

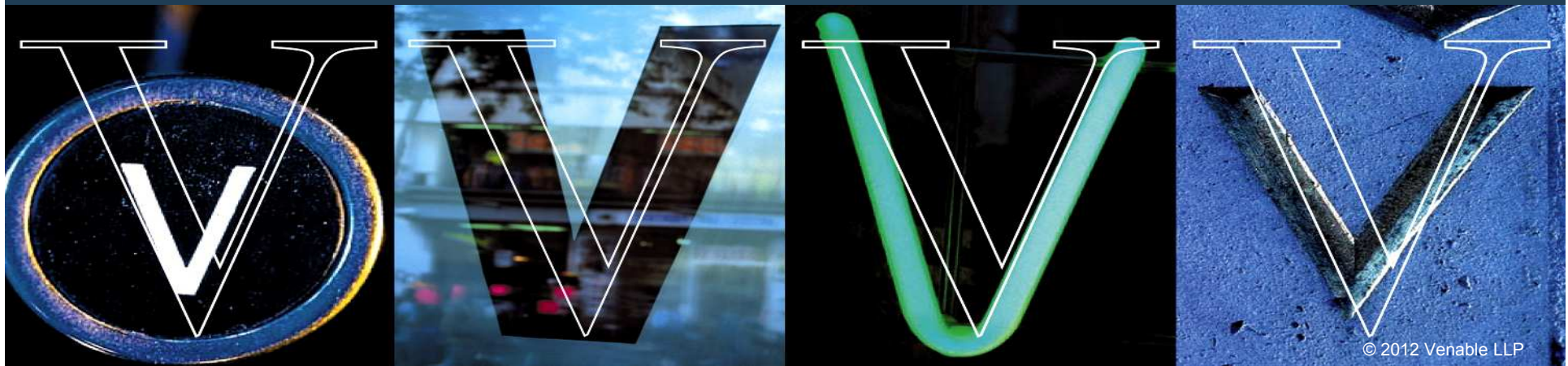


Nonprofit Chapters and Affiliates: Key Legal Issues, Pitfalls and Successful Strategies

Thursday, July 12, 2012
12:30 p.m. - 2:00 p.m. EDT
Venable LLP
Nonprofit Organizations Practice
Washington, DC

Moderator:
Jeffrey S. Tenenbaum, Esq.

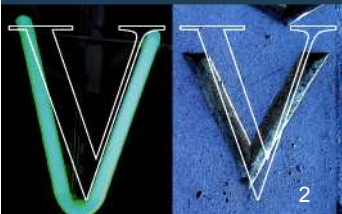
Panelists:
George E. Constantine, III, Esq.
Janice M. Ryan, Esq.



Upcoming Venable Nonprofit Legal Events

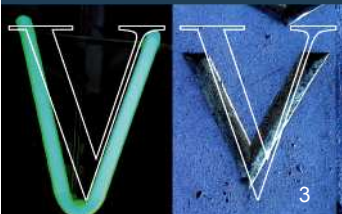
August 2, 2012 - [How Nonprofits Can Raise Money and Awareness through Promotional Campaigns without Raising Legal Risk](#)

September 13, 2012 – Details Coming Soon



Today's Discussion

- Common affiliation structures
- Key legal pitfalls
 - Attribution of liability to affiliated entities
 - Intellectual property ownership and use
 - Antitrust considerations
 - Governance-related challenges
- Special tax considerations
 - Group tax exemption
 - 501(c)(3) affiliates of non-501(c)(3) entities (e.g., association foundations)
- Managing affiliate relationships
 - Affiliation agreements, and other successful strategies



