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FEATURE ARTICLE:

Dissecting the Consortium: a Uniquely Flexible Platform for Collaboration

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Abstract: *The opportunities and imperatives for collaborative action of all kinds among both for-profit and non-profit entities are growing as the world becomes more interconnected and problem solving becomes less susceptible to unilateral action. Those activities include research and development, information acquisition and sharing, group purchasing, open source software and content creation, applying for government grant funding, and much more. At the same time, the rapid spread of Internet and Web accessibility allows collaborative activities to be undertaken more easily, and among more widely distributed participants, than has ever been possible before. But while the technology enabling collaboration has become ubiquitous, hard-won knowledge regarding best practices, successful governance structures, and appropriate legal frameworks for forming and managing successful collaborative activities has yet to be widely shared. As a result, those wishing to launch new collaborative projects may have difficulty finding reliable guidance in order to create structures appropriate to support their activities. In this article, I provide a list of attributes that define and functions that are common to consortia, an overview of how their activities are typically staffed and supported, a comparative taxonomy of the existing legal/governance structures that have been created to address them, and an overview of the legal concerns which consortium founders need to address.*

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Introduction: Although the word "consortium" has long been in common use, providing a precise definition for such an organization might challenge many that are familiar with the term. This should not surprise, because the label has been applied to endeavors as diverse as library collectives, syndicates formed to purchase professional sports teams, multimillion dollar collaborative research and development (R&D) projects, groups of competing companies allying to bid on government contract opportunities, and standards development organizations. This impressively heterogeneous set of examples suggests the importance of the consortium concept in the public, commercial, academic and non-profit sectors.

While the particulars of the legal structures used to support consortia across so many domains varies, the concerns these structures address are remarkably uniform, providing a clue why the word "consortium" is applied to such divergent types of organizations in so many different disciplines. The range of examples also suggests the degree of flexibility available to unite multiple stakeholders (often of many different types) behind a common purpose. For example, among the collaborations listed above can be found very successful organizations that are incorporated, and also ones managed under short memoranda of understanding; entities that have very limited, by-invitation only membership, and others that have an open, global membership of thousands; organizations with hundreds of dedicated employees and others with none; and initiatives with budgets ranging from the inconsequential to the many millions of dollars.

In our increasingly globalized, digitized and interconnected society, both the need and the opportunities, for collaboration is increasing dramatically.

One of the central attributes that defines a consortium is collaboration to achieve a common purpose, often one that cannot be achieved well, or perhaps at all, absent collective cooperation and pooling of monetary, information or other resources. In our increasingly globalized, digitized and interconnected society, both the need as well as the opportunities for such collaborations are increasing dramatically.

Historically, the utilization of the consortium concept has been limited to certain narrow for-profit activities. More recently, its use has expanded into additional areas, and particularly to support non-profit endeavors. Once proven to be useful in a new domain or niche area, consortia have often multiplied, and sometimes greatly, in the same sector. This record of experimentation followed by proliferation suggests that the restriction of consortium activity to certain vertical domains arises more from lack of awareness in adjacent sectors of the potential for consortium-based collaboration than with deficiencies in the concept itself.

The premise of this article is that consortium principles and structures should be become more widely familiar and better understood, so that these useful and flexible tools can be universally utilized. Accordingly, in this article, I will provide a list of attributes that define and functions that are common to consortia, an overview of how consortia activities are typically staffed and supported, a comparative taxonomy of the existing legal/governance structures that have been

created to address them, and an overview of the legal concerns which consortium founders need to address.[1]

I What Defines a Consortium?

What perhaps best defines the concept of a consortium is the lack of clear boundaries to separate what clearly is a consortium what clearly is another type of joint activity. When defined by a single characteristic, such as number and type of members, or nature of purpose, consortia can be found along a broad spectrum that, at some indefinable point, transitions into other types of endeavors that would not commonly be deemed to fall within the same definition. To give a single example, R&D projects with two participating partners, each funding the project and sharing in the commercial benefits, would more properly be referred to as a joint venture, while the same project with ten members would commonly be viewed as a consortium. What then, of a similar project with three participants?

Similarly, a trade organization qualified in the United States with the Internal Revenue Service (IRS) as a public charity, with thousands of individuals as members and a variety of activities, only one of which is standard setting, would be categorized simply as a non-profit membership or trade organization. Conversely, another non-profit organization formed only to develop standards, admitting only corporate members, and gaining tax exemption as a trade association, would invariably be recognized as a consortium.

