment. Though every situation varies, the process of a contested lawsuit generally proceeds as follows: (1) Something occurs to cause a known or unknown risk to become an actual problem that forms the legal basis for a lawsuit (for example, a car accident or a business dispute). (2) The problem rises to the level that the prospective plaintiff sends the prospective defendant a demand letter or otherwise notifies the defendant that unless the plaintiff's demands are met, litigation will ensue. (3) The plaintiff moves forward with the filing of a lawsuit against the defendant. (4) The lawsuit survives potential motions to dismiss, motions for summary judgment, and defenses asserted by the defendant. (5) The court rules and enters judgment against the defendant. (6) Finally, the plaintiff executes on the judgment and attempts to collect money from the defendant.

While no one relishes the prospect of going through these steps—or spending the money to defend a lawsuit—it is important to keep these steps in mind when evaluating your risks and considering not only whether a risk will actually mature from a concern into an actual problem with a legal basis for a lawsuit, but also whether a lawsuit will result in the execution and collection of a judgment.

It is worth noting here that in instances where insurance proceeds apply, the risk exposure of concern is not the amount of the judgment a plaintiff obtains, but the amount of the judgment less any applicable insurance proceeds. It is also important to note that throughout the process outlined above, there may be multiple opportunities to address or settle the problem before it proceeds to a point where a plaintiff is empowered to execute and collect on a judgment against the defendant.

Titling of Assets/Exemptions

In looking at your assets and assessing risk, it is helpful to think of your assets in two basic groupings: (1) assets as the cause, or the subject, of liability risks or lawsuits; and (2) assets that are available to satisfy the claims of creditors as a result of a lawsuit or judgment. Similar to overlapping circles in a Venn diagram, specific assets may fall within both groupings, depending on the particular situation. How your assets are titled or owned, and how they fit into theses two groupings, will dictate the level of risk associated with each asset.

Take, for instance, real property owned as an investment. Depending on the type of property—whether it is rental property or simply raw land—the property will inherently carry a greater or lesser degree of liability risk. And depending on whether you own the property in your individual name, as tenants by the entireties with your spouse, or through a business entity, you will have varying degrees of risk of (1) a lawsuit associated with the property putting your other assets at risk and (2) whether your interest in the property can be used to satisfy judgments or creditors that are unrelated to the property.

Florida recognizes a number of types of property ownership for personal property and real property, as well as a number of protections that may preclude, or exempt, a person's creditors from looking to certain assets to collect on a judgment. These protections, commonly referred to as "exemptions," include (1) homestead protections for a Florida resident's primary residence, (2) protections for real and personal property owned by spouses as tenants by the entireties, (3) protections for life insurance and annuity contracts, (4) protections for certain types of retirement or profit-sharing plans, and (5) protections for certain education and medical savings accounts.

By being thoughtful about the assets you own, how you own those assets, and the possible exemptions that may apply to those assets, you are better able to build and preserve wealth. Michael Hartenstine's article, "Protecting Your Assets Under Florida Homestead Exemption" in *Requisite IX*, provides a good example of the thought process and considerations surrounding the protections provided to one of Florida's most well-know protections: a Florida resident's homestead. Another protection of which to be mindful in looking at your assets is the protection Florida affords to spouses who own real or personal property as tenants by the entireties. When properly structured, tenants by the entireties property is generally protected from the individual creditors of a single spouse. Though it may not be advisable for spouses to own assets that have a high degree of liability risk as tenants by the entireties, in combination with spouses owning assets individually and other types of property ownership and exemptions, the creditor protection afforded to property owned as tenants by the entireties under Florida law can be significant in managing risk to build and preserve wealth.

