The Role of the Professional Advisor in Planned Giving:
How to Help Clients Meet Charitable Goals

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Ms. Miree is a frequent lecturer, co-author of *The Family Foundation Handbook* with Jerry J. McCoy (CCH Publishers) and author of *The Professional Advisor's Guide to Planned Giving* (CCH Publishers). She has served on the Editorial Advisory Board of *Planned Giving Today*. Her clients include a variety of nonprofits and foundations across the country.

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I. What We Know About Charitable Giving in the United States

A. Giving USA Foundation *Giving USA 2015*

On June 16, 2015, Giving USA Foundation released *Giving USA 2015* reporting charitable gifts of $358.38 in 2014 an increase of 7.1% over 2013. 2014 giving represented 2.!% of GDP. As in years past, individuals accounted for most (80%) of the gifts. Table 1 shows the sources of 2014 charitable gifts, while Table 2 shows the charitable sectors that were the largest recipients of funds.

TABLE 1
SOURCES OF CHARITABLE GIVING, *GIVING USA 2015*

Source	*Amount in Billions*	*Percentage of Total*
Individuals	$258.51	72%
Foundations	$53.97	15%
Bequests	$28.13	8%
Corporations	$17.77	5%
Total	$358.38	100%

TABLE 2
RECIPIENTS OF CHARITABLE GIFTS, *GIVING USA 2015*

Sector	*Amount in Billions*	*Percentage of Total*
Religion	$114.90	32%
Education	$54.62	15%
Human Services	$42.10	12%
Foundations	$41.62	12%
Health	$30.37	8%
Public Society/Benefit	$26.29	7%
Arts, Culture, and Humanities	$17.23	5%
International Affairs	$15.10	4%
Environment/Animals	$10.50	3%

B. Statistics of Income Bulletin

The IRS publishes an annual *Statistics of Income Bulletin* that includes a state-by-state extraction of data on charitable giving drawn from income tax returns of taxpayers who itemize. The most current report, published in Spring 2016, provides data from the 2013 tax year. Of those who filed returns, 30.41% of those itemized, and 82,26% of those who itemized claimed charitable deductions. Those charitable deductions totaled $195.801 billion. Table 3 provides figures for all states.

TABLE 3
ITEMIZED DEDUCTIONS FOR THE TAX YEAR 2012[1]

State	*Number of Returns*	*Number of Taxpayers Taking Itemized Deductions*	*Number of Itemizers with Charitable Deductions*	*Value of Charitable Deductions (in thousands)*
Alabama	2,048,730	551,240	479,360	$3,040,744
Alaska	359,140	82,930	59,770	$311,943
Arizona	2,813,630	819,130	691,420	$3,045,306
Arkansas	1,220,230	283,090	227,330	$1,478,918
California	17,171,740	5,899,640	4,884,880	$26757,371
Colorado	2,502,950	844,250	692,270	$3,293,945
Connecticut	1,749,600	731,350	611,470	$3,303,462
Delaware	439,680	144,650	119,840	$475,889
DC	331,050	131,090	108,530	$810,111
Florida	9,316,270	2,186,860	1,773,050	$10,819,531
Georgia	4,358,720	1,457,810	1,249,050	$7,464,596
Hawaii	675,280	200,700	161,9501	$608,836
Idaho	691,620	198,060	161,150	$915,704
Illinois	6,100,680	2,022,320	1,670,780	$7,817,776
Indiana	3,047,720	725,460	582,050	$2,973,794
Iowa	1,434,620	428,290	348,110	$1,500,839
Kansas	1,325,720	363,190	299,400	$1,798,568
Kentucky	1,886,170	504,200	411,070	$1,891,855
Louisiana	2,004,320	465,050	363,450	$2,136,453

[1] IRS Statistics of Income Bulletin Spring 2014.

State	Number of Returns	Number of Taxpayers Taking Itemized Deductions	Number of Itemizers with Charitable Deductions	Value of Charitable Deductions (in thousands)
Maine	635,870	181,150	137,140	$435,042
Maryland	2,941,920	1,337,290	1,125,940	$5,221,641
Massachusetts	3,301,030	1,237,790	1,025,660	$5,089,369
Michigan	4,656,840	1,270,760	1,071,450	$4,957,925
Minnesota	2,653,420	959,100	812,880	$3,423,590
Mississippi	1,245,660	289,910	243,030	$1,549,604
Missouri	2,743,080	745,390	598,650	$3,181,287
Montana	487,640	140,480	109,110	$547,267
Nebraska	880,090	250,010	209,310	$1,101,741
Nevada	1,307,650	330,960	270,880	$1,477,661
New Hampshire	681,760	221,690	170,290	$606,771
New Jersey	4,326,880	1,797,330	1,524,690	$5,486,148
New Mexico	905730	212,700	163,660	$753,380
New York	9,442,850	3,275,780	2,771,490	$17,729,465
North Carolina	4,335,840	1,364,540	1,157,090	$5,715,662
North Dakota	361,850	114,023	49,360	$330,505
Ohio	5,536,900	1,534,410	1,208,430	$5,031,722
Oklahoma	1,630,700	400,660	319,070	$2,463,773
Oregon	1,793,890	658,480	529,920	$2,225,454
Pennsylvania	6,153,510	1,811,540	1,477,280	$6,346,484
Rhode Island	517,840	174,860	146,190	$453,789
South Carolina	2,106,060	590,060	505,380	$2,753,799
South Dakota	412,660	72,150	56,450	$504,690
Tennessee	2,908,080	611,390	507,320	$3,678,418
Texas	11,888,890	2,758,040	2,164,710	$16,402,192
Utah	1,196,460	431,760	377,340	$3,256,367
Vermont	321,480	89,490	65,430	$267,302

State	Number of Returns	Number of Taxpayers Taking Itemized Deductions	Number of Itemizers with Charitable Deductions	Value of Charitable Deductions (in thousands)
Virginia	3,834,990	1,454,450	1,199,780	$5,673,253
Washington	3,293,100	1,033,470	827,340	$4,400,530
West Virginia	784,420	137,670	98,580	$474,421
Wisconsin	2,798,380	927,530	744,380	$2,738,031
Wyoming	283,920	62,980	43,430	$614,277
United States	146,542,500	44,559,850 30.41% of all who filed	36,654,190 82.26% of all who itemized	$195.801 Billion

C. Boston College Social Welfare Institute

Researchers at the Boston College Social Welfare Research Institute published a study projecting the intergenerational transfer of wealth expected to occur between 1998 and 2052.[2] That study estimates the transfer will range from a low of $41 trillion to a high of $136 trillion, figures substantially higher than the frequently used $10.4 trillion figure developed in the 1990's by Robert Avery and Michael Rendall of Cornell.

In 2003, responding to concerns raised about economic changes that have occurred since 1998, Havens and Schervish published an updated commentary[3] addressing the impact of slower economic growth, the bear markets of 2000-2003, longer life spans, the tendency to exhaust personal assets (leaving less to transfer) when life spans extend, and other issues impacting their earlier work.[4] They concluded that the $41 trillion estimate was valid and represented the low end of the potential amount.[5]

D. Other Data

The culture of philanthropy in the United States is unique. A survey by Independent Sector revealed that 89% of all households give to charity.[6] 44% of adults volunteer.

II. The Critical Role of the Donor's Professional Advisors

Professional advisors – attorneys, accountants, financial planners, trust officers, insurance agents, and stockbrokers – are drawn into the charitable gift planning process in a variety of ways. The

[2] A summary of the study can be found at <www.bc.edu/bc_org/avp/gsas/swri/> in the article entitled "Millionaires and the Millennium: New Estimates of the Forthcoming Wealth Transfer and the Prospects for a Golden Age of Philanthropy."

[3] Havens, John J. and Paul G. Schervish, "Why the $41 Trillion Wealth Transfer Estimate is Still Valid," Planned Giving Design Center (Gift Planner's Digest, January 27, 2003), <www.pgdc.net>.

[4] *Id.*

[5] *Id.*

[6] Giving and Volunteering in the United States, Independent Sector (2001), http://www.cpanda.org/pdfs/gv/GV01Report.pdf.

advisor may serve as advisor to the donor (focusing on protecting and achieving the donor's best interests), as advisor to the charity (focusing on the charity over the donor), as fiduciary (volunteering time and putting the charity's interests first), or as vendor (focusing on company profitability). Over time, the advisor may serve in one or more of these role for the same charity. Filling multiple roles, or moving from one position to another, creates complications.

A. Who Are the Donor's Professional Advisors?

1. Attorneys

The attorney plays the most visible role in planning since she drafts the documents that create the gift. While the idea for the gift may originate with a discussion between the donor and the charity, the attorney should be involved for advice on how to achieve the stated goals, guide the selection of the gift form, and in most cases, draft the documents to implement the plan.

2. Certified Public Accountants

The certified public accountant (CPA) provides the tax expertise for the donor's gift and may be the impetus for consideration of charitable- or tax-planning strategies. The donor's accountant also handles the tax reporting for the gift, including the annual income tax return (Form 1040), the gift tax return (Form 709), the estate tax return (Form 706) and the accompanying valuation form (Form 8283). Public accountants also specialize and may not have expertise in charitable planning.

3. Insurance Professionals

The insurance agent, generally a certified life underwriter (CLU) or chartered financial consultant (ChFC), may have the longest relationship with the donor. Generally, clients purchase insurance early in life to provide economic protection for family members in the case of a catastrophe. The insurance agent's role may include family protection issues, estate-planning liquidity, and small business transfer issues. In the gift planning process, insurance professionals are often involved in providing wealth replacement insurance and frequently initiate the idea for a gift.

4. Financial Planners

Financial planners are more frequently involved in gift planning as individuals seek one-stop planning and coordination of family financial needs. This field, however, is difficult to define for three reasons. The term "financial planner" is broad, describing a skill often possessed by accountants, trust officers, brokers, and insurance professionals. It is used in this context to refer to someone in the primary business of counseling clients on budgeting and other current planning, retirement planning, and estate planning issues with a focus on allocation of resources to meet specific financial goals. The field is not regulated. Anyone can represent himself as a financial planner. There is no single professional designation to distinguish financial planners with credentials or expertise. The most common professional designations for a financial planner are the Chartered Financial Planner (CFP)[7], the Chartered Financial Consultant (ChFC)[8] or the Registered Financial Consultant (RFC).[9] Each of these organizations has an accreditation process and a code of ethics governing its members. Financial planners may have a better

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[7] The CFP Board, 1700 Broadway, Suite 2100, Denver, CO 80290, 800-487-1497 (phone), 303-860-7388 (fax).

[8] The Chartered Financial Consultant designation is awarded by The American College, 270 South Bryn Mawr Avenue, Bryn Mawr, PA 19010-2196, 888-AMERCOL (phone), 610-526-1465 (fax), <www.amercoll.edu>.

[9] The Registered Financial Consultant designation is awarded by the International Association of Registered Financial Consultants, The Financial Planning Building, P. O. Box 42506, Middletown, Ohio 45042, 800-532-9060, <www.iarfc.org>.

understanding of planned giving than most professionals since the most effective charitable planning requires analysis of the gift in terms of current needs, retirement needs, and estate options.

5. Trust Officers

The trust officer may have a relationship with several generations of family members, providing a unique perspective of the family's resources, needs, and long-term objectives. When families use banks to manage transfers of wealth, the trust officer learns about the strengths and weaknesses of each family member and the trust resources available to meet short-term and long-term needs. This relationship expands over time so that trust officers proffer advice beyond administration. In other cases, the trust officer may serve as the primary investment advisor. The bank may hold the assets that will be used to make the gift. The donor may consult the trust officer before any other advisor and rely on that officer's guidance in completing the gift.

6. Stockbrokers

Stockbrokers are often the donor's primary source of investment advice; in these instances, the broker is an important member of the planning team. Appreciated publicly traded securities are the most common form of non-cash gift. The broker understands the donor's investment strategy and long-term goals; moreover, she can identify the most appropriate asset for the gift transaction. In fact, the broker may be in the best position to suggest a charitable gift.

7. Real Estate Agents and Brokers

While rarely considered as part of the planning team, real estate agents are in an excellent position to identify client opportunities for making charitable gifts. The role of the real estate agent depends on the donor's assets. If the client's holdings consist largely of real estate, a real estate manager or broker involved in the donor's investment strategy should be included as part of the team.

B. When and How Advisors Get Involved

The professional in the gift planning process may serve in a variety of roles. Each role requires a unique perspective and incurs its own set of expectations.

1. The Donor's Advisor: Assisting the Donor in Making a Gift

The most common role in gift planning is the representative of the donor. Many professional practices are built on individual relationships with clients. The genesis of the client relationship is likely a request to plan an estate, prepare an annual tax return, invest assets, plan for retirement, buy or sell a business, provide assets for family in the event of a disaster, or other estate planning task. This personal relationship with the client and his family may develop well before the interest in making a charitable gift arises. The professional is understandably protective of the client and the relationship, wanting to ensure that decisions are made without undue pressure or influence from the charity. The professional's charge is to plan the proposed gift in a manner that maximizes its value for the donor and meets the donor's goals in making the gift.