Indeed, even the term "consortium" is at best a generic label of convenience for otherwise comparable entities that may choose to adopt a wide range of identifiers in their proper names, including Alliance, Forum, Foundation, Partnership, Special Interest Group (or simply, "SIG"), and Association.[2]

What then defines organizations that are likely to be referred to, or to refer to themselves, as "consortia," and what differentiates them from other, in some ways comparable organizations?

Core attributes: I would suggest that the following characteristics would be commonly acknowledged to be shared by all entities properly referred to as consortia:

Common purpose: Consortia are invariably formed for a specific purpose. That purpose is more typically narrow than broad, but in any case in a successful consortium it will be well defined, easily understood, and of sufficient importance to motivate action. Usually there will be some urgency attached to addressing the purpose, thus providing sufficient motivation for the founding members to take time from their normal responsibilities to combine and act.

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[1] Much of the material in this article is based on the author's more than twenty years of experience in forming and representing more than 100 consortia, as well as other joint ventures and syndicates of various types.

[2] Indeed, even the use of "consortium" as a collective label of convenience is not universal. For example, for historical reasons, collaborations in some sectors are usually referred to as "syndicates" rather than consortia. Examples include groups of banks that each provide part of the funding for a "syndicated" loan, and "syndicates" of newspapers that share news.

Collaborative imperative: For any of a variety of reasons, the purpose will either be better addressed, or may only be possible to accomplish, through joint action. Examples of motivations may include high cost (e.g., in an R&D consortium); a desire to share information without violating antitrust laws (e.g., a consortium formed to share marketing and sales information); the need to gather consensus as well as combine technical expertise and/or intellectual property (e.g., a standards development consortium); a desire to demonstrate unity and/or market power (e.g., a political action group); the opportunity to aggregate buying power to secure better prices and terms (e.g., a purchasing consortium); or the desirability of spreading acquisition costs across multiple, similar peer organizations (e.g., a library consortium).

Definable target group: The common purpose will be easily recognizable by one or more categories of stakeholders in a given technical, political, geographic or other domain as a matter of importance indicating the need for action, thereby providing a pool or easily identified and recruited participants.

Consortia are often formed to allow individual participants to gain access to an opportunity that lies beyond their individual economic means or competencies, or which is only attractive if the risk of failure can be shared more widely

Entity participation: While a given consortium may admit individuals as well as legal entities, very few organizations that merit characterization as consortia are based primarily on individual membership (which by its nature tends to lead to structural, funding, governance and other differentiators of substance).[3]

Coordination, administration and cost: Achieving a common purpose requires a sufficient degree of coordination and administrative support that a means is required to provide these functions, either through member volunteerism, hired employees, or outsourced service contracts. Achieving the common goal may also require a budget, which must be met, in whole or in part, by member contributions.

Consensus governance: In contrast to stock corporations, where control is largely a reflection of percentage ownership, consortia typically operate at some level of consensus governance. As a result, an individual consortium member will typically have greater influence, relative to its percentage economic contribution to the maintenance of the enterprise, than will a stockholder in a corporation, or a limited partner in a limited partnership.

Optional attributes: Many consortia will also demonstrate, or be formed in part to take advantage of, one or more of the following capabilities:

[3] Indeed, the standard setting consortia that are primarily based on individual membership, such as the Institute of Electrical and Electronics Engineers (IEEE) and the Internet Engineering Task Force (IETF), rely heavily on direct or indirect corporate sponsorship to support the standard setting activities in which employees of the sponsors engage. This participation is usually with the encouragement, and in some cases at the direction, of these sponsor-employers. The same is true with many of the most important open source foundations, such as the Apache Foundation and Eclipse Foundation.

Ownership and management of intellectual property: Consortia will often be formed to create, or as a means to another end will need to develop, valuable intellectual property. Once created, these assets must be owned and managed in a way that serves the goals of the consortium (on which more will be said later).

Aggregation of resources: Consortia are often formed to allow individual participants to gain access to an opportunity that lies beyond their individual economic means or competencies, or which is only attractive if the risk of failure can be shared more widely. Examples include R&D consortia with very significant budgets, as well as consortia formed to purchase sports teams, real property, race horses, or indeed any other type of asset.[4]

Non-profit purpose: While consortia are most often formed at least in part to serve economic ends, they are almost always formed without the objective of being independently profit-generating (the notable objection being consortia formed for the purpose of purchasing and managing assets). Thus, an R&D consortium may create commercially valuable technology, but will not be likely to commercialize the technology itself, and a group purchasing consortium will secure better prices for its members, but will not generate and distribute profits in its own right. This preference for a non-profit business plan is usually independent of whether the organization does, or does not, plan to seek tax exemption.

