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SPECIAL ISSUE
ENTERTAINMENT LAW

by Bradford S. Cohen and Kyle R. Neal

STAR POWER

Celebrity involvement in charitable causes raises both tax and business affairs issues

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THE PARTICIPATION OF CELEBRITIES in charitable causes is rooted in tradition and increasingly apparent in a variety of venues. When those who are famous for their achievements in the arts, entertainment, media, or sports decide to become involved in charities, they are undertaking a complex endeavor, with a wide variety of legal and business challenges involving many parties. They are becoming "charitable actors," with many attendant rewards but also a number of responsibilities.

The close relationship between entertainment and sports celebrities and charities has a long lineage. In the entertainment world, Bob Hope's decades-long support of the USO by performing for U.S. troops throughout the world led Congress to name him an honorary veteran. At last year's Emmy Awards ceremony, George Clooney received the Bob Hope Humanitarian Award for his fundraising contributions. In the sports arena, Ted Williams, the legendary baseball player with the Boston Red Sox, worked behind the scenes for years on behalf of the Dana Farber Cancer Institute's Jimmy Fund, making unannounced (and unreported) visits to children and paying their hospital bills.[1]

Celebrities often respond when a natural disaster strikes or when they are asked to raise public awareness for a worthy cause. One example is Farm Aid, organized by Willie Nelson, John Mellencamp, and Neil Young in 1985. Sometimes a charitable event becomes

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an annual tradition, such as the Jerry Lewis MDA Telethon, which has taken place every Labor Day weekend since 1966. In response to a crisis, celebrities plan and present one-time fundraisers in a matter of days, such as the Hope for Haiti event organized by George Clooney and Wyclef Jean in 2010.

Whatever the circumstance, a legal team needs to oversee the formation of the charitable program. Attorneys provide direction in working with personal and business managers, public relations teams, agents, in-house counsel, corporate advisers, and nonprofit directors to ensure strict compliance with all applicable laws. They also monitor the proceedings so that all the participants' objectives are met.

This process actually begins before any specific charitable need or involvement is even considered. Successful young entertainment or sports stars soon realize that the rap lyric distilling their lives to "mo money, mo problems"[2] also includes "mo" people: lawyers, publicists, tax and wealth advisers, business managers, and CPAs. At some point, the young stars will usually have a conversation with one or more of these advisers about personal wealth planning. That conversation should include a discussion about charitable giving as a way to accomplish personal and financial goals.

A simple, direct gift to a charity results in a charitable income tax deduction in the year of the gift.[3] The gift can be cash, or securities, or some other property. A gift that is not a readily valued asset (such as cash or publicly traded securities) requires an appraisal, and an attorney is needed to sort through the sometimes confusing rules on deductions for appreciated property. The deduction can depend on the type of property contributed, the holding period, who the donee charity is, what the donee does with the gift, if there were large gifts in prior years, and the number of elections that the donor and his or her CPA may choose to make.

If a celebrity wishes to make a gift of assets but still retain some ongoing benefit from the assets, he or she may consider a charitable remainder unitrust, which provides for a continuing income stream to the celebrity for life or a term of years, with the remainder passing to the charity at the celebrity's death or the end of a predetermined time.[4] If the celebrity creates a charitable remainder trust, he or she can provide for family members, such as a spouse and children, to be beneficiaries of the trust as well, but this type of trust requires careful planning regarding the type of asset contributed, the length of the trust term, the annual payout amount, and investment of trust assets.

Alternatively, the trust could be a charitable lead trust, which provides an income stream first to the charity for a term of years, with the remainder to the celebrity's family members after the charity's term interest. If the asset to be donated is something other than publicly traded stock, the celebrity should carefully choose a trustee. Practitioners can help with this as well as advise the celebrity on managing expectations for investments. The celebrity donor also must be alerted to avoid the pitfall that occurs when the donor enters into a contract for sale of the asset prior to contributing the asset to the charitable remainder trust. If the trustee of the trust later sells the asset, what would have been a tax-free sale instead becomes a taxable sale followed by the donation of the after-tax proceeds.[5]

Private Foundations

For some celebrities with a considerable record of charitable giving and adequate resources to continue doing so,[6] the use of a private foundation may be the best means of sustaining the individual's philanthropy in the future. A private foundation allows celebrities to channel their charitable giving through an organization under their control. This type of foundation can be formed fairly quickly by, for example, establishing a California or Delaware nonprofit public benefit corporation. A trust may be used instead of a corporation, but a trust is a less flexible structure than a corporation and tends to be used infrequently.