Since the professional represents the donor, the charity is not perceived as a necessary party to the transaction. Cannons of ethics require client confidentiality, adding additional incentive to keep gift plans private. When the gift involves a current transaction, the charity may be notified when the transaction has been completed. When the planned gift is deferred, the advisor may recommend that the donor notify the charity at the appropriate time, which may not be until the donor's death. In both scenarios, it is likely that the charity will not learn of the gift until after it has been completed.

2. The Charity's Advisor: Representing the Charity in Accepting a Gift

Professionals who represent the charity have a much different perspective. Their role is to represent the charity's interest in the gift transaction. Generally, the professional becomes involved with the charity through providing traditional support services such as preparing the corporate charter and by-laws, amending governing documents, representing the organization with the Internal Revenue Service, providing accounting services, or investing assets. The advisor's role in the gift planning process may be ancillary. The professional service provider may offer to draft gift acceptance policies, write investment policies, prepare calculations to determine the tax value of the gift, or analyze the present value of a gift for accounting purposes as a way of helping a valuable client. Regardless of the way in which the role develops, the professional representing a charity places the charity's interests (rather than the donor's) at the forefront.

Representing charities engaging in planned giving programs represents a practice opportunity for firms that since those charities need a number of services. These include the following:

1. Ongoing assistance in analyzing gift transactions. These may include acceptance of gifts of real estate, complicated trust documents naming the charity as trustee (or even naming charity as beneficiary where the charity is given a chance to review the document), closely held business transactions, bargain sales, conservation easements, or gifts of remainder interests in property. These transactions may be difficult for a charity to analyze if they receive periodic gifts of this nature.

2. Document preparation, for donors with attorneys that are not experts in the field.

3. Internal accounting and administrative procedures for planned gifts. This includes a uniform system of recording gifts, preparation of substantiation documents for gifts, and allocating gifts to appropriate investment positions.

4. Foundation accounting and reporting, when the charity has established a separate foundation to hold its endowment.

5. Gift annuity management, including tax reporting, multi-state registration and annual reporting.

6. Investment management of endowed and long-term assets, including special management strategies for charitable remainder trusts, charitable lead trusts and gift annuity pools. Many charities need help in developing spending policies and understandable (and appropriate) investment management policies.

7. Administrative management of trusts and gift annuity pools.

8. Advice on transactions involving conflict of interest.

9. Assistance in establishing or management an insurance policy gift program.

10. Assistance in managing real estate contributed as gifts.

11. Assistance in establishing and providing a regular review of gift acceptance policies.

The needs may vary from charity to charity, but all of these tasks exist and most charities find it more effective to outsource these services than to hire permanent staff simply because the needs are intermittent and require a high degree of professional expertise.

3. The Vendor: Providing Products and Services to the Charity

Some of the professionals involved in the gift planning process establish their relationship with the charity as a vendor. These include trustees, investment managers, financial planners, or accountants providing administrative or accounting services, tax services, investment management, and accounting or reporting for the charity. These individuals see many transactions at various charities and are frequently in a position to provide perspective and assistance for a donor, a charity, and a less-experienced attorney or accountant. Sometimes, they are not included in the planning process, because they are considered ancillary, rather than primary, professionals.

Their interest in the transaction is generally to support their charitable client in developing the gift. When the charity benefits by receiving an additional gift and assets, the vendor also benefits by providing additional services to support or manage that gift. Vendors are happy to assist in the gift planning and development process because it allows them to offer a value-added service to clients, and ensures the longevity of the relationship with the charity.

4. The Board Member: Serving in a Governing Role

There is a fourth, and increasingly common, role for the professional – serving in a governing role for the charity. She may serve on the charity's board of directors, on the board's planned giving committee, or on the professional advisory board. In these volunteer roles, the professional is most helpful if she has a basic understanding of the planning process and details of planned gift forms, so that she can provide advice on how to expand the charity's development program.

Serving in a volunteer role may complicate the professional's relationship with the donor and the charity. At times, the professional roles may be blended, such as when the professional serves as a representative of the donor and on the board of the charity. This combination may require that the professional have a strong grasp of the ethical issues involved. In most cases, the professional simply wants to provide the greatest level of support to the charity that is possible.

C. The Importance of Working as a Team

The client and the charity are both beneficiaries of the team approach. When all of the client's advisors are involved in planning, the donor is assured of achieving the best result in gift planning. When the charity is also involved, it is more likely to help structure a gift that fits its needs, and the donor is more likely to achieve satisfaction from the process by knowing exactly how the gift will benefit the institution. Each piece of the planning triangle is critical to the success of the overall gift. This need to coordinate efforts is the thesis upon which this book is based, and the theme is apparent throughout this text.

The charitable planning team generally involves at least four participants: the donor, the donor's attorney, the donor's accountant, and the development officer from the nonprofit. In some instances, the team should also include the insurance agent, the financial planner, the real estate agent, or the trust officer that works with the donor. All of the participants are important to achieve the most effective gift plan. Without one of these participants, the gift may be effective for some purposes, but not for the goals of the more comprehensive plan.

D. What Can Go Wrong When Advisors Do Not Work as a Team?`

1. A Case Study: A Gift Initiated and Planned by the Charity (Without the Professional Advisor)

Since 1995, the development staff at City University had been talking to Danny Dollar, a long-term donor, about creating a chair in the School of Medicine to honor Danny's father. Danny was intrigued by the idea. His father had been on the founding staff of the medical school and had taught at the University for 25 years. He had considered many other ways to create a memorial for his father and provide a significant benefit to the medical school. Danny was also approaching retirement and wanted to create an additional income stream once he left his job.

The University's development staff was very helpful. They defined the financial requirements to establish a chair, and explained the options – such as, an outright current gift, a current gift to a remainder trust, or various deferred gifts – for funding. With the help of a financial planner on staff, the development staff helped Danny review his assets, select a vacation property (that was highly appreciated and no longer used) to fund a charitable remainder unitrust, and decide on a six percent unitrust payment that would meet his retirement needs.

Danny was satisfied that the creation of a charitable remainder trust that would fund a chair at termination was the best way to meet his personal goals. He was further gratified by the fact that the chair was one of the top priorities of the University in its current capital campaign; although Danny's gift was in trust and the benefit to the university would be delayed, the gift would be included in the campaign total. All that remained was to have Danny's attorney prepare the documents and Danny's accountant confirm the deduction.

When Danny's attorney, Paul Planner, received the gift proposal prepared by the development staff and delivered by Danny in his first meeting, he questioned everything. "Why create this gift now?" he asked. "There is no need to rush into this. I know you want to make sure your family is taken care of. What if something happens to you, and your wife and children need these assets? Why don't you just wait to make this decision? I'm afraid you're rushing into this." Danny's accountant, Fred Figures, had similar reservations. "You can't use a deduction this large in one year. This doesn't make sense for tax purposes."

Danny was truly confused. In truth, he thought his attorney would admire his philanthropic goals. Yet, he reacted as if Danny had made a mistake. And his accountant indicated that the gift did not make sense for tax purposes. Maybe it was a mistake. Perhaps he should wait. Perhaps he was being pressured. Consequently, the gift was not executed and Danny was uncomfortable talking with the development staff, his advisor, or even his family about the result.

2. A Case Study: A Gift Initiated and Planned By the Donor And His Advisor (Without the Charity)

Now consider this same example assuming that the gift originated with Danny's attorney, Paul Planner. Danny Dollar approached his attorney, Paul Planner, with an idea. He had graduated from City University and felt that the education he received had created the foundation for his current economic and professional success. He was an entrepreneur, and he wanted to do something creative to help the college and to help others obtain the same benefit.

Paul took him through the estate planning process, looked at his assets, and assured Danny he could take care of his family and make a gift to City University. Danny offered to introduce Paul to the development staff at the school to help in planning the gift. (The University staff had had several visits with Paul and had mentioned they had resources and ideas that might help the planning process.) Paul Planner decided against contacting the University staff, indicating that it was not necessary and expressing concerns that the University staff might complicate the process through rules and approvals as well as put pressure on Danny to fund the gift as quickly as possible.

So Paul and Danny planned the gift without the help of the development staff. They settled on a bequest to be used to start a business school at City University. Although there were several business schools in the state, Danny really felt that City needed such a school to be competitive and continue to grow. The bequest was significant although not large enough to completely fund the start-up. The bequest also contained a number of restrictions as to the form and philosophy of the new school.

Danny knew his gift was only enough to start the project, but hoped the gift would attract other donors once they understood its purpose. Danny executed his new will and went home cheerfully thinking about how he would likely be honored with his name on the new school. City University was never informed.

At Danny's death the University was notified of the bequest and the strings attached. The Board of Trustees was forced to turn it down. The Board had previously considered and rejected a business school as part of its long-term plan, choosing instead to focus on its medicine and science departments. A business school would dilute the medical-research focus of the university, distract the development staff in effecting funding for the program, and drain faculty resources.

Danny's family was naturally upset and Paul Planner was dismayed. Danny had talked for years about his excitement in making this gift. He had shared his vision of the future of the university with his family. Many of his family members had included gifts under will for the business school as well. As a result of the disclaimer, family involvement with the university ceased and their charitable gifts were made to other, more grateful institutions.

3. A Solution

The gifts in these examples failed because communication failed. The results in both examples could be dramatically improved by bringing the two teams together early in the process. Effective gift planning requires that the donor, the charity, and the professional advisors representing the donor and the charity work together. If, in the first example, the development staff of City University had involved the donor's professional advisors in the planning process, the donor's attorney and accountant would not have been blindsided when presented with a nearly-complete gift and would have understood the donor's interests in making the gift. Likewise, in the second example, if the attorney involved City University in the plan to create a business school, the donor and the attorney could have explored other alternatives (such as creating a chair at the School of Medicine in honor of the donor's father).

III. Results from Donor Surveys: What Donors Want from Their Advisors

A. The 2014 U. S. Trust® Study of High Net Worth Philanthropy[10]

U.S. Trust and the Indiana University Lilly Family School of Philanthropy has surveyed high net worth individuals since 2006, publishing survey results in 2006, 2008, 2010, 2012, and 2014. These studies focus on high net worth philanthropic trends that include giving patterns, perceptions, motivations, decision-making, strategies, values, traditions, and volunteering.[11] High net worth individuals are those with investable averaging $3 million or more.`

1. High Level Results

Here are some of the key findings of the survey:

- 98.4 percent of those surveyed gave to charity in the survey year (2013). This compares to 97.4% in 2005, the first survey year.

- The top five areas of giving were education (85.2%), Basic Needs (80.7%), Arts (69.6%), Health (67%), and Religious organizations (66.7%).

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[10] The 2014 U. S. Trust® Study of High Net Worth Philanthropy (October 2014), https://scholarworks.iupui.edu/bitstream/handle/1805/6360/2014ustrustfinalreport.pdf?sequence=1&isAllowed=y.

[11] Id., p. 5.

- Average annual giving per household was $68,580, up from $53,519 in the prior survey period in 2011, an increase of 28.1%. For households with $5 million or more, average annual giving was $166,602, up from $117,027 in the prior survey period.

- The average gift size varied by the source of wealth. Those whose primary source of net worth was business gave an annual average of $187,971; those whose primary source of net worth was financial assets gave an annual average of $74,461.

- 36.8% of those surveyed had wills with charitable provisions; 15.6% had an endowment fund; 14.5% had a donor advised fund; 12.6% had a CRT, CLT, or CGA; and 6% had a private foundation.

- 75.1% volunteered.

- 45.7% serve on nonprofit boards.

- 73.5% give when they believe their gift can make a difference; 73.1% gave for personal satisfaction.

2. Where Do Donors Get Their Advice?

The survey found that 64% would like to be more knowledgeable about at least one aspect of charitable giving. Of these 28.7% wanted to know more about engaging the next generation; 16.3% wanted to know more about nonprofit organizations and community needs, and 14.7% wanted to know more about strategic giving.

Donors are learning more about charitable giving. 72% rated themselves as “knowledgeable;” these individuals gave an average annual amount of $64,599. 13.8% rated themselves as “expert;” these individuals gave an average of $150,229.

When asked about the role of their advisor in giving, 45.4% reported they had consulted with at least one advisor during the year. These advisors included the following:

TABLE 4
PROFESSIONAL ADVICE SOUGHT BY HIGH NET WORTH

Type of Advisor	*Percent Consulting with This Type Advisor*
Nonprofit Personnel	49.2%
Independent Financial Wealth Advisor	45.5%
Accountant	44.5%
Attorney	28.8%
Community Foundation Staff	22.8%
Peers or Peer Networks	16.5%
Bank or Trust Company	9.2%

B. The US Trust Study of the Philanthropic Conversation[12]

U. S. Trust and the Philanthropic Initiative worked with Phoenix marketing International to conduct a surge to determine the level of advisor interest in promoting philanthropy and to understand how advisors talk to clients about philanthropy and to contrast their perspectives with those of the high net worth clients they serve. The work was conducted through two surveys. The first focused on a national sample of financial/wealth advisors, attorneys, and accountants. The second focused on high net worth individuals with investable assets of $3 million or more.