Promotion and market support: While the work of an R&D consortium may be conducted on a confidential basis and shared only with the consortium participants, other consortia may include market education as an essential part of their common purpose. An interoperability standard created by a standard setting organization (SSO), for example, only becomes useful if it is widely implemented, usually by others in addition to the members of the SSO that created it. Similarly, the economic benefits of the standard to its developers may only be obtained if customers come to associate value with compliance, and therefore require compliance in the products or services they are willing to purchase. Members of such a consortium will therefore usually coordinate at some level on marketing activities, and may also invest in the creation and management of global certification and branding campaigns.[5]

Open membership: While some consortia adopt "invitation only" admission policies, others (and especially national and international consortia) will operate on an open membership basis, allowing any eligible applicant to join. This is for

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[4] One could fairly argue that consortia comprising primarily individuals, or individuals and businesses, which are formed solely to purchase and manage discrete assets should not be included in the definition of consortia at all, but should be relegated to one or more additional categories, better referred to as syndicates and partnerships. Ultimately, the question is one of whether such organizations have more in common with consortia than not, and whether the differences outweigh the commonalities. Be that as it may, for purposes of this article, I have elected to include these groups, in part because they, and outside observers, often use the word consortium to describe them, and in part because their inclusion helps demonstrate the breadth, flexibility and wide utility of consortium principles.

[5] For a detailed review of certification and branding as conducted by SSOs, see: Updegrove, Andrew, Certification and Branding, *Essential Guide to Standards*, ConsortiumInfo.org, at http://www.consortiuminfo.org/essentialguide/certification.php

multiple reasons, including lessening of antitrust risk, increasing the likelihood of gaining tax exemption, earning credibility in the marketplace, spreading costs, and increasing the number of supporters of the common goal.

Qualification: The gross parameters or other features of a consortium are sometimes dictated by qualification criteria imposed by a third party, such as a government agency that provides funding for certain types of collaborative activities, such as R&D, information gathering, economic development or some other public purpose. In such a case, the eligibility of members, types of activities and certain other attributes may be mandatory rather than elective.

II Consortium Functions

Since participation in a consortium is by definition voluntary, success depends upon providing potential members with a value proposition that equals, or exceeds, the full costs of participation. Those costs include not only any cash contributions required, but also travel and time costs, which may often outweigh initial and ongoing participation fees.[6]

Potential participants must believe that they will have more to gain than to lose by participating in a consortium

Examples of the functions that a consortium needs to provide (depending on its purpose, scope of activities, membership, and other factors) in order to be successful include the following:

Governance: Potential participants must believe that they will have more to gain than to lose by participating in the consortium. Typically, having a say in the operations, strategy, and policies of a consortium is a valuable right. Consequently, it is important that the founders of a consortium not reserve too much control to themselves, because the result may be a failure to recruit sufficient additional participants to achieve the founders' goals.

However, those forming a consortium should also bear in mind that control may be of greater importance to some potential members than others, and a "pay to play," multi-tiered membership structure, with the more influential classes of members paying higher fees to gain more influence, will often provide an appropriate means to maximize both operating funds as well as numbers of members. In other situations, differentiating control in this fashion could be fatal, because the perception among potential members may be that certain factions, or categories of stakeholders, with more ample resources will be able to skew results to their unique advantage.

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[6] Indeed, some consortia require members to provide the full time of one or more dedicated employees as part of their membership commitment, representing an in-kind commitment that can run into the hundreds of thousands of dollars in the case of highly skilled (and compensated) engineers.

Liaison: Many consortia will pursue goals that require interaction with other entities. The consortium provides a means whereby the credibility to request the right to consult with, and be consulted by, other organizations can be established, and for that activity to be conducted.

Hosting: Collaborative activities need to be organized, scheduled, hosted, chaired, recorded and reported back, all in an efficient, member-friendly fashion.

Administration and staff support: While some consortia will have few members and no need for any sort of centralized administrative function, others will have many members, face to face meetings to schedule and host, Web sites to create and maintain, membership applications to accept, renewals to process, bank accounts to maintain and bills to pay. These functions are usually provided in one of the following fashions, with some models being more common in some domains more than others:

- ***Share and share alike:*** Members take turns providing necessary support. This is usually a poor solution unless there is little to be done. Not surprisingly, it is employed most often where the goals are limited (e.g., to develop a single deliverable) and the budget is necessarily small.