A California corporation may have as few as one director,[7] is not required to have voting members, and is allowed to have honorary members if it so chooses.[8] The corporation applies to the Internal Revenue Service (and to California's Franchise Tax Board) for recognition as a tax-exempt organization.[9] Once this status is granted, tax exemption is generally retroactive to the date of incorporation.

A celebrity or an authorized agent uses a private foundation to grant money to established charities. By law, a private foundation must make an annual minimum distribution of 5 percent of the average fair market value of its assets, as determined by periodic appraisals.[10]

A private foundation allows a celebrity to put his or her name on a charitable organization and to directly manage how the funds will be distributed. However, there are drawbacks to this approach. The deductibility limitations are lower than they would be if the celebrity contributed directly to a charity or to a fund that the celebrity established at the charity.[11] Moreover, private foundations have special excise taxes on net investment income.[12] In addition, private foundations with gross revenues exceeding $2 million must prepare audited financial statements.[13]

Celebrities also must guard against administrative expenses exceeding charitable spending. A private foundation's good works could be overshadowed if its missteps are on display for all the world to see in publicly available filings.[14]

Private foundations have special rules against self-dealing to prevent the founder, family members, related business interests, or otherwise disqualified persons from taking advantage of their position to engage in transactions with the private foundation, regardless of whether the transaction might benefit the foundation. Acts of self-dealing are subject to penalties in the form of additional taxes. A celebrity who establishes a private foundation needs to be well advised on what can and cannot be done with the funds he or she has contributed to the foundation. Even a seemingly insignificant act, such as distributing tickets purchased by the foundation for a gala dinner, must be carefully scrutinized with an eye toward the self-dealing rules.[15]

Celebrities may appoint family members as salaried officers to the foundation. Reasonable salaries will not violate the self-dealing rules, but the board must demonstrate how it arrived at its determination of reasonableness. In addition, California rules provide that no more than 49 percent of the directors of a foundation may be "interested persons." An "interested person" is defined as any person other than the director who is compensated for services rendered to the foundation during the previous 12 months, including brothers, sisters, spouses, parents, descendants, and in-laws of interested persons.[16] The self-dealing rules prevent any sale, exchange, license, or lease of property between the foundation and the celebrity or his or her family members, unless the lease is without charge.[17]

Celebrities who created private foundations include actor and director Matthew Modine, who formed Bicycle for a Day (BFAD), a nonprofit organization dedicated to educating individuals about environmental and health issues and encouraging students to ride their bicycles to school. BFAD's first event attracted approximately 14,000 bicyclists to lower Manhattan. Modine himself has used a bicycle as his primary form of transportation since moving to New York City in 1980. Modine also serves on the board of New York City's Transportation Alternatives, Madison Square Garden's Garden of Dreams Foundation, the Lustgarten Pancreatic Cancer Foundation, and the Van Cortlandt Park Conservancy. To advise a strong charitable actor like Matthew Modine, practitioners must understand the complex rules applicable to founders and directors of charitable organizations.

Another example of a celebrity involved with a private foundation is musician Jack

Johnson, who created the Kokua Hawai'i Foundation to support environmental education in the schools and communities of Hawaii. The foundation raises money through an annual music and environmental festival and continues to grow and expand. As it does so, it takes on the characteristics of any other business and must address issues relating to employment, real estate, and intellectual property (including the protection of trademarks and logos). Moreover, it must ensure compliance with the relevant laws to maintain its tax-exempt status.

Artists for Peace and Justice, formed by film director Paul Haggis in 2009, has long-term plans to support a host of social projects, but its immediate goal is to serve children in the poorest areas of Haiti by building schools and providing meals, clean drinking water, and regular medical treatment. Practitioners advising charitable organizations with overseas operations must determine whether the U.S. charity will establish its own program in a foreign country or will operate by supporting an existing foreign charity. This decision may affect the deductibility of donations made by U.S. taxpayers.