Here are the key findings:

- Having the philanthropic conversation. The survey found that 71% of the advisors surveyed asked high net worth clients about philanthropy. Attorneys were most likely to ask (80%) and accountants were least likely to ask (57%). However, only 55% of high net worth clients reported they had had philanthropic discussions with their advisor. 13% reported they had had no philanthropic discussion but were open. 9% reported the topic had come up but was not discussed due tot he advisor's lack of familiarity with the client's personal life or values.

- The importance of the philanthropic conversation. Advisors and clients agree it is an important topic. 46% of advisors rated the conversation "very important" and 42% rated it "somewhat important." 18% or clients reported the conversation was "very important" and 55% reported it was "somewhat important."

- Who initiates the conversation. Advisors indicate they generally initiate the philanthropic conversation, with the client initiating the conversation only 20% of the time. However, clients indicate they initiate the conversation at least half of the time.

- When is the conversation initiated. 34% of clients prefer the topic is introduced at the first meeting; 15% after a few meetings of discussing needs; and 41% after several meetings when the advisors fully understands them. Advisors report they raised the knowledge when they have a detailed knowledge of the client's financial picture (47%) or when they have detailed knowledge of the client's personal life (40%).

- 41% of advisors encourage clients at al asset levels to consider philanthropy. 71% of the advisors emphasized technical topics and only 35% emphasis personal topics such as passion and activities. However, clients report a balance passions/interests and tax benefits would best engage them, rating personal and technical topics equally.

- Only 41% of high net worth clients are satisfied with their philanthropic conversations with their advisors.

- 74% of advisors believe discussing philanthropy is good for business development. 56% believe that discussing philanthropy helps build relationships with the clients' extended family.

- 49% of advisors found client needs exceeded their capabilities. 57% plan to increase their knowledge about philanthropy.

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[12] The US Trust Study of the Philanthropic Conversation, (October 2013) http://www.sjsu.edu/advancement/docs/philanthropic-conversation-study.pdf.

IV. How to Have the Conversation with Donors: Questions and Checklists

A. The Barriers: Assumptions in Planning

Most individuals – and their advisors – come to the planning process with assumptions that get in way of creating significant estate gifts for charity. The most common assumptions are:

- **Assumption One: The individual wants to leave his or her entire estate to family**. The planner should not assume that the client wants to leave the entire estate to a spouse, children, or other relatives. The client should be asked to quantify his goals for family members. More and more individuals – those with excessive wealth and those with more moderate estates – have specific dollar goals in mind.

- **Assumption Two: The individual is driven by tax avoidance.** So much of what the client reads in *Forbes*, *The Wall Street Journal*, or even the local newspaper on estate planning focuses on tax avoidance or reduction. The planning professional also focuses on estate planning techniques and tax avoidance. The donor is focused on neither. Instead, he is concerned about personal needs, family needs and in many cases, charitable goals; he is not willing to sacrifice those goals merely to save taxes.

- **Assumption Three: The individual has fully thought through the issues that impact estate planning.** Most have not. It is important to understand the perspective of the client involved in charitable planning. While the professionals involved consider the tax consequences and alternatives, the donor is dealing with more personal issues. The donor must first ensure that he or she will be able to maintain or improve a lifestyle. Next, the donor must ensure that he or she can provide for family, both during life and at death. Finally, the donor may want to impact or benefit those charitable organizations that were priorities during life. If the donor has not taken the time to articulate or quantify these concerns and goals, it is difficult to make decisions in the planning process.

B. Opening the Door: The Three Questions Every Professional Should Ask Donors

Many professionals are not comfortable raising the issue of charitable giving. These questions are designed to make that process easier. These questions may be incorporate into an intake questionnaire to identify charitable objectives.

- *Do you have charitable organizations that you currently support on an annual basis?*

- *Do you want to include a gift to any of these organizations or other charitable organizations as a part of your estate plan?*

- *If there were a way to make a gift to charity largely out of federal estate tax dollars, would you be interested in exploring options to accomplish that goal?*

If you want to explore the client's charitable planning goals and objectives in more detail, ask these questions.[13]

- *What are your values? What have been the principles that have guided how you have lived your lives, raised your family run your business?*

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[13] Breiteneicher, Joe, "Advisor's Enthusiasm Helps To Shape Client's Charitable Role," *Trusts & Estates* (August, 1996), p. 32.

- *What charitable interests have you pursued as an outgrowth of your values?*
- *What have you learned from your giving? What would you do differently? Would you feel confident expanding your giving?*
- *What has been the most satisfying charitable gift that you have made? Why?*
- *How do you view your wealth in connection to your community, to society?*
- *What role has philanthropy played in your family? What role should philanthropy play? What value would it bring to your children and grandchildren?*
- *What core values would you like to express through your giving? What do you want to stand for?*
- *When they think about the challenges facing your community, what are your major concerns?*
- *Are any of these or should any of these concerns be the focus of your giving?*
- *What would you like to accomplish with your giving? What do you think is possible?"*

The key is to ask the questions to allow the client to express charitable giving in terms of a priority. If you raise the issue and the client is not interested, move on. If you raise the issue and the client does express an interest, then there is an opportunity to integrate charitable giving in the overall estate plan.

C. Preparing Clients for Planning

1. Donor Motivation

Motivation refers to the reasons a donor makes a gift; objectives refer to the results the donor wants to achieve in making a gift. A discussion of the gift's quantifiable results is often easier since it deals with objectives factors rather than the intangible feelings behind the gift. Sometimes objectives in making a gift are easy to articulate. Consider the following examples.

EXAMPLE 1: Oseola McCarty was an African-American sixth-grade dropout from Mississippi who made a living as a laundress. She lived frugally, saved her earnings, and made a $150,000 gift to the University of Southern Mississippi to establish a scholarship fund to enable other African-American women without resources to attend college.

EXAMPLE 2: Bill Gates, one of the world's richest men, has contributed over $21 billion to a family foundation. Among his multiple objectives were the eradication of polio in the world and the improvement of public education quality in the United States.

EXAMPLE 3: Walter Annenberg, one of the world's top philanthropists before his death in 2002, gave away in excess of $1 billion during his lifetime.[14] He gave because: "Giving is a mark of citizenship."[15] His objective in giving, which focused on institutions of higher education, was to improve the quality of and access to higher education in the United States.

These stories illustrate generosity in giving, as well as a focus on giving. One of the advisor's greatest challenges is to integrate the specific goals of the donor in a gift arrangement that is flexible enough to meet the needs of charity and stand the test of time. This ongoing conflict between the goals of the donor and the needs of charity is beneficial in encouraging dialogue about the structure of the gift. If, after discussion, the charity has no interest in the gift as restricted or designed, the advisor should either counsel the donor to modify the gift of help the donor identify a charity with that specific need.

In addition, the donor may have personal goals and objectives in making a gift. He may want to achieve a tax deduction for the gift. Since the deduction will depend on the form of the property contributed, the form of the gift created, and the donor's adjusted gross income, the advisor must determine whether that goal is achievable. On the other hand, the donor may want to generate additional income in retirement from a gift.

Wealthy donors may have more complex planning goals. A survey, conduct by Paul G. Schervish and John J. Havens at Boston College, found that the very wealthy have a strong interest in controlling the timing, direction, and level of giving to charitable organizations. Therefore, much of their giving (63 percent) is directed through donor-advised funds, trusts and family foundations.[16] Researchers felt this pattern indicated a realization that financial needs and charitable interests change over time and that their charitable giving mechanisms must be able to respond to these variances.

2. Tax and Financial Incentives in Planning

While the tax benefits are not generally the primary motivation for a gift, they do provide a tangible bonus for those who contribute to charity. It is difficult to establish general rules concerning the value of tax incentives to an individual donor since results will vary depending on the gift, the donor, and the following factors:

- *The charitable deduction depends in part on the form of property contributed* (cash, securities, real estate, tangible personal property), the donor's basis in that property (short-term loss, long-term loss, even, short-term gain, long-term gain), the type of gift made (current outright gift, current split-interest gift), and the donor's adjusted gross income (to determine the 20 percent, 30 percent, and 50 percent limits for the charitable deduction in the year.

- *Some gifts avoid income tax on capital gains on contributions, while others simply defer the gain.* Often, the result depends on the facts rather than the form of the gift. For example,

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[14] Ann Marsh, They Don't Expect To Take It With Them, Forbes 400, at 130 (Oct. 13, 1997).

[15] *Id.*

[16] Schervish, Paul G. and John J. Havens, The Mind of the Millionaire: Findings from a National Survey on Wealth with Responsibility, in New Directions in Philanthropic Fundraising, Understanding Donor Dynamics: The Organizational Side of Charitable Giving, edited by Eugene R. Tempel, No. 32 (Summer 2001), pp. 75-107 (a copy of the paper is available at www.bc.edu/bc_org/avp/gsas/swri/swri_features_recent_papers.htm.

capital gains on appreciated property contributed to a charitable remainder trust are not taxed because the trust is non-taxable (However, this income becomes part of the trust's accounting records and may eventually be distributed to the trust beneficiary as a part of the annual distribution stream and therefore subject to tax.) Contribution of appreciated long-term capital gain property to charity in exchange for a charitable gift annuity is treated as a bargain sale so long as the interest is non-assignable; the gain attributable to the donor's share of the gift (the present value of the annuity stream) is deferred and distributed over the expected life of the donor.[17] Contribution of long-term capital gain property to charity in exchange for a gift annuity for the benefit of someone other than the donor is taxed to the donor in the year of the gift.[18]

- *Many gifts made currently create multiple tax deductions, such as an income tax deduction, and a gift tax or estate tax deduction*. For example, a gift of a retirement plan to charity through beneficiary designation may avoid both income and estate tax on the gift. A grantor lead trust creates an income tax deduction for the donor, while a non-grantor lead trust creates estate and gift tax (but no income tax) deductions for the donor. The planner must be careful to explore all ramifications of the gift and explain the benefits to the donor.

- *The value of a charitable gift made through an estate is easier to calculate since the gift generates a dollar for dollar deduction for the charitable portion of the gift.* However, life income gifts, such as a charitable remainder trust created for a child, are not fully excluded from estate taxes since the portion representing the income interest for the children will be included in the estate. In addition, donors with non-taxable estates receive no benefit from the charitable deduction.

3. A Checklist for Goal Setting

Many clients have difficulty establishing goals for planning. Use the worksheet at Appendix A to lead them through the process of setting goals and prioritizing those goals. Common planning goals may include:

- Providing for sufficient assets for spouse and family and addressing special needs.

- Providing for children. This requires a discussion of the amount or nature of the property to be left to the child, and the form of the gift. The client should review whether the child is capable of financial asset management or if an advisor or trustee should be appointed.

- Providing for grandchildren. This also requires a discussion of how much and in what fashion. Can they handle financial asset management? Would a professional trustee be of benefit?

- Providing for special educational, rehabilitation, medical or remedial provisions that should be made for one or more dependents.

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[17] Reg. §1.1011-2(a)(4)(ii).

[18] Reg. 1.1011-2(a)(4)(i).

- Providing for the care of extended family members. Do you have any special concerns or needs that should be addressed in providing for your parents? Are there any other extended family members (or siblings?) that require special help?

- Creating a way to maintain control or allow for flexibility. How important is the ability to provide direction and meet needs?

- Establishing family values and philanthropic goals that are important.

- Support specific charities that the client has supported during his or her lifetime.

The worksheet allows the client to accomplish several goals. First, he is able to articulate priorities in planning. Second, he is prompted to quantify the costs of meeting those goals. For example, many individuals have not thought about the cost of providing for long-term health care, or providing a college education, or even the amount that they want to leave their children after death. The goal-setting process allows donors who have not quantified those goals to take the next step to talk with a financial planner, a CPA, or other professional that can help assign a dollar amount to a priority goal. Finally, he is able to take action to achieve goals, or make alternate plans if the goals cannot be met.

D. Basic Principles for Lifetime Giving

1. Large, Outright Gifts

The most effective asset to use for outright lifetime gifts is generally a capital asset with long-term appreciation. This is because the donor will not only receive a charitable deduction (if the donor itemizes) but will also avoid the capital gains on the contributed property. The math makes the case as shown in Table 5.

TABLE 5
ANALYSIS OF TWO OPTIONS FOR A $10,000 GIFT

	Donor Writes Check for $10,000	*Donor Contributes L-T Appreciated Stock, $4,000 Basis*
Market Value/Deduction Value of Gift to Charity	$10,000	$10,000
Capital Gains		$6,000
Value of Tax Deduction for Donor in the 35% Tax Bracket	$3,500	$3,500
Tax Value of Avoiding Capital Gains Tax on $6,000 Gain at 15%		$900
Total Tax Value to the Donor	$3,500	$4,400

2. Transactional Opportunities

Transactional opportunities represent one of the most common opportunities to use long-term appreciated assets to make charitable gifts. These transactions may include the sale of a closely held business, a corporate buy out, a retirement, or the sale of a building or tract of real estate. Your clients often compartmentalize these transactions, focusing on the transaction itself and considering a charitable gift after the transaction to minimize the tax impact. Remind them to check with you before these transactions.