- ***Secretariat:*** One member volunteers to provide all of the support services, usually referred to as the "Secretariat function." This can work well if the Secretariat member takes the job seriously. Sometimes, the Secretariat function relieves the volunteering member of the requirement to pay dues. Consortia formed by, or among, academic institutions will frequently adopt this model. It is also used where an existing non-profit organization (e.g., a trade association) agrees to host an activity that may recruit participants that are not members of the host organization as well as members.

- ***Outsourced management:*** Outsourcing some or all of the administrative functions is an increasingly popular choice of consortia in disciplines such as standards development. There are a number of service providers that exist solely for the purpose of providing this function, some of which will hire dedicated staff that exclusively serve their larger consortium clients.

- ***Mixed management:*** The consortium has one or more core employees to provide dedicated leadership, and outsources other functions to a single management company, or piecemeal to a variety of service providers.

- ***Standalone:*** When consortia reach a certain size, usually defined by headcount, they are likely to operate as an independent entity, with their own lease, payroll, administrative staff, and other dedicated resources.

III Legal Considerations[7]

Collaborative associations invoke a variety of legal concerns, all of which should be properly considered and addressed prior to formation in order to avoid later complications, risks, excess costs, and lost opportunities.[8]

Pre-formation: The following categories of concern should be considered prior to settling on a legal structure and fixing the rules under with the collaboration will operate:

Governance: The structure of a consortium should facilitate, rather than inhibit, achieving consensus and operating cooperatively together. As a result, the choice of law, choice of structure (as discussed in a later section of this article), policies, and procedures of the consortium should be appropriate to the task at hand.

Antitrust: Many consortia bring head to head competitors together in the same room, to discuss and work towards common objectives. As a result, great care must be taken to avoid even the appearance of improper activities lest regulators or private parties bring an action against the consortium and its members. This should not be viewed as a reason to shy away from appropriate collaborative activities (indeed, many such activities, such as standards development, are viewed as being pro-competitive under applicable laws of the United States, when properly conducted), because the rules to be observed are usually well known and clear.

How the consortium is structured at the outset will often have a marked impact on the liability profile of the consortium on an ongoing basis. For example, if the governance structure favors one type of entity over another, or the admissions criteria would exclude one class of industry participants that will be impacted by the actions of the consortium, then the potential for abusive behavior will have been built into the foundations of the organization. Even if such conduct does not occur, the organization may become a lightning rod for a private legal action, or a letter to regulators recommending investigation, by a party that suspects that such conduct has, or will, occur.

The structure of a consortium should facilitate, rather than inhibit, achieving consensus and operating cooperatively together

Tax: In many cases, it will be desirable and appropriate for a consortium to apply for exemption from U.S. and state taxation under IRS Section 501(c), most

[7] It should be noted that the laws of jurisdictions vary widely and change frequently, and that the facts and circumstances applicable to any given consortium or consortium participant will vary widely. Accordingly, any information provided or observations or opinions stated in this article relating to legal subjects are provided for illustrative purposes only, and under no circumstances be regarded or taken as legal advice.

[8] I have addressed the legal considerations involved in forming an SSO in greater depth in this chapter of the earlier cited *Essential Guide to Standards:* Forming a Successful Consortium Part II – Legal Considerations, at http://www.consortiuminfo.org/essentialguide/forming2.php Many of these considerations will be applicable to a greater or lesser extent to forming a consortium for other purposes.

commonly as a 501(c)(6) trade association, but on occasion under Section 5.10(c)(3) as a charity or as a foundation. However, making too reflexive a decision to opt for tax exempt status can be a mistake, to the extent that it unnecessarily restricts actions that would otherwise be important to undertake in order to achieve the consortium's goals. This is a particularly relevant consideration, given that if the consortium is likely to have a modest budget, it should not be difficult to manage it in such as way as to incur little or no tax liability.

The choice of the category of tax exemption should also be carefully considered, as the restrictions applicable to each alternative can vary. Often, a consortium will elect to seek qualification as a public charity when it could as easily, and often more easily, qualify as a trade association. The result of this decision can be needlessly greater reporting requirements at the state and federal levels throughout its existence, a higher likelihood of being audited, a requirement to obtain audited financials, and the necessity of transferring its assets (perhaps with the prior approval and under the supervision of the State Attorney General) to another public charity, rather than to distribute them back to its members, or transfer them to a different type of tax exempt entity. None of these restrictions would be likely to apply to a trade association.

