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Nonprofit Mergers, Alliances, and Joint Ventures: Options, Best Practices, and Practical Tips

Thursday, February 15, 2018, 12:30 pm – 2:00 pm ET

Venable LLP, Washington, DC

Moderator

George Constantine, Esq.
Partner and Co-Chair, Nonprofit Organizations Practice,
Venable LLP

Speakers

Andrew L. Steinberg, Esq.
Associate, Nonprofit Organizations Practice,
Venable LLP

Thomas Dente,
President & CEO,
Humentum (formerly InsideNGO)

Scott Cotenoff
Partner,
La Piana Consulting

Presentation

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Upcoming Venable Nonprofit Events
Register Now

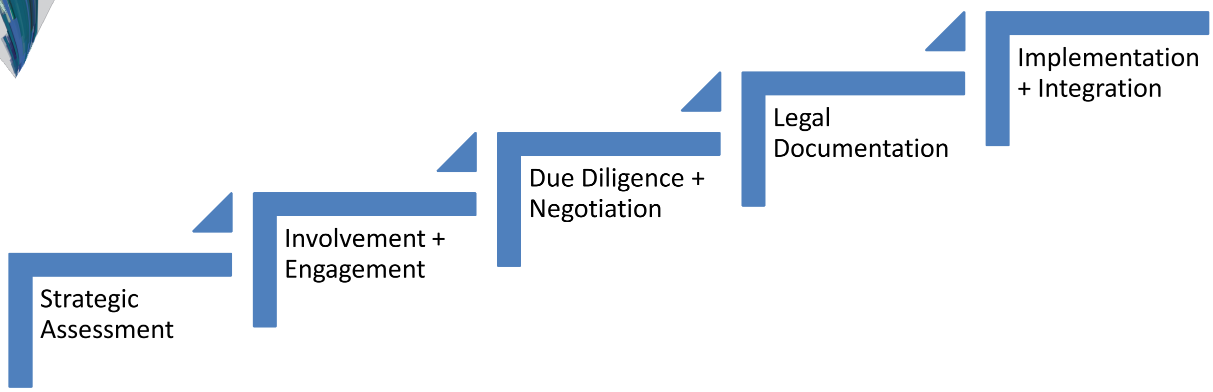
- **March 15, 2018:** Sexual Harassment: What Should Your Nonprofit Be Doing to Keep Itself Out of the Headlines and Out of Legal Hot Water?

- **April 19, 2018:** Post-Award Noncompliance Disclosures and Audit Resolution

Overview

- Setting the Stage
- Going from A to Z
- Common Deal Structures
- Case Study: Humentum
- Key Legal and Non-Legal Considerations

Steps in the Combination Process



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Why Start Down This Road?

- **Vision Realignment**: Enlightened organization/board has visionary goals + sees limitations of current model and/or situation
- **Membership/Funders/Services**: Competition for a limited market of members/funders/attendees/consumers
- **Sustainability or Expansion**: Assure continuance or enhancement of programs through collaboration
- **New Opportunities**: Maximizing resources, expand geographic focus or footprint, broaden revenue sources

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Contemplating Organizational Change

- Define strategic vision + goals
- Identify your "fit"
- Analyze potential synergies + practical implications
- Outline rough concept
- Designate your dealmakers

There is No One Size Fits All Approach

- What leads to success?
  - Mission focus
  - Flexibility in pursuing mission
  - Not in an immediate crisis
  - A lack of divisiveness
  - Clarity regarding desired outcomes
  - Positive relations with potential partners
- Roadblocks
  - Autonomy concerns
  - Lack of trust
  - Self-interest
  - Organizational culture

Typical Legal "Life Cycle" of a Deal

Adopt Letter of Intent

- Most transactions formally begin with execution of a non-binding letter of intent ("LOI") that outlines a roadmap for the transaction. LOIs typically serve as the basis for formal negotiations toward a definitive agreement and outline terms such as the transaction structure, timeline for due diligence and closing, and requirements for confidentiality and non-disclosure.

Negotiate Combined Structure

- The appointed representative(s) should negotiate how they envision the combined organization operating. Details about board seats, officer positions, committees, membership dues and categories, budget and financial matters, staff and benefit provisions, program continuation, oversight and funding, and related governance and operational issues should be discussed.

Conduct Due Diligence

- The parties gather sufficient information and documents in order to ascertain the financial and legal condition of the other organization, to identify any potential concerns (prior, current, or future) that might influence a decision to move forward with the transaction. Due diligence is the step which requires the largest commitment from each party and a great deal of analysis, but will mean the difference between a gamble and an educated guess in the decision to consummate the transaction.

Typical Legal "Life Cycle" of a Deal

Finalize + Sign Agreement

- The Definitive Agreement is a more detailed document than the executed LOI, and will reflect the terms agreed upon by the parties. Each entity must appropriately approve the transaction following the procedures of applicable state nonprofit corporation laws and each entity's governing documents, and obtain any required governmental authorizations.

Closing Conditions

- Parties usually agree on a set of specified conditions that must be satisfied or waived before a transaction is consummated. The failure to satisfy a condition gives the other party obligation to consummate a transaction between the signing is subject to customary conditions, including completion of due diligence, receipt of regulatory approvals and third party consents to existing contracts, and that there is no material adverse change since execution of the Definitive Agreement.

Stakeholder Notification + Systems Integration

- Develop an internal and external strategy for educating staff, board, clients, regulators, and the general public about the transaction, as well as to address the post-transaction growing pains.

Due Diligence and the Identification and Mitigation of Risk

Look Before You Leap

Key Hot Spots

- Contractual commitments
- Pending claims
- Employment practices compliance
- Data privacy practices
- Adequacy of insurance
- Tax-exemption
- Conflicts of interest
- Corporate separateness

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Needs Drive Structure

- An nonprofit interested in combining with another organization has several structural options to consider.
- Each types of combination involves different legal steps and procedural requirements and have varying benefits and considerations.
- Often decisions to combine are based on legal, tax or economic concerns, sometimes power and politics will dominate the decision-making process, and usually it is a combination of all of these factors.

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Types of Combinations

- Merger or Consolidation
- Acquisition of Dissolving Entity's Assets
- Program or Entity Acquisition
- Joint Venture/Program Collaboration
- Shared Space and Resources

Fully Integrated
no separate legal existence

↓

Entity Collaboration
Entities remain autonomous but a separate combined entity is created

↓

Contractual Affiliation
relationship governed by agreement
affiliates may or may not be separately incorporated

Case Study: Humentum

- Who: INSIDE NGO Achieving Global Impact, LINGOs, mango
- What: Statutory Merger + Strategic Affiliation
- Why:
  - Challenges facing the sector are increasingly complex and numerous
  - Difficult to solve these challenges alone with legacy areas of focus
  - Requires both global network and locally relevant solutions
  - Leverage strengths of each organization

Humentum's Aspiration

Vision

A just and sustainable world with a trusted and thriving social sector.

Mission

To inspire and strengthen operational excellence in the social sector.