Liability Insurance

When looking at your assets and considering the issues outlined above, keep in mind the ability to reduce risk and exposure to liability through automobile, homeowner, general liability, and umbrella insurance policies. To the extent applicable to your individual assets, each of these polices, as well as your insurance agent, is an important part of managing risk to build and preserve wealth. Make sure to read your insurance policies and ask your insurance agent questions so you are clear about (1) what risks are covered, (2) the amount of coverage for specific risks or claims, (3) whether the policy provides coverage for incidents that occurred during the term of the policy (known as an occurrence policy) or whether the policy provides coverage for claims made while the policy is in effect (known as a claims made policy), (4) whether the policy includes an obligation on the part of the insurer to provide you a defense to claims made,

(5) what notifications you have to give your insurance company in the event of a claim, and (6) specific actions that may void coverage under your policy. Though it is unlikely that you will totally eliminate risk, by integrating the appropriate liability insurance into your considerations regarding what assets you own and how you own them, you will be better equipped to manage risk.

Fraudulent Transfers

While the concepts in this article concern real estate, business, tax, estate planning, and debtor-creditor issues—each of which may implicate valid planning issues—in certain circumstances, where a debtor transfers assets to another party or converts nonexempt assets into exempt assets for the purpose of avoiding creditors, the transfer of the assets can be set aside. Among the transfers that can be set aside under Florida's Fraudulent Transfers Acts are transfers (1) where a debtor transfers an asset with the actual intent to hinder, delay, or defraud a creditor; or (2) where a debtor transfers an asset for inadequate value at a time when the debtor was insolvent or was about to become insolvent. Though the nuances of fraudulent transfers and what options people have when they are about to be sued or a judgment is imminent are outside the scope of this article, we cannot overstate the importance of looking at your assets and implementing real estate, business, tax, estate, and debtor-creditor planning concepts to manage risk prior to the occurrence of facts that would support a fraudulent transfer claim.

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Intellectual Property: It Matters for Nonprofit Organizations Too

~ Elizabeth M. Stamoulis

The rapid expansion of technology and the growing interconnectivity afforded by the internet have increased the value and importance of intellectual property rights for all businesses, while making it easier to infringe those same rights. These days, intellectual property considerations are no longer limited to technology-focused companies; intellectual property now matters to every company. It is critical that all businesses account for, maintain, and enforce their intellectual property rights, while avoiding infringement of others' rights.

These considerations are not limited to for-profit entities. Many nonprofit organizations ("NPOs") may not realize that they have similar assets and potential liabilities. For example, in 2009 a jury awarded one nonprofit (WWP, Inc., d/b/a Wounded Warrior Project, headquartered in Jacksonville, Florida) a judgment of nearly $1.7 million dollars based on claims made in connection with the use of the name "Wounded Warriors" by another nonprofit (Wounded Warriors Family Support, Inc., headquartered in Omaha, Nebraska) and the resulting misdirected donations. In light of the growing importance of intellectual property in the modern world, it is important that NPOs better understand some of the intellectual property matters that may be especially relevant to them. Let's dispel some common myths, look at the facts, and recommend actions NPOs should take to protect themselves.

Myth Number One

We are an NPO, so we do not have any intellectual property.

Fact: These days, intellectual property is important to all businesses, including NPOs. Copyrights and trademarks are likely two of the most important types of intellectual property for NPOs.

Copyright. Copyright protection applies to all original works of authorship that are fixed in a tangible medium. This means any original work, including any writings (like program descriptions), designs (such as logos), and photographs created by an NPO could be eligible for copyright protection. Because copyright protection attaches automatically at the creation of the work, registration is not technically required to obtain copyright protection, but it is required to obtain certain other benefits. Notably, the US Supreme Court recently held that a registration must be issued before a copyright owner can sue for infringement. In addition, in certain cases, registration may allow the owner to obtain statutory damages in litigation, which saves the trouble of having to prove actual damages.

Trademark. Trademark protection generally applies to anything that identifies the source of a good or service. This includes a company name, slogan, or logo. As with copyrights, trademark protection can arise without registration just by using the mark in commerce; however, those rights are generally limited to the geographic area in which the mark is in use. Trademark registration is available on the state and federal levels and can provide certain benefits, including the exclusive right to use the mark within certain geographic areas and, for federally registered marks, the right to use the registered trademark (®) symbol.