In the case of a more complex consortium, it may be appropriate to incorporate more than one entity. For example, to the extent that there are activities that cannot be engaged in without jeopardizing the tax exempt status of the main organization, a taxable subsidiary can be created. And to the extent that the main organization is not eligible for certain types of funding, a sister organization (e.g., a foundation) can be created as well. Obviously, the complexity of the organizational structure should not exceed real needs and budgetary realities.

Ongoing concerns: Besides everyday legal needs (e.g., contract review, corporate maintenance, etc.) consortia can also have unique ongoing legal needs. Depending on the nature of the organization, those needs may include the following:

Antitrust monitoring: While many consortia will be completely innocuous from an antitrust perspective, either by the nature of their activities and/or the composition of their membership, others will require ongoing monitoring to ensure that members do not inadvertently violate antitrust laws and regulations in the United States, and, as appropriate, abroad.

Accordingly, legal counsel representing consortia should be sufficiently familiar with antitrust laws to provide advice on how consortium activities can be established and conducted within appropriate boundaries. Any organization with the potential to conduct activities in connection with which antitrust concerns might arise should adopt, distribute to its members, and observe, an appropriate antitrust compliance policy. That policy should clearly state that criminal, as well as civil, penalties can be imposed on those that violate the antitrust laws, and that individuals as well as their employers can be held liable.[9]

[9] Historically, consortia have often adopted detailed antitrust memos that not only list prohibited activities, but also provide an explanation of the principles and laws of concern. More recently, many

Where participation by a significant percentage of the competitors in a given market niche are expected to participate, or activities of a more sensitive nature from an antitrust perspective are conducted, monitoring by legal counsel should be proportionately more active.

IPR Considerations: As a generality, joint ownership of copyrights, patents and other intellectual property rights (IPR) is cumbersome and to be avoided. A legal entity provides both a neutral owner, as well as a mechanism for publishing, licensing or otherwise making the IPR available to consortium members (and often the marketplace generally) in an economical and manageable fashion. IPR management by consortia can in the alternative include accepting member commitments to license IPR (or, as usefully, commitments not to assert IPR) to implementers or users of the consortium's work product, leaving the ownership of relevant IPR with consortium members. This practice is near-universal in consortia functioning as SSOs with respect to "essential claims" of patents that would be "necessarily infringed" by an implementation of an SSO standard.

The formation of a consortium as a legal entity also provides long-term stability with respect to IPR, regardless of the continuing participation of any individual member. In the appropriate case, ownership by the consortium also provides a liability shield for consortium members, protecting them from any risks associated with the ownership and management of the IPR.

Consortia use IPR policies (in the case of an incorporated organization) and inter-company documents (in the case of an unincorporated initiative) to regulate the ownership of, and rights in, IPR as it is created, in order to avoid later disputes or surprises. For non-technical consortia that will own only text-based materials such as white papers, Web sites and the like, a very short IPR policy, or section of the organization's Bylaws, will suffice to ensure agreement among members that the consortium will own the copyright in all work product, whether or not created by member committees or arriving in the form of member contributions.

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In the case of SSOs, IPR policies typically require working group participants (and sometimes all members) to disclose essential patent claims. The obligated parties are also required to state whether they will, or will not, make such claims available to all would-be implementers on "reasonable and non-discriminatory terms," and whether such "RAND" terms will, or will not, include the requirement to pay a royalty or other fee.

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organizations have adopted high level policies less than a page in length, presumably on the theory that flagging the overarching risk, and then referring members to their own legal counsel is a better strategy. In any event, perhaps the most worthwhile preventive policy is to ensure that committee chairs, and others that supervise activities where inappropriate behavior could occur, have a clear understanding of what discussion topics and other actions are prohibited, and of their obligation to intervene if such activity occurs.

For a consortium formed for other purposes, such as submitting a collaborative bid on a contract or conducting joint research and development of actual technology, much more detailed legal documentation will typically be used to assure that ownership and usage rights are properly addressed. In each of these examples the legal documentation may vary widely, and careful attention is essential at the time of formation to ensure that the consortium will operate smoothly, and that ongoing relations of the consortium's members will be harmonious rather than the opposite.[10]

IV Consortium Legal Structures

The legal structures predominantly in use today have evolved partly out of pragmatism, and partly as a matter of convention, dictated by the evolutionary history of the organizations founded in a given industry sector or non-profit area of activity. Anyone seeking to launch a new consortium would therefore be well advised to research a variety of different alternatives, rather than simply model a new organization on an existing consortium within the same area of endeavor.[11]

