

INCREASING REVENUE THROUGH SUCCESSFUL BUSINESS ALLIANCES

Parties engaged in commerce often find it advantageous to join together in business endeavors because many benefits can be derived by forming alliances with the right partners. Some of the benefits can include the following: the ability to share risks in particular endeavors; the potential savings in associated costs; the ability to gain access to foreign and domestic distribution channels and markets; and achieving the benefits of economies of scale. These types of endeavors are generally referred to as “partnerships”, “joint ventures”, “strategic alliances” or “corporate partnering.”

The press releases for some recent high-profile joint ventures in the entertainment industry are illustrative of situations in which businesses find it advantageous to partner with another company. In September, 2006 *News Corporation* and *VeriSign* announced a joint venture in order to create “the world’s largest provider of mobile entertainment.” *Sprint Nextel Corporation*, *Comcast Corporation*, *Time Warner Cable*, *Cox Communications* and *Advance/Newhouse Communications* entered a joint venture with the aim of accelerating the convergence of video entertainment with wireless communications products and services. In May, 2007 *News Corporation* and *NBC Universal* announced the addition of *FUEL TV*, *Oxygen*, *SPEED*, *Sundance Channel* and *TV Guide* to their list of growing content providers, which then can be distributed across the joint venture’s distribution network which includes *AOL*, *MSN*, *MySpace*, *Yahoo*, *Comcast* and *CNET*. In late 2006, *Fox Filmed Entertainment* and *Walden Media* entered into a joint venture agreement with the directive to market and release family films. *Walden Media’s* Chief Executive Officer, Cary Granat, expressed a basic advantage of joint ventures when he stated: “*Fox* is a great studio and this joint venture allows us to create a new family film label together that complements *Fox’s* existing strengths and gives our upcoming slate of franchises and films a great home. *Walden* and *Fox* each have a unique vision and voice that fit together very well, and through this venture we have the opportunity to develop new paradigms for the marketing of family films.”

Every day, many corporate alliances occur involving individuals and companies which are not large Fortune 500 companies. In fact, the majority of these types of formations are created because one party finds a need within its operating system which can be filled by a resource within another party’s operating system. The operating size of the parties is usually not an issue. Often the resources contributed by each party are specialized assets and/or products, specific expertise, technology, intellectual property and/or capital.

Alliances are inherently cooperative and collaborative arrangements which are successful when the participating parties have an understanding of their partner’s business, and the parties have a high level of trust. Nevertheless, these types of arrangements require thorough attention to legal and business details in order to ensure their proper functioning. By the inherent nature of their work, business attorneys are required to understand the unique details of the general industry in which their client’s business functions as well as the specific details of the companies involved in the proposed transaction, and how they can be effectively integrated. Because of the frequent open-ended nature of alliances and the specific goals of the parties, it is essential that legal

advice encompasses legal counseling in addition to traditional legal negotiation and drafting. This legal counseling should begin by addressing certain “strategic business questions”, the answers to which will shape the framework of the deal and the underlying legal paperwork necessary to implement it. Alliances often involve numerous unknown and unforeseeable events, and it is not practical, if not virtually impossible, to draft documents that will encompass all possible eventualities. The evaluation of the answers to the “strategic business questions” will help guide the attorneys in achieving the critical goal of drafting paperwork which will reflect the organic business philosophies and structures of the participants and provide a solid framework for the operation of the alliance.

At a minimum, these “strategic business questions” will include the following: 1) What are the primary business goals of the participants?; 2) Is the proposed venture a core business operation of the participants or a stand-alone venture?; 3) What are the assets each participant is contributing?; 4) Do the participants require frequent/daily access to any of the contributed assets?; 5) Have the participants determined their level of participation in the endeavor?; 6) Have the participants agreed to and written a business plan?

A critical issue to be addressed is what legal entity will be created in order to govern the endeavor. There is no requirement that a separate entity be formed to operate an alliance; in fact, these types of arrangements can be established by contract alone, and do not even need to be reduced to writing to be enforceable. If two or more parties begin working together, their actions will be controlled by applicable law. Under California law, the terms “strategic alliance” and “corporate partnering” are not clearly defined as are “partnerships” and “joint ventures”. In California, a partnership exists where there is the association of two or more parties to operate a business for profit as co-owners. A joint venture is defined as an undertaking by two or more parties jointly to carry out a single business enterprise for profit. A traditional distinction between the two is that joint ventures generally involve a single business transaction of limited duration; whereas a partnership is formed for a continuing business that will exist for an indefinite period of time. But from a legal perspective both relationships are virtually the same and California courts liberally apply partnership principles and partnership law to joint ventures.

However, most ventures are complex and uncertain enough so that the participants have attorneys negotiate and draft detailed documents defining their relationship before the parties begin working together. Most often the specific facts and circumstances require the formation of a separate entity so as to give the participants the tools to: 1) create independent management; 2) segregate profits and losses from non-partnership/joint venture assets and liabilities; 3) create formal and informal means of communication and a structured means of resolving disagreements; 4) have the administrative framework to better deal with unforeseen complications; and, 5) have the ability to delineate clear “exit” strategies from the alliance.

The most common entities utilized for the creation of business alliances include jointly owned corporations, general and limited partnerships and the limited liability company, which has emerged as the most popular entity. Although the facts and circumstances of each situation should dictate the most suitable entity created, some of the issues which will effect the decision include: 1) accounting and tax issues; 2) possible regulatory concerns (FCC, SEC, antitrust, etc.); 3) labor and employment issues; 4) the sources and types of funding; and, 5) the exit strategies of the parties. The specific terms negotiated and drafted in the paperwork governing the selected entity, as well as in any ancillary agreements, should relate back to the answers to the “strategic business questions”, and any other specific facts and circumstances of the participants’ endeavor. It is incumbent on the legal advisors to understand the concerns of the participants and to respond to those concerns by proposing and drafting terms which reflect the understanding of the participants and will also provide a framework addressing any potential unknowns and uncertainties. Often the focus is placed on the issues and terms relative to entering and exiting the relationship, while the success of the endeavor more often rests on taking the time to discuss the details of the daily operation of the proposed venture. More often than not, carefully drafting the paperwork that will provide the administrative framework the parties will rely on in the daily operation of the endeavor and on the fulfillment of their initial goals outlined in the answers to the “strategic business questions” will determine the ultimate success or failure of the endeavor.