

Key points re: managing partner relationships

Facts:

The branded partners, through a licensing and consulting agreement with you, will be operating a program of your design under your brand. You will be in ongoing contact with partners, including providing technical assistance and consulting support, and engaging in regular data collection and performance evaluation.

Legal concern:

The concern arises under a legal doctrine called vicarious liability. Under that doctrine, in some cases a licensor (you) may be held liable for the actions of a licensee (partner), including employment decisions, student and other third party interactions, and contract obligations. The key issue in determining liability is whether the licensor controls the licensee's day-to-day activities giving rise to the claim, or if external communications are such that third parties believe licensor and licensee are one and the same.

Some factors courts look to in determining vicarious liability:

- Licensor's ability to hire and fire licensee's employees, control licensee's wage and hour practices, and mandate personnel policies (e.g., providing employee manuals)
- Licensor's control over licensee's contract negotiations and decisions
- Use of licensor's name or trademark in external communications concerning licensee operations without also including licensee's name
- Licensee's actions or statements that identify licensee with licensor without making clear that licensee is a separate independent entity

Reducing the risk here:

- Articulate program requirements to partner in terms of core elements, standards, and desired outcomes
- Act in a manner such that partner program management takes place at partner level, including personnel decisions and policies, budgeting decisions, entry into contracts, and compliance with grants, government and other contracts
- Frame technical assistance to partners as information provision, guidance, and support, not mandate or directive
- Use consistent description of partner relationships in external communications (e.g., website, grant applications, financial statement notes) that make clear that partners are independent, locally-controlled entities (see attached Appendix for examples)
- Provide partners standard language for external communications about your relationship with partner, including communications with funders, businesses, and other contract parties (see attached Appendix for examples)
- Advise partners to make clear to employees that partner, not Client, is employer and makes all hiring, firing, and performance management decisions
- Include independent actor provision in all contracts between you and partners

What you can do:

Your relationships with partners provide multiple avenues through which Client can carry out proper program execution. They include, among other things, Client's ability to set standards, specify outcomes, provide technical guidance, require submission of data and reports, monitor use of the Client trademark, coordinate advocacy activities, and require partner to hold itself out as an independent entity. At a more macro level, the fact that partners can and do operate other programs is especially helpful in demonstrating appropriate separation and local control, as is the partners' flexibility under the [] and their ability to develop and deploy derivative content.

Additional protections:

Our draft licensing and consulting agreement requires the partner to indemnify Client with respect to claims against Client arising by virtue of the partner's actions in carrying out the program. The agreement also requires the partner to maintain insurance satisfactory to Client, and includes provisions reflecting the risk reduction principles noted above.

Appendix: Sample relationship descriptions

For use by Client:

Use	Sample Standard Description
Website / public relations	Other nonprofits sharing our goals operate Client programs in their communities under agreement with us. These are separate, independent nonprofits that operate their own programs as well. We don't control them, they're not our agents, and they manage their own activities, including program delivery, funding, contracting, and personnel matters. We're delighted to have these nonprofits bring their organizational strengths and local knowledge to bear in bringing the Client program to new communities across the country.
Financial statements	Other nonprofits operate the Client program under licensing and consulting agreements with Client. These are separate, independent nonprofits that operate their own programs in addition to the Client program. These organizations are not controlled by, or contractors or agents for, Client; they manage their own activities, including program delivery, funding, contracting, and personnel matters.
Grant proposals	[In communities outside _____,] other nonprofits operate the Client program under licensing and consulting agreements with Client. These are separate, independent nonprofits that operate their own programs in addition to the Client program; they are not contractors or agents for Client. The licensing and consulting agreements provide for Client's ability to set program delivery standards, specify outcomes, provide technical guidance, learn from partners, collect and evaluate performance data, monitor use of Client trademarks, and coordinate advocacy activities.

For use by partners:

Use	Sample Standard Description
Website / public relations	We operate the Client program under an agreement with Client, a nonprofit organization based in [_____], which shares our deep commitment to creating opportunities for youth and [_____] by supporting a [_____] program. Client is a separate, independent organization that developed the program model and licenses it to us. We operate and manage the Client program in addition to our other programs.
Financial statements	[Partner] operates the Client program in [Territory] under an agreement with Client, a nonprofit organization based in [_____]. Client is a separate organization and is not our parent organization or otherwise related to [Partner], and [Partner] is not an agent or contractor for Client.
Grant proposals	[Partner] operates the Client program in [Territory] under an agreement with Client, a nonprofit organization based in [_____]. Client is a separate organization and is not our parent organization or otherwise related to [Partner]. [Partner] is not at agent or contractor for Client. The affiliation agreement provides for use by [Partner] of the program model and materials, receipt of technical assistance and guidance from Client, and regular interaction with Client.