While no list of alternatives would be likely to include all of the legal variations that have been used to stand up a consortium, the following examples should capture most of the frameworks that would be appropriate to use in creating a collaborative project, with some of the principle advantages and disadvantages of each noted, as well as summarized in the table provided at the end of this article section:

Intercompany contract consortium: In this model, no legal entity is formed. Instead, an agreement among the members provides for all legal purposes, with the result that anything that needs to be established must be provided in the members' agreement, or in another agreement entered into among the parties (this contrasts with an incorporated entity, where off the shelf bylaws can be easily customized to provide most of the legal governance documentation needed). This means that the legal work required to set up a contract consortium, as compared to an incorporated consortium, may be significantly greater and more costly, since most or all of the work required will require custom drafting and negotiation among the founding members.

Failing to create a corporate entity can have other shortcomings, depending on the nature and scope of the initiative. Because no legal entity is formed, the profits and losses of the organization will pass through to the members, which may be inconvenient if the consortium will have significant cash flow. Moreover, the consortium will not be able to carry insurance, open and maintain a bank account, or sign contracts. As a result, one or more members must volunteer to maintain the account, sign the contracts, and otherwise act to an extent as the legal alter ego of the consortium – a role that few members may be willing to play. Hiring a third party to act as a representative may solve this problem, but unless the

[10] For a detailed review of certification and branding as conducted by SSOs, see the Intellectual Property Rights and Standard Setting chapter of my earlier cited *Essential Guide to Standards*, ConsortiumInfo.org, at http://www.consortiuminfo.org/essentialguide/certification.php

[11] That said, where a particular model has become well entrenched and widely known in a particular niche, up to a point it may make better sense to utilize the same structure in order to facilitate recruitment, since potential members are already familiar and comfortable with the status quo.

services of a management company are otherwise needed, this represents a needless additional cost.

Those considering a non-incorporated structure should also consider the fact that there may be less certainty that their contractual terms will be legally enforced, in comparison to bylaw terms that are directly based on corporate statutory language, and which have been interpreted for decades in available case law. Where certainty of result does exist, it will not always be welcome. For example, regardless of any language to the contrary that is included in the operative agreement among the members of an unincorporated consortium, applicable law may deem the arrangement to be equivalent to a partnership, subjecting all members to joint liability not only with respect to the debts or actions of the organization itself, but potentially for the acts or omissions of any single member when that member is arguably acting on behalf of the organization.

For all these reasons, and contrary to a common misconception, unless the scope, membership and duration of the projected collaboration are all intended to be quite limited, creating a corporation and allocating rights in the entity's bylaws will almost always present an easier, cheaper, and more risk-free option than constructing a consortium from the ground up through a custom contract. A notable exception will arise when an external factor (e.g., a government funding requirement) dictates a contractual relationship between the consortium members in order to qualify.

Because of the costs and risks of custom creation, where a decision is made to form a contract-based organization it will be particularly wise to emulate any existing contract-based structures that may be appropriate for the project at hand. In the world of standards development, one such structure has become quite popular, and scores of collaborative organizations have been formed under this "promoter-adopter" model.

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While some full-fledged organizations have been formed to operate on the promoter-adopter model, it is best suited to create and release a single standard. Typically, a small number of core members (often a group formed by invitation only) enter into a "promoter agreement," under which the founding members agree to use a specification contributed by one or more members, or to jointly create a specification needed by all (for example) to provide interoperability for a new type of product that each of the founding members wishes to sell.

Under the terms of the promoter agreement, each founder typically provides the group with a royalty-free cross license to all of its essential patent claims under the specification under development. The promoter agreement also permits each participant to sublicense the right to implement the same specification, subject to the patent rights of each promoter. All promoters typically agree to make patent licenses available to all such sublicensees under RAND terms.

The right to implement the specification is in turn provided to third parties under an "adopter agreement," using a form mutually agreed upon by the promoters. Adopters may or may not still be required to enter into separate patent license agreements with each other promoter. The terms of these licenses may sometimes be more restrictive than might commonly be found in relation to standards that are developed by consortia based upon more open models, or which find it necessary to employ less stringent IPR policies in order to attract a broad membership.

The promoter-adopter model is particularly popular with a few companies with very large patent portfolios, and is most often found in the market niches occupied by these companies. The advantages of the promoter-adopter model include the following:

- A high degree of certainty regarding patent rights among promoters and adopters (adopters are usually asked to provide a reciprocal license of their own essential claims back to the promoters, allowing them and other sublicensees to implement the specification without concern).

