



The Case for Ensemble Agreements

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The saga of the Audubon Quartet could well send shivers down the spine of any ensemble musician. In this widely publicized case, the quartet fired its first violinist, who then turned around and sued his three former colleagues, garnering a judgment of \$611,119.24. At the end of the epic, six-year legal battle, the remaining members had lost their faculty positions and management. Two of them had declared bankruptcy. The three were almost forced to sell their instruments to pay the judgment, saved only by a gift from an anonymous donor.

But the whole disaster likely could have been avoided if the quartet had an ensemble agreement: a written contract between the members of the ensemble that outlines the rights and responsibilities of each of the members. An ensemble agreement will spell 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—and the testament of cautionary tales like the Audubon Quartet's—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 each other. Or they think it just isn't important.

None of these excuses should keep you from drawing 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 proven 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 imagined that an unpleasant situation would pop up. Now that there's tension or an open dispute between the members, 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 form 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 of this document, and it can actually be more harmful than having no agreement at all.

You should 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. When representing an ensemble in these negotiations, the lawyers at my firm like to meet with the entire ensemble at once. We bring an agenda of issues that need to be addressed and a list of clear ground rules for the discussion that ensure that everyone is heard and a respectful and productive atmosphere is maintained. Our training as mediators lets us facilitate a productive discussion of the relevant issues and prepare a written agreement accordingly. We have found that when done in this manner, instead of evoking hostilities, the negotiations create a sense of unity and purpose among the musicians. Since they've 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 to select the appropriate legal entity for the ensemble. Each member will have a defined interest or share in the entity (and, by extension, in the ensemble itself). There are several options available: a partnership; a corporation; a 501(c)(3) non-profit corporation; a limited liability company (LLC) There are many factors to consider when choosing an appropriate entity type,

including liability protection, formalities required, income potential, and tax issues. Although it is impossible to fully consider these factors in this article, the following are some general considerations:

- A corporation or LLC, if managed correctly, has the benefit of protecting the members from incurring personal liability for the ensemble's debts or obligations, while the members of a partnership are personally liable for the debts and liabilities of the partnership.
- Corporations (both for profit and non-profit) typically require observance of corporate formalities, such as having a board of directors, keeping formal minutes of regular board meetings, preparing formal resolutions, etc. while partnerships and LLCs typically require very few formalities.
- Partnerships, for-profit corporations, and LLCs are for the benefit and owned by their members or shareholders, who are thus entitled to receive profits generated by the entity. A non-profit corporation is not owned by its members and is for a public purpose. Thus, ensemble members would receive a salary from the entity and any profits would be used for the operation of the organization. However, non-profit status may be beneficial for fundraising and receiving grants.
- 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 non-profit corporation is typically exempt from paying taxes as long as the income is from activities related to its charitable purpose, although the ensemble members are still required to pay personal income taxes on the salaries that they receive from the nonprofit corporation. In partnerships and LLCs, the profits from the entity are not taxed separately, but are instead "passed through" to the individual members' personal tax returns.

Governance. The term "governance" refers to how artistic and business decisions will be made among the members. The governance aspect of the agreement will spell out procedures for dealing with different 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 that votes of certain members are more heavily weighted than others'. 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, whether it's the trademark in the ensemble name itself, or the copyright in recordings and compositions it has produced. It is critical that the agreement spells out who owns these rights. 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 utilize any of the ensemble's intellectual property, he must abide by the terms of the ensemble agreement.

Admission, Removal, and Withdrawal of Members. The most common cause of tension within an ensemble is personnel change. Resignations, hirings and firings can all stress the 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: Does the decision need to be unanimous? Will a majority vote suffice? The agreement should also specify the process to be employed to remove an existing member or for an existing member to voluntarily withdraw from the ensemble, and the rights and responsibilities of the departing member. For example, how much notice is required? What grounds can be invoked to remove a member? What *vote* is required to remove a member? 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.

Assume, for example, that a successful quartet has several sold out concerts and a recording session for a new CD scheduled over the next month. After several unresolved internal disagreements over repertoire and other terms for the concerts and CD, one member informs her fellow members that: (1) she will be resigning from the quartet immediately; (2) the quartet no longer has her permission to use its name, which she says belongs to her because she came up with it; and (3) the quartet no longer has her

permission to perform or record several of her original compositions that were slated to be part of the upcoming concerts and recording.

Without an ensemble agreement, there is no clear resolution to these issues, and the quartet is faced with the possibility of cancelling the concerts and recording, and perhaps disbanding entirely, because it is missing a member and its right to continue use of its name and certain compositions is in dispute.

An ensemble agreement might have avoided this problem in the first place by providing the process by which decisions on repertoire are made and by providing a mechanism for dispute resolution. And 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.

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 Between the Members. If or when 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.. Will it involve arbitration or litigation? Where will the legal process take place, and which state's laws will apply? How will the members receive legal notice?

Of course, 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 non-binding mediation prior to taking any formal legal action. This provides a structured opportunity to resolve the dispute without the need for protracted and costly legal proceedings. I have been both the mediator and an attorney representing a party in mediations, and I have often been impressed by the effectiveness of the 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 with each other 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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