Donor-Advised Fund

An alternative to a private foundation is a donor-advised fund (DAF), a kind of "mini foundation" that offers many benefits of a private foundation but without some of the pitfalls. A DAF is a giving vehicle that provides an individual with immediate tax benefits. At the same time, individuals forming a DAF may support the charities of their choice through grant recommendations—and may do so on timetables of their choosing.

DAFs are efficient, cost-effective alternatives to private foundations. Unlike a private foundation, there is no annual minimum gifting amount. The donor making a gift to the DAF is allowed the higher deduction limits that are provided to donors to a public charity. The donations may be made anonymously, unlike a private foundation that must make its records available to the public. The paperwork of the DAF, such as tax returns and informational reporting, is handled by the fund's administrator, so the celebrity is only responsible for advising on the grant recipients.

A DAF can be formed swiftly and without difficulty, and many organizations are set up to facilitate their creation. These include the California Community Foundation, the Jewish Community Foundation, and many banks and trust companies. However, the donor does not have as much control as in a private foundation, because the celebrity donor acts only as the adviser to the DAF, and the fund's administrator legally must have the final say on where to allocate the grant funds. Still, a celebrity donor working closely with a DAF customarily will find that his or her wishes will be fulfilled. According to Carol Bradford, senior counsel and charitable advisor of the California Community Foundation, "Donor-advised funds are a popular way for celebrities or anyone to make charitable contributions easily, quickly, and even anonymously. CCF can set up a fund within 36 hours, handle all sorts of contributions to the fund, and ensure that grants from the fund, whether large or small, are made efficiently and effectively."

Some celebrities have a natural affinity for certain charities based on family circumstances or personal passions. For others, sorting through the many charities seeking support can be daunting. There is so much need and so many good causes that finding a way to make each dollar count requires time and due diligence. Organizations have emerged to help donors with these decisions. For example, Charity Navigator is an independent charity evaluator that assesses the financial health of more than 5,500 charitable organizations. Its Web site has a page that allows users to search charities based on which celebrities support the charity.[18]

Some organizations specialize in helping celebrities manage their philanthropy. For example, the Giving Back Fund, a 501(c)(3) organization, provides philanthropic consulting and foundation management to high-profile individuals committed to philanthropy. The Giving Back Fund can establish a DAF for the individual or provide consulting regarding a private foundation.[19] Athletes for Hope, a 501(c)(3) charitable organization, was founded by a group of successful athletes[20] to inspire and foster a commitment to charitable and community causes in the next generation of athletes and in the fans who support them.

Another advisory organization is Global Philanthropy Group, whose founder, Trevor Neilson, has been dubbed a "Charity Fixer to the Stars."[21] The company currently advises 20 clients, with some paying $150,000 to $200,000 a year for consulting services. These include research, education, and strategic design to ensure that a celebrity's philanthropy will have the intended impact.

Celebrities must understand that donating their considerable and valuable time and energy to a cause they believe in does not pay off with an income tax deduction. The contribution of services cannot be deducted.[22] Celebrities must contribute money or property to charity to receive an income tax deduction. However, a celebrity's endorsement or link to a charitable cause can increase the celebrity's value to a sponsor or marketer—and this, in turn, may increase the individual's bottom line more than a charitable income tax deduction.

The 2010 Cone Cause Evolution Study, a 17-year benchmark study of cause marketing attitudes and behaviors, found that 83 percent of consumers want more of the products, services, and retailers that they use to benefit causes. According to the study, 88 percent of consumers say it is acceptable for companies to involve a cause or issue in their marketing, 85 percent have a more positive image of a product or a company when it supports a cause they care about, and 80 percent are likely to switch brands, similar in price and quality, to one that supports a cause.[23]

Cause-Related Marketing Campaigns

Celebrities who are publicly identified with a particular cause can align with a company as a partner in an effort to market a product that will benefit that cause. The celebrity, the developers of the product, and the charity all must make careful choices in taking this approach.[24] Moreover, a celebrity presence does not guarantee that a charity will see an increase in donations. According to a 2006 Cone study, Americans rank celebrity involvement as one of the least effective methods for nonprofits to gain attention, placing it ninth on a list of 10 marketing methods to gain consumer support (just edging out telemarketing).[25] The right combination, however, can be extremely effective—for example, Sheryl Crow's 2008 concert for the Susan G. Komen Breast Cancer Foundation, with admission consisting of 10 specially designed lids from Yoplait products.[26]