Sales of real estate represent one of the most common transactional opportunities for giving. Real estate is generally held long-term and has significant capital gain making it tax-advantaged asset for giving. Here are some principles to remember.

- Personal residences are a common type of charitable gift. Donors may make gifts of all or part of a personal residence at retirement when they are downsizing and moving to a retirement or smaller home.

- Vacation homes also make an attractive gift. Vacation homes may have extensive expenses associated with them (condo/community fees, insurance, maintenance, utilities) and may not longer get much use as the owners age. Vacation homes can be converted to an income stream if contributed to a charitable remainder trust. Vacation homes with debt are not good candidates for transfer to charitable remainder trusts.

- Undeveloped real estate - whether a vacant lot or acreage - can be used to make a charitable gift. This may be farmland, land zoned for commercial development, or simply land holding the world together that may not be developed for many years. A transfer of undeveloped real estate can become complicated if the property is owned by multiple individuals or corporations.

- Commercial real estate may not be as attractive for gift purposes as residential real estate because the property is often depreciated, meaning the deduction will be reduced. There may also be more costs associated with it and more uncertainty around tenants and revenue which is unattractive to the charitable recipient.

- Ask questions related to costs, marketability, and value, and environmental damage. Community foundations should be extremely careful before agreeing to accept real estate because of the potential for environmental liability, the swiftly changing market for sale, valuation, and the costs to hold the real estate.

- Transfers of property with debt should be carefully reviewed by the donor's attorney and accountant.

- Bargain sales allow the donor to sell the property to charity at less than its value - in essence a partial sale and partial gift. This may be a good way for donors to walk away with funds needed to retire debt, purchase a new home, or meet other personal needs.

3. Charitable IRA Rollover

In 2015, Congress made the "Charitable IRA Rollover" became permanent.[19] This allows individuals age 70 1/2 or older to make distributions of non-taxed assets in an IRA directly to a qualified charity. There are several caveats. First, the list of qualified charities includes only public charities (so

[19] The Charitable IRA Rollover was initially part of the Pension Protection Act and had a two-year life. It has subsequently been extended in two-year segments until it was made permanent in 2015.

that private foundations are excluded) and excludes gifts to supporting organizations and donor advised funds. Further, the donor may not receive a benefit for the gift. This is a powerful way for donors to make gifts to charity from their most heavily taxed assets, and allows a benefit for a charitable gift even if the donor does not itemize.

E. Basic Principles for Deferred Giving

The single best asset for testamentary giving is generally Income is generally Respect of Decedent (IRD) property. IRD is the term defining income that has accrued but not taxed at a decedent's death. These assets reach beneficiaries with a tax burden; the decedent's estate, the named beneficiary, or person or entity to which the asset is properly distributed is responsible for payment.[20] The untaxed income has the same character in the hands of the recipient it had in the hands of the owner.[21] Since the highest estate tax rate in 2013 is 40%, and the highest federal income tax rate is 39.6%, the two taxes can take a significant bite out of the asset's value at death.[22]

The goal of using IRD assets in testamentary charitable planning is simple: give the most highly taxed assets to charity, leaving the non-taxed assets for heirs. If the transfer is structured properly:

- The estate receives a charitable estate tax deduction for the gift to charity;
- The income in the property is allocated to the charity, an entity that pays no tax; and
- The non-charitable beneficiaries receive estate assets with a stepped-up basis and no inherent tax burden.

Many commonly-held assets have IRD, including the following:

✓ *Retirement plans*, such as qualified employee benefit plans, Keoughs, IRAs, and other retirement benefits funded with pre-tax income. This would not include defined benefit plans (where there is the right to certain benefits but no ownership or right of disposition of the assets funding those benefits), Roth IRAs, or portions of retirement plans funded with after-tax dollars.

✓ *Savings bonds* with accrued, untaxed income. The most common form of bond with untaxed income is the EE (Patriot) Savings Bond, which is purchased at a discount of face value, and accrues interest for up to 30 years. Until August 31, 2004, it was possible to convert EE Bonds to HH Bonds without triggering tax on the accrued income; the Treasury no longer allows such a conversion. It was also possible until August 31, 2004 to defer interest on HH Bonds; this option, too, has been eliminated.

✓ *Deferred compensation*.

✓ *Compensation earned – but not received* – before death. This includes any payment for remaining vacation or sick time accruing to the decedent.

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[20] IRC § 691(a)(1).

[21] IRC § 691(a)(3).

[22] Most states also impose a state estate tax and income tax. The state estate tax can be claimed in part or in whole as a credit against the federal estate tax; the state income tax adds an additional overall tax burden to the IRD.

- ✓ *Accounts receivable*, earned but not received before death.
- ✓ *Unrecognized income from annuities*, such as deferred annuities.
- ✓ *Remaining installment sale payments*.
- ✓ *Accrued interest* on stocks and bonds due at date of death.

Sometimes the inclusion of these assets in an estate is predictable. Retirement plans and savings bonds, for example, may comprise a large percentage of a decedent's assets. In other cases, the inclusion of the asset is not anticipated. An installment sale, for example, may have been executed after the estate plan was prepared. The principles of IRD planning, however, are equally applicable to all assets with this form of income.

F. Documents Clients Should Bring to You for Review (That Others May Draft)

Sometimes client get their planning documents from the charity. While these are not wills or trusts, these are documents that can control large gift amounts. Encourage clients to bring these documents to you for review prior to execution. These may include:

- Endowment documents. Charities frequently provide endowment documents to donors as a convenience and to clarify the goals and function of the gift. If these are written by the charity, they will favor the charity (just as the lease written by the landlord favors the landlord over the tenant). Endowments are perpetual, and your review can ensure there is a "Plan B" in the event the charity fails to use the funds for the purpose specified by the donor or in the event that purpose is no longer viable.
- Gift agreements for major gifts, especially those with naming privileges. On a similar vein, encourage your clients to allow you to review gift agreements with naming provisions. Look specifically for language that dictates what happens when the charity does not follow through, or they rename the building for an even larger donor a few years down the road, or use the funds for other purposes.

- Charitable gift annuity documents. Charitable gift annuities are fairly standard, especially for charities that do many annuities. However, if it is a smaller charity or one that is new to charitable gift annuities, you may not only want to read the document, you may want to call the institution and ask questions about the size of the pool, the firm that manages the money, and whether the charity has registered in the state.

G. Guiding the Client in Creating a Family Philanthropy Platform

Selecting the appropriate entity for a client revolves around the client's goals, expectations, management skills, and adaptability. For the planner, this means asking the right questions before establishing the entity. Appendix A contains a checklist to guide you through this process.

Many of your clients structure charitable bequests under will, name charities as beneficiary of their IRAs, or make significant charitable gifts during their lifetimes. While tax impact is always a consideration, how often do you engage in a discussion with your client about their non-tax objectives in making the gift?

Knowing the donor's goals is essential to selecting the right form for institutionalized philanthropy. Consider these common objectives and probe the donor to determine their priorities in creating the philanthropic entity. Many of these goals are overlooked because they do not relate to legal or tax considerations, and yet they are important in achieving the client's objectives.

1. Philosophical Goals

One of the difficulties in counseling clients about a family philanthropy form is that they have had little experience with either the management or outcomes of the available options. For that reason, it is difficult to articulate priorities, and almost impossible to anticipate administration. Suggest the client use the kitchen table philanthropy model to test drive the family's philanthropy style and goals. To start the conversation, get them to answer these questions:

- Have you successfully engaged your children in the giving process in any way?
- Was it a positive experience for you and for them? What would have made the process stronger?
- Were you able to use that platform to teach them the process of making effective gifts? Did you need or use outside help to identify charities or analyze effectiveness?
- What part of the process was most meaningful to you and your family members?
- Which part of the process would you prefer not to do again?
- How easy was it to manage the paperwork during the process? Do you have methods to track and analyze giving long-term? Do you anticipate that if this work load were quadrupled to include quarterly tax reporting, annual tax returns, short-term and long-term accounting (up to five years of records), meeting minutes, grants oversight, and compliance you could accommodate the work? Would you need to hire outside advisors? Would you prefer to shift responsibility to third parties?
- What is the next step in developing the philanthropic process for your family? Do you want more professional help, or would you prefer to develop that expertise within your family?

2. Effective Giving

Some clients want to be more effective in their giving. They are inundated with requests for capital campaigns, major gifts, special projects, disaster relief, and year-end solicitations. Most quickly tire of writing a stream of checks and want to focus funds on an area of personal interest that will "make a difference." They may believe that creating a foundation will give them a permanent pool of resources to ensure effectiveness through long-term fund, or will allow them to invest in staff and research to identify the most effective organizations.

3. Giving for Impact – Not To Specific Charities

Other clients, especially those with an entrepreneurial or business background, prefer to give to outcomes. They may want to improve the quality of public education, and raise graduation rate, because they believe these outcomes will improve the community's economic future. Or more simply, they want to focus their giving to groups of organizations that have a cooperative plan, measure outcomes, and report progress.

4. Engaging Family

Some individuals want to institutionalize their philanthropy simply as a means of engaging family in philanthropic decisions and sharing their passions for giving with lower generations. Always probe for specifics:

- How does the client want to engage family? In a formal way, such as board members or more casually as consultants to the ultimate decision?
- How frequently do they want to engage family in the decisions making? It may be once a year, or the client may want an ongoing, quarterly family meeting.

- How much power do they want to invest in family members, and does this vary by generation or relationship to the client?
- Are there any family relations difficulties they hope to solve in the process?

5. The Generational Gap

Some clients may want to bridge the generational gap and find a way to work side by side with grandchildren in philanthropy, while others may simply be interested in having children and grandchildren admire their philanthropic decision making. In truth, every individual has specific charitable interests and these interests shift as they move through the decades. It is rare to find multiple members of a family on the same generational levels who share interests, much less on multiple generational levels. Ask the client to be as specific as possible in articulating these objectives.

6. Teaching Values

Many individuals relish the idea of teaching the family's values on a stage that perpetuates the teaching from generation to generation. The idea is that family members will learn from being involved, and will automatically assume those values and pass them to their descendants.

7. Protection from Solicitations

Some clients believe that by creating a private foundation or supporting foundation they will protect themselves from the relentless pursuit of charitable solicitors by being able to say: "My foundation handles the charitable giving – just send the request to them for consideration." In this day, with easy access to Form 990-PF and required disclosure, a foundation will not insulate the donor from solicitations. Most charities know that donors use family foundations to execute their personal giving. There are simpler ways (such as saying "no") to create that protection if that is all that is desired.

8. Visions of Tax Savings

While it is true that gifts to private foundations (and all charitable gifts) generate tax benefits, gifts to private foundations – the most popular institutionalized philanthropy options – are far less substantial than gifts to public charities. For example, instead of 50% (cash/ordinary income property) and 30% (long-term capital gain property) adjusted gross income limits for deductions in a single year, gifts to private foundations are limited to 30%/20%. And while gifts of long-term capital gain property of all types to public charities may be deducted at market value, only gifts of qualified appreciated stock receive a market value deduction for gifts to private foundations. Other long-term appreciated property – such as real property and closely-held business interests – are limited to the donor's tax basis. Therefore, one of the big planning decisions revolves around the property that will be used to fund the gift as well as the donor's deduction goals.

V. Ethical Issues in Gift Planning

A. The Current Platform for Ethics

1. What Is Ethics?

Ethics is critical to the professional practices comprising the gift planning field. Clients must trust advisors to act in the client's - not the adviser's - best interests in designing gifts and creating estate plans with wills, trusts, charitable entities, and beneficiary designations. As Michael Josephson, the founder of the Josephson Institute of Ethics, states: "Our future depends on ethics. Its challenges require a society of individuals wise enough and strong enough to do what is right."

2. Malfeasance and Misfeasance

The definition of ethics varies widely, depending upon whom you ask. Consider these definitions available through online dictionaries:

Ethics (Dictionary.com)[23]

1. A system of moral principles.
2. The rules of conduct recognized in respect to a particular class of human actions or a particular group, culture, etc.
3. Moral principles, as of an individual.
4. That branch of philosophy dealing with values relating to human conduct, with respect to the rightness and wrongness of certain actions and to the goodness and badness of the motives and ends of such actions.

Ethics (Miriam Webster)[24]

1. The discipline dealing with what is good and bad and with moral duty and obligation.
2. A set of moral principles: a theory or system of moral values.
3. The principles of conduct governing an individual or a group.
4. A guiding philosophy.
5. A consciousness of moral importance.

Ethics (Oxford Dictionaries)[25]

1. Moral principles that govern a person's or group's behavior.
2. The moral correctness of specified conduct.
3. The branch of knowledge that deals with moral principles.

A further difficulty is that each profession describes ethical conduct differently, and state laws may impose varying standards. At the heart of all standards is the requirement that the interests of the client supercede the interests of the advisor, and that all facts and parties to the transaction be disclosed.