Common Affiliation Structures

Reasons to Affiliate

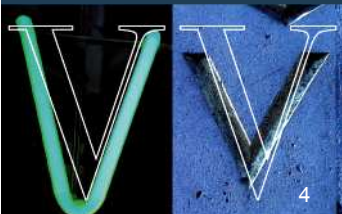
Tax
Restrictions

Fundraising
Opportunities

Maximizing
Resources

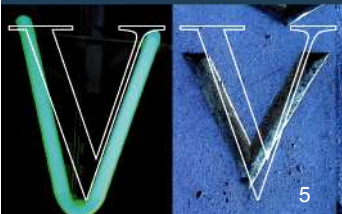
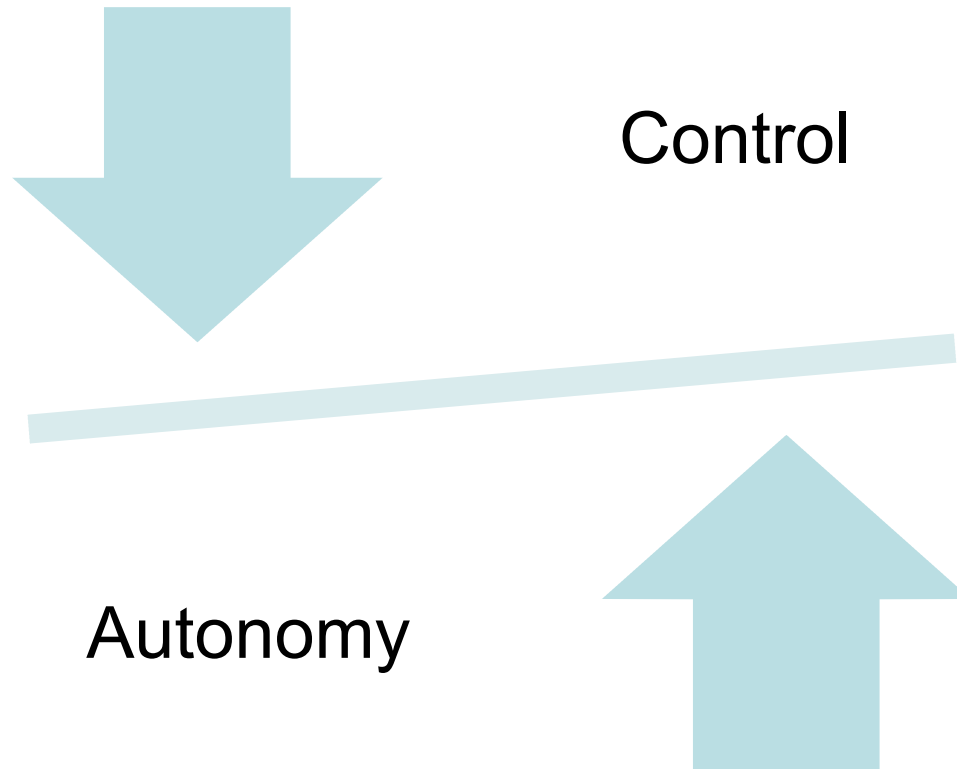
Geographic
Focus