In creating a cause-related marketing campaign involving a concert and a product tie-in, numerous legal issues emerge. If the concert is filmed, a determination of who will own the film rights and any music recordings must be made. For liability purposes, the organizers must decide whether a separate entity from the charity should be used or established to produce the show. If the price of the ticket is an actual dollar amount (instead of the proof of purchase of a product), concertgoers need to be informed that they are not entitled to a charitable deduction for the portion of their ticket that represents the usual cost of attending the show. Normally, the concertgoer would be allowed to deduct any premium that was charged and was intended to be a charitable gift. For example, when a $50 ticket is sold for $75 on the night of a gala, $25 of the ticket price is deductible.[27] The legal team should consider how the event can be structured to best enhance the ability of donors and sponsors to receive income tax deductions. Attention to the charitable solicitation registration requirements for all applicable jurisdictions is key. A well-coordinated effort to comply with all state and local registration requirements will prevent penalties and fines.

The tax code provides a new, albeit underused, provision that could be a boon to cause-related marketing. Under Internal Revenue Code Section 170(m), a songwriter may donate a song to a charity, providing significant benefits to both the songwriter and the charity. The songwriter can donate all or a portion of the writer's and/or publisher's share of a copyright to a charity, avoid the income tax on the income from the exploitation of the copyright, and receive a significant income tax charitable deduction over a 10- to 12-year period, based upon the revenue received by the charity. The song can be either specifically written for the charity or an existing song from the songwriter's catalogue. No appraisals are required; the deduction is instead based on the income received by the charity during the applicable period. Music publishers and record companies do not have to participate for the songwriter and charity to take advantage of this provision. However, music publishers and record companies generally are supportive of the songwriter's donation, since it expands public awareness of the song and potentially increases the overall revenue from the song at no additional cost to them. Indeed, the charity steps in as a marketing and distribution partner for the song, so everyone wins.

Qualified Sponsorship Payment

Two main umbrella nonprofit organizations serve the charitable needs of the entertainment industry, but in very different ways: the Motion Picture and Television Fund (MPTF) and the Entertainment Industry Foundation (EIF). The MPTF was created in 1921 by Charlie Chaplin and Mary Pickford, among others. Its mission statement is "We Take Care of Our Own." The MPTF recognizes that the vast majority of persons who work in entertainment are not the people whose familiar faces line the magazine racks at supermarket checkout counters. What started as coin boxes for Hollywood workers to donate change to help their fellow workers has evolved into a comprehensive organization offering health-related and financial services for needy members of the entertainment industry.

The mission of EIF[28] is to harness the collective power of the entertainment industry—including artists and celebrities, film and television executives, guild members, talent agencies, and employees—to raise awareness and funds for critical health, educational, and social issues. EIF has created a series of initiatives to address specific issues and has developed a fundraising plan for each initiative. Often these plans involve one or more key celebrities who become the face of the cause.

EIF is a charitable organization with its own donors and sponsors. A tax-deductible payment by an EIF sponsor to a charity must be distinguished from a payment for a service, such as an advertisement for goods. Under the IRC, a "qualified sponsorship payment" is any payment made by any person engaged in a trade or business to which there is no expectation that the person will receive any substantial benefit other than the use or acknowledgment of the name, logo, or product lines of the person's trade or business in connection with the activities of the recipient exempt organization.[29] The tax code provides that the solicitation and receipt of qualified sponsorship payments does not constitute an "unrelated trade or business" that would cause the charity to receive unrelated business income and incur tax.[30]

A sponsorship message crosses the line from mere acknowledgment to impermissible advertising if the message contains qualitative or comparative language; price information, or other indications of savings or value; endorsements; or inducements to purchase, sell, or use the payor's products or services. There is a safe harbor for an arrangement that designates a corporate sponsor as the exclusive sponsor of an event, as long as the designation does not result in a substantial return benefit to the sponsor. If, however, the charity agrees with the sponsor that it can be the sole provider of a product or service at the event, then the transaction may be taxable, because the sponsor is receiving a significant benefit.[31]