Humentum's Journey

Strategic Recommendations

- Joint Board Task Force develops shared strategic recommendation
- Boards approve moving to next phase
- Mar. to Oct. 2016

Due Diligence and Legal Structure

- Financial and legal due diligence across three organizations
- Merger agreements approved by Boards in June 2017
- Jan. to June 2017

Integration

- Launch preparation and team retreat
- Name; public launch
- New reporting structure
- Official legal agreement
- Integration phases
- Culture initiative
- Mar. 2017 - ongoing

Strategic Value

- Review and refresh Humentum strategy
- Long-term technology strategy
- New external events and value
- Oct. 2017 - ongoing

Agreement Drafting Considerations

Key Takeaways + Lessons Learned

- The process will take time – A to Z is not Zero to Sixty
- Change is hard
- People may leave
- There are costs and benefits (short, mid, and long-term)
- Reach out to donors, supporters, and membership early on

Key Takeaways + Lessons Learned

- No "One Size Fits All" Form for Combinations
- Necessity of Due Diligence - Look Before Your Leap
- Understand What Liabilities You are Retaining, Avoiding, or Accepting
- Document That Understanding in Clear Terms
- If Things Do Go Wrong, "Hang Together" If You Can

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Questions?

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To view recordings of Venable's nonprofit programs on our YouTube channel, see www.YouTube.com/VenableNonprofits or www.Venable.com/nonprofits/recordings.

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INDUSTRIES

Nonprofit Organizations

Credit Counseling and Debt Services

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BAR ADMISSIONS

Maryland

District of Columbia

George Constantine serves as co-chair of Venable's Nonprofit Organizations Group. He concentrates his practice exclusively on providing legal counseling to and advocacy for nonprofit organizations, including trade associations, professional societies, advocacy groups, charities, and other entities. He has extensive experience with many of the major legal issues affecting nonprofit organizations, including tax-exemption, antitrust, governance, and lobbying and political activity matters.

Mr. Constantine is well-versed on matters related to association standard setting and enforcement, certification, accreditation, and code-of-conduct reviews.

Mr. Constantine has represented Internal Revenue Code § 501(c)(3), 501(c)(4), and 501(c)(6) clients on a number of critical tax-exemption matters, including representing clients that are undergoing Internal Revenue Service examinations challenging their exempt status; he has assisted associations and other nonprofit organizations going through mergers, consolidations, joint ventures, and dissolutions; and he has provided ongoing counseling on numerous transactional and operational matters that are unique to nonprofit organizations.

Mr. Constantine is the former Staff Counsel of the American Society of Association Executives (ASAE), the 25,000-member national society for trade and professional association executives. As ASAE's sole staff attorney, he gained in-depth experience with the many legal issues facing associations. He also represented ASAE's interests before Congress and federal agencies. He previously served as a member and chair of ASAE's Legal Section Council and is a frequent speaker and writer on topics of interest to nonprofit organizations. Mr. Constantine co-chairs Venable's 80-plus-lawyer Regulatory Practice Group.

HONORS

Recognized in *Legal 500*, Not-For-Profit (Nonprofit and Tax Exempt Organizations), 2012 - 2017

PUBLICATIONS

Mr. Constantine is the author of numerous articles regarding legal issues affecting associations and other nonprofit organizations published by ASAE, the Greater Washington Society of Association Executives, the American Chamber of Commerce Executives, the New York Society of Association Executives, and the Texas Society of Association Executives.

- October 13, 2016, How Your Nonprofit Can Operate a Legally Sound Certification or Accreditation Program
- August 4, 2016, When the Convention Parties Are Over: How Public Charities Can Be Involved in the 2016 Elections and Talk about the Issues, Nonprofit and Political Law Alert

EDUCATION

J.D., University of Maryland School of Law, 1998

Recipient, Order of the Coif law school honors society

Recipient, Judge R. Dorsey Watkins Award for excellence in torts

B.A., Loyola College In Maryland, 1989

- July 18, 2016, New Mandatory IRS Notification Process for 501(c)(4) Nonprofit Organizations Finally Announced, Nonprofit Alert
- July 15, 2016, New Mandatory IRS Notification Process for 501(c)(4) Organizations Finally Announced, Political Law Briefing
- February 4, 2016, Nonprofit Chapters and Affiliates: Finding Structures and Relationships that Address Your Challenges and Work Well for Everyone

SPEAKING ENGAGEMENTS

Mr. Constantine is a frequent lecturer on association and tax-exemption organization legal topics, including corporate and tax issues.

- October 13, 2016, How Your Nonprofit Can Operate a Legally Sound Certification or Accreditation Program
- November 12, 2015, "Nonprofit Chapters and Affiliates: Best Practices, Common Pitfalls, and Successful Approaches to Change" at the Third Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- November 19, 2014, Enhancing the Nonprofit Governance Model: Legal Pitfalls and Best Practices
- October 2, 2014, "Best Practices for Enhancing the Nonprofit Governance Model " at the Second Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- August 11, 2014, "Association Law Review for Aspiring CAEs" at the 2014 ASAE Annual Meeting & Exposition
- August 10, 2014, "Comparing Compensation: Effective Approaches to Benchmarking Pay and Perks" at the 2014 ASAE Annual Meeting & Exposition
- June 24, 2014, "Multi-Entity Organizations" for the Greater Washington Society of CPAs (GWSCPA)
- June 3, 2014, "The Impossible NO (A Panel on Getting Funders to YES)" at the 2014 Nonprofit Empowerment Summit hosted by Raffa, PC
- April 25, 2014, "Trade Association Update" for Georgetown Law's Representing and Managing Tax-Exempt Organizations CLE

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Andrew focuses on advising nonprofit organizations, including their management, officers, and boards of directors. He helps nonprofits navigate the broad range of legal and regulatory matters and best practices surrounding their activities, alongside the political, economic, and other practical considerations which influence organizational strategy and decision-making.

Andrew's experience representing charities, trade and professional associations, cultural and religious institutions, advocacy groups, and other nonprofits addresses entity formation and related corporate governance and structural matters, federal and state tax exemption, mergers, acquisitions and joint ventures, transactional negotiation and review, managing conflicts of interest, executive compensation, fundraising regulation, affiliates and subsidiaries, governmental investigations, antitrust, copyrights and trademarks, international operations, and many other unique and sensitive issues that confront nonprofits and their leaders on a daily basis.

Andrew is an active participant in the firm's summer associate program and pro bono matters, including the Washington Lawyers' Committee Generous Associates Campaign and D.C. Bar Advice and Referral Clinic.

While earning his law degree, Andrew served as a judicial intern in the chambers of the Honorable George E. Miller of the United States Court of Federal Claims, and as a legal intern at the College of William & Mary's Office of University Counsel.

