



PretiFlaherty

501(c)(3) Collaborations: Opportunities and Issues

Presented by:
Charles F. Dingman
and Leonard M. Cole

NEI-MeHAF Community of Learning - June 27, 2012 - Lewiston, ME

PretiFlaherty

Disclaimers



- The following information is for educational purposes only and is not intended as legal advice. Organizations contemplating a collaboration are advised to consult an attorney.

PretiFlaherty

Disclaimers



- IRS Circular 230: Any tax advice in this memorandum was not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer by the Internal Revenue Service.

PretiFlaherty

Overview of Presentation

- Scope = Collaborations between 501(c)(3) organizations ... short of merger.
- Collaborations with a non-501(c)(3) entity raise additional issues.

PretiFlaherty

Take-Aways



- The possibilities are *ENDLESS*
- An **INFINITE** number of colors between **red** (no collaboration) and **violet** (merger)

PretiFlaherty

Take-Aways

- There are many legal issues that may arise in a collaboration.
- Engage a lawyer (or group of lawyers) with expertise in the relevant fields of law.
- Work with them to create a structure around your goals and have them advise you on related compliance issues.

PretiFlaherty

Today, we will . . .

- Demonstrate some common collaboration structures, and
- Illustrate some – but not all – of the legal issues that might arise.

PretiFlaherty

MODEL 1 Informal Cooperation

HALLMARKS:

- Organizations remain independent.
- Organizations are not “legally bound”.
 - Oral contract
 - MOU to avoid contract formation
 - What rights are created unintentionally?

PretiFlaherty

MODEL 1 Informal Cooperation

HALLMARKS:

- Often, roles and responsibilities are unclear, which can cause tension.
- May be okay for small, simple projects with a trusted partner.

PretiFlaherty

MODEL 1 Informal Cooperation

EXAMPLES:

- NEI-MeHAF Community of Learning
- Join an association of similar organizations to further shared interests.

PreTiFlaherty

MODEL 1 Informal Cooperation

EXAMPLES:

- Joint projects:
 - Joint program design
 - Joint fundraising (e.g., grant proposals)
 - Joint staffing

PreTiFlaherty

MODEL 1 Informal Cooperation

SAMPLE LEGAL ISSUES:

- The state encouraged you to collaborate and consolidate to improve efficiency, but now that you have . . .

PretiFlaherty

MODEL 1 Informal Cooperation



SAMPLE LEGAL ISSUES:

- Antitrust
 - State action doctrine
 - Right to address government (1st Amendment – Noerr-Pennington)

PretiFlaherty

MODEL 1 Informal Cooperation

SAMPLE LEGAL ISSUES:

- Anti-kickback
 - Solicit or receive any kind of remuneration for referral or arrangement
 - Felony, \$25,000, 5 years

PretiFlaherty

MODEL 1 Informal Cooperation

Anti-kickback cont'd:

- Affordable Care Act expansion
- False Claims Act liability
- Numerous safe harbors
- OIG Advisory Opinions

PretiFlaherty

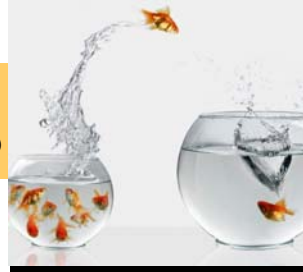
MODEL 1 Informal Cooperation

SAMPLE LEGAL ISSUES:

- Inadvertent partnership for tax purposes.

PretiFlaherty

MODEL 2 Contractual Relationship

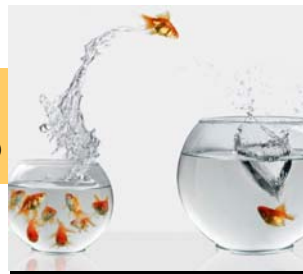


HALLMARKS:

- Organizations remain independent.
- Legally binding (?)
- Clear roles and responsibilities.
- Better for more complex and larger projects.

PretiFlaherty

MODEL 2 Contractual Relationship

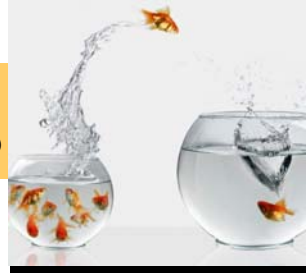


EXAMPLES:

- Joint Program as above, but bound by contract.

PretiFlaherty

MODEL 2 Contractual Relationship



EXAMPLES:

- Strategic Collaboration

PretiFlaherty

MODEL 2 Contractual Relationship

HYPOTHETICAL:

- Other terms specified:
 - Marketing and communications to clients regarding the arrangement.
 - Term and Termination
 - Boilerplate
 - Indemnification

PretiFlaherty

MODEL 2 Contractual Relationship

SAMPLE LEGAL ISSUES:

- Antitrust
- Anti-kickback
- Patient choice requirements
- DHHS licensing
- DHHS contracts (grant agreements)

PretiFlaherty

MODEL 2 Contractual Relationship

SAMPLE LEGAL ISSUES:

- DHHS reimbursement
 - change in provider number,
 - restrictions on assignment of Medicaid revenues;
 - theoretical false claims issues of billing under one provider and delivering the service through another

PreTiFlaherty

MODEL 2 Contractual Relationship

SAMPLE LEGAL ISSUES:

- Employment law issues – employee transfers or layoffs

PreTiFlaherty

MODEL 2 Contractual Relationship

SAMPLE LEGAL ISSUES:

- Loan covenants violation by terminating an income-generating program

PretiFlaherty

MODEL 3 Strategic Collaboration



HYPOTHETICAL:

- Charity 1 and Charity 2 like their collaborations to date and want to consolidate their client intake process.