Most of us, fortunately, have few instances in which we find ourselves confronting ethical dilemmas. Or, perhaps, we do not see the ethical issues before us. Does this create misfeasance - a failure to recognize the ethical issue and act on it resulting in a disservice to our client - or malfeasance - an intentional failure to redress the issue? The purpose of this session is to raise awareness of some of the most common ethical issues in gift planning. Since gift planners work as a team and often involve multiple professional advisors and charitable gift planners, this look at the ethics in gift planning looks beyond legal ethics to include issues for accountants, trust officers, financial planners, insurance professionals, and even investment managers.

[23] www.dictionary.reference.com.

[24] www.miriam-webster.com.

[25] oxforddictionaries.com.

3. Sarbanes Oxley and The Push for Transparency and Accountability in the Nonprofit Sector

Every element of the nonprofit sector is under Congressional scrutiny. Headlines across the country in the late 1990's and early 2000 detailed corporate scandals involving fraud and mismanagement.[26] These stories prompted Congress to legislate accountability (The American Competitiveness and Corporate Accountability Act of 2002, also known as the Sarbanes-Oxley Act[27]) and increased scrutiny of the charitable sector. The Sarbanes-Oxley Act requires corporate boards to: maintain an independent and competent audit committee; hire an independent auditing firm not compensated by the corporation for other types of services (delineated in the statute); rotate the reviewing partner of the auditing firm at least every five years; have the CEO and CFO certify the company's statements (with criminal penalties for intentional false certification); prohibit loans to corporate directors and executives; and disclose internal control processes, corrections to past financial statements, off-balance sheet transactions, and material changes in operations or financial condition. While these provisions were directed at for-profit corporations, these standards may eventually be imposed on the nonprofit community, especially if stories of misuse of charitable funds continue.[28]

Similar news hit the nonprofit sector. Stories of misfeasance and malfeasance made headlines in the *Washington Post*, the *Wall Street Journal* and many more beginning with the William Aramony/United Way news, the New Era Foundation, and more recently, The Nature Conservancy insider dealing and non-cash gift valuation issues. These ongoing issues prompted a series of Congressional hearings, legislative reforms, and dramatic proposed regulations and legislation affecting donors and the nonprofit sector.

Congress has heard too many stories of egregious behavior on the part of donors and their advisors and has conducted hearings since 2004 to legislate the behavior of all parties to the gift transaction. The watchwords are "transparency and accountability." Transparency means that all details of the transaction should be revealed so that a third party can identify related parties and those who benefit. Accountability usually means fines or punishment for behavior that violates the rules. The cry for transparency and accountability is generally directed at the charities, their officers, and their boards but has been extended to focus on individuals who run charities and have personal business interests that profit from that influence as a charity's officer or director.

For the attorneys who violate ethical standards the price can be high - the attorney can be disbarred for the failure to abide by the Ethical Standards of Conduct of the state bar association. For trust officers, they can lose their job and be banned from banking. Other professionals may also lose their license of professional designation.

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[26] Corporations creating headlines prompting Congressional action included (among others) WorldCom, Enron, and Global Crossing.

[27] Public Law No. 107-204 (July 30, 2002).

[28] An excellent article on the Sarbanes-Oxley Act and the implications or lessons for nonprofit management can be found at <www.guidestar.org/news/newsletter/sarbanes_oxley.jsp>.

B. The Enforceable Codes of Ethics for Professional Advisors

1. An Overview

Rules of professional conduct, including ethical standards, are designed to cover all aspects of a member's practice and therefore address issues broader than the gift planning process. This session focuses on the ethical standards that affect charitable planning, specifically the receipt of commissions or fees, disclosure of fees, and relationships to the donor, professional education, and other factors impacting gift transactions. While standards of conduct and competence are similar from organization to organization, the policies on fees and commissions vary widely.[29]

2. The Attorney - The American Bar Association

The American Bar Association (ABA) publishes the American Bar Association Model Rules of Professional Conduct and Model Code of Professional Responsibility.[30] The rules are promulgated to provide standards for states as they consider and implement codes of conduct for their members. The ABA also issues rulings and creates task forces periodically to address emerging issues (such as multi-disciplinary practice groups[31] or the impact of the Internet on marketing and practice). Many states have adopted these rules and comments wholesale; others have adopted an edited version.

Attorneys are licensed to practice law by the state in which they practice. States test potential attorneys for competency, require ongoing education to remain in active practice, and oversee attorney conduct through disciplinary proceedings. Many states also require that attorneys receive training in ethics, mandating that a portion of the attorney's continuing legal education (CLE) requirement for the year comprise ethics courses. Many of the canons of ethics have applicability to the gift planning process.

3. The Accountant - The American Institute of Certified Public Accountants

The American Institute of Certified Public Accountants (AICPA) represents more than 330,000 members. Its ethical standards are incorporated into the American Institute of Certified Public Accountant's (AICPA) Code of Professional Conduct, including provisions on professional ethics, independence, integrity and objectivity, responsibilities to clients, and responsibilities in tax practice.[32] The Code of Professional Conduct is divided into two sections: Principles, which provide a framework or context for the rules; and Rules, which address the manner in which professional services are delivered. The AICPA also issues "Interpretations of Rules of Conduct" and "Ethics Rulings" which are formal opinions on practice issues.
The heart of the ethical standards of the AICPA is set out in the Preamble, which places honorable behavior over personal benefit.[33]

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[29] These vary with the manner in which the professional is compensated for services.

[30] American Bar Association, Service Center, 541 North Fairbanks Court, Chicago, Illinois, 60611, 312-988-5522.

[31] http://www.abanet.org/cpr/mdpfinalrep2000.html

[32] http://aicpa.org/about/code/comp.htm.

[33] AICPA Code of Professional Conduct 51.02.

"These Principles of the Code of Professional Conduct of the American Institute of Certified Public Accountants express the profession's recognition of its responsibilities to the public, to clients, and to colleagues. They guide members in the performance of their professional responsibilities and express the basic tenets of ethical and professional conduct. The Principles call for an unswerving commitment to honorable behavior, even at the sacrifice of personal advantage."

4. The Life Insurance Agent - Regulation of the Insurance Agent

The state insurance commissioner regulates insurance agents selling policies to residents of the state. The insurance commissioner's goal is to protect consumers through regulation of companies operating in the state and licensure of agents representing those companies. Therefore, an agent is required to register with each state in which she practices. Each state has its own set of registration requirements and standards. However, the state commissioners meet frequently and many subscribe to the Model Standards published by the National Association of Insurance Commissioners (NAIC).[34]

Many insurance agents seek certification as Chartered Life Underwriters (CLU) and/or Chartered Financial Consultants (ChFC). These designations, awarded by The American College in Bryn Mawr, Pennsylvania, signal that the agent has passed, a ten-course curriculum including insurance basics, estate planning, business succession planning, and financial planning. As a part of this accreditation process, the American College requires certified members to abide by a set of ethical standards. Violation of these rules puts membership or accreditation in jeopardy.

The standards of professional conduct for CLUs and ChFCs) have been established in the eight canons of behavior. These canons require the agent to conduct himself with dignity, avoid practices that bring dishonor on the profession, continue educational activities to maintain professional competence, assist others in the profession, and comply with all laws and regulations. These canons also emphasize maintaining integrity and building the image of the profession. Those certified by the American College are required to comply with all laws and regulations, including the IRS Code and Treasury Regulations. Of course, these standards are in addition to the standards required by the State Insurance Commissioner that licenses the agent. Many of the state and American College certification standards overlap.

5. Trust Officers

Trust officers serve as fiduciaries and officers of financial institutions and are not licensed by the state or federal government unless that officer also sells securities or engages in other forms of regulated conduct. However, trust officers are regulated by state bank examiners (if the bank is chartered by the state) or the federal Comptroller of the Currency (if the bank is a national financial institution).[35] These

[34] More information on the National Association of Insurance Commissioners, including model language, is found at<www.naic.org/consumer>.

[35] Although trust companies are often part of a bank, there are many independent trust companies. These independent companies are granted a charter through the same process required for a bank. Banks, and trust companies, elect to obtain a state or national charter. The state or federal body issuing the charter governs the conduct of the employees of the bank or trust company.

officers must also comply with state fiduciary and securities laws. Violation of these strict banking, fiduciary, or securities regulations may result in fines or criminal conviction.

Some trust officers receive accreditation as Certified Trust and Financial Advisors (CTFAs) through the Institute of Certified Bankers, a division of the American Bankers Association. This certification reflects a high level of experience, competency, and education concerning complex trust topics such as tax law, fiduciary responsibilities, personal finance, and investments. The Institute of Certified Bankers introduced the designation to encourage professionalism in the field, but does not promulgate separate ethical standards for its membership.

6. Financial Planners

The term "financial planner" is broad and includes any individual offering financial planning services to the public. The profession is not regulated under state or federal legislation and is less structured as a group than the life insurance, legal, or accounting professions. In the past, financial planners were organized under three primary organizations. These groups included the Institute of Certified Financial Planners (ICFP), the International Association for Financial Planning (IAFP), and the National Association of Personal Financial Advisors (NAPFA). On January 1, 2000, the ICFP and the IAFP groups merged to become The Financial Planning Association (FPA). NAPFA still exists as a separate organization.

Many planners have the designation "Certified Financial Planner" awarded by the Certified Financial Planner Board of Standards, Inc.[36] This organization places great emphasis on ethical standards and updated those standards in 2007. The Code of Ethics and Professional Responsibility has Seven Principals: Integrity, objectivity, competence, fairness, confidentiality, professionalism, and diligence.

Members of NAPFA, a group representing the fee-only group of planners, adhere to similar standards incorporated into the member's fiduciary oath. This oath provides:

NAPFA Code of Ethics

Objectivity: NAPFA members strive to be as unbiased as possible in providing advice to clients and NAPFA members practice on a fee-only basis.

Confidentiality: NAPFA members shall keep all client data private unless authorization is received from the client to share it. NAPFA members shall treat all documents with care and take care when disposing of them. Relations with clients shall be kept private.

Competence: NAPFA members shall strive to maintain a high level of knowledge and ability. Members shall attain continuing education at least at the minimum level required by NAPFA. Members shall not provide advice in areas where they are not capable.

Fairness & Suitability: Dealings and recommendation with clients will always be in the client's best interests. NAPFA members put their clients first.

Integrity & Honesty: NAPFA members will endeavor to always take the high road and to be ever mindful of the potential for misunderstanding that can accrue in normal human interactions. NAPFA members will be diligent to keep actions and reactions so far above board that a thinking client, or other professional,

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[36] Certified Financial Planner Board of Standards, Inc., www.cfp.net.

would not doubt intentions. In all actions, NAPFA members should be mindful that in addition to serving our clients, we are about the business of building a profession and our actions should reflect this.

Regulatory Compliance: NAPFA members will strive to maintain conformity with legal regulations.

Full Disclosure: NAPFA members shall fully describe method of compensation and potential conflicts of interest to clients and also specify the total cost of investments.

Professionalism: NAPFA members shall conduct themselves in a way that would be a credit to NAPFA at all times. NAPFA membership involves integrity, honest treatment of clients, and treating people with respect.

NAPFA members distinguish themselves from other planners on the basis of the fees they charge for services; they do not accept commissions or referral fees for sales of products. Their standards of professional conduct, similar to other planners and professionals involved in gift planning, stress the importance of impartiality, the independence of the advisor, and full disclosure. Unfortunately, many financial planners are not members of either the FPA or the NAPFA and thus are not guided by any enforceable code of conduct.

C. The Non-Enforceable Codes of Ethics Applicable to Gift Planning

In addition to the enforceable codes of ethics governing the various professions, there are also codes of ethics adopted by those who are members of segments of the gift planning population.

1. The Partnership for Philanthropic Planning

a. Membership

The Partnership for Philanthropic Planning (formerly the National Committee on Planned Giving) is a membership organization including for-profit and not-for-profit gift planners. According to the most recent membership survey conducted in 2007, approximately 85.3% percent of its members are development officers and nonprofit executives, 9.7% are professional advisors advising individual donors, and 5% were professional advisors advising nonprofit organizations.[37]

b. The Model Standards of Conduct for the Charitable Gift Planner

One of the first tasks undertaken by the National Committee on Planned Giving upon its creation was the formulation in 1991 of the Model Standards of Practice for the Charitable Gift Planner. The Model Standards were designed to address the occasional, but growing, number of abuses in the area of gift planning. These abuses consist primarily of the "selling" of charitable gifts to institutions in return for a cut or commission from the gift, the encouragement of the use of charitable gift techniques to "make money" without regard to charitable intent, and the encouragement of the violation of the law in completing a gift.

The issues of charitable intent and abuse have been hotly debated. However, the overwhelming majority of the gift planning industry joined together to agree on the following points that are a part of the model standards:

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[37] http://www.pppnet.org/resource/gift-planner.html.

