

By **Avi Z. Kestenbaum & Shaya Slomovics**

## Should Practitioners Advocate Charitable Giving?

There are arguments both for and against

**A**n issue that often arises in the attorney-client relationship, as within some other professions, is the nature and extent that attorneys should be shaping and guiding their clients' objectives and wishes. Should attorneys be active participants with their clients and advocate for what they, in their "professional" opinion, believe is the most proper and moral path for their clients to take? Or should clients identify the general goals to achieve, leaving the practitioners' role limited to providing an assessment of the available options and then helping clients achieve their desired objectives? That is, should attorneys be using their own ethos, ethics and morality when advising clients, and should this be part of their "professional opinion"? Or should attorneys limit themselves to the law itself and the clients' wishes, without juxtaposing their own feelings and agenda? In reality, neither the question nor the answer is simple or straightforward.

In the field of estate planning, this issue can arise when attorneys decide whether to advise their clients to make charitable donations either during lifetime or after death. Estate-planning attorneys may grapple with whether it's in fact part of their role to encourage their clients, particularly affluent ones, to make charitable donations or whether they should only be involved with this endeavor on their clients' stated wishes and objectives. Most agree that estate-

planning attorneys can and should inquire about their clients' charitable intents, but whether they should actively push for and advocate philanthropy is a more complicated question. Here are the for and against arguments that can be made regarding this issue.

### Personal Benefits to Clients

**For.** One argument supporting the position that attorneys should encourage their clients to make charitable donations is that their clients can receive substantial personal and family benefits from charitable giving.

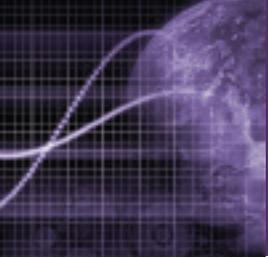
A study by Fidelity Charitable found that when families are engaged in philanthropic activities, the family members become happier and closer to each other.<sup>1</sup> Additionally, family values are passed on to future generations when family members make charity a part of their lives.<sup>2</sup> Furthermore, memories of current and past family members can be enhanced and perpetuated by making generous charitable donations that will be recognized by charitable organizations. Therefore, if among the goals of estate planning is to secure the family legacy and help family members be more productive, happier and feel closer to each other, advocating for philanthropy should be a proper and worthy role for the estate-planning attorney.

**Against.** It may not be all that clear that making charitable dispositions as part of the estate plan will increase family harmony and happiness for the entire family. Estate planning can cross and span multiple generations, often involving individuals with divergent values, personal situations, life experiences and goals. Elderly clients who are financially secure may be more inclined to donate than their children and grandchildren who are less so. The children and grandchildren may need to

(From left to right) **Avi Z. Kestenbaum** is a partner and **Shaya Slomovics** is an associate, both at Meltzer, Lippe, Goldstein & Breitstone, LLP in Mineola, N.Y.



and New York City. Avi is also an adjunct professor at Hofstra University School of Law in Hempstead, N.Y.



plan for the longer term and unforeseen situations and may not appreciate the client's philanthropy. By nature, some family members may be more willing and ready to give than others, and an estate plan that incorporates large charitable donations can foster resentment on the part of the receivers who don't want these donations to be made. This in turn could create jealousies and family disputes. Attorneys shouldn't voluntarily recommend planning that could actually *decrease* family unity, and at the very least, there are different degrees of philanthropy, and it isn't a one-size-fits-all subject.

Furthermore, even if the proposition that philanthropy helps bring families closer together and promotes happiness is correct, there are many other activities that can accomplish this goal, such as family dinners, vacations, retreats, counseling sessions and just learning how to treat all family members with proper dignity and respect. Estate-planning attorneys will undoubtedly agree that promoting generic activities that advance and foster family harmony is typically out of the purview of their roles. Attorneys are neither social workers nor psychologists, and their proper job may be to stay focused on estate, trust and tax laws and avoid giving advice aimed at promoting family harmony and happiness if not asked for it.<sup>3</sup>

### Part of the Practitioner's Role

**For.** Advocating philanthropy as part of an estate plan, even if the underlying objective is to increase family unity, is different from advising on family vacations or counseling. The role of the estate-planning attorney is to provide a framework and guidance for the disposition of the client's estate. This role is broad, and giving to charity, even if the motive is to increase family harmony, falls under this ambit.