PUBLICATIONS

- June 2017, Federal Grant and Contract News for Nonprofits – June 2017
- May 31, 2017, More Changes to the New York Nonprofit Corporation Law Take Effect: What Nonprofits Incorporated or Registered to Solicit Contributions or Conduct Activity in New York Need to Know, Nonprofit Alert
- May 9, 2016, Chinese Government Passes Landmark Law Tightening Controls on Nonprofits
- March 17, 2016, Ahead of White House Visit, BIS and OFAC Ease More Sanctions, International Trade Alert
- January 27, 2016, U.S. Lifts Certain Sanctions on Iran, Implementing Historic Nuclear Deal: What is the Impact for U.S. and Non-U.S. Persons?, International Trade Alert
- October 15, 2015, Recent Developments Following *North Carolina Dental* Decision
- September 29, 2015, The Obama Administration Continues to Expand Opportunities in Cuba, International Trade Alert
- May 14, 2015, Maryland Changes Rules Again on Political Contribution Disclosure by Government Contractors; Lobbyist-Employers Also Affected, Political Law Alert

EDUCATION

J.D., *magna cum laude*, William & Mary School of Law, 2014

- Order of the Coif
- Articles Editor, *William & Mary Law Review*
- Chief Justice of the Honor Council
- Appellate & Supreme Court Litigation Clinic
- Moot Court Competition Team

B.A., Government & Politics, Criminology & Criminal Justice, University of Maryland, 2011

- May 1, 2015, FMC Requests Comments on Proposal to Modify Confidential Contracting Rules, International Trade Alert
- April 10, 2015, White House Opens New Front to Combat Cyber Attacks, Cybersecurity Alert , International Trade Alert
- January 27, 2015, IRS Publishes New Revenue Procedures Addressing Applications for Tax-Exempt Status
- January 2015, New Sanctions Imposed on North Korea Following Cyber Attack, Client Alerts
- December 31, 2014, Updates on Fax Laws: Opt-Out Notices Required for All Fax Advertisements (Retroactive Waivers Recommended for Previous Noncompliant Faxes)
- November 13, 2014, Advertising Law News & Analysis - November 13, 2014, Advertising Alert
- November 11, 2014, Facing the Fax: Always Use Opt-Out Notices for Fax Advertisements (and Seek A Retroactive Waiver, If You Haven't), *All About Advertising Law blog*

Tom Dente

President and CEO

As president and CEO of Humentum, Tom Dente is responsible for developing and executing the organization's strategy and ensuring its overall performance as Humentum evolves to support the needs of its members, clients, customers, and partners in a changing and dynamic sector. Before the merger of InsideNGO with LINGOs and Mango to create Humentum, Tom had been serving as InsideNGO's President and CEO since early 2016. He joined InsideNGO in January 2011 as Chief Operating Officer.

Tom has worked extensively in assisting global organizations to realize their full potential. He previously was a partner at both Bain & Company and A.T. Kearney, two leading global management consulting firms, where he worked with senior leaders on strategy development, organizational effectiveness, and performance improvement in a 20+ year career as a management consultant. During his consulting career, Tom worked with both nonprofit and commercial organizations across North America, Europe, and Asia. In addition, Tom has also worked with the Criterion Institute, a nonprofit advisory firm, and began his career in the strategy practice of Price Waterhouse.

He currently serves on the board of directors for InterAction, the alliance of more than 180 US based NGOs, as well as the board of directors for PM4NGOs, a global nonprofit focusing on project management in the development sector. He has also served on the C-Suite Advisory Committee of Independent Sector and participated in the Transnational NGO Initiative at the Maxwell School at Syracuse University.

Tom graduated summa cum laude with Bachelor of the Arts in economics from Dartmouth College and earned an MBA in finance and marketing from Columbia University's Graduate Business School. Tom lives with his wife and two teenaged children in New Rochelle, New York.

Scott Cotenoff

Partner

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Scott is committed to helping clients align their strategies, structure, and culture to deliver real results. He works creatively with nonprofits and foundations to develop thoughtful responses to the challenges and opportunities presented by a rapidly changing environment. Scott has worked with the Innocence Network, the Health Federation of Philadelphia, Passaic River Coalition, National Environmental Education Foundation, and Behavioral Health System Baltimore to advance strategic decision making, build organizational capacity, and forge effective partnerships.

Scott brings diverse skills and experience to helping organizations accelerate progress toward their goals. Prior to joining La Piana Consulting, Scott was senior VP for programs and new initiatives at New York City's Partnership for the Homeless and served as executive director for the Children's Hope Foundation and Body Positive. He has also worked for the City of New York in multiple capacities. Scott has an MS in Urban Public Health from Hunter College School of Health Sciences and a JD from Boston University School of Law; he has an undergraduate degree in Political Science from Duke University.

Learn more about Scott in this La Piana Consulting staff interview.

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NONPROFIT PARTNERSHIPS: A GUIDE TO THE KEY LEGAL ISSUES AND PITFALLS

This article uses the term "partnership" as most people would use the word when speaking to one another. When two or more people, or two or more groups of people, pool their resources together and collaborate to achieve a common purpose, it is fair and accurate to call them "partners." From a legal sense, however, the term "partnership" is a term of art—when lawyers describe two entities as "partners," they are speaking about a particular type of legal arrangement. From a lawyer's perspective, a "partnership" is a complex interaction of business law, tax law, and the rules of intellectual property.

Still, for all the legal complexity that often comes with forging partnerships, maintaining them, and amicably parting ways, there are a few basic steps that every nonprofit can take to better understand the law of partnerships. This article lays out some basic terminology, then explains the tax and intellectual property implications involved in forming partnerships. It concludes by highlighting provisions that should be included in every partnership agreement, no matter what the technical form of the relationship.

I. Terminology

Strictly speaking, a "partnership" is an unincorporated business organization created by contract between two or more entities in order to carry out a common enterprise. Each partner contributes money, property, labor, or skill, and expects to share in the profits and losses of the undertaking. Generally speaking, a partnership does not pay income taxes; instead, the individual partners report their share of the partnership's profits or losses on their individual tax returns.

Within this legal definition, there are several categories of partnership, each with its own balance of management rights and personal liability. There are also several forms of cooperation that fall short of the technical definition of "partnership," but are nonetheless advantageous to nonprofits not yet ready to commit to a long-term relationship with another entity.

A. General Partnership

In a general partnership, each partner shares equal rights and responsibilities in connection with the management of the partnership, and any partner has the authority to bind the entire partnership to a legal obligation. Unlike shareholders in a corporation, the members of a general partnership are personally liable for all of the partnership's debts and obligations. That amount of personal liability is often daunting, but it comes with a significant tax advantage: partnership profits are not taxed to the business. Instead, profits *pass through* to the partners, who include the gains on their individual tax returns.

B. Limited Partnership

In a limited partnership, partners are divided into two classes—general partners and limited partners. The personal liability of a limited partner is limited to the amount he or she has actually invested in the partnership; as a trade-off, however, limited partners are not permitted to participate in management decisions. At least one partner in a limited partnership must be a general partner. General partners retain the right to control and manage the limited partnership, but assume full personal liability for the partnership's debts and obligations.

C. Limited Liability Partnership

In a limited liability partnership ("LLP"), all partners may directly participate in the management of the partnership and are granted some protection from the partnership's liability—although the extent of that protection varies from state to state. Some states tax limited liability partnerships as corporations, although they are considered partnerships under federal law. Many states also make the LLP available only to certain professional businesses—*e.g.*, law and accounting firms—and mandate that LLPs adhere to specific filing requirements.