The Treasury Regulations provide an example of a qualified sponsorship payment: M, a local charity, organizes a marathon and walkathon at which it serves drinks and other refreshments provided free of charge by a national corporation. The corporation also gives M prizes to be awarded to winners. M recognizes the assistance of the corporation by listing the corporation's name in promotional fliers, in newspaper advertisements of the event, and on T-shirts worn by participants. M changes the name of its event to include the name of the corporation. M's activities constitute acknowledgment of the sponsorship. The drinks, refreshments, and prizes provided by the corporation qualify as a nontaxable sponsorship payment rather than as income from an unrelated trade or business.[32] A charity such as EIF may provide a link on the charity's Web site to the sponsor's Web site—and this is a permissible acknowledgement, not advertising. However, the charity should not endorse the sponsor's products in connection with this link on the charity's Web site,[33] because that can change the link from permissible acknowledgement to taxable advertising.

Responding to Crises

A celebrity may have established a private foundation or a DAF, and may be working with an advisory organization, business manager, or lawyer to structure his or her appearances, sponsorships, and charitable gifts. At times, the celebrity seeks to join forces with others in response to an urgent natural or man-made crisis. Celebrities may decide to become involved in immediate action or set in motion a "spread the word" campaign.

An example of the acute response is the Hope for Haiti Now telethon. A telethon generally has celebrity hosts and performers, all donating their time and services, as well as celebrities operating the phone banks to receive pledges of support from viewers. In the case of the Hope for Haiti Now telethon, EIF processed the donations and distributed the funds to seven identified charitable recipients. Celebrities produced a top-selling album and video, with the proceeds benefiting the charity. The preparations for the telethon involved determining whether intellectual property rights were donated or licensed as appropriate.

Examples of a "spread the word" response include Stand Up to Cancer (SU2C) and the RED Campaign. SU2C is an initiative formed by EIF to raise funds for ground-breaking research in the fight against cancer and bringing new treatments to patients as quickly as possible. The initiative involved a team of film, television, music, and sports stars appearing on all the major broadcast networks in a one-hour commercial-free program. It also included 30 online streaming partners as well.

The Red Campaign—with its tag line "Buy (Red), Save Lives"—focuses on stopping the spread of HIV/AIDS in Africa. A company pays a fee for permission to market a product under the Red logo. Then, when a consumer buys a Red product, the seller donates a percentage of the sale to the Global Fund, which invests 100 percent from the sale to HIV/AIDS programs in Africa.[34] The wide array of Red products allows celebrities a way to simultaneously associate with a brand and with the charitable campaign. Moreover, special edition products are being created for the campaign.

One of the next major collaborations between the charitable world and the entertainment industry will be a telethon this year on Veterans Day to provide support for the needs of U.S. veterans. The plan is to transform Veterans Day, November 11, into a participatory national holiday of major importance similar to July 4. EIF is developing an event that will be broadcast nationally with the Alliance for Veterans (AV), a tax-exempt organization. The broadcast will feature performances by acclaimed concert artists interspersed with testimonials from veterans and their families.

For a celebrity, living a life in the public eye may be measured by a list of credits and sometimes awards. But for many who have found fame, their resumes now include charitable work. Stepping into the role of charitable actor may begin as a way to save on taxes, but it can end as defining a celebrity's true legacy. ■

[1] For years, Williams encouraged people who wanted his autograph to make out checks to "Ted Williams for the Jimmy Fund." Williams would then endorse the check and send it to the charity. The Jimmy Fund would get the donation, and the check writers would get valuable Ted Williams autographs on the back of their canceled checks. *See* http://www.jimmyfund.org.

[2] NOTORIOUS B.I.G., *Mo Money Mo Problems*, on LIFE AFTER DEATH (July 15, 1997).

[3] I.R.C. §170.

[4] I.R.C. §664(d)(2). Alternatively, a charitable lead trust provides for payment to a charity for a term of years, with the remainder passing typically to the donor's children at the end of the term. I.R.C.