Managing
Liability
Exposure



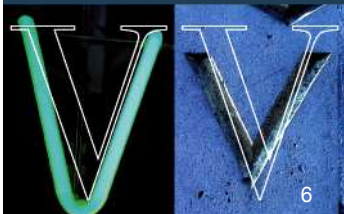
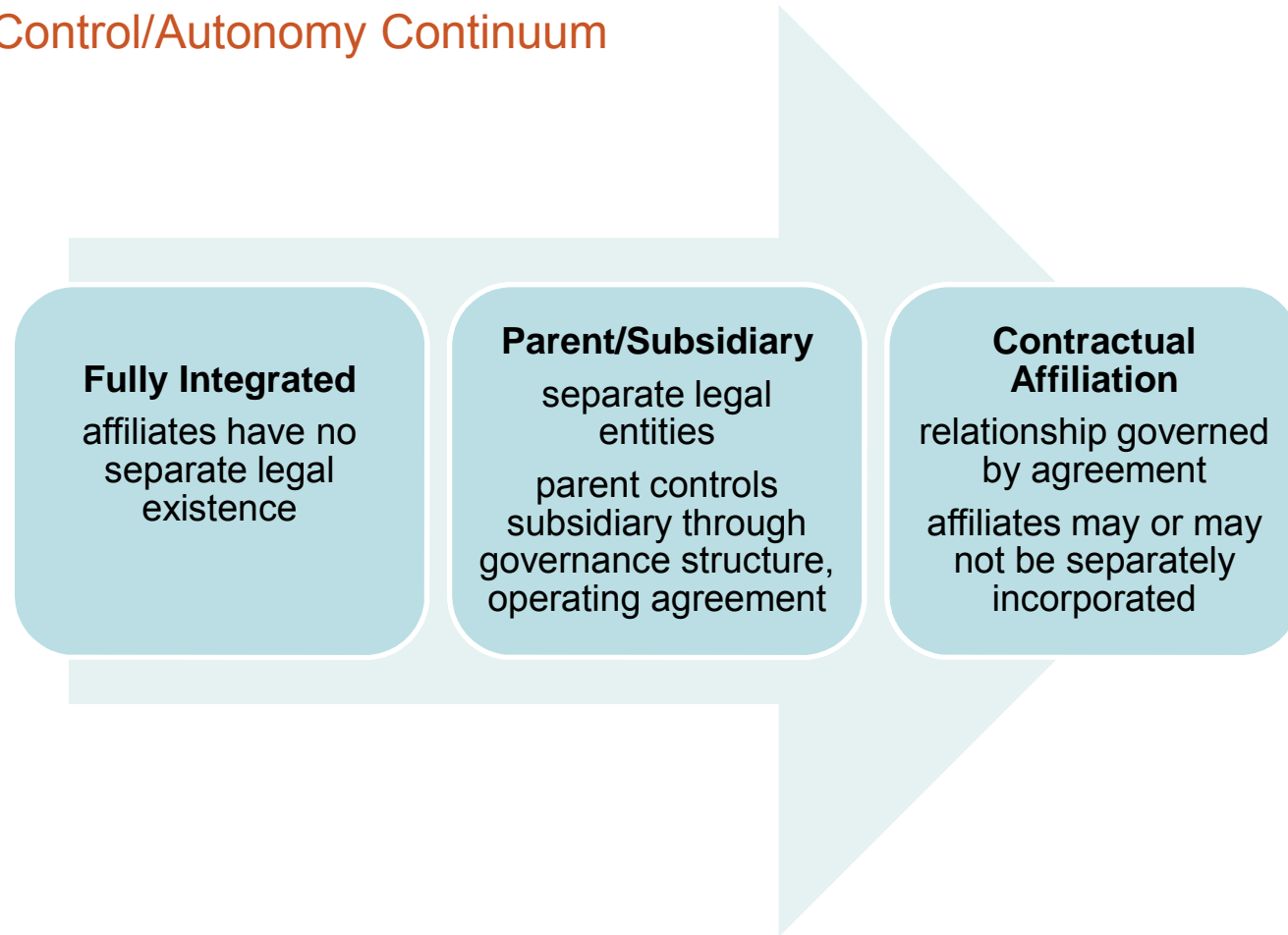
Common Affiliation Structures