Recommendation: All NPOs should conduct an internal audit of their intellectual property assets and register for copyright and trademark protection of their works.

Myth Number Two

One of our workers created the work for our organization, so we automatically own it as a "work for hire."

Fact: The work-made-for-hire doctrine under copyright law is more complicated than you might suppose. It does provide that works made by an individual for an organization will be owned by the organization—but only under either of the following circumstances:

Employment Test. The work is made by an employee within the scope of his or her employment.

Specially Commissioned Test. The work is specially commissioned by the company, the work is made by an independent contractor, there is a written agreement between the parties stating that the work is a work made for hire, and the work falls within one of the following limited categories:

- It is a contribution to a collective work;
- It is part of a motion picture or other audiovisual work;
- It is a translation;
- It is a supplementary work (a work prepared for publication as an adjunct to a work by another, such as a foreword, pictorial illustration, map, chart, table, or editorial note);
- It is a compilation;
- It is an instructional text;
- It is a test;
- It is answer material for a test; or
- It is an atlas.

If the work does not meet either of the above tests, the individual who created it would own the work, and an assignment would be needed to transfer ownership of the work to the NPO.

Many NPOs use volunteers and contractors to perform services, either in addition to or in lieu of employees. Because volunteers and contractors are not employees, any works those individuals create would not automatically be owned by the NPO under the Employment Test set out above. Furthermore, unless the work falls into one of the limited types of works enumerated above and there is a written agreement with the person stating that the work is a work made for hire, the work would not automatically be owned by the NPO under the Specially Commissioned Test set out above. This means that any works those individuals create would likely be owned by the individuals, not the NPO; therefore, the NPO may infringe the individuals' copyright if it does not properly obtain a license to use the work.

Recommendation: Regardless of a person's status as an employee or contractor, it is always best to have a written agreement confirming the ownership of works and the NPO's and the individual's rights to use those works.

Myth Number Three

If it is available on the internet, it is in the public domain and is free to use. And it does not matter anyway, because, as an NPO, all uses of others' works are "fair use."

Fact: Just because a work is made available on the internet does not mean it is not protected by copyright. In addition, the Copyright Act sets out four nonexclusive factors to consider when deciding whether a use of another's work is fair. Whether the use is "commercial" is only one of the considerations for one of the factors. And just because the use is made by an NPO does not necessarily mean that the use is not commercial.

Recommendation: Fair use is a notoriously uncertain and unpredictable area of the law. Each analysis must be done on a case-by-case basis to determine if the work at issue is protected by copyright and if a given use is fair. Also, fair use would be raised as a defense once copyright infringement is alleged, so the NPO will need to consider its risk tolerance and its likelihood of success when determining whether to rely on fair use or to seek a license from the owner to use the work at the outset.

Myth Number Four

If an NPO buys a CD or an mp3 or hires a DJ, it does not need to obtain a license to play music at its event.

Fact: Sound recordings of music are protected by copyright. Generally, a license is required to publicly perform a copyrighted work. A "public performance" is one that occurs in a place open to the public or where a substantial number of people are gathered (other than a small family circle and its social acquaintances).

Recommendation: NPOs that publicly perform sound recordings on their premises should ensure they have the right to play the music. There are three performing rights organizations: the American Society of Composers, Authors, and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and the Society of European Stage Authors and Composers (SESAC). Together they own the US performing rights for most songs. They offer licensing structures to allow venues to publicly perform sound recordings. Streaming services like Pandora also offer special business subscriptions. When sound recordings are performed at other venues, the NPO should consult with that venue's management to confirm whether they hold the required licenses.

Myth Number Five

NPOs can use pictures of attendees taken at their events for any purpose.

