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The Ensemble Agreement—Why You Need One

by ZACHARY V. MOEN

We've all heard the horror stories. An ensemble decides to eject one of its members. Or the group starts getting into acrimonious battles over business and artistic decisions. Or the process of dissolving an ensemble puts its members in legal and financial limbo.

The fact is, disasters like these can be avoided through the adoption of an ensemble agreement: a written contract, signed by the ensemble members, that outlines the rights and responsibilities of each person. A good ensemble agreement spells out the ensemble's legal structure and ownership, the formulas for dividing income and expenses, and the apportioning of intellectual property rights. It will provide

methods for resolving disputes and effecting personnel changes—even for the eventual dissolution of the ensemble. It's a way for ensemble members to protect themselves, their assets, and the ensemble itself.

Despite the indisputable value of these agreements, many ensembles carry on without them. They've got plenty of reasons: They never get into fights and feel that they work so well together that an agreement is unnecessary. They worry that airing potential areas of conflict will put a strain on their dealings with one another. Or they think it just isn't important.

None of these excuses should keep you from drawing up an agreement. The survival of your ensemble may depend on it.

Negotiating an Ensemble Agreement: When and How

Ideally, you'll negotiate an agreement soon after your ensemble is formed. At this point, all of the members will presumably be on good terms with each other. This very factor may make it seem like you don't need an ensemble agreement: since you all get along well, the thinking goes, you'll easily be able to work out any problems that will arise in the future.

Unfortunately, this belief has been proved wrong time and time again. In fact, most ensembles that find themselves involved in protracted disputes started happily—the members at one time would never imagine that an unpleasant situation would pop up.

A Question of Identity

The entity type you choose for your ensemble can affect liability protection, formalities required, income potential, and tax issues. Here are some general considerations:

Corporations and LLCs, if managed correctly, have the benefit of protecting the members from incurring personal liability for the ensemble's debts or obligations. Members of a partnership, on the other hand, are personally liable for the ensemble's debts and liabilities.

Corporations (both for-profit and nonprofit) typically require observance of corporate formalities. For instance, they need to have a board of directors, whose meetings require formal minutes. Partnerships and LLCs typically require very few formalities.

Partnerships, for-profit corporations, and LLCs are owned by their members or shareholders, who are thus entitled to receive profits generated by the entity. Fundraising will probably be easier for a nonprofit organization; but in that case, the members don't own the ensemble: they receive salaries, while any profits are used for operations.

A for-profit corporation is taxed on its earnings, and the individual members also pay personal income taxes on the share of those earnings that they receive. A nonprofit corporation is typically exempt from paying taxes as long as the income is from activities related to its charitable purpose. (Ensemble members, of course, are still required to pay personal income taxes on their salaries.) In partnerships and LLCs, profits are "passed through" to the members' personal tax returns, rather than being subject to separate taxation.

Once there's tension or an open dispute, it will be difficult, if not impossible, to negotiate an ensemble agreement.

Of course, even when the ensemble members are on good terms, it's important to ensure that they *remain* on good terms by the time that the agreement has been finalized. There is a common saying in the rock music world that "the best way to break up the band is to try to negotiate a band agreement." This concern is shared by many chamber musicians. But in my experience, if the process is structured properly, you can avoid unpleasant results.

The first step is to select an experienced attorney. You can find templates on the Internet for creating an ensemble agreement, but the result will typically fail to adequately address the specific needs of the ensemble. The ensemble members may not understand the terms, in which case a template agreement may actually be more harmful than having no agreement at all.

Instead, look for an attorney who makes all of the members feel comfortable. This person isn't just there to draw up a document; she also has to work as a neutral facilitator during discussions. In such negotiations, it helps if the lawyer meets with the entire ensemble at once. This way, an agenda of issues that need to be addressed can be presented to everyone at the same time; and—to ensure that everyone is heard and a respectful and a productive atmosphere maintained—a list of ground rules can be set out. If the group members have had an active role in the creation of the agreement, they're more likely to adhere to its terms when problems arise in the future.

Key Considerations

Here are some of the issues that an ensemble agreement will typically address. Note that this list isn't exhaustive, nor will your own agreement necessarily address all of these issues. Just as each ensemble is unique, so is each ensemble agreement.

LEGAL STRUCTURE One of the threshold issues to be decided is the selection of the appropriate legal entity for the ensemble: partnership, corporation, 501(c)(3) nonprofit corporation, limited liability company (LLC). Each member will have a defined interest or share in the entity (and, by extension, in the ensemble itself). (See "A Question of Identity," opposite.)

GOVERNANCE The term "governance" refers to how artistic and business decisions are made among the members. This aspect of the agreement will spell out procedures for dealing with the various types of issues. For certain routine decisions, for example, an individual member may be given the authority to bind the ensemble without consulting the other members. For more important decisions—the artistic direction of the ensemble, repertoire selection, tour dates, recording agreements, etc.—a majority or unanimous vote of the members might be required. Most ensembles will grant all members an equal vote. In some cases, however, the agreement will specify that votes of certain members are more heavily weighted than the others are. The agreement should also specify who has the authority to sign checks on behalf of the ensemble.

RESPONSIBILITIES OF MEMBERS

The ensemble agreement should outline the responsibilities of each member. Depending on the ensemble's preferences, the list may limit itself to the basic responsibilities of all members (such as attending scheduled rehearsals and performances), or it could include specific responsibilities for each member.

DIVISION OF INCOME AND EXPENSES

The way each member shares in the ensemble's income and expenses should be spelled out in the agreement. Some ensembles may split earnings evenly among the members. Others may make distinctions between different kinds of income—for instance, if certain members compose the ensemble's music, they may receive a greater share of publishing income. The agreement should also outline how expenses will be shared among the members, and under what circumstances individual members will be required to contribute additional capital to the ensemble.