- A light-weight document structure, since the promoter agreement typically provides for all obligations (formation, governance and IPR related) in a single agreement, and the shorter adopter agreement provides all that an adopter needs, other than any direct licenses required by one or more of the promoters.

- A reasonably standardized document package, due in part to the fact that a large percentage of the organizations based upon this model have been founded by a small number of companies.

While these advantages do not eliminate the shortcomings of a non-incorporated structure, the promoter-adopter model has been well tested, and can therefore be relied upon to function as a workable basis for collaboration among the members themselves in situations where valuable IPR will be involved. It is particularly worth noting that this model could be used in other situations involving pooled IPR beyond the standards development environment.

Third party contractor consortium: While most consortia are formed by those that become their members, on occasion a product or service vendor will conceive of a plan for a consortium-type activity over which it desires to maintain a level of control, or from which it hopes to gain a particular advantage. For example, there may be great value in a particular market sector to sharing and analyzing information relating to sales data, materials acquisition data, or other areas of common concern. However, competitors in that sector will rightly be concerned over the antitrust implications of sharing such information directly.

At the same time, while there may be insufficient motivation among those in that sector to form and manage a consortium intended to collect, anonymize, analyze and share such information in an appropriate, risk-free fashion, there may be sufficient interest to attract a meaningful number of companies to participate for a fee. The motivation for the service provider, besides the fees it can collect, may include the opportunity to market the same data and/or services relating to

applying the lessons learned from such data, to the same companies, and to other companies, if the contract terms permit it to do so.

In situations such as these, the service provider may barter its up-front time and energy in setting up what superficially may look like a membership consortium in order to gain access to data it could not otherwise easily collect, and in order to gain an advantageous platform from which to market its services. As with a traditional consortium, individual companies apply for "membership" on an annual basis, and pay an annual fee. In the example above, they would also provide data, and share data, and may also have the opportunity to attend meetings and engage in other activities hosted by the service provider.

The principal difference in such an arrangement is that the service provider may own and control all of the data or other deliverables created, as well as the name of the organization and the right to alter, discontinue and sell the enterprise. For this reason, those approached as potential founding participants in such an initiative may wish to negotiate for protective provisions that give them some measure of control over the future of the venture to lower the risk of later abandonment or disappointment.[12]

Forming a corporation with stock ownership is an appropriate alternative where the consortium may generate profits, or will create valuable commercial assets that at some point will be liquidated or distributed

The third party contractor model can be created in a variety of ways. In the simplest, the contractor simply offers a short contract to each participant, which for all intents and purposes becomes a customer of the contractor. If liability concerns are an issue for the service provider or the members, of if the members wish to have some protection against abandonment, a membership corporation may be created, with the contractor providing all services during good behavior, and (in the example above) exclusive rights relating to the information being gathered. Absent gross neglect, the service contract renews automatically, and the contractor may be able to sell the contract, and its exclusive rights, to a third party reasonably able to perform the same function.

While the staffing model is similar, the third party contractor model should not be confused with the out-sourced management model discussed in Part II of this article. The important difference is that in the latter, the management company has no ownership or control rights, and can be more easily terminated by the consortium and its members.

Stock corporation: Forming a corporation with stock ownership is an appropriate alternative where the consortium may generate profits, or will create valuable commercial assets that at some point will be liquidated or distributed (i.e.,

[12] A variant on this theme is the "user group," in which a vendor shares information, and welcomes input, from customers that it hopes will become more loyal and active as a result. A user group may also resemble a membership consortium, with regular meetings, technical activities, and perhaps an elected advisory council that acts as a representative interface with the vendor. The economic support for a user group is provided by the vendor.

where the consortium is more in the nature of a joint venture). However, where the consortium has been formed for a non-profit motive or on a non-profit basis, the existence of stock can be more of a burden than a benefit, because the value of the stock at the time that a member joins or leaves must be calculated, and the shares bought or sold, which may be a needless and pointless exercise. Additionally, such an organization could not secure tax exempt status, and its appearance to the public (if this is a consideration) would be closed rather than open, and commercial rather than non-profit.

Limited Liability Company (LLC): While similar to a stock corporation in some respects, an LLC allows great flexibility with respect to how profits and losses are allocated, and also in some jurisdictions permits members of the LLC, when serving on the governing body of the LLC, to disclaim any fiduciary duty to each other, which would not be possible in the case of the other incorporated alternatives addressed in this Section. Unless these differentiators are important to meeting the needs of the members, using an LLC structure will usually be inadvisable, due to the costs of creating and maintaining the organization, and the generally more complex and confusing nature of the governing documents.