Fact: NPOs frequently host events to raise funds and educate the public about their mission, and photographs of the attendees at these events are often used to promote the NPOs and their future events. As we discussed above, these photographs can be protected by copyright, and the copyright would attach automatically to the author of the work (the photographer) upon creation. This means that, unless the work satisfies either the Employment Test or the Specially Commissioned Test outlined above, an NPO would need an assignment or license to allow it to use the work.

In addition, Florida recognizes a right of publicity that generally gives every individual in Florida the right to prevent others from using their name or likeness for commercial purposes. Whether a particular use is "commercial" is fact-sensitive and can sometimes be uncertain. Therefore, even if the NPO has the right to use a photograph from a copyright perspective, depending on how the NPO uses the photograph, its use may violate the right of publicity of the individuals in the photograph.

Recommendation: As we discussed above, the NPO should always enter into a written agreement with the photographer to confirm the NPO's right to use the photographs. In addition, if it will be using the photographs in a way that could be considered commercial, the NPO should consider seeking consent from the individuals in the photographs before it uses them.

Myth Number Six

Partnering with a for-profit entity is an easy way for both the NPO and the for-profit entity to raise money, while also raising awareness for the NPO's mission.

Fact: You almost certainly have heard the familiar refrain in advertisements that "a portion of the proceeds" will go to an NPO. Recently, it has become popular for NPOs to license their names/logos for for-profit entities to use when selling their goods or services. In exchange, the NPOs receive a percentage of the for-profit entity's profits. While these types of ventures can be very successful and profitable, they must be conducted carefully. On the surface, this may appear to be a normal trademark licensing arrangement, because this type of arrangement (sometimes called a "commercial co-venture") uses the NPO's name and goodwill to influence the public to purchase certain consumer products. But commercial co-ventures have recently attracted the attention of many regulatory bodies to provide oversight and confirm that the ventures are operated properly. In particular, these arrangements raise the following considerations:

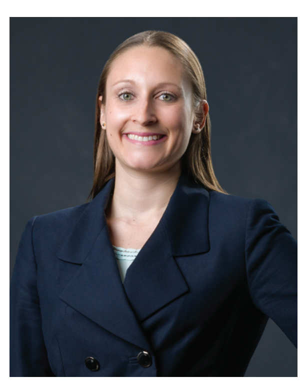
- Many states have adopted laws that govern this type of activity, and multiple states' laws might apply, depending on how the venture is conducted. Florida's law requires, in part, that the commercial co-venturer (the for-profit entity) obtain the charity's written consent to the use of its name by the co-venturer, prepare a final accounting of the promotion and provide it to the charity, and keep the accounting from the venture for a period of three years. Other states may require registration or the posting of a bond with the state before the campaign begins.
- In addition to specific legislation adopted by states, federal and state laws generally prohibiting deceptive and unfair trade practices apply to these ventures. Certain attorneys general and other authorities have promulgated best practices to provide guidance to companies on how best to organize these promotions and advertise them to the public.

- NPOs also must take into account practical considerations when deciding whether to enter into one of these arrangements. Recently, there has been significant backlash by consumers against "pinkwashing" (the sale of goods bearing a pink ribbon or designed in a pink color to benefit breast cancer). Public opinion has started to turn against some of these promotions, viewing them as the commoditization of a cause.

Recommendation: Before an NPO embarks on a joint promotion with a for-profit entity, it is important to conduct an assessment of the relevant laws, regulations, and best practices to confirm that the NPO and the commercial co-venturer will be able to comply with their applicable requirements. It is also important to carefully consider how to design the promotion with the public's perception in mind.

Conclusion

Intellectual property can have many benefits for NPOs. And the use of others' intellectual property, if handled improperly, can come with liability. We have presented just a few considerations for NPOs to keep in mind as they navigate their day-to-day business to maximize the potential—and minimize the risks—that comes with intellectual property in this modern age.