INTELLECTUAL PROPERTY RIGHTS

Any ensemble generates a certain amount of intellectual property, from the trademark in the ensemble name itself to the copyright in recordings and compositions. There are various ways to structure these rights, but many agreements state that intellectual property belongs to the ensemble itself, not its members. When one of the musicians, whether a current or former member, wants to use any of the ensemble's intellectual property, he must abide by the terms of the ensemble agreement.

PERSONNEL CHANGE Resignations, hirings and firings can stress a group to its breaking point. The agreement should outline the process for auditioning new members, specifying how the auditions should be announced and conducted and, most important, spelling out how the existing members should make their selection—by unanimous or decision majority vote? The agreement should also specify the process for resignations (how much notice is required?) and especially firings: What grounds can be invoked? What *vote* is required? What are the ensemble's financial responsibilities to a departing member? What claims, if any, does the departing member have on the ensemble's name, recordings, or compositions? Many agreements also include a clause preventing former members from making disparaging remarks about the ensemble.

DISSOLUTION OF THE ENSEMBLE The agreement should state the circumstances under which the ensemble will dissolve and no longer exist. This can occur, for example, upon a majority or unanimous vote of the members, upon the withdrawal of certain members, or upon the withdrawal of the majority of the original members. The agreement should also outline the process that will be used to dissolve the ensemble.

How will the assets be distributed? How will debts be paid? What rights will the former members have to use the ensemble name or share in revenue from recordings?

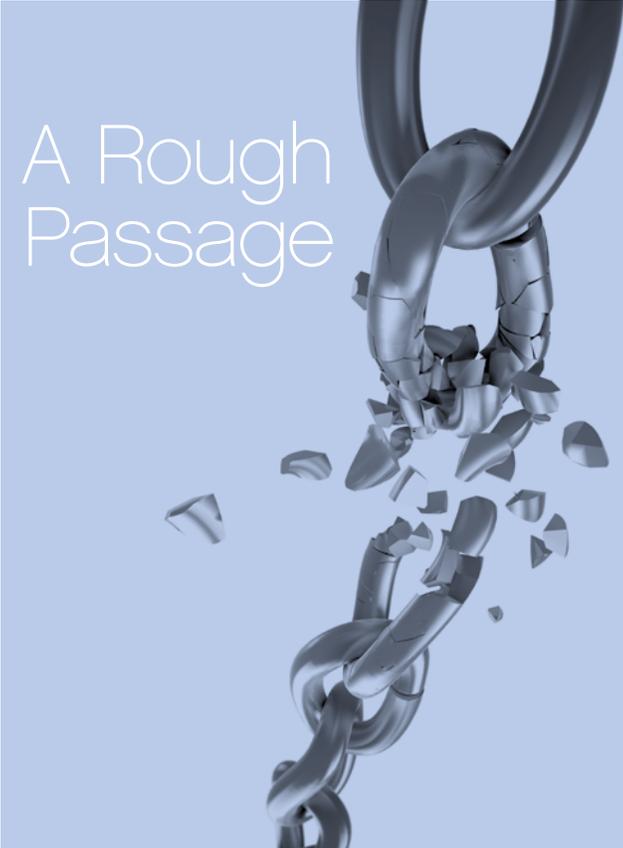
DISPUTE RESOLUTION AMONG THE MEMBERS If a disagreement among the members does arise, the ensemble agreement can outline procedures for resolving it. This may seem a bit superfluous at first—can't everybody just talk things out? But in fact, many people find that, even when minor disagreements crop up, it's good to have an agreed-upon process in place. It can be as simple as allowing any member to request a meeting with her colleagues and air her concerns. In the event of a major dispute that the members may not be able to resolve among themselves, the agreement should contain provisions specifying legal means toward resolution.

Anyone who has been involved in litigation likely knows that it quickly becomes a costly, lengthy, and burdensome distraction with an uncertain outcome. Accordingly, I often recommend that the members agree to participate in nonbinding mediation prior to taking any formal legal action. Working with a trained mediator provides a structured opportunity to resolve the dispute without the need for protracted and costly legal proceedings. I have been

a mediator, as well as an attorney representing a party in mediations; and I have often been impressed by the effectiveness of the mediation process. In one case in which I was involved, at the outset of the mediation, the parties didn't even want to be in the same room and refused to even look at each other. Several hours later, after opening the lines of communication, an agreement had been reached, a protracted legal battle had been avoided, and the process of healing the relationship between the parties had begun.

You have spent a lot of time and energy ensuring the artistic excellence of your ensembles. I now urge you to take the effort to put an ensemble agreement in place. It will protect all that you've worked so hard to achieve.

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A Rough Passage

A successful quartet has several sold-out concerts and a recording session for a new CD scheduled over the next month. But after some unresolved internal disagreements over repertoire and business arrangements, one member informs her colleagues that she will be resigning from the quartet immediately. Since she is the person who came up with the quartet's name, she says she won't permit the other members to use it. Moreover, the quartet has plans to perform and record some of her own compositions, but now she withdraws her permission for their use.

Since the quartet has no ensemble agreement, it lacks a method for resolving these problems. It is faced with the possibility of canceling the concerts and recording, and perhaps disbanding entirely. If the group had had an ensemble agreement, it would probably have processes in place for making repertoire decisions and for resolving disputes. Even if those mechanisms did *not* prevent the member from resigning, the ensemble agreement would address who has rights to use the ensemble name and compositions, as well as the rights and responsibilities of the withdrawing member.