D. Limited Liability Company

A limited liability company ("LLC") is a relatively new type of business structure created by state statute. Unlike general partnerships, which were developed over time by case law and require no formal documentation for creation, LLCs are created by filing a document (usually referred to as "Articles of Organization") with the state. LLC owners (called "members") are not personally liable for the debts and obligations of the LLC. In most cases, an LLC will be taxed like a general partnership—that is, the LLC itself will not be taxed, and the individual members will report their share of profits and losses on their individual tax returns. An LLC may, however, elect to be taxed as a corporation.

E. Joint Venture

A joint venture is an enterprise jointly undertaken by two or more entities for the limited purpose of carrying out a single transaction or isolated project. Unlike a partnership agreement, which creates a new entity and anticipates a long-term and continuous relationship, a joint venture usually ends once the limited purpose of the joint venture is complete. A joint venture can be structured like a general or limited partnership or an LLC, although LLCs are often preferred because of the additional liability protection and tax advantages. Similarly, joint ventures can be structured with an increasingly overlapping set of commitments between the parties and an eye towards eventually entering a more formal relationship. In any event, a well-structured joint venture will be codified in a written agreement that details the precise obligations and allocation of risk between the parties involved.

In a *whole joint venture*, one or more of the partnering entities contributes all of its assets to the enterprise. Nonprofit organizations more commonly engage in ancillary joint ventures. *Ancillary joint ventures* are essentially small-scale joint ventures—enterprises that do not become the primary purpose of the organizations involved. Organizations typically engage in ancillary joint ventures for a limited duration, and memorialize the terms of their arrangement in a written agreement. For example, nonprofits may enter into an arrangement with another organization to host a convention, publish a newsletter, or provide a series of educational programs. Tax-exempt organizations seeking additional sources of revenue also may enter into ancillary joint ventures with for-profit corporations, as long as doing so furthers the tax-exempt organization's purposes and the tax-exempt organization retains ultimate control over the underlying activity. Nonprofits often create new entities from which to undertake the joint venture. Depending upon the nature of the activity contemplated, such an organization may or may not be eligible for tax-exempt status.

Joint membership programs allow individuals to join two nonprofits typically, for a reduced fee. These initiatives allow the members of one organization to become more familiar with another, and are typically conducted in the context of other jointly-run programs and activities. Again, programs in this vein are designed to bring nonprofits closer together, often as a precursor to a more formal alliance, but allowing the entities to tinker with the arrangement or disengage altogether if circumstances or expectations change.

F. Independent Contractor Relationships

An independent contract relationship is an agreement between two or more entities for the provision of goods or services under the terms specified in the agreement. For the most part, independent contractors are defined by the IRS's "facts and circumstances" test. For instance, if the nonprofit hiring the contractor has the right to control or direct the result of the work, but not the means of accomplishing the work, then this will be a factor in favor of characterizing the arrangement as an independent contractor relationship. Otherwise, the contractor may be treated as an employee of the nonprofit, whose earnings are subject to withholding for employment tax purposes. The employee also may be eligible for employee benefits from the nonprofit, among other significant implications.

G. Commercial Co-Venture

A commercial co-venture (sometimes referred to as a "charitable sales promotion") generally consists of an arrangement between a charitable organization and a for-profit entity that otherwise engages in a trade or business. In most cases, the for-profit entity agrees to promote the sale of a product or service and represents that part of the sales proceeds will benefit a charitable organization or charitable purpose. Commercial co-ventures generally resemble independent contractor relationships more than partnerships, LLCs or joint ventures.

Commercial co-ventures are a relatively new idea, and the body of law addressing them is still developing. Presently, 24 states expressly regulate commercial co-ventures. Although none of these states require the commercial co-venture to form a separate business entity, many do require that both the for-profit corporation and the charitable organization file a written contract with the state before engaging in any sales or charitable solicitations.

II. Tax Issues for Tax-Exempt Organizations[1]

Because the terms of a partnership often implicate the tax-exempt purposes of an organization, tax-exempt entities must be mindful of the Internal Revenue Code ("IRC") and the conditions of tax-exempt recognition. This section discusses four central tax concepts for nonprofits to consider before signing any partnership agreement: unrelated business income tax, control by the tax-exempt organization, private inurement and private benefit, and compliance with state charitable solicitation laws.

A. Unrelated Business Income Tax

In general, tax-exempt organizations are exempt from federal taxes on income derived from activities that are substantially related to the organization's exempt purpose. A tax-exempt organization may still be subject to unrelated business income tax ("UBIT"). UBIT is a federal income tax imposed on tax-exempt organizations for income derived from a trade or business that is carried on regularly, but is not substantially related to the organization's exempt purposes. This tax is generally imposed at the federal corporate income tax rates.

For the purposes of determining UBIT, an activity is considered a "trade or business" where it is carried on for the production of income from the sale of goods or performance of services. Income from a passive activity—*i.e.*, an activity in which the exempt organization allows another entity to use its assets, for which the organization receives some payment—is not considered a business. The IRC specifically excludes certain types of passive income from UBIT—dividends, interest, annuities, royalties, certain capital gains, and rents from non-debt financed real property. UBIT also does not include income generated from volunteer labor, qualified corporate sponsorship payments, or qualified convention or trade show income.

In determining whether an activity is "regularly carried on," the IRS will examine: (1) the frequency and continuity with which the activity is conducted; and (2) the manner in which it is pursued. These factors will be compared with the same or similar business activity of non-exempt organizations. Discontinuous or periodic activities are generally not considered "regularly carried on," and generally do not result in UBIT.

An activity that is substantially related to an organization's tax-exempt purposes will not be subject to UBIT. A "substantially related" activity contributes directly to the accomplishment of one or more of the organization's exempt purposes. Alone, the need to generate income so that the organization can accomplish other goals is not considered a tax-exempt purpose.

In the context of trade and professional associations, for example, an activity is "substantially related" if it is directed toward the improvement of its members' overall business conditions. Particular services performed to benefit individual members, although often helpful to their individual businesses, usually results in UBIT to the association where those services do not improve the business conditions of the industry overall.

UBIT is even a consideration where a partnership is formed by two otherwise tax-exempt organizations. To the extent that the activities of a partnership do not further the exempt purposes of either organization, income from the partnership may be subject to UBIT. Notably, if two tax-exempt entities form an LLC operated exclusively for exempt purposes and consisting solely of exempt members, the LLC itself may seek exemption under Section 501(c)(3) of the IRC. Accordingly, if such exemption is recognized by the IRS, the income of the LLC would not be subject to tax. In contrast, the IRS will not grant general or limited partnerships exempt status, even if all of the partners thereof are exempt organizations.

Under the UBIT rules, deductions are permitted for expenses that are "directly connected" with the carrying on of the unrelated trade or business. If an organization regularly carries on two or more unrelated business activities, its unrelated business taxable income is the total of gross income from all such activities less the total allowable deductions attributable to such activities.