Control v. Autonomy is Key Factor in Choice of Structure



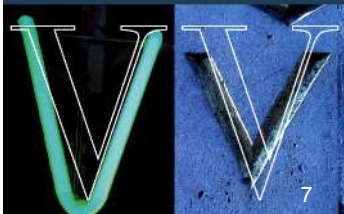
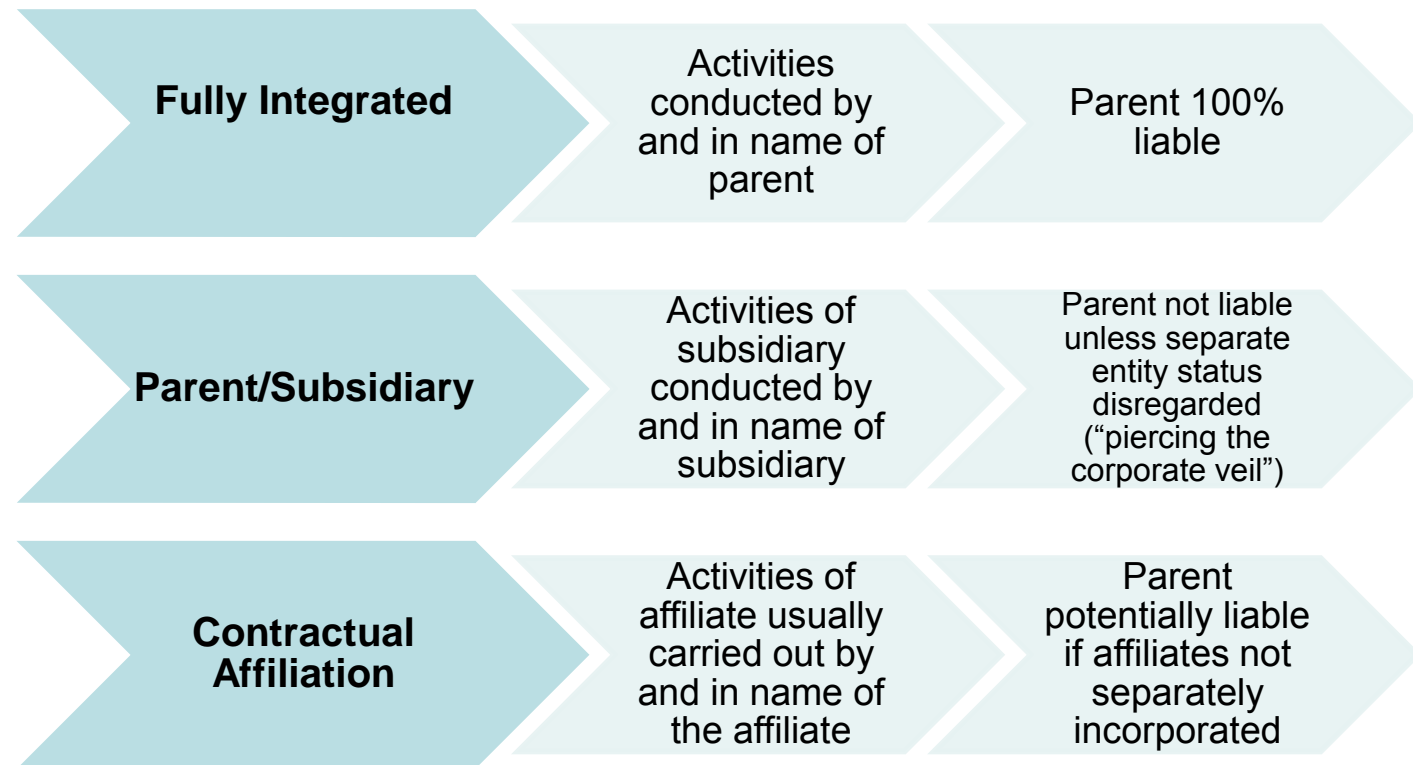
Common Affiliation Structures

Control/Autonomy Continuum



Common Affiliation Structures

Risk Profile of Common Affiliation Structures



Common Affiliation Structures

Other Characteristics

Fully Integrated

- Common for entities with affiliates dedicated to specific subject-matter interests; also sometimes used by entities with geographic-based affiliates
- Full integration minimizes administrative burden of maintaining separate legal entities

Parent/Subsidiary

- Common for association-related foundation relationships or other closely-affiliated relationships
- Maximizes control while minimizing liabilities

