

# Partner with Care and a Prenuptial Agreement



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Throughout the year, countless brides and bridegrooms come join together, happily anticipating a lifetime of wedded bliss. Many nonprofits engage outside consultants and vendors in the hope that these “unions” will enable the nonprofit to achieve some aspect of its mission. In some cases outside help is retained to meet the need for goods and services. In other cases a nonprofit may engage a consultant to enable the cross-fertilization of expertise or experience. Challenges may arise in these relationships regardless of whether the consultant/vendor is assisting the nonprofit for the first time, or has been providing goods or services since the inception of the organization. Some of the risk management strategies to increase the odds of success apply at both ends of the spectrum.

## Risk Tips for Productive Unions

**Communicate with care.** Clear communication between the nonprofit and the consultant or vendor is necessary to a successful outcome. You should be explicit about objectives, measurements of success, the types of resources each party will commit, and the areas for which each will be responsible. Spend the time that is necessary to work out all of the details of the relationship or agreement, before work begins.

**Get in the habit - use a contract.** When your organization employs people, buys goods, purchases services, rents space, and holds meetings, it does so by contract. Whether the contract is written or oral, long or short, it sets forth your rights as compared to the other party's. How you set the terms of those contracts can either increase or limit your liability exposure (not to mention anxiety and potential headaches). Effective contracts help the contracting parties begin an endeavor with a shared vision of a desired outcome, provide options to limit risk and exposure if either party decides to withdraw from the relationship, minimize or prevent surprises about the cost of an activity, and provide a roadmap if things do not go as hoped and the relationship is terminated.

An effective contract between your nonprofit and a consultant or vendor should cover the information described below:

- **WHY** you are purchasing this good or service and why from this person or organization (It's a good idea to state this at the beginning of the contract in the Recitals or “Whereas” clauses).
- **WHO** you are contracting with, their legal status (i.e., a corporation, partnership, individual, limited liability company), their street address and phone number, and the principal contact person.

- **WHO** will be liable and in what amount if there are problems that lead to a lawsuit; they should indemnify you and hold you harmless for what is in their control and you may choose to indemnify the other party for harm that results solely from your own acts or omissions (Caution: you should never assume responsibility for something over which you do not have control.).
- **WHO** will own any assets that are produced (e.g. copyrighted material).
- **WHAT** goods or services are meant to be provided, conducted, performed, or accomplished, stated in clear and explicit terms.
- **BY WHEN** the obligations will be performed (Consider having interim deadlines or progress mileposts).
- **WHERE** the performance (or any dispute, such as a lawsuit or arbitration about the performance) will occur.
- **WHERE** (and under which State's laws) any dispute, such as a lawsuit or arbitration about the performance will occur.
- **HOW** the performance will occur.
- **HOW MUCH** payment is expected and how and when the payment will occur.
- **HOW** the parties will handle confidential information.
- **HOW** the other party will pay for any liability or indemnification of you — you want to be certain that anyone who is indemnifying you maintains adequate insurance (you can request evidence of insurance such as a certificate of insurance or be named a co-insured).
- **HOW** you will pay for any liability you incur or any indemnification you provide — make certain that your insurance fully covers the liabilities and indemnification you agree to.
- **HOW** any termination will occur, by which parties, under which circumstances (only for unsatisfactory performance or also without cause), and under what terms (for settling amounts owed up until that point).
- **HOW you will handle:**
  - Notices to each other — you should specify the name and address for official correspondence.
  - Waiver Clauses — you always want to enforce your rights whenever they have been breached, regardless of whether you've ignored a problem previously.
  - Merger Clauses — are all the terms and conditions you want spelled out in the contract or are there some unwritten provisions or understandings? (e.g., "All enforceable provisions of this agreement are included in this written contract.") Without a merger clause, one could argue that other (unwritten) promises and assurances DO and HAVE BECOME part of the agreement enforceable against the party that made such promises.
  - Binding on Heirs, Successors, and Assigns – you want the other party to know that if they are replaced or succeeded by anyone else, that person is bound to fulfill the original party's contract obligations.

**Make certain those with and without contracting authority know it.** One area where nonprofits often encounter trouble is when individuals in an organization who aren't in position to bind the nonprofit do so anyway. Consider providing a clear statement to all members of the organization (employees and volunteers) about their contracting authority or lack of contracting authority and how to avoid contractually committing the organization inadvertently.

**Proceed with caution when contracting with "insiders."** Youthful organizations often rely heavily on insiders to provide goods and services. These insiders may include board members or family members of the board or paid staff. As an organization matures, it should strive to make certain that these contracts are the exception rather than the rule. These insider relationships could draw the scrutiny of the IRS or other regulators, and they can also cause awkwardness and embarrassment when one of the contracting parties fails to meet its commitments.

Each June my parents celebrate their wedding anniversary. As I prepared to give the toast at a recent anniversary party, I thought about some of the keys to a great marriage. I decided that the most important key to wedded bliss is good communication. The very same "golden rule" applies to managing consultants and vendors. Make your expectations clear. Strive to achieve a shared vision of your partnership. Consider what you'll do if the other party is unable to fulfill their obligations. And exercise caution when contracting with an insider.

Additional information on managing the risks of collaboration is featured in the Center's publication: [No Strings Attached: Managing the Risks of Fundraising and Collaboration](#). [Click here](#) to order a copy for your resource library.

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