An organization can jeopardize its tax-exempt status if the gross revenue, net income, and/or staff time devoted to unrelated business activities is "substantial" in relation to the organization's tax-exempt purposes. In an effort to prevent loss of exempt status, many tax-exempt organizations choose to create one or more taxable subsidiaries in which they may house unrelated business activities. Taxable subsidiaries are separate but affiliated organizations. A taxable subsidiary can enter into partnerships and involve itself in for-profit activities without risking the tax-exempt status of its parent. Moreover, the taxable subsidiary can remit the after-tax profits to its parent as tax-free dividends.

B. Control

In a partnership, a nonprofit organization continues to qualify for tax exemption only to the extent that (1) its participation furthers its exempt purposes and (2) the arrangement permits the organization to act exclusively in its own interests and in the furtherance of those exempt purposes. If a tax-exempt entity cedes "control" of partnership activities to a for-profit entity, the IRS will consider the partnership to serve private aims, not public interests.

In a partnership with a for-profit entity that involves all or substantially all of a tax-exempt organization's assets, the IRS generally requires the tax-exempt organization to retain majority control over the partnership—*e.g.*, a majority vote on the governing board. In a similar arrangement that involves only a portion of the tax-exempt organization's assets, the IRS has approved a structure in which the for-profit and tax-exempt organizations share most management responsibilities but leave the exempt organization in charge of the exempt aspects of the partnership. Even in a partnership consisting solely of tax-exempt organizations, the management of the partnership must remain with tax-exempt organizations and may not be delegated to for-profit entities.

Nonprofits frequently enter into short-term partnerships with for-profit corporations in order to conduct a particular activity. These ventures should not jeopardize the nonprofit's tax-exempt status in most cases—even if the nonprofit does not maintain operational control over the venture—because the nonprofit will still carry on substantial tax-exempt activities.

C. Private Inurement and Private Benefit

In general, organizations recognized as tax exempt under Sections 501(c)(3) and 501(c)(6) of the IRC are prohibited from entering into a transaction that results in "private inurement." Private inurement occurs where a transaction between a tax-exempt organization and an "insider"—*i.e.*, someone with a close relationship with, or an ability to exert substantial influence over, the tax-exempt organization—results in a benefit to the insider that is greater than fair market value. The IRS closely scrutinizes partnerships between tax-exempt organizations and taxable entities to determine whether the activities contravene the prohibitions on private inurement and on excess private benefit (see below).

Private inurement through dealings with tax-exempt organizations can carry with it individual penalties as well. The IRS may levy excise taxes (referred to commonly as "intermediate sanctions") against "disqualified persons" that receive better-than-fair-market-value in transactions with 501(c)(3) and 501(c)(4) organizations. A "disqualified person" is any person who is in a position to exercise substantial influence over the tax-exempt organization, or has been in the past five years. Directors, officers, and the immediate family of directors and officers are all disqualified persons, among others.

501(c)(3) organizations also are prohibited from entering into transactions that result in more-than-incidental "private benefit" to another party, including unrelated third parties. Incidental benefits related to an organization's tax-exempt purposes are not considered private benefits, but the benefits must be both quantitatively and qualitatively incidental. To be quantitatively incidental, the private benefit must be insubstantial when compared to the overall tax-exempt benefit generated by the activity. To be qualitatively incidental, the private benefit must be inextricable from the exempt activity, in that the exempt objectives could not be achieved without necessarily benefitting certain individuals privately.

While the private inurement prohibition and the private benefit doctrine may substantially overlap, the two are distinct requirements which must be independently satisfied.

D. Charitable Solicitation Statutes

Over the last two decades, the vast majority of states and the District of Columbia have enacted and strengthened charitable solicitation statutes, designed to guard against fraudulent or misleading fundraising solicitations. The term "charitable solicitation" generally refers to requests for contributions to a tax-exempt organization or for a charitable purpose. Many state statutes restrict the application of their charitable solicitation statutes to organizations recognized as tax-exempt under Section 501(c)(3); others apply such statutes to all tax-exempt entities. Solicitations may take many forms, including Internet and telephone appeals, special fund-raising events, and direct-mail campaigns. Any partnership that engages in a charitable solicitation must adhere to the state requirements in each state in which such solicitation occurs.

While the specifics of these statutes vary by state, they generally require tax-exempt organizations to register before soliciting contributions from residents of the state. Registration typically involves providing general information (*e.g.*, name, address, corporate status, purpose, proposed registration activities, tax status, information about officers and directors, etc.) about the tax-exempt organization.

Many states also impose reporting and disclosure requirements. Tax-exempt organizations are typically required to file a report or other financial information with the state on an annual basis. Many states make all or most of these reports and registrations available to the public. Some states also require solicitors to disclose certain information—*e.g.*, the nature of the organization's activities and the amount of a donation actually designated for charitable purposes—at the request of a prospective donor.

As commercial co-ventures have gained popularity, many states have enacted statutes that specifically address and regulate arrangements between non-profit and for-profit entities. Under these statutes, the for-profit partner may be subject to reporting and accounting requirements to both the tax-exempt organization and the state. Alternatively, states may subject the partners of a commercial co-venture to the registration and bonding requirements usually reserved for professional fundraisers and solicitors.

Failure to comply with charitable solicitation statutes may result in sanctions against the tax-exempt organization, including investigations, revocation of registrations, injunctions, and civil and criminal penalties. Because of the variances in state filing requirement, compliance is often burdensome when nonprofit organizations contemplate solicitation programs that will span several states. This burden is somewhat eased by the fact that 35 states and the District of Columbia have agreed to accept a uniform registration form; however, many of these jurisdictions also require state-specific attachments—*e.g.*, a Form 990, audited financial reports, and/or copies of partnership agreements—to complete the charitable organization's registration.

III. Protecting Intellectual Property within Partnerships

The various types of partnerships discussed previously all likely will result in the creation of or involve the use of some form of intellectual property. Perhaps a company and a charity partner together to promote a "green" program on each other's websites. Nonprofits often come together to produce an educational conference, convention or trade show. Several different types of organizations might enter into a partnership to create the definitive publication on best practices in a given field or industry.

These business ventures, and many others, likely involve the development of products or written works, advertising and marketing literature, the sharing of logos and organization names, and/or the use of membership and customer lists to market the program. In addition, business activities like these often require a nonprofit to share its trademarks, trade secrets, and copyrights. All of these things constitute intellectual property. When such intellectual property assets are managed poorly, an organization runs the risk of damaging or diluting its rights in its own intellectual property assets and potentially infringing upon the rights of others. If managed properly, these assets can remain protected even as they are used to accomplish the goals of the business venture.

In short, a rudimentary understanding of the basics of trademark, trade secret, and copyright law can go a long way toward giving an organization the flexibility it needs to successfully launch new partnerships and business activities.