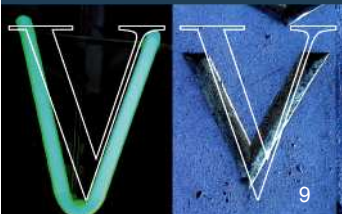
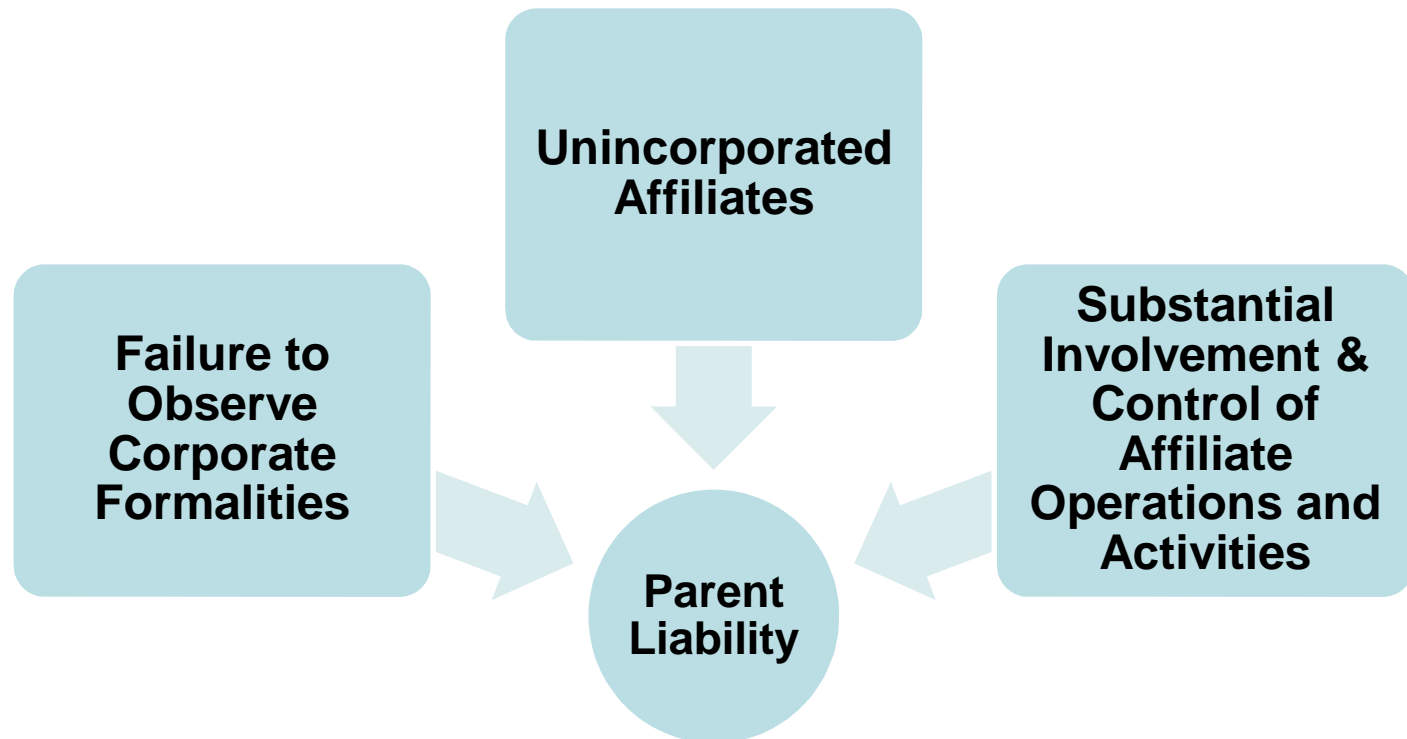
Contractual Affiliation

- Common for “federation” model of related national, regional, state, or local associations
- Degree of integration or autonomy varies to suit organizations’ needs and preferences
- But beware unincorporated affiliates and/or absence of affiliation agreement



Key Legal Pitfalls

Attribution of Liability to Parent (Tort, Contract, etc.)



Key Legal Pitfalls

Intellectual Property Ownership and Use

Names & Logos

- Common practice for affiliate name to include parent's name
- Disputes over use of name likely in the event of disaffiliation
- Specify trademark license terms in affiliation agreement and/or bylaws or policies
- Consider trademark registration (U.S. and foreign, if operating internationally)

Publications & Data

- Address ownership and licensing of membership lists, data, and works created by or through affiliates in affiliation agreement or on a project-by-project basis as necessary
- Consider 501(c)(3) tax implications before assigning rights to a non-501(c)(3)



Key Legal Pitfalls

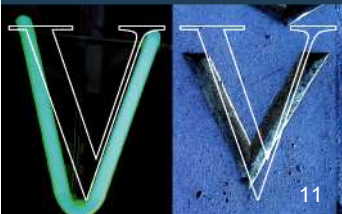
Antitrust Considerations

Price Restrictions

Territorial
Restrictions

Common
Membership
Requirements

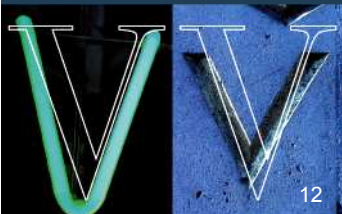
Facilitating or
Participating in
Anticompetitive
Activities of Affiliate



Key Legal Pitfalls

Governance-related Challenges

- Fiduciary duties
 - Overlapping directors on parent and affiliate boards
 - Affiliate representatives on parent board
- Common governance structure requirements
 - What works for parent might not be best for affiliate
- Common membership requirements
 - Qualifications
 - Termination
- Managing Affiliate Status
 - Threshold for granting charter
 - Dispute resolution
 - Inactive or probation status
 - Disaffiliation
- Financial management
 - Dues collection arrangements
 - Internal controls at affiliate level