Non-profit corporation: The corporate laws of U.S. states generally provide for the formation of one or more variations on the corporate form that are intended to be more suitable, and often more flexible, for non-profit purposes. However, these options vary greatly from state to state, and the types of associations for which these statutes were originally intended (e.g., churches, agricultural collectives, fraternal associations, and so on) do not always align well with the needs of a modern consortium. Even if the laws of a given state may provide an appropriate vehicle for consortium formation, if that entity is intended to have wide national or international membership, potential members and their legal counsel may be uncomfortable relying on laws and structures with which they are unfamiliar.

Delaware membership corporation: Delaware law is more universally familiar to both domestic and foreign attorneys than the law of any other US state. Moreover, the differences between its laws as they apply to not for profit membership companies are not only slight, but provide ample flexibility for the task at hand. For this reason, I have formed scores of consortia under Delaware law with excellent results. Within this type of structure, all of the rules relating to member class structure, member rights, obligations, voting, creation of a governing body, indemnification and more can be included entirely in the Bylaws. To the extent the activities of the consortium require, other rules can be provided for in Board adopted policies (e.g., IPR Policies, Antitrust Policies, Committee Process Rules, and the like).

Multiple entities: For more ambitious consortia with larger budgets, more diverse funding sources, and opportunities to operate partially in a tax exempt mode and partly not, a multiple-entity structure may be appropriate, notwithstanding the greater complexity and costs of creation and maintenance. As earlier noted, entities can include taxable operating subsidiaries and other types of non-taxable entities as affiliates, as well as separate for-profit corporations or partnerships that are separately funded and owned by subset of members willing to underwrite a greater percentage of the consortium's budget, sometimes in return

for ownership of, or preferential rights in respect of, IPR or other assets developed or purchased by the for-profit entity.

Structural summary: When contacted by a client to assist in forming a consortium, many attorneys will find themselves faced with a task that they have never confronted before, and for which they have no models to consult as references. In such a case, a natural reaction is to begin from a familiar starting point, which in many cases will be a joint venture agreement or the bylaws for a traditional non-stock corporation intended to qualify as a public charity. While the former may be a good choice if only a few parties are involved, and the latter for a locally-based project which intends to seek contributions as a charity, if other factors already noted are present, one of these alternatives may represent a very poor and limiting choice that may be later regretted.

It is therefore important to explore all available models before committing to a decision that will have long term implications. Ideally, a model will be found that has been used by comparable organizations already in existence that have demonstrated their ability to succeed and thrive under the structures they have adopted.

Comparison of Consortium Structural Options

	Flexi-bility	Cost to Create	Liability Shield	Entry/ Exit Ease	Tax Exempt Eligible	Most Suitable For	Notes
Contract Consortium	High	High	No	Varies	No	Few members, discrete purpose	Requires custom drafting/much negotiation
Promoter-Adopter	Low	Low	No	Easy	No	Narrow focus projects in IPR-rich environ-ments	Commonly used to develop standards in semiconductor and some other IT sectors
Third Party Contractor	High	Varies	Yes	Easy	No	Limited objectives	Likely to arise where potential members are not motivated to create the consortium themselves
Stock Corp.	Low	Low	Yes	Hard	No	For profit venture	Stock ownership makes changes in membership complicated
LLC	High	Can be High	Yes	Varies	No	Complex for-profit situations	Main advantages are lack of fiduciary duties and flexibility

NFP Corp.	Varies by State	Low	Yes	Easy	Yes	Varies by state	Less desirable for most national and international consortia
Delaware NFP Membership Corp.	High	Low	Yes	Easy	Yes	General non-profit uses	Well recognized, flexible
Multi-Entity	High	High	Yes	Varies	Yes	Complex projects	More expensive to create and maintain

V Summary

Multiple forces in the world today are converging to increase the ease and raise the value of collaboration in both the public and private sectors. Indeed, it is becoming increasingly common in business literature to find the opinion expressed that companies that fail to collaborate with their peers will be at a severe disadvantage to their more-willing competitors.

In light of such opportunities, it is important for the founders of new collaborative projects, and their legal counsel, to be familiar with the types of frameworks available to serve as platforms for their endeavors, and to choose wisely before launching their initiatives. Happily, the consortium model, in all of its variations, provides a uniquely flexible and appropriate foundation upon which the collaborations of the future can be based.