A. Trademark Basics

An organization's name and acronym may be "trademarks" protected by law. By definition, a trademark is any word, phrase, symbol, design, slogan, or tag line (or combination thereof) used by a company, individual or nonprofit to identify the source of a product. A service mark is the same as a trademark except that it identifies the source of a service. A certification mark is a mark used by an authorized third party to indicate that their products or services meet the standards set by the owner of the mark. It is important to note, however, that there are several exceptions that prevent a mark from being a protected trademark under the law, including the fact that the mark is too generic or is a merely descriptive term.

B. Trade Secret Basics

The term "trade secret" is generally defined as information used in a business that provides a competitive advantage to its owner and is maintained in secrecy.[2] Almost any type of information, if truly valuable, not readily known in the industry, and properly protected, may constitute a trade secret. Trade secret information might include (1) business information; (2) customer or member lists and related confidential information; (3) procedures, such as employee selection procedures, business methods, standards and specifications, inventory control, and rotation procedures; (4) financial information; (5) advertising and marketing information; (6) processes and methods of manufacture; (7) designs and specifications; and (8) computer software.

C. Copyright Basics

While they often may not realize it, organizations create and use copyrighted works on a regular basis. Under the federal Copyright Act, a copyright automatically vests in the author of a work as soon as the work is fixed in some tangible medium of expression. Essentially, when any entity puts pen to paper and an original work appears, a copyright exists. The copyright may be owned by a single author, or by two or more contributors who are joint authors or co-authors. A "joint work" is one created by two or more authors who intend their contributions to be merged into a single work. As a matter of law, each co-author of a copyrighted work has an independent right to use and exploit the entire work, but must share the profits equally and provide an accounting to the other co-author.

Organizations frequently miss a key copyright principle: the law treats works created by independent contractors and other non-employees differently than works created by an organization's employees. Materials created by an organization's employees generally are presumed to be the property of the organization, even absent a written copyright transfer or agreement, thus making the organization the owner of the copyright in such works. However, even if an organization has conceived of the idea for a work, supervised its development, and funded its creation, an independent individual (*e.g.*, an independent contractor or any other non-employee) hired to create a work retains the copyright in that work unless he or she explicitly transfers it back to the organization by way of a written agreement. Even articles and graphics used and reused in the regular publications of a nonprofit may remain the intellectual property of their original creators and owners. If the organization wishes to continue to use such a work, it must obtain permission from the copyright owner and may be required to pay a licensing fee.

D. Preventative Measures

To protect and maximize an organization's intellectual property rights and avoid infringing upon the intellectual property rights of others, the organization should take the following preventative steps, either on an ongoing basis or in contemplation of a new business venture:

- **Register copyrights.** Register the content on websites, publications and all other important, original, creative works that are fixed in any print, electronic, audio-visual, or other tangible medium with the U.S. Copyright Office. Although such registration is not required to obtain and maintain a copyright in a work, it is a prerequisite to filing a lawsuit to enforce the rights in such works and it confers other valuable benefits. Copyright registration is generally a simple, inexpensive process that can usually be done without the assistance of legal counsel.

- **Register trademarks.** Organizations should register their name, logos, slogans, certification marks, and all other important marks with the U.S. Patent & Trademark Office. While federal registration of marks is not required to obtain and maintain trademark rights, it can be extremely helpful in enforcing and maintaining them. Trademark registration, although a bit more expensive than obtaining copyright registration, is still an affordable process, particularly when one considers that trademarks and service marks generally protect the actual identity of an organization or its brand(s). As a result, the ability to fully enforce an organization's trademark or service mark rights through registration is paramount.

- **Use copyright and trademark notices.** Use copyright notices (*e.g.*, "© 2011 Venable LLP. All rights reserved.") on and in connection with all creative works published by your organization, and trademark notices on and in connection with all trademarks, service marks, and certification marks owned and used by your organization (*e.g.*, "TM" for non-registered marks and "®" for federally registered marks). While copyright and trademark notices are not required, their effective use can significantly enhance intellectual property rights, including putting others on notice as to their protection and preventing others from asserting the defense of "innocent infringement."

- **Verify ownership and permission to use all intellectual property.** An organization should ensure that it owns all intellectual property or has appropriate permission to use all intellectual property belonging to third parties that appears in its publications, on its website and in any other media, and should maintain and update such permissions on a regular basis. It is notable that, generally speaking, more copyright problems arise in this area than any other. If an organization discovers that it does not own intellectual property that it seeks to use as part of a partnership or business venture, it may be required to obtain permission from and pay a licensing fee to the owner of the work in order to make lawful use of the work.

- **Police use of your intellectual property.** Police the use of your copyrights and trademarks by others and enforce your rights where necessary. Trademark law requires the owner of a trademark or service mark to take measures to enforce its rights in such trademarks or service marks. An organization may use periodic web searches, outside watch service vendors, or other means to do so. Enforcement does not necessarily involve the filing of a lawsuit.

E. Contractual Protections

It cannot be emphasized enough that organizations entering into a business venture should memorialize their arrangement in a written contract. Among the other issues discussed in this article, a written agreement will ensure that the ownership rights (or at least sufficient license rights) to all intellectual property created under the agreement are apportioned among the business partners as they intend. If ownership of works is not spelled out in an agreement, the default copyright laws discussed above will apply, among others. The following are key issues that partnering organizations should address in their written agreements:

- **Ensure confidentiality—either up-front or in the partnership contract.** Potential business partners should enter into a written confidentiality agreement up-front—while they are ironing out the business terms—to protect the tentative deal, trade secrets, and any other intellectual or proprietary property revealed through the process of negotiations and due diligence investigations. Alternatively, the parties can address confidentiality in the comprehensive written contract that outlines their business venture.

- **Include an intellectual property license.** Any time an organization allows any other individual or entity—be they members, affiliated entities, or business partners—to use its trademark, service marks, name, logos, copyrighted works, other intellectual property, or proprietary information (such as names, addresses, and other contact information contained in its membership or customer directory or list), it is licensing those rights to the other party. The terms and conditions of such a license should be in writing and the writing should include certain provisions regarding the policing of the use of such intellectual property by others.

The license of an organization's intellectual property to the other partner generally should be limited solely to the scope and purpose of the business venture contemplated under the agreement, and should cease immediately upon termination. The owning partner should explicitly retain all key copyright, trademark, patent, and domain name rights created under the agreement; retain its ownership and control of the "look and feel" of any of its content used on a website; retain quality control over the use of any trademark, service mark, name, logo, or other indicator of source of any product or service; restrict the use of its name, logo and membership list; obtain confidentiality and security assurances regarding the use of its customer or membership data and other information; and obtain a warranty by the licensee partner that it will use no infringing or otherwise illegal material in connection with its use of the owning partner's intellectual property.

- **Minimize liability risk through representations and warranties.** An effective contract will include sufficient representations and warranties that each partner's intellectual property, software, website, and other elements that it brings to the venture do not infringe any intellectual property or other rights of third parties, do not violate any applicable laws and regulations, and that each partner will perform as promised.