Special Tax Considerations

Federal Group Tax Exemption

Application Process

Increasingly Lengthy
& Expensive Process

Changes May Be
Forthcoming

Benefits & Limitations

Substantial Benefit
for Subordinates

“General Supervision
or Control” Element &
Liability Risk

UBIT
Federal Employment
Taxes
State & Local Taxes

Compliance

Annual Filings &
Automatic
Revocation

Monitoring
Subordinate Activities

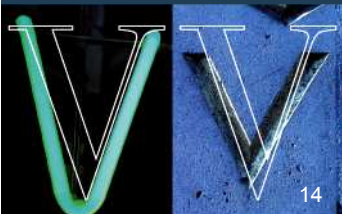
Training



Special Tax Considerations

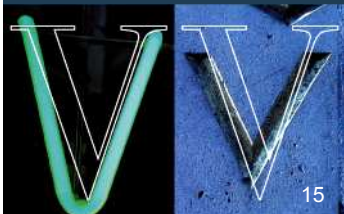
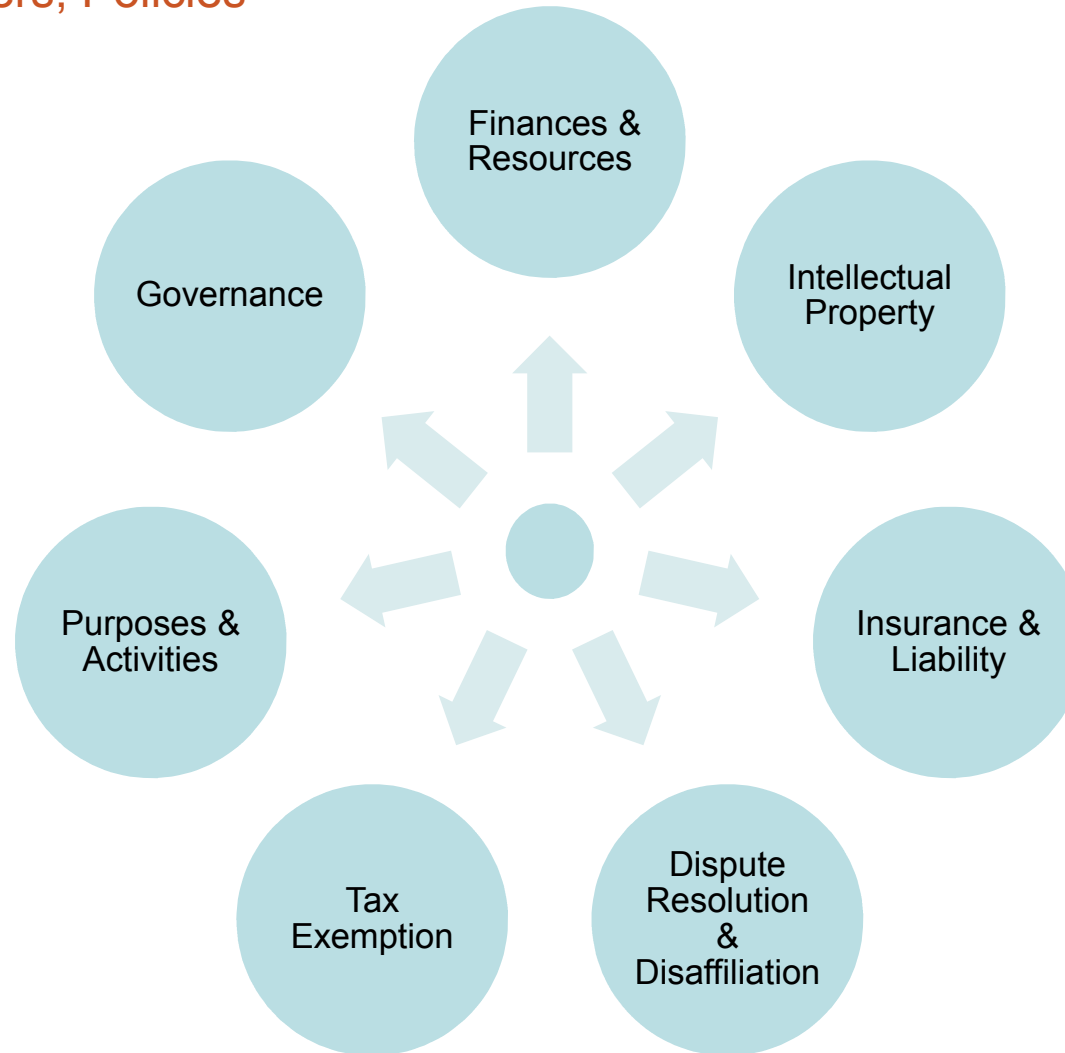
501(c)(3) Affiliates of Non-(c)(3) Entities