- Charitable intent should be the primary motivation for a charitable gift.
- The tax incentives for the gift, and all relationships of the parties involved in planning the gift, must be fully disclosed to the donor.
- Gift planners should be paid a salary, not a commission. Gift planners should not accept finder's fees or other fees designed to encourage bounty for gifts. The gift planner should not stand to profit personally from the execution of a gift.
- The gift planner should continually work to maintain a high level of knowledge of the field and should only provide advice or counsel in those areas in which he is qualified.
- Gift planners should always encourage the donor to get independent counsel from the donor's personal advisors.
- For-profit gift planners (attorneys, accountants, etc.) should encourage the donor to work with the charity to discuss the terms and type of gift to ensure that the gift will meet the needs of the charity. It is recognized that in some cases the donor will require anonymity. However, contact with the charity is encouraged even though the name of the donor is not revealed.
- The gift planner shall do everything possible to make sure the donor receives a full explanation of the gift.
- The gift planner shall encourage compliance with all laws and regulations in making the gift.
- Gift planners shall act with fairness, honesty, integrity and openness.

2. The Charitable Trade Groups

a. The Groups Representing Charities

The Association of Fund Raising Professionals represents the charitable industry as a whole. There are also numerous trade organizations representing charitable sectors, such as the Association for Healthcare Philanthropy (AHP), which represents development professionals in hospitals, and the Council for Advancement and Support of Education (CASE). There are groups representing religious organizations, such as the national Catholic Development Conference. Furthermore, there are specialty organizations, such as the American Association of Fundraising Counsel, a group that represents consultants to charities. These are membership organizations, although membership is generally dependent upon years of experience in the field and payment of a fee.

b. The Donor Bill of Rights

The Donor Bill of Rights was developed in 1993 by a group consisting of many of these trade organizations. Sponsors included the American Association of Fundraising Counsel (AAFRC), Association for Healthcare Philanthropy (AHP), Council for Advancement and Support of Education (CASE), and Association of Fundraising Professionals (AFP). The Donor Bill of Rights was then endorsed by Independent Sector, National Catholic Development Conference (NCDC), National Committee on Planned Giving (NCPG), National Council for Resource Development (NCRD), and United Way of America. The guidelines focus on the rights of the donor and the need for full disclosure to the donor when planning a gift.

The Donor Bill of Rights stresses the importance of informing the donor about the use of the gift, the organization's financial strength, and confidentiality, i.e., that the details of the relationship will be maintained confidentially. In addition, it prompts fundraisers to acknowledge gifts promptly, to recognize donors, and to respond promptly to donor questions. These standards deal primarily with donor relations and stewardship and do not specifically address conduct of related professionals in fundraising or fees and commissions. However, it does encourage full disclosure and the highest level of accountability to donors.

D. The Key Ethical Issues

1. Introducing Charitable Giving - Is This a Conflict with the Family?

One of the most difficult aspects of charitable gift planning is determining how and when to introduce the idea of a charitable gift. Professionals who do not regularly engage in charitable gift planning often feel there is an inherent conflict in suggesting a charitable alternative when the client has not articulated that goal. Indeed, most professionals feel that her primary obligation in planning is to maximize the benefit to the client's family. Many professionals find it uncomfortable to suggest that the client divert dollars from family to charity.

How do you talk to potential donors about a charitable gift, and when is it appropriate? How does the conversation about the gift with the client fit within the ethical standards for the profession and for the industry as a whole? These are difficult questions for professionals committed to the highest standard of service. The quick response is that discussions about charitable giving are always appropriate when it is part of the general exploration of estate planning objectives; it is rarely appropriate when the professional promotes a charity of personal interest.

As discussed in the earlier session, consider the following questions:

- *Do you have charitable organizations that you currently support on an annual basis?*
- *Do you want to include a gift to any of these organizations or other charitable organizations as a part of your estate plan?*
- *If there were a way to make a gift to charity largely out of federal estate tax dollars, would you be interested in exploring options to accomplish that goal?*

If you want to explore the client's charitable planning goals and objectives in more detail, ask these questions.[38]

- *What are your values? What have been the principles that have guided how you have lived your lives, raised your family run your business?*
- *What charitable interests have you pursued as an outgrowth of your values?*
- *What have you learned from your giving? What would you do differently? Would you feel confident expanding your giving?*

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[38] Breiteneicher, Joe, "Advisor's Enthusiasm Helps To Shape Client's Charitable Role," *Trusts & Estates* (August, 1996), p. 32.

- *What has been the most satisfying charitable gift that you have made? Why?*

- *How do you view your wealth in connection to your community, to society?*

- *What role has philanthropy played in your family? What role should philanthropy play? What value would it bring to your children and grandchildren?*

- *What core values would you like to express through your giving? What do you want to stand for?*

- *When they think about the challenges facing your community, what are your major concerns?*

- *Are any of these or should any of these concerns be the focus of your giving?*

- *What would you like to accomplish with your giving? What do you think is possible?"*

The key is to ask the questions to allow the client to express charitable giving in terms of a priority. If you raise the issue and the client is not interested, move on. If you raise the issue and the client does express an interest, then there is an opportunity to integrate charitable giving in the overall estate plan.

2. Compensation

Compensation is the most widely discussed and controversial aspect of gift planning; it is also the area in which most conflicts occur. Potential for conflict always exists when a party to a gift transaction is paid to ensure the gift takes place. In other words, advice to a donor is suspect when payment to the party issuing the advice is contingent upon the completion of the gift, i.e., paid if the transaction occurs but not paid if the transaction does not occur.

a. Gift Brokers

A persistent ethical issue concerns the payment of a fee or commission to receive a gift. There are two common scenarios. In the first, a "gift broker" approaches a charity, states that he is working with a donor who wants to make a charitable gift but has not settled on a charity. For a fee, generally a percentage of the gift, the broker will convince the donor to name the charity. Many charities pay the fee to be named as the beneficiary of a charitable remainder trust or other gift simply because they see no disadvantage to doing so.. In the second scenario, the charity offers a commission to financial advisors, attorneys, stockbrokers, or anyone who brings a donor to the charity.

Sorting through compensation issues is not simple. Each professional on the planning team may be compensated in a different manner. Attorneys, accountants, and some financial planners charge an hourly fee. Trust officers and asset managers charge a fee based on the market value of assets in their care. Life insurance agents, stockbrokers, and real estate brokers generally receive a commission for a sale. Further, fees and commissions are paid for different purposes. There are commissions paid on transactions, referral fees paid when one professional (or other individual) refers a client to a service provider or an in-house customer to another sales area (such as when a broker in a securities firm refers a customer to the trust area), and service fees, for work done to advise on or assist in a specific transaction. The key to managing conflict is to assess the interests involved, reveal all compensation – where current or deferred – to the parties to the transaction, and avoid those.

b. Finder's Fees for Gifts

Gifts are not investments or products and should not be sold. The most obvious example of a gift sale occurs when a "gift broker" encourages a donor who has no charitable intent to make a gift solely to reduce or avoid taxes. The broker assists the donor in finding a suitable nonprofit, and charges the named charity a fee in exchange for its inclusion in the gift plan. The fee, paid in advance, generally ranges from 10 percent to 20 percent of the gift's value. All industry codes of ethics as well as the Philanthropy Protection Act of 1995 strictly forbid this practice.[39]

> **EXAMPLE:** Sandy Salesman approached John Jones with a way to increase John's income in retirement, avoid income taxes on highly appreciated stock, and eliminate estate taxes on insurance passing to family members. Sandy urged John to create a $500,000 charitable remainder trust funded with the highly appreciated stock. He explained to John that he would avoid capital gains on the contributed stock and receive a 7 percent or 8 percent income stream for life. John could then use the tax savings generated by the charitable deduction and a portion of the annual income from the trust to purchase a life insurance policy for his family. He recommended that the life insurance be purchased inside an irrevocable trust so that the assets will avoid taxation in the donor's estate. John thought the idea was wonderful, but had no charitable contacts or interests. Sandy offered to solve that problem for him.
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> Sandy approached three charities: a church, a social services organization, and a museum and explained the opportunity. For a fee of $75,000 or 15 percent of the funding amount (paid to Sandy), the charity would be named as the irrevocable beneficiary of the trust; John was willing to name the first charity to respond and pay the fee.
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> The social services agency responded quickly and paid the fee; the trust was executed naming the agency. Unfortunately, John died three weeks later. John's children got involved and immediately filed a petition to have the transaction set aside. The charitable remainder trust was dissolved, and the property passed to the children. The charity not only received unwanted publicity for its role in the transaction, but lost its $75,000 fee.[40]

Less obvious examples of gift sales involve charitable gift annuities. Charitable gift annuities are similar to commercial annuities in that the donor's contribution secures a lifetime, guaranteed income stream. Gift annuities are distinguished by the facts they are issued by the charity and are designed to leave a charitable residuum (the gift). Since the charitable gift annuity is designed to leave a gift for charity, its rates are slightly lower than a commercial annuity, although higher than the typical income from stocks, taxable bonds, and certificates of deposit. Charities, intent on selling a product, may succumb to the pitfalls of selling annuities that produce a high return, but omit the charitable component. Advisors, who represent charities that are just launching or already engage in gift annuity programs, should counsel

[39] Public Law 104-62.

[40] This example is based on a true story that took place in Arizona in the early 1990's.

those nonprofits to use annuities as appropriate gift options rather than selling those annuities as a product.

c. Commissions Associated with Gifts

"Commissions associated with gifts" can be divided into two categories: commissions associated with securing the gift and commissions associated with products or services necessary to creation of the gift. In a world in which a commission earned through getting a donor to create a gift is considered highly unethical, the two are often confused.

The voluntary standards of conduct adopted by the National Committee on Planned Giving (The Model Standards of Conduct for the Charitable Gift Planner) and embedded in the Philanthropy Protection Act of 1995 prohibit commissions on gifts. Most professional codes of conduct, however, permit remuneration through commission. Indeed, some professionals – such as real estate brokers, stockbrokers, and insurance agents – are compensated purely on commission basis. Commissions can be sorted into various types, some of which may be appropriate with full disclosure and proper representation.

i. Commission to Obtain a Gift

Payment of commissions and fees to obtain gifts is an ongoing problem in the gift planning field. The conflict arises when the advisor to the donor – the one recommending the gift – is compensated only if the gift occurs. The salesperson (as advisor) has a personal interest in the gift transaction that is greater than the donor's interest, and he cannot offer impartial advice. For example, when an advisor recommends that a client purchase a charitable gift annuity from a charity that pays a commission to the advisor if the transaction is closed, the payment on closing lead him to focus on that option, since it pays a fee, rather than other gift forms that do not generate a commission.

A good example of this practice is evidenced by several national charities operating as national community foundations, which offer commissions to advisors that bring donors to the foundation. These charities solicit sales representatives, develop sales referral sources, and pay a commission of five, six, or even seven percent of the gift value to the sales representative. Other organizations pay a set fee to the referral source as a professional fee. These fees are often five or even ten times the standard professional fee for such a transaction, and roughly equivalent to a commission paid on the same transaction.

A STORY: NATIONAL HERITAGE FOUNDATION: The National Heritage Foundation was a nonprofit organization organized as a community foundation with headquarters in Falls Church, Virginia. The Foundation specialized in donor advised funds which it marketed to donors as foundation substitutes. It also became actively involved in marketing charitable split dollar life insurance plans to donors between 1997 and 1999 in which donors made a charitable donation to the Foundation and took a charitable income tax deduction for the full amount of the gift. The Foundation used the donations to purchase life insurance policies, the beneficiaries of which were both the donor's heirs and a charity selected by the donor. The Foundation charged a fee equal to 4.5% of the death benefit. In 1997, Dr. Juan and Sylvia Mancillas began contributing $85,000 a year for $7 million in life insurance, $5 million of which was designated for a trust for their sons (one of whom suffered a severe brain injury that left him seriously impaired) and $2 million of which was designated for the Sisters of the Incarnate Word. In 1999, the IRS determined these plans were not tax deductible and imposed penalties for transactions in which insurance premiums were paid by charities to benefit individuals. The Foundation had roughly 600 of these policies, including the Mancillas, at the time if the IRS action with fees of $25 to $90 tied to the policies. The Foundation did not notify the Mancillas, who continued to pay the premiums. However, to avoid the penalties, the Foundation modified the beneficiary designation to name the Foundation as the sole beneficiary of the policies. When the Mancillas learned what had happened seven years later, they sued the Foundation and were awarded $6.2 million. When this judgment pushed the Foundation into bankruptcy, additional issues were discovered, i including a loan of $14 million in Foundation assets to Stellar Financial (the company that produced the Foundation's fund accounting software) without credit analysis or security other than the accounting software's source code, because Stellar's CEO also served as the Foundation's investment advisor (even though Stellar was not registered or licensed to manage investments). The Foundation assets used for the loan were the assets contributed in exchange for charitable gift annuities, which were already diminished by the fees the Foundation paid professional advisors who sent donors to the Foundation for charitable gift annuities. Donors with donor advised funds and charitable gift annuities at the Foundation learned a difficult lesson as those assets were used to cover the Foundation's debts.

