FEATURE
ESTATE PLANNING

NEGOTIATING GIFT AGREEMENTS
A PROACTIVE WAY TO ADDRESS DIFFICULT GIFTS AND DIFFICULT DONORS

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In March 2022, the Sackler family, of Purdue Pharma, entered into a settlement agreement relating to their and the company's role in the United States opioid crisis. Among the various requirements of the settlement was a provision that if any charitable organization — including several well-known arts, medical, and educational institutions from the Metropolitan Museum of Art to the Louvre — wanted to remove the Sackler name from their facilities, the Sackler family could not contest the decision.

But what if there were no settlement and the organizations had become uncomfortable with holding out the family name as supporters of their institution? The charity's options for trying to remove the name would likely depend on the terms of the gift agreement, if any. And if there were no gift agreement, the options become even more limited, involving negotiations with the donor, surviving family members, and involvement by the Court and the state Attorney General.

A gift agreement is not necessary for every gift. There is almost certainly no need for a negotiated gift agreement when a donor writes a check in response to a year-end general-fund appeal and returns it in the envelope provided. The donor has made an unrestricted gift, and the charity is free to use those funds in any manner to fulfill its charitable purposes. Even very large gifts, if they are relatively simple, may not necessitate a written gift agreement with the charity. For example, a multi-million dollar gift of cash or appreciated publicly traded securities to add to a university's endowment without creating a separate restricted fund probably would not require a gift agreement.

So when might be a gift agreement be a good idea for the donor, the charity, or both? In this article, we explore a few factors impacting this determination. Among the most significant factors are naming rights and stewardship reporting concerning the use and impact of gift to the donor or his or her family.

Fundamentally, whether a gift agreement is a good idea hinges not on the dollar amount of the gift, but whether the gift imposes an obligation on the charity — either to allow naming rights or to restrict use of the gift for a limited purpose. Gift agreements are the clearest way to document the specific restrictions on the use of the gift, whether it be to construct a specific building, provide scholarships for a particular class of individuals, support a particular program, or endow a particular professorship. The agreement clearly should document the restricted purpose and provide for both (a) who gets to determine if the purpose can no longer be fulfilled and (b) what to do with the gift once that determination has been made. Another added benefit of a clear gift agreement is that it documents for posterity the charity's and the donor's expectations; as the charity's leaders turn over and the donor fades from view, the gift agreement may be the only document indicating the parties' intentions.

Transformational gifts to charitable organizations, particularly for capital campaigns, often come with naming rights. When the donor signs the check to complete the gift and digs the ceremonial golden shovel into the dirt at the ground-breaking ceremony, both charity and donor are excited about each other and feel like they have entered into a permanent, mutually beneficial relationship. However, time has a way of changing our perspectives. News can come to light that makes the charity reluctant to continue holding out the donor's name as endorsing their organization.

From Purdue Pharma to Jeffrey Epstein to Enron, there are plenty of examples of scandals caused by corporations and individuals who have also been generous donors with their tainted or ill-gotten gains. These often very public episodes put charities in the difficult place of needing to either retain a tainted donor's name or negotiate with — or even litigate against — the donor regarding the removal of the name. It should also be noted that this issue cuts both ways; donors may also ultimately become disenchanted with the way the charity is fulfilling its mission and no longer wish to have their name associated with the charity's work. This may be increasingly true in our current polarized political and cultural environment if the charity or its leaders are advocating positions that conflict with the donor's beliefs.

The best way to address these naming rights conflicts is in advance through a written gift agreement. For the charity, it is natural to want the ability to get out of a naming arrangement if circumstances deteriorate enough. However, it is hard to define a class of "bad acts" that would be grounds for terminating the naming rights. Human nature is such that we keep coming up with new and interesting ways to behave badly. Rather than itemizing a specific list of activities that are grounds for terminating naming rights, the organization should try to be more general in giving its Board authority to decide whether the naming rights should be terminated due to conditions that negatively impact the image or mission of the charity. Boards are sensitive to the impact such a decision would have on incentives for future gifts, so they would naturally use such authority sparingly, but the gift agreement should vest in the Board the decisive ability to act if it felt it necessary to do so.

Some organizations choose not to do this as a matter of policy. For example, Jeff Bezos's recent gift of $200 million to the Smithsonian Air and Space Museum made news, in part, because it did not include a so-called "morals" clause allowing removal of naming rights. According to the museum, this was not because of Mr. Bezos's negotiating leverage, but rather due to the museum's standard policy of not including such language. Such a policy can eliminate the need for an awkward negotiation while pursuing

a transformational gift, but it can lead to even more awkward negotiations down the road if circumstances and reputations change.

Bad acts by the donor are not the only future problem when it comes to naming rights. Sometimes the building outlives its usefulness, or the room named for the donor undergoes significant renovation and is combined with other space. Do the naming rights survive these kinds of transformations, leaving the donor a right to have his or her name on the new facility, or are those spaces reserved for the new generation of donors who are supporting the cost of the renovation or new construction? These issues can, and to the extent possible should, be addressed in advance in a gift agreement.

The donor should retain the right to remove his or her name as well. This should be easier for the institution to accept, as the naming rights usually benefit the donor more than the charity. The donor should consider to what extent, if any, he or she wants to retain this right to remove the name for his or her designees as well. If so, the agreement should document how the class of people with that right is defined, and the extent to which they are entitled to receive information about how the gift is being used.

It is not just the ability to remove a name from a gift that makes stewardship reporting from the charity so important. The donor has often parted with a substantial sum of money out of a deep commitment to the charity and the cause it serves. Donors want to know that the charity is succeeding in meeting the stated objectives. With this in mind, a gift agreement should document the charity's obligation to provide informational reports to the donor and the donor's family and other designees. These reporting obligations do not need to end at the donor's death. Indeed, the donor may require the reports be provided to his or her children or other designees. Such reports not only provide insight into the charity's use of the gift but could impact the donor's and the donor's family's desire to make additional future gifts to the institution.

It is important to remember, however, that even if the donor's family is unhappy with the results from the stewardship reports, they may not have standing to sue the charity to enforce the terms of the gift agreement. Instead, under Ohio law, oversight and enforcement of charitable gift restrictions typically lies with the Ohio Attorney General. Similarly, if the charity seeks to unilaterally remove restrictions on a gift due to a change in circumstances that makes the restricted purpose no longer practical, in the absence of provisions in the gift agreement allowing the Board to remove the restriction and put the funds to other use, the Board must either petition the Court or, in certain circumstances with older, smaller gifts, the Ohio Attorney General's office, for that relief.

While negotiating a gift agreement can take the joy out of a positive occasion almost as thoroughly as negotiating the prenuptial agreement before a wedding, a candid conversation between donor and charity in the process of setting up the gift can save both parties far more difficult interactions in the long term.

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