- Private benefit and private inurement
- Transferring funds and other resources from (c)(3) to non-(c)(3)
 - Grants to non-(c)(3)s
 - Providing fair market value consideration
- Attribution of political and lobbying activities to (c)(3)
 - Shared websites



Managing Affiliate Relationships

Key Elements for Agreements, Articles & Bylaws, Affiliate Charters, Policies



Managing Affiliate Relationships

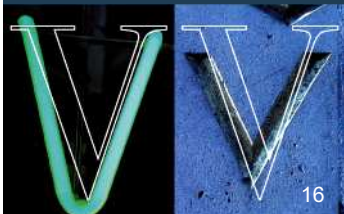
Key Elements for Agreements, Articles & Bylaws, Affiliate Charters, Policies

Governance

- Parent entity control mechanisms
- Requirements for governance structure, nominations & elections, etc.
- Common membership requirements

Finances & Resources

- Cost allocation for shared staff, facilities, and other resources
- Allocation of revenues, fundraising requirements
- Dues collection arrangements
- Internal controls requirements
- Annual reports for group exemption purposes



Managing Affiliate Relationships

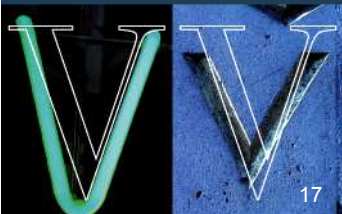
Key Elements for Agreements, Articles & Bylaws, Affiliate Charters, Policies

Purposes & Activities

- Common (or at least not inconsistent) mission and purposes
- Expectations and parameters for affiliate activities; geographic territory (but note franchise issue)
- Support and other services, if any, to be provided by parent to affiliate

Tax Exemption

- Expectation for affiliates to maintain tax-exempt status (group exemption or otherwise)
- Reasonable cost allocation for shared staff and facilities to avoid adverse tax consequences (UBIT, private benefit, private inurement)



Managing Affiliate Relationships

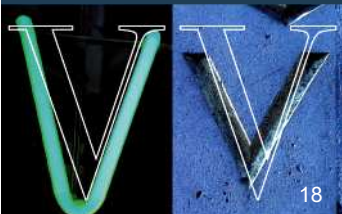
Key Elements for Agreements, Articles & Bylaws, Affiliate Charters, Policies

Intellectual Property

- Ownership and license terms applicable to use of names, logos, and other trade or service marks
- Ownership and license terms applicable to use of membership lists and other copyrighted or proprietary data or materials

Liability & Insurance

- Confidentiality
- Limitations on authority to speak or act on behalf of affiliated entity
- Indemnification
- Insurance expectations

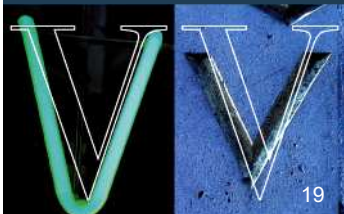


Managing Affiliate Relationships

Key Elements for Agreements, Articles & Bylaws, Affiliate Charters, Policies

Dispute
Resolution
&
Disaffiliation

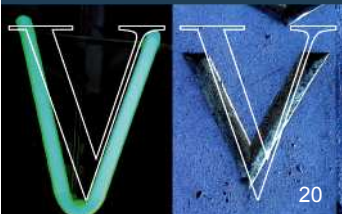
- Establish clear procedures and authorities governing dispute resolution, including and up to probation or disaffiliation
- Consider leverage of respective parties
- At minimum, address parent's right to terminate license of name, logo, and other trade or service marks



Managing Affiliate Relationships

Other Successful Strategies

- Invest in dedicated affiliate or chapter relations staff
- Provide affiliate leaders with resources and training on fundamentals of nonprofit governance and tax-exempt status requirements
- Include affiliate leaders in decision-making where appropriate
- Insurance



Questions and Discussion

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