Additionally, and importantly, charitable giving can provide significant tax benefits. One of the main goals of estate planning is asset preservation, and tax savings through charitable planning is part and parcel of this objective. Moreover, attorneys should inform clients of normative and common planning practices in which clients in similar situations engage. Giving to charity is one such practice.

Admittedly, however, the nature and the extent of the advocacy for philanthropy by the attorney is

the question at hand. There's no question the subject can be brought up. The query is how strongly should the estate-planning attorney push for charitable giving. This perhaps entails the broader question as to whether attorneys should be providing moral and ethical advice or confine themselves to legal advice—if such a distinction can properly be made. Model Rules of Professional Conduct 2.1 states that: “[i]n rendering advice, a lawyer *may* refer not only to law but to other considerations such as moral, economic, social and ... factors, that may be relevant to the client's situation.”<sup>4</sup> The American Bar Association's (ABA) *Lawyer's Manual on Professional Conduct* goes further and suggests that: “a lawyer's recommendations arguably *should* go beyond advising the client about [legal issues] and ought to incorporate moral and ethical considerations as well.”<sup>5</sup>

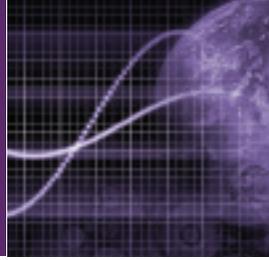
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The ABA's position is clear that an attorney can and perhaps should provide moral, ethical and social advice. Philanthropy would seemingly come under such purview. In fact, some legal scholars have gone so far as to say that moral considerations should outweigh legal considerations when providing advice to a client.<sup>6</sup> Furthermore, an attorney shouldn't be afraid of providing advice because the client may disagree with the attorney's proposition. The comment to Rule 2.1 states that: “a lawyer should not be deterred from giving ... advice by the prospect that the advice will be unpalatable to the client.”<sup>7</sup>

**Against:** The propriety of lawyers giving moral advice can nonetheless be seriously doubted. Pushing too aggressively for charitable giving is breaching the fundamental legal duty of impartiality as attorneys should be focused on the client's wishes and not their own. No two individuals share the exact same values, and who's to say that philanthropy



is an ethical responsibility or a moral imperative. At the very least, the charities chosen and the extent of the giving are deeply personal in nature.

Attorneys need to be cognizant of the potential serious damage to the attorney-client relationship that can result from an attorney's overbearance once the line is crossed between legal advice and ethical advice.<sup>8</sup> Clients will feel uncomfortable if they perceive that their attorneys are pressuring or judging them. Additionally, clients who were "convinced" by their attorneys to make charitable donations may later change their minds and resent the fact that their attorneys prodded them into doing so. If estate-planning attorneys turn into charitable preachers, the attorney-client relationship will never be the same. Attorneys need to be impartial and owe the client deference to the client's personal opinions and objectives.<sup>9</sup>

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We think that attorneys can, and perhaps ought to, gently bring up the subject of the benefits of philanthropy.

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Attorneys also charge significant fees for their legal expertise and should, therefore, limit their advice to the law unless specifically asked otherwise. Clients engage attorneys for their legal experience and expertise, not their moral and ethical advice. Legal fees are already a significant impediment to the attorney-client relationship. Clients will be even less inclined to contact their attorneys if they expect to receive and be charged for unsolicited ethical advice.

### Crossing the Line

**For.** The line between "legal" and "moral" advice isn't as clear-cut as it may seem. Clients typically choose their attorneys not only for their legal expertise but also for their wisdom and personal counsel. This higher level of guidance perhaps pertains to certain areas of law more than others, such as the deeply personal ones of matrimonial,

elder, criminal and trusts and estates, to name a few. Attorneys in these fields often deal with complicated and unique individual and family circumstances that require sensitivity and sagacity above and beyond the law. Experienced estate-planning attorneys should understand the peculiarities of a client's personal and familial situation and sensitively navigate the issues that arise. It would stand to reason that they should be giving advice regarding charitable contributions because they were hired by their clients for their personal perspectives as well.<sup>10</sup>

**Against.** The same arguments above as to attorney impartiality and the need to let clients set their own agendas without feeling pushed or judged apply to this argument. There's no argument that the attorney can and should provide more personal advice if asked for it.