- **Spell out rights upon termination.** While the parties may intend for their brilliantly-conceived business venture to continue forever, even the best plans end or change. Thus, one of the most important issues to address in advance in the original written contract is what happens to each party's intellectual property assets upon termination. Joint authors who formerly shared all rights, expenses and revenues may want to buy one another out upon termination, or ensure that the other party cannot use or alter their joint work once they part ways. Partner organizations should consider whether derivative works can be created after termination, and if so, to what extent. The key is for partners to think ahead about what assets they expect to keep or to gain, what rights they wish to protect, and how to enforce those rights at and after termination. In certain cases, a written agreement may be required to alter the statutory default provisions that govern ownership rights related to these types of considerations.

- **Maintain agreements with contractors, authors and speakers.** Partnering organizations also should maintain written contracts with any contractors and non-employee authors and speakers utilized under their business plan. If the ownership of works is not spelled out in a written agreement, the default copyright rule generally will apply, *i.e.*, the person who creates the work is the one who owns it, regardless of who conceived of or paid for the work. An exception to that general rule is represented in the work-made-for-hire doctrine. If a work qualifies as a "work-made-for-hire" under the law, the entity commissioning the work is considered its author and is the copyright owner, not the individual who created the work.[3] This area of the law is complex and many works may not qualify under the word-made-for-hire doctrine (the doctrine is only applicable to certain limited, expressly-defined categories of works). Among other requirements, in order for a work to be considered a work-made-for-hire, a written agreement reflecting such status is necessary.

A written agreement with any non-employees should contain a section that provides that (1) works created pursuant to the agreement are "works-made-for-hire;" (2) to the extent a work is not a work-made-for-hire under the statute, the non-employee author, creator or speaker assigns the copyright to the organization; and (3) in the event that the non-employee will not agree to assign its work to the organization, the non-employee grants the organization a broad, irrevocable, worldwide, royalty-free, and exclusive license to the work in any manner in the future.

IV. Issues to Consider before Signing the Agreement

After considering the relevant tax and intellectual property issues and choosing the appropriate legal structure for the partnership envisioned, a nonprofit's staff must delve into the specific details. No partnership agreement is complete without taking certain matters under consideration:

- **Due Diligence and Quality Control:** Before entering into any partnership agreement, a nonprofit should become familiar with its potential partner. Nonprofit leadership is obligated to exercise due diligence on this front, and nonprofit staff should be prepared to check references and review key legal, financial, corporate, and insurance documents. Avoiding negligence in the selection process—and on an ongoing basis—is key to avoiding liability for the errors and omissions of a partner.

- **Confidentiality:** While not essential, it often is prudent for a nonprofit to enter into a confidentiality agreement with a potential partner *prior* to beginning negotiations over the partnership agreement. Such an agreement can help ensure that the nonprofit will not be damaged or put at a competitive disadvantage by the disclosure or improper use of sensitive information or documents.

- **Intellectual Property:** Engaging in a business venture with another entity almost always involves the use of one another's intellectual property and frequently the creation of new works. Each organization should include a license to its intellectual property that limits the other partner's use of that property solely to the purposes of the partnership. An organization must preserve the right to maintain quality control over any use of its trademarks, service marks, name, logos, or any other indicator of the source of a product or service. Both partners should address who will own any works created by the partnership—both while it exists and after it terminates—as well as the rights to share in revenue related to such works and the right to create derivative works based on such works.

- **Choosing the Right Form:** As discussed above, each form of partnership has its own liability and tax considerations. Be specific. For example, an agreement to enter into a joint venture should state so explicitly. An agreement that represents a limited, one-time arrangement should contain a clause that states that is the intention of the parties that it be a limited, one-time arrangement.

- **Comply with Tax-Exemption Requirements:** As previously noted, tax-exempt organizations have to abide by special tax rules in order to maintain their tax-exempt status. A nonprofit's tax-exempt status is preserved by continuously monitoring the amount of the resources devoted to a partnership that generates unrelated business income, as well as limiting the unrelated business income itself. The agreement should state that the tax-exempt entity, at the very least, maintains control over the tax-exempt purposes and activities of the partnership.

- **Performance Obligations and Performance Standards:** A partnership agreement must be clear about the precise obligations of each partner, and should err on the side of being too specific. Partners should be required to perform with high standards of quality, professionalism and expertise, and the agreement should contemplate adverse consequences for a party that fails to satisfy these standards.

- **Timeline:** Any time constraints should be stated in the agreement. The phrase "time is of the essence" may be used to prevent late performance.

- **Indemnification:** Most partnership agreements contain an indemnification clause. The basic obligation is that if one partner's negligence or misconduct causes another partner to be sued by a third person, then the party at fault is responsible for any expenses resulting from the suit, including judgments, damages, settlements, and attorney's fees and court costs.

- **Antitrust Compliance:** Any provision that fixes prices, limits competition, allows for the exchange of competitively-sensitive information, attempts to set industry standards, restricts membership in a nonprofit, limits access to particular products or services, limits the production of particular products or services, or attempts to restrict who may do business with whom in an industry, likely is suspect to scrutiny under federal and state antitrust laws. While not necessarily illegal, extreme care and prudence should be exercised. If the agreement implicates any of these—or otherwise limits competition in any way—consult with legal counsel before proceeding.

- **Representations and Warranties:** Every party to a partnership agreement should be willing to make certain basic guarantees (often called representations and warranties)—to respect the rights of third parties, to follow all applicable laws and regulations, to sign the agreement only if actually authorized to do so, and to perform all obligations in good faith and fair dealing. Many partnership agreements also spell out particular consequences for breach of these guarantees.
- **Term, Termination and Transition:** All good partnership agreements contemplate an exit strategy at every stage of the enterprise. A solid agreement will spell out the initial term of the contract, whether and how the term will automatically renew, and when and how the agreement may be terminated. Unless the agreement specifies otherwise, the law generally will permit a partner to assign its rights and obligations under the partnership agreement to any third party, as well as to terminate the agreement at any time for any reason. Nonprofits can avoid costly disputes at the end of a relationship by deciding, up front, which partners will take which assets with them when they leave the partnership, or at least specifying a process for making such determinations.

This list is by no means exclusive. All partnership agreements should be in writing and generally should be reviewed by legal counsel.

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The Building Blocks for a Successful Nonprofit Merger

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Financial imperatives, contractions in membership bases, and consolidation in industries have led to an unprecedented period of growth in interest in nonprofit mergers. As a result, many nonprofits are eyeing current competitors as potential partners. However, mergers can easily fail when organizations mistake a central fact: mergers occur between people, not organizations. Mergers can fall apart for a variety of reasons: unexpected discoveries in the due diligence process, intractable issues that have been ignored, and differences in organizational cultures, among others. The following is a list of "lessons learned" from two association attorneys who have handled a broad range of association mergers.

Establish a Core Group of Merger Stewards. Establishing a group of volunteer and staff leaders to act as stewards of the merger is critical to success. The merger stewards will have two roles: 1) to come to an understanding of the merger plan, and to communicate this plan to the association's stakeholders, including the boards, staff and membership; and 2) to work through the inevitable issues that will arise in the due diligence process and/or as the groups integrate.