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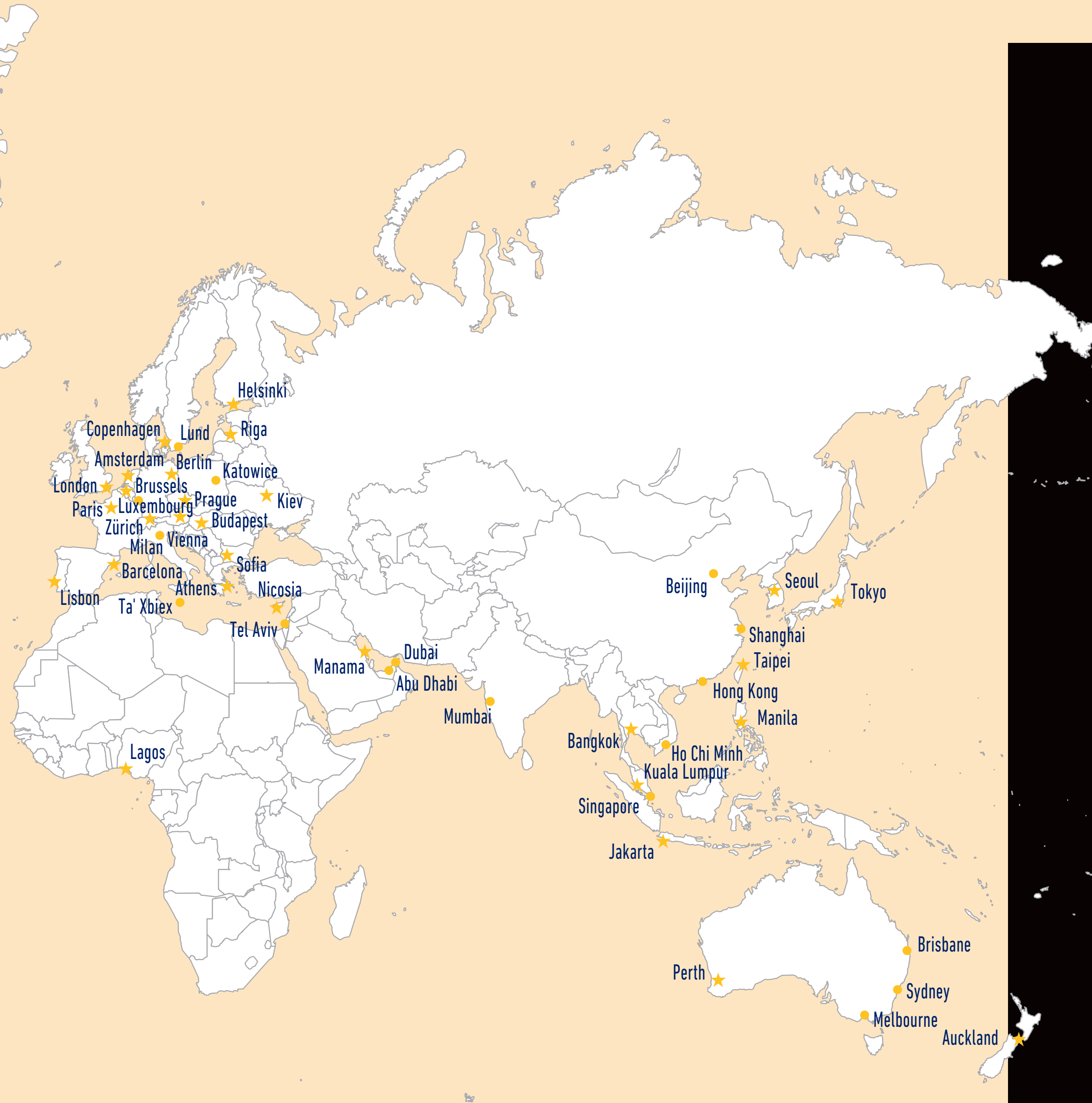

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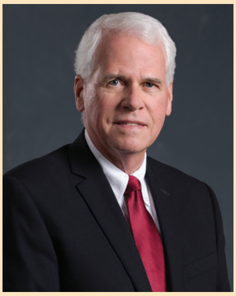

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