### Our View

There isn't a clear cut answer or approach to this question. It's one of lines and degrees. We think that attorneys can, and perhaps ought to, gently bring up the subject of the benefits of philanthropy



**SPOT LIGHT**

#### Scenic Route

*Country Road in Autumn* by Tadashi Asoma sold for \$5,985 at Doyle's Fine Art auction on Dec. 14, 2021 in New York City. Born in Japan,

Asoma kicked off his career as an artist after receiving a scholarship from the Japanese government to study painting in Paris. He eventually settled in New York, where he produced the majority of his work. Asoma's paintings are recognized for his brilliant use of color.

and charitable giving, even if unsolicited by their clients. That’s part of the estate-planning process. However, how strongly the attorneys should proactively advocate charitable giving, and the extent the attorneys should be involved, if at all, in providing counsel concerning the selection of particular charities and the amounts given, is subject to ponder and debate. There are vital lines that need to be drawn for attorneys to be considered impartial in fulfilling their clients’ estate-planning agendas and not to cause later resentments among clients or their heirs. Additionally, it would severely impair the attorney-client relationship if clients feel morally judged or unduly pressured by their attorneys. 

## Endnotes

1. Fidelity charitable study finds childhood giving traditions create happier, more charitable adults. See [www.fidelitycharitable.org/about-us/news/study-finds-childhood-giving-traditions-create-happier-more-charitable-adults.html](http://www.fidelitycharitable.org/about-us/news/study-finds-childhood-giving-traditions-create-happier-more-charitable-adults.html).
2. *Ibid.*
3. See comment 5 to Model Rules of Professional Conduct 2.1: “In general, a lawyer is not expected to give advice until asked by the client.” American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules), MR 2.1, comment 5 (2009).
4. Model Rules, MR 2.1 (2009) (emphasis added).
5. *ABA/BNA Lawyers’ Manual on Professional Conduct* Section 31:701 (1998) (emphasis added).
6. See David Luban, “The Adversary System Excuse,” *The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics* (1984) (“[W]hen professional and moral obligations conflict, moral obligations take precedence.”)
7. *Supra* note 4, comment 1 (2009).
8. See, e.g., Larry O. Natt Gantt, II, “Integration As Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney-Client Relationship,” 16 *Regent U. L. Rev.* 233, 239 (2004) (“[E]ncouraging lawyers to engage in [non-legal] counseling will compromise client autonomy and strain the attorney-client relationship. Clients may become less willing to share certain confidences for fear of being judged by their attorneys; they may even forgo legal counsel altogether.”)
9. As Lord Brougham famously stated: “[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty...” *III Parliamentary Debates* 114 (N. S. London, T. C. Hansard 1821). An interesting instance in which this concept arose in a criminal law context involved a 1990 shooting outside a bar in New York City in which two suspects were convicted of murder. In 2005, new evidence called these convictions into doubt, and the Manhattan District Attorney reopened the case. Veteran prosecutor Daniel Bibb was assigned the case. Bibb became convinced that the defendants were innocent and helped the defense while ostensibly prosecuting the case. Some legal ethics experts, including New York University Professor Stephen Gillers, believed that Bibb violated his ethical duty of loyalty to his client, the State of New York. New York State authorities brought an ethics complaint against Bibb that was later dropped. See David Luban, “The Conscience of A Prosecutor,” 45 *Val. U. L. Rev.* 1 (2010).
10. Experienced attorneys will usually feel more comfortable raising issues that the client didn’t raise on their own and advocating for what the attorney feels is correct. “To raise and discuss moral problems thoughtfully with [a client] requires wisdom, a quality that comes in part with age and experience.” Robert F. Cochran, Jr., et al., “Symposium: Client Counseling and Moral Responsibility,” 30 *Pepp. L. Rev.* 591, 600 (2003).

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