The Model Standards of Conduct for the Charitable Gift Planner prohibit commissions on gifts. In addition, the salesperson may face regulation by the securities commission, since individuals selling gifts (those who take commissions on gifts) are not exempted under the Investment Company Act of 1940.[41] The Investment Company Act of 1940 exempts charities from the definition of an "investment company," so long as no part of the company's earnings benefits a private shareholder or individual. Since charitable gift annuities, pooled income funds, and charitable remainder trusts have an element of individual benefit (the income stream), Congress amended the Securities Act in the Philanthropy Protection Act of 1995 to exempt charities who offer and pool investment of such funds so long as the charity provides the donor with disclosure about the operation of the fund, the person soliciting the funds is either a volunteer or employed on the charity's fundraising staff, and the individual is not paid a commission for closing the gift.[42] Therefore, charities paying commissions to professionals who bring, and the individuals selling the securities, are covered by the Investment Act of 1940. In other words, charitable gift annuities, pooled income funds, and charitable remainder trusts are not considered securities when offered and managed as a part of the charity's regular activities, using staff compensated by set salary; these same gifts are considered securities if sold by outsiders for a fee.[43]

There has also been a flurry of activity by banks, brokerage firms, and mutual fund companies to create nonprofit charitable gift funds similar to the successful fund created by Fidelity Investments. Since 2001, Fidelity has grown from 2.649 billion and 27,601 funds to $7.589 billion in assets and 54,881 funds.[44] This fund is invested entirely in Fidelity mutual fund products, and thus generates substantial

[41] 15 U.S.C. § 80a-3(c)(10).

[42] Public Law 104-62.

[43] For an excellent discussion of this issue, see the testimony of Barry P. Barbash, Director, Division of Investment Management, United States Securities and Exchange Commission concerning the Philanthropy Protection Act of 1995 before the Subcommittee on Telecommunications and Finance Committee on Commerce, <www.sec.gov/news/testimony/testarchive/1995/spch062.tx>.

[44] Fidelity Charity Fund 2012 Annual Report, http://www.fidelitycharitable.org/2012-annual-report/net-assets.shtml.

revenue to the for-profit company. These new entities pay commissions and fees to salespeople for generating additions to the fund.

ii. Commissions Incidental to the Gift Transaction

Commissions for products that facilitate gifts are a step removed from a direct commission for a gift. Indeed, many of these products are appropriate for the gift arrangement. The donor may purchase insurance to replace the wealth transferred to charity; the insurance agent is paid a commission. The donor may need a professional to serve as trustee of a remainder trust or lead trust; the trust officer is paid a commission for new business at year end based on percentage of new trust fees developed. Or, if the donor has named himself as trustee, he may require the services of a broker, financial advisor, or other investment manager to manage or administer the trust assets; these individuals will be paid a transaction fee for brokering the transaction, or a portion of an investment fee for ongoing management. A trust or charity may sell real property; the real estate agent will take a commission. In all cases, the professional should disclose his compensation and personal benefit to the donor and advise the donor to obtain independent advice for the transaction.[45]

> **EXAMPLE:** Jane Johnson, age 78, used a local brokerage firm to manage her money. Jane decided to make a contribution to the local community foundation to benefit women. She had discussed this with the development director at the foundation and had worked with the officer to draft a designated fund agreement to meet her objectives. She then called her broker to transfer $500,000 to the foundation.
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> The broker responded quickly by insisting that Jane create an irrevocable trust at the brokerage firm's affiliated trust company rather than transferring the money to the foundation. "You can control the trust," he said, "but you'll lose control if the foundation gets the money." What he failed to mention was the $5,000 fee he would receive for establishing the trust and the annual revenue he would collect from the fee trailer[46] and transaction fees on the activity in the trust, all of which he would lose if the assets were transferred to the community foundation.
>
> Jane was terribly confused by the conflicting advice offered by the community foundation and the broker. She called a friend who quickly understood and sorted out the transaction. Her friend encouraged her to fund the gift at the foundation and move her remaining assets from the broker to another investment manager.

Fees to consultants based on a percentage of funds raised by the consultant are never appropriate. For example, it is not appropriate to pay capital campaign fundraising counsel a fee equal to a percentage of the funds raised by the campaign. This compensation structure is specifically prohibited by the standards governing the Association of Fund Raising Professionals and the Partnership on Philanthropic Planning. This applies to all fundraising consultants – annual fund, major gift, capital

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[45] The advisor that counsels the donor on a gift must be aware of this potential for conflict. For example, a trust officer that is counseling a donor on a life income gift may be more inclined to suggest a trust, that may mean ongoing revenue for the trustee, rather than a charitable gift annuity, which is held by the charity and does not require a trust.

[46] A trailer is an ongoing commission stream paid to a broker for as long as the assets remain at the firm, or in the mutual fund paying the commission.

campaign, and planned gift. These consultants represent the charity. Personal fees for gifts compromise the consultant's objectivity and his ability to determine if the gift is appropriate for the donor.

Similarly, industry standards of conduct prohibit commissions on gifts for the nonprofit's development professionals. A staff member who is paid on commission cannot be objective in evaluating the appropriateness of a gift for the charity or the donor. Moreover, he has an incentive to facilitate the completion of the gift without regard for resulting liability, poor publicity, or other cost to the charity. Boards that allow this practice invite penalties for violation of the intermediate sanction rules and fiduciary laws of the state.

d. Referral Fees

Referral fees are also common among the professions involved in gift planning. Normally, these fees flow from professional to professional to compensate the referring party for sending business to the other. The professional advisor who recommends a gift and will receive a referral fee or commission from the transaction must disclose the fee arrangement and ensure the donor has independent counsel. A professional that stands to profit personally from a transaction cannot advise a donor objectively.

Typically, professionals do not pay referral fees to charities nor do charities pay them to professionals.[47] These referral fees create the appearance of impropriety and must be examined closely for appropriateness. Most charities recommend professionals who provide prompt, professional service to donors. Likewise, professionals may occasionally recommend charity if a donor indicates a specific charitable objective that the professional knows the particular charity can meet.

3. Competency and Duress

Competency and duress in the execution of a will often go hand in hand as seen in the case of Brooke Astor. Competency is a difficult issue because there is no bright line test to determine an individual is competent, and it is difficult to define competency under most state laws. It is easy to get comfortable in a donor-charity relationship and even in a donor-advisor relationship.

> **FROM THE HEADLINES - BROOKE ASTOR:** Brooke Astor, who died at the age of 105 in 2007. In 2009, her son, Anthony Marshall, 85, was convicted for defrauding his mother and stealing millions of dollars at a time when she was suffering from Alzheimer's and no longer competent. In the same criminal trial, her estate planning attorney, Francis X. Morrissey, jr., was convicted of fraud and conspiracy in addition to forging Mrs. Astor's signature on an amendment to her will.[48] Some estate planners now suggest that it may be appropriate to take extra steps in execution of estate documents to ensure competency of the client, either through a video statement of the client while executing the will, or through documented question and answer sessions in which the attorney determines competency. Might the same be appropriate for large gifts, especially if age or illness creates a possibility of incompetency.

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[47] See the Arizona State Bar Association Ethics Opinion in Section C below which permitted referrals so long as the referrals where not made in exchange for the attorney's donations to the institution.

[48] Eligon, John, "Brooke Astor's Son Guilty in Scheme to Defraud Her," New York Times (October 8, 2009).

FROM THE HEADLINES - LOUISE PETER: Competency can also be an issue in a gift creation. One of the most far reaching examples of competency to create a gift was the Texas lawsuit involving. While Louise Peter's name may not be as familiar to planners, but the issue of competency was one of the big issues in a nation wide antitrust trial involving hundreds of charities across the country. Ms. Peter, who suffered from dementia and Alzheimer's disease, inherited a large amount of money from her brother late in her life. her guardian alleged that soon after she received that inheritance the Lutheran Church-Missouri Synod began pressuring her to allow them to manage the money on her behalf. She transferred $1.5 million into a revocable trust and a charitable remainder unitrust, and gave the Synod $200,000 in exchange for charitable gift annuities. While the lawsuits that followed focused on whether the American Council on Gift Annuities and its members who set suggested rates for charitable gift annuities were in violation of the Sherman Antitrust Act and whether charities were illegally offering unregistered securities (that eventually required state laws and the Philanthropy Protection Act of 1995 to resolve) the real issues for planners were: 1) competency of the donor and 2) independent representation of the donor. Here's how this issue of competency and duress became a national issue.

PETER LAWSUIT CHRONOLOGY[49]

Date	Transaction
1993/1994	Louise T. Peters transfers $1.7 million to the Lutheran Foundation of Texas (and other Lutheran charities) to create a revocable trust, a charitable remainder trust, and $200,000 of charitable gift annuities.
June 1994	Ms. Peter's great niece, Dorothy Ozee, approaches the Lutheran Foundation stating she suspects undue pressure in pressuring Ms. Peter to transfer the assets. Ms. Peter did not have independent counsel.
September 1994	The Lutheran entities ask a state judge to declare Texas law authorizes and allows them to issue charitable gift annuities and serve as the trustee of a charitable trust.
December 1994	Ms. Ozee sued the Lutheran organization alleging a collusion to set rates for charitable gift annuities and wrongfully serve as trustee.
May 1995	U.S. District Judge Joe Kendall rules Lutheran charities were in violation of Texas law in issuing charitable gift annuities and serving as trustee.
June 1995	The Texas Legislature responds with legislation giving charities the legal right to offer charitable gift annuities and serve as trustee.

[49] "Key Events in Gift Annuity Lawsuit: A Chronology," The Chronicle of Philanthropy (January 15, 1998).

Date	Transaction
July 1995	U. S. Sen. Kay Bailey Hutchison (R-Texas) introduces legislation to exempt charitable gift annuities from the Sherman Act and Securities Act.
October 1995	Rep. Henry Hyde (R-Illinois, Chair, House Judiciary Committee) joins with other lawmakers to introduce a similar bill.
October 1995	Judge Kendall allows the lawsuit to move forward as a class against involving 1,900 charities affiliated with the American Council on Gift Annuities that had issued charitable gift annuities to donors as of December 30, 1990.
December 1995	President Clinton signs the Philanthropy Protection Act of 1995 to resolve the antitrust and securities issues.
December 1995	The defendants in the Texas lawsuit file for dismissal based on the PPA; plaintiffs amend charges saying the 1995 law doesn't provide protection from antitrust issues.
September 1996	The U. S. District Court does not dismiss case based on the PPA.
April 1997	The First Circuit Court of Appeals refuses to dismiss the lawsuit.
July 1997	Congress approves - and President Clinton signs - a bill to exempt charities from antirust suits.
November 1997	The defendants appeal to the U. S. Supreme Court.
December 1997	The U. S. Supreme Court nullifies the Appellate Courts April 1997 decisions and instructs the Appeals Court to reconsider in light of the new federal legislation.
June 1998	The Fifth Circuit Court of Appeals terminated the federal litigation, but noted that state law issues were still open to resolution.

4. Wearing Multiple Hats

a. Representing the Charity and the Donor

Sometimes the advisor is asked to represent both the charity and the donor in the gift transaction. In many cases, this request is prompted by the donor, who is reluctant to spend the money to hire a separate attorney. This conflict is most likely to occur when the nonprofit and the donor have a long-term relationship and are therefore comfortable with the concept. The arrangement is inappropriate, because the charity and the donor have opposing interests: the donor has assets that the charity hopes to obtain. This conflict exists *without regard* to common goals about the ultimate use of the funds.
The conflict is most obvious when the professional is an attorney. The attorney cannot effectively represent the interests of both the charity and the donor. In addition, such representation is forbidden by

the attorney's canons of ethics. If the charity agrees to pay the attorney's fee, and the attorney agrees to represent the donor in the transaction, he cannot also represent the charity in the same transaction. This transfer of representation – from the charity to the client – should be clearly communicated and reduced to writing. The charity cannot then inquire about conversations between the donor and charity or even the ultimate outcome of the gift, unless the donor chooses to reveal that information.

Conflicts are also possible when any professional renders advice to the donor that encourages completion of the gift. The professional's allegiance always will be to the client (the charity). Unless the professional severs his relationship temporarily with the nonprofit, the transaction will, at a minimum, appear to present a conflict of interest. Even when the professional has severed the relationship temporarily, the transaction may be suspect if the donor later changes his mind. A professional should encourage the donor to seek separate advice and retain separate advisors to complete the gift.

The professional who represents the charity is not obligated to make the donor obtain separate counsel. Many donors prefer to make decisions without outside advice. For example, when a donor decides to create a charitable gift annuity, make a gift to a pooled income fund, designate the charity in a beneficiary designation, or make a substantial outright gift, she may choose to do so without professional advice. For other transactions, such as a charitable remainder trust, a charitable lead trust, or a bequest, the donor will need professional advice since those gifts require legal documents. In those cases, conflict issues such as payment of professional fees or drafting documents for the donor's attorney may arise.

Attorney have the most obvious potential conflict and sometimes get into ethical issues in the interest of providing help or support to a charity of interest. Volunteering legal advice does not remove the attorney from the constraints of the standards of conduct. Consider these examples.

OREGON: The Oregon Ethics Committee of the Bar in Formal Opinion No. 1991-116[50] addressed a fact situation in which an attorney served as a board member of a nonprofit organization and provided legal advice to that organization. Another individual associated with the charity asked the lawyer to do some estate planning involving both inter-vivos charitable remainder trusts and wills, both of which named the charity as the beneficiary. The Opinion addressed three issues:

1) Could the attorney represent the donors and the charity in the charitable remainder trust transaction? The Committee found he could not since there was a conflict between the interests of the donors and the charity.