PretiFlaherty

MODEL 3 Strategic Collaboration



HYPOTHETICAL:

- By contract:
 - Charity 1 will conduct the intake for new clients for both organizations, and
 - Charity 2 will reimburse Charity 1 for a portion of the costs of each client's intake, in proportion to the revenue each charity receives for serving that client during his first year.

PretiFlaherty

MODEL 3 Strategic Collaboration

SAMPLE LEGAL ISSUES:

- Anti-kickback problem: Charity 1 would be referring clients to Charity 2 for payment (intake reimbursement).

PretiFlaherty

MODEL 3 Strategic Collaboration

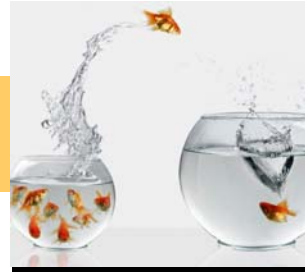


HYPOTHETICAL:

Because of anti-kickback concerns, Charity 1 and Charity 2 decide not to pursue the consolidated intake process. Instead, they will consolidate their administrative functions.

PretiFlaherty

MODEL 3 Strategic Collaboration



HYPOTHETICAL:

- By contract:
 - Charity 2 agrees to provide recordkeeping and accounting services to Charity 1.
 - Charity 1 agrees to pay Charity 2 for those services on at cost plus 5%.

PretiFlaherty

MODEL 3 Strategic Collaboration

HYPOTHETICAL:

- Other terms specified:
 - Term and Termination
 - Boilerplate

PretiFlaherty

MODEL 3 Strategic Collaboration

SAMPLE LEGAL ISSUES:

- HIPAA – BA agreement
- Medicare cost-reported services? Controlled entity? If so, cannot mark up 5%; can only provide at cost.

PretiFlaherty

MODEL 3 Strategic Collaboration

SAMPLE LEGAL ISSUES:

- Antitrust
- Anti-kickback
- DHHS licensing
- DHHS contracts (grant agreements)

PretiFlaherty

MODEL 3 Strategic Collaboration

SAMPLE LEGAL ISSUES:

- Unrelated business income tax (UBIT)

PretiFlaherty

MODEL 4 Joint Venture



HYPOTHETICAL:

- Charity 1 and Charity 2 are pleased with their combined back office and think they could raise additional revenues for their missions by selling administrative services to other 501(c)(3) organizations.

PretiFlaherty

MODEL 4 Joint Venture



HYPOTHETICAL:

They agree to

- form a new entity (“Newco”),
- transfer Charity 2’s administrative and accounting staff to Newco,
- purchase administrative and accounting services from Newco, and
- have Newco sell such services to other 501(c)(3) organizations.

PretiFlaherty

MODEL 4 Joint Venture

SAMPLE LEGAL ISSUES:

- **Why use a separate entity?**
- **What type of entity?**
 - Taxable corporation
 - Tax-exempt nonprofit corporation
 - Limited liability company (LLC)
 - Low-profit LLC (L³C)
- Tax implications, incl. UBIT (zero out income?)

PretiFlaherty

MODEL 4 Joint Venture

SAMPLE LEGAL ISSUES:

- New entity governance

PretiFlaherty

MODEL 4 Joint Venture

SAMPLE LEGAL ISSUES:

- HIPAA
 - New entity must comply with HIPAA
 - BA agreements with each customer
- Medicare: Controlled entity providing cost-reported services? If so, cannot mark up 5%; can only provide at cost.

PretiFlaherty

MODEL 4 Joint Venture

SAMPLE LEGAL ISSUES:

- Antitrust: Is there a market among 501(c)(3)s?
- Anti-kickback
- DHHS licensing
- DHHS contracts (grant agreements)

PretiFlaherty

MODEL 5 “Hard-Wired” Strategic Alliance

HYPOTHETICAL:

- Charity 1 and Charity 2 want to establish closer ties in order to provide complementary programs, eliminate duplicative services and administrative redundancy, and conduct joint fundraising and public relations.

PretiFlaherty

MODEL 5

“Hard-Wired” Strategic Alliance

- They remain separate corporations but adopt any of the following to stay aligned:
 - Shared senior staff
 - Overlapping board membership
 - Parent-subsidary structure, i.e., sole membership

PretiFlaherty

MODEL 5

“Hard-Wired” Strategic Alliance

- Consolidated financial reports
- Medicare: Controlled entity providing cost-reported services?
- To the extent that organizations achieve “economic integration”, both anti-trust (assuming market share is not excessive) and anti-kickback issues may diminish in significance.