Ask the Hard Question Early: Which Organization Survives? Strength of negotiation posture can be measured by financial assets, membership base, industry contacts, and depth of operational expertise. Deciding how, and whether, to acknowledge this power disparity can be key to success in the long run. Early on, the organizations should agree on whether one organization should be viewed as the "surviving" entity, or whether both organizations will combine as equals. Although most mergers are described as the marriage of equals, rarely is this, in fact, the case.

Ask the Harder Question: What Are the Roles of the Respective Staff and Officers? A clear understanding of future roles and authority is central to a successful integration.

Jointly Develop a Merger Plan. The merger stewards from each organization should jointly develop a merger plan. This plan should include an outline of the combined governance structure, mission, core activities, membership categories and dues, and a broad staffing plan. A critical component of this plan is identifying board appointment procedures and the key leaders of the combined organization. The merger plan should include sufficient detail on the hard issues, but should be broad enough to allow for revision and elaboration based on stakeholder input.

Understand Approval Requirements and Dynamics. Once the core elements of the merger plan are in place, each organization should undertake a careful analysis of its respective board and member approval requirements. These requirements will be outlined in the state corporate code provisions of the organization's state of incorporation, as well as each organization's governing documents, such as bylaws. Where high approval requirements exist, early and active communication to the board and members is essential, as is a thorough understanding of permissible voting mechanisms.

Coordinate Internal and External Communication. In organizations with overlapping membership, having a coordinated "sell" document for the staff, board and members of each organization is critical. Release of information should be carefully coordinated between the organizations and each party should agree to give the other notice before making any announcements to the public. Nothing kills a merger faster than being blindsided by an unauthorized communication.

Agree on Coordinated Due Diligence. Merger timelines must allow for thorough due diligence. Associations considering mergers face a multitude of legal, governance, financial, and administrative issues that must be carefully explored and coordinated. To facilitate this process, the parties should agree upon a scope of due diligence and a diligence timeframe.

Culture Matters. Finally, while it may make good business sense to merge, key stakeholders –

including members, staff, and volunteer leaders – will not shift allegiances if the combined organization fails to bridge the cultures of both entities. Mergers work only when associations take the necessary steps to build teamwork and a shared vision of the future.

* * * * * *

Brock Landry and Lisa Hix have handled a variety of mergers, including the American Bankers Association/America's Community Bankers merger and the American Electronics Association/Information Technology Association of America merger. For more information, please contact or Mr. Landry at ***brlandry@Venable.com*** *or Ms. Hix at* ***lmhix@Venable.com****.*

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Q: We are considering an affiliation, combination, or possible merger, with another organization. What options do we have?

A: There is a wide array of ways in which nonprofit associations can combine, affiliate or otherwise come together. Some involve a complete integration of programs, activities, membership, leadership, and staff, while some provide for maintaining varying degrees of separateness and autonomy. A summary of several options is below.

Merger. Nonprofit corporations can fully and completely integrate their programs, functions, and membership by merging. When two nonprofit entities merge, one entity legally becomes part of the surviving entity and effectively dissolves. The surviving corporation takes title to all of the assets, and assumes all of the liabilities, of the non-surviving entity.

Benefits. By merging, associations may combine their assets, reduce costs by eliminating redundant administrative processes, and provide broader services and resources to their members. Furthermore, members who paid dues and fees to participate in the formerly separate associations are often able to reduce their membership dues and the costs and time demands of association participation by joining a single, combined organization. Finally, merger may allow associations participating within the same field or industry to offer a wider array of educational programming, publications, advocacy and other services to a larger constituency in the public arena.

Mechanics. To merge with another organization, each organization must follow the procedures mandated under the nonprofit corporation law of its state of incorporation, as well as any specific procedures in its governing documents. While nonprofit corporation statutes differ by state, the laws governing merger typically set forth certain core procedures. The board of directors of each precursor organization must develop and approve a plan of merger according to the requirements set forth in the nonprofit corporation statute of the state, or states, where the organizations are incorporated. The plan of merger also must be submitted to the voting members, if any, of each organization for their approval. While the conditions for member approval vary from state to state, statutes generally require a vote of two-thirds to effectuate the plan merger – a number that can be difficult to reach for practical and political reasons.

Acquisition of a Dissolving Corporation's Assets. Another legal mechanism is the dissolution and distribution of assets of a target association. While the dissolving entity must adhere to specific statutory procedures, a dissolution is much less onerous on the entity that acquires the dissolving entity's assets (the "successor" entity) than a merger. Because the successor entity is merely absorbing the assets of another organization, a vote of the membership and accompanying state filings are typically not required for that corporation.

Benefits. An asset transfer may be strategically preferable for combining organizations when one organization is of a much smaller size than the other, or the "successor" entity is only acquiring discrete programs or assets of the dissolving entity. Another benefit is that the successor organization is typically shielded from its predecessor's debts and liabilities, though an asset transfer always poses some risk of successor liability, particularly if adequate provision has not been made for pre-existing liabilities.

Mechanics. Like a merger, an asset transfer must follow the applicable state nonprofit corporation laws and each entity's governing documents. The procedure for dissolution and asset distribution is fairly simple for the successor entity. Member approval for such a transaction is typically unnecessary unless the organization's bylaws require otherwise. The process is more complicated, however, for the dissolving entity. In most instances, the nonprofit corporation statute of the dissolving entity's state of incorporation requires approval by both the board and any members having voting rights:

Other Types of Strategic Alliances. Mergers and asset acquisitions involve a substantial level of commitment, but associations need not go so far in order to engage in alliances with one another. Nonprofit corporations may enter into other strategic alliances that are temporary or permanent, and allow both entities to "test the waters" before binding themselves to a more involved or permanent arrangement.

Joint Venture. For example, in a joint venture, two or more associations lend their efforts, assets, and expertise in order to carry out a common purpose. The associations involved may develop a new entity (such as a limited liability company or a partnership) to carry out the endeavor. One example is joint trade shows.

A well-structured joint venture is codified in a written agreement that details the precise obligations and allocation of risk between the associations involved. Joint ventures can be permanent, set to expire on a given date or after the accomplishment of a certain goal, or structured with an increasingly overlapping set of commitments and an eye towards an eventual merger. Although the bylaws of an organization might specify otherwise, joint ventures do not usually require the approval of the general membership.

In the event that a contemplated joint venture would involve a taxable entity or an organization that is exempt under a different section of the tax code, there are additional precautions that may need to be taken in order to protect your organization from incurring taxable income or jeopardizing its exempt status.

Joint Membership Programs. Joint membership programs typically allow individuals to join two associations for a reduced fee. These initiatives allow the members of one organization to become more familiar with another, and are usually conducted in the context of other jointly run programs and activities. Programs in this vein are designed to bring associations closer together, often as a precursor to a more formal alliance, but allow the entities to modify the arrangement or disengage altogether if circumstances or expectations change.

Conclusion. There is an array of possible mechanisms for combinations and alliances that available to associations. The selection of an appropriate structure is heavily dependent on fully identifying the goals of the transaction and the potential ramifications for both groups.

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