2) Could the attorney represent only the donors in the charitable remainder trust transaction? The Committee found he could with full disclosure and consent of both parties.

3) Could the attorney prepare the donors' wills naming the charity as one of the beneficiaries? The committee found he could so long as he fully disclosed his relationship with the charity and received the donors' approval; the approval of the charity was not necessary because its interests were not deemed adverse in the transaction.

MARYLAND: The Committee on Ethics of the Maryland State Bar Association considered the question of whether a lawyers who served as Chair of the Church's Legacy Committee as a volunteer,

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[50] Readopted as Formal Opinion 2005-116.

and in that capacity encouraged members of the congregation to consider bequests to the Church under will, could prepare those wills free of charge for members of the Church. In their opinion,[51] the Committee relied on Rule 1.7 of the Maryland Rules of Professional Conduct governing conflicts of interest which prohibits a lawyer from representing a client if the representation of that client will be adverse to another client or materially limited by the attorney's responsibilities to another client or third person, or by the lawyer's own interest.[52] The Committee found that his interests as Chair of the Church Legacy Committee which was focused on planned and deferred gifts did compromise his professional judgement and that he could not represent both interests at the same time.[53]

b. Referrals Where There Are Connections

Many attorneys make gifts to charitable organizations because they have a great interest in the services provided by the nonprofit and want to ensure their continued operation in the community. In a 1998 opinion, the State Bar of Arizona was asked to consider whether an attorney who made contributions to a charity, could also accept client referrals from that charity.[54] The concern was ER 7.1(j), Ariz. R.S.Ct. 42 which states: "A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written or recorded communication permitted by these rules."

The Arizona Bar found that if the charitable donations were causal and unrelated to (and not conditioned on) the referrals those referrals were permissible so long as the charity was not functioning as a lawyer referral service. The opinion further noted that if the purpose of the donation was to secure referrals and was aimed an the individuals who needed legal services, it would likely violate the standards. In other words, the referrals must be incidental to the charity's work (and not its primary work) and the gifts should not be the consideration for the referrals.

c. Who Pays the Professional's Fee?

Sometimes the charity may offer to pay the professional fees incurred by the donor to complete the gift. Is this ethical? Does this create the appearance of conflict? One should consider the situation in which the donor and professional work through the gift only to determine that the gift is not in the best interests of the donor. Is the attorney under an obligation to complete the gift?

As a general rule, nonprofits are advised not to pay fees for the professional services rendered to the donor. There is nothing inherently unethical in the arrangement as long as it is disclosed, the transaction does not violate the professional's code of ethics (generally, i.e., the payment does not interfere with or affect the professional's conduct and advice), and the professional clearly represents the interests of the donor. This practice, however, may lead to questions and the appearance of impropriety. Moreover, perception *is* often reality for many observers.

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[51] Maryland Ethics Docket 2003-08, 2003.

[52] Rule 1.7 of the Maryland Rules of Professional Conduct track Rule 1.7 of the ABA Model Rules of Professional Conduct.

[53] This opinion was later withdrawn, although the Committee on Ethics did not provide a reason for withdrawing the opinion.

[54] State Bar of Arizona Ethics Opinions 98-10, Referrals (December 1998).

If the donor's professional advisor is paid by the charity, the charity should disclose this fact to the donor in writing and make it clear that the professional represents the donor – not the charity – in the transaction. The professional should also inform the donor, in writing, that although the fee will be paid by the charity, the relationship is between the professional and the donor.

Payment of professional fees is also a problem for the charity. Professional fees charged for drafting documents or providing representation for a donor are the personal legal obligation of the donor. When the charity assumes those payments, the donor receives an economic benefit equal to the fee. This economic benefit should be reflected in the "goods and services" portion of the substantiation statement.[55]

There is a second issue relating to individual benefit conferred by a charity. Section 501(c)(3) of the Internal Revenue Code requires that "no part" of the net earnings of a tax-exempt organization can inure "to the benefit of any private shareholder or individual." If the IRS finds there has been individual benefit (called private inurement) the charity risks losing its tax-exempt status and the transactions may trigger penalties to the individual under the intermediate sanctions rules designed to prevent individuals from receiving personal benefit from charitable funds.[56] While there are no published cases equating payment of legal fees to private inurement, this may be because these fees are rarely revealed or discovered. The professional advisor should simply consider this risk with other factors in making the decision to move forward with this arrangement.

d. Volunteer Service and Representation

The professional may serve on the nonprofit's board of directors or professional advisory board. Can the professional effectively represent the donor while serving in a fiduciary role? Service on a board or advisory board does not disqualify the professional, although it does pose the appearance of conflict. The best way for the professional to address this potential conflict is by disclosing the relationships and clearly dedicating himself to representing the client in the transaction.

At other times, the professional may serve on the professional advisory board strictly to further business interests with the charity or with the charity's donors. This motivation invariably leads to ethical problems for both the charity and the professional; in addition, it may lead to intermediate sanctions (fines imposed by the Internal Revenue Service), if the professional personally benefits from charitable funds.

The potential conflict can be managed in one of two ways. First, when the professional is serving in a fiduciary or advisory role, he must put the charity's interests above his own personal interests. Second, the charity can reduce the potential for conflict by clearly explaining the fiduciary duties to the board candidates. The charity may also ask the professional to sign a conflict of interest statement in which he pledges to place the charity's interests above his own when he provides volunteer service.

e. Fiduciary Duties and Conflicts

[55] See Chapter 8 for more rules on the substantiation requirements for charitable gifts.

[56] IRC § 4948(a)(1).

A fiduciary is someone responsible for managing and handling funds that belong to another. In a gift planning context, fiduciaries include trustees of charitable remainder trusts and charitable lead trusts, trustees of revocable trusts for donors, or executors of estates with charitable provisions. Although banks have traditionally filled the fiduciary role, it is now common to see accountants, attorneys, insurance agents, or brokers serving in this capacity. Fiduciaries are generally paid for the services they provide.

A trustee is held to a higher standard of care than an ordinary individual. He has a duty to act in the best interests of the trust, to act in good faith, to act with the care of an ordinarily prudent person, to be loyal, and to balance the interests of the trust's beneficiaries (the nonprofit and the individual). Balancing the interests of the charitable and individual beneficiaries can be difficult.

> **EXAMPLE:** Ann Jenkins, an attorney representing the Small family, agreed to serve as trustee of Sam and Sally Small's charitable remainder annuity trust. Serving as trustee seemed to be an excellent way for Ann to keep in touch with her clients and collect an ongoing management fee. The trust was funded with property with little appreciation. The Smalls, ages 59 and 57, respectively, were interested in reducing taxable income and called Ann to instruct her to invest all the assets of the trust in tax-exempt bonds. The charitable beneficiary, the Guiding Light Mission, was extremely upset that the trust was to be invested in tax-exempt bonds, since it would limit the growth potential of the assets and the ultimate remainder. The attorney/trustee must now inform the client of her obligation to invest the trust to balance the best interests of both beneficiaries (and face losing a client) or follow the instructions of the client (and risk a lawsuit from the charity).

> **EXAMPLE:** In this very uncomfortable example, Sam Smith, who had been the John James' attorney for more than 40 years, agreed to serve as Executor of his $10 million estate, and had agreed during John's lifetime to serve as the trustee of a Family Trust. The attorney charged legal fees, Trustee fees, and a fee for serving as executor. John had no children, and his wife had predeceased him; at John's death, all amounts remaining after expenses and taxes were transferred to two charities. The charities were excited about the prospect of receiving a roughly $5 million bequest each from John's estate and begin to make plans to use those funds to expand their services and improve their programs. However, five year later they were still waiting for the Family Trust to be dissolved and the estate to be distributed. Ultimately, they filed an action in the Probate Court to hasten those distributions, concerned that it was in the law firm's best interests to continue to hold the funds and collect the fees. Is there an ethical issue here?

5. Drafting Documents - Do They Understand What You Design?

Sometimes a donor retains an attorney or other professional who does not practice in the charitable or estate planning field. For example, the donor may ask her corporate attorney or real estate attorney to review the transaction. In those instances, the charity may volunteer to provide sample documents to the donor's attorney to ensure the transaction takes place. This action also raises conflict issues. One should consider the following questions:

- *Does the donor's attorney understand the transaction?* If the donor's attorney does not understand the transaction, it is unlikely the donor will receive competent advice about his options and how the gift will affect him.

- *Does the donor understand the transaction?* If so, who provided the donor with the analysis? It is not the charity's role to ensure that the advice received by the donor is competent. It is, however, a tenet of the Model Standards of Practice of the Charitable Gift Planner and the Donor's Bill of Rights that all aspects of the transaction should be disclosed to the donor so that he understands the gift's impact on him.

- *Is the attorney or nonprofit liable for providing a defective document to the donor's attorney?* Does liability attach if the gift is inappropriate? Often, professionals draft documents that are ready to be executed, even though they warn that the documents are provided as a sample. The professionals representing the donor and the charity understand the arrangement. This is clearly an issue that may be litigated in the future.

6. Unauthorized Practice of Law

Some charities and non-legal planning practices provide standard documents for trusts and bequests. This raises many issues, including the unauthorized practice of law which is defined at the state level. Sometimes planners step into traps when a practice may be approved under the state law in which they practice, but defined differently if the charity, the trust situs, or the donor resides in another state that defines unauthorized practice differently. The professional ethics rules of the legal profession generally prohibit assisting non-lawyers in this practice. This can begin as a simply act of good will by providing basic documents to a charity on a pro bono basis for use with their donors, and can transform into the unauthorized practice of law when the charity believes it is "helping donors make gifts" by providing those documents to them.

One of the most aggressive states in policing the unauthorized practice of law is Illinois which states in its Illinois Fraud and Deceptive Business Practice Act that "the assembly, drafting, execution, and funding of a living trust document or any of those acts by a corporation or a non-lawyer is an unlawful practice with the meaning of this Act."[57]

VI. Final Thoughts

Professional advisors play an essential role in planned giving. Advisors bring the global knowledge of the client's goals, estate planning, retirement planning, and business planning to the conversation which allows charitable giving decisions to be integrated in personal planning decisions where planned giving options provide leverage for goals and tax benefits. Giving is important to your clients and they want their advisors involved. Learn more about charitable giving options, and include philanthropic planning in your planning conversations with clients.

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APPENDIX A
CHECKLIST FOR USE IN ANALYZING APPROPRIATE FAMILY PHILANTHROPY OPTION

I. Client Goals: What do you hope to accomplish in creating this entity?

- ___ A vehicle for personal philanthropy
- ___ A way to work with children in creating more effective philanthropy
- ___ A way to pass family values from generation to generation
- ___ A way to bring the family together
- ___ A way to memorialize the family's name in the community
- ___ Creating a permanent pool of funds to focus on a specific organization or purpose
- ___ Big tax savings to offset a specific taxable transaction
- ___ Insulate the client from charitable solicitations

II. Size of Entity

- ___ Under $250,000
- ___ $250,000 - $1,000,000
- ___ $1,000,000 - $3,000,000
- ___ $3,000,000 - $10,000,000
- ___ $10,000,000+

III. Duration of Entity

- ___ Less than 5 years
- ___ 5 to 25 years
- ___ 50 to 100 years
- ___ Perpetual

IV. Assets Used to Fund Entity

- ___ Cash
- ___ Publicly traded securities
- ___ Privately traded securities
- ___ Real estate
- ___ Insurance
- ___ Tangible personal property

V. Grantmaking Goals

- ___ Wants to make grants to domestic IRC §501(c)(3) entities
- ___ Wants the freedom to make grants for any charitable purpose, regardless of whether the entity is a recognized IRC§501(c)(3) entity
- ___ Wants to make grants overseas to IRC§501(c)(3) recognized entities as well as those that are not
- ___ Wants to award scholarships
- ___ Wants to make grants to individuals in distress

VI. Importance/Size of Charitable Deduction

- ___ Want to maximize charitable income tax deduction
- ___ Reduce lifetime transfer tax
- ___ Reduce estate tax
- ___ Charitable deduction less important that personal goals

VII. Costs to Create Entity

- ___ Determine creation costs – how does this compare to asset size?

VII. Annual Administration Costs

____ Make list of annual administrative duties (legal, transactional accounting, tax accounting, staff, space, postage, stationary, marketing, other miscellaneous)

VIII. Family's Role in Administration/Management

___ How old are the family members?
___ Will any of those family members potentially serve on the board?
___ Will any of those family members provide ongoing administrative services to the foundation; if so, describe those services.
___ Will any of those family members service as staff members?

IX. Client Support System

___ Does the client have office support to help with administration and record keeping?
___ Is the client willing to use professional services for this support?
___ Who will be responsible for managing the client's entity records?

X. Miscellaneous Considerations

___ What is the client's temperament?
___ Does he or she have the discipline to follow direction?
___ Is he or she likely to be able to run the entity within the requirements proscribed for the form?
___ Is the client likely to use you or other professional to provide oversight of grantmaking?