
**LEXPUNK LEGAL DEFENSE PROTOCOL v1.0**

***WARNING!****

*This Operator's Manual and the LeXpunK Legal Defense Protocol are provided for general educational purposes only. When participating in DAOs and Multisigs,* ***you*** *are solely responsible for* ***your own*** *activities and risks. The authors strongly encourage all DAO/Multisig participants to* ***retain their own personal legal counsel*** *to provide advice and prepare custom documentation appropriate to their unique facts and circumstances.*

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***it wouldn't be a lawyer thing without one***

1. Introduction

Decentralized Autonomous Organizations ("***DAOs***") and smart-contract based multi-private-key-signature schemes ("***Multisigs***") are quickly gaining traction as an attractive way for communities or small groups to organize, raise funds, and conduct governance in relation to decentralized software systems. Democratized organization represented by rules embedded in open-source code is an egalitarian concept – and understandably, many have enthusiastically jumped on board to revolutionize

the corporate form. Protocols and interfaces for deploying customized DAO smart contracts[1] and even DAO smart-contract/legal-contract pairings[2] enable DAOs to be created at the push of a button. The rise and excitement of Web3 has allowed flash DAOs' to assemble and raise extraordinary funds overnight.[3]

A wide range of legal questions has accompanied the rise in popularity of DAOs and Multisigs. Legal scholars have questioned, for example, whether DAO members can lawfully engage in "code deference" to determine legal outcomes based on rules embedded in smart contracts[4]. Furthermore, participants in DAOs and Multisigs increasingly find themselves targets of private litigation–e.g., by users of an associated smart contract system which suffers a 'hack' or 'exploit'--and regulatory scrutiny–e.g., by the U.S. Securities and Exchange Commission, which published "The DAO Report" in 2017[5] and has since launched numerous investigations related to DAOs. These questions and adversarial actions have inspired significant interest among DAO/Multisig participants in implementing legal defense measures that could enable them to keep building with greater peace of mind.

LeXpunK is an army of lawyers, degens, and developers united under the purpose of driving legal innovation for the benefit of DAOs and developers of decentralized technologies. To address these legal concerns, LeXpunK has created and open-sourced the LeXpunK DAO/Multisig Legal Defense Protocol, which is made up of:

- this Manual, which summarizes the legal threat landscape for DAOs/Multisigs and explains how to use the Legal Defense Protocol to mitigate these threats;
- the LeXpunK DAO Charter, which enables DAO members to set certain ground rules about the nature of the DAO's purposes and rules.
- the LeXpunK DAO/Multisig Joint Defense Agreement, which enables persons participating in unincorporated DAOs/Multisigs to obtain the benefits of attorney-client confidentiality and attorney-client privilege when prosecuting or defending claims where they share a mutuality of interest, claims or defenses–this agreement also includes a Joinder Agreement and Non-Disclosure Agreement as exhibits;
- the LeXpunK Multisig Participation Agreement, which enables Multisig participants to set certain ground rules about the nature of their activities, responsibilities to their communities and responsibilities to one another; and
- the LeXpunK Model Yield Disclaimers for yield-bearing DeFi protocols;

The LeXpunK Legal Defense Protocol is intended to be an evolving open-source community-driven legal risk management toolkit. Accordingly, we are calling this first batch of documents "v. 1.0" but anticipate there is much room for improvement of these forms, as well as adding new tools, as cryptolaw evolves and the LeXpunK Army continues pursuing its mission.

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[1] *See* e.g. Aragon Client (https://client.aragon.org/#/), Aragon Govern (https://govern.aragon.org/#/), DAOhaus (https://app.daohaus.club/), DAO DAO (https://daodao.zone/starred), JuiceBox (https://juicebox.money/#/create)
[2] *See* e.g.KaliDAO (https://app.kalidao.xyz/), Syndicate (https://app.syndicate.io/)
[3] *See* Nilay Patel, "From a Meme to $47 million: ConstitutionDAO, Crypto, and the Future of Crowdfunding", *The Verge*
[4] *See* Andrew Hinkes, "The Limits of Code Deference".
[5] SEC Release No. 81207 / July 25, 2017: Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO.

DAOs and Multisigs, and the technologies, products and services they create, are at the cutting edge of social movements, with roots firmly planted in anarchism and civil disobedience. When done right, they raise the prospect that people can self-organize on an anonymous, decentralized basis in a way that achieves resilient self-sovereignty–and thus freedom from censorship and tyranny–with the assistance of cutting-edge technologies. Thus, DAOs and Multisigs intrinsically challenge the mainstream social order.

Let us be clear: at present, there is no completely legally safe way to participate in DAOs and Multisigs. Such participation should not be undertaken lightly or without a certain level of trepidation over the threats posed by adversaries who might seek to leverage state coercion to preserve the status quo. However, with the right tools and awareness, DAOs and Multisigs can become legally ***safer*** and thus more resilient on the social layer than they typically are today. It is vital that lawyers assist with this goal and that DAOs and Multisigs not neglect the legal techniques which could help them achieve decentralized autonomy. Accordingly, the purpose of the LeXpunK Legal Defense Protocol is to help DAOs and Multisigs become as legally defensible as they can be without compromising their core values.

## 2. Overview of Unique DAO/Multisig Risks

All creative and commercial activities entail some level of legal risk. The goal of this Manual is not to cover risks that DAOs and Multisigs may share in common with more conventional activities–albeit that the overlap is, of course, significant. DAOs and Multisigs can become embroiled in tort claims, breach of contract claims, discrimination claims, fraud claims, regulatory claims, IP infringement claims, tax claims and more–but so can any other organization or association of persons.

Instead, this Manual and the Defense Protocol focus on addressing the sources of legal risk that are somewhat *unique* to or uniquely *magnified* by DAOs/Multisigs. These include:

- the risk that DAO/Multisig participants could suffer personal liability arising from:
    - their own respective activities taken for the benefit of the DAO/Multisig or its other participants;
    - the activities of the DAO/Multisig (if the DAO/Multisig is deemed to have separate legal personality (aka "jural personality")); or
    - the activities of other DAO/Multisig participants (if some participants are deemed to be the legal agents of the others);
- the risk that any personal liabilities incurred or damages suffered by DAO/Multisig participants in connection with DAO/Multisig activities could fail to be appropriately exculpated, indemnified, insured or insurable;
- the risk that DAO/Multisigs or their participants could be unable to obtain joint representation by a law firm or attorney to pursue or defend claims against adversarial parties;
- the risk that, even if a DAO/Multisig is, or its participants are, able to jointly engage a law firm/attorney, the effectiveness of legal counsel could be hobbled due to loss of traditional protections such as attorney-client confidentiality/privilege; and

- the risk that DAO/Multisig governance outcomes could be deemed unenforceable, void, voidable or subject to rescission–whether as a result of complaints by dissenting DAO/Multisig participants or adversarial actions pursued by third parties (such as creditors).

The remainder of this Manual addresses each of these unique risks and the manner in which the Defense Protocol seeks to mitigate them.

3. To Incorporate or Not to Incorporate? That is the Question

One Issue that repeatedly arises for DAOs and Multisigs is whether they should organize as entities (aka "incorporation"), such as LLCs, corporations, or cooperatives, to take advantage of the limited liability (among other benefits) that formal entity structures can offer. Entities formed pursuant to an express legal statute typically have the status of legal persons fully independent from their equityholders, employees and managers. The separate 'legal personhood' of state-chartered entities has at least three major benefits:

- the entities can enter into contracts, hire contractors (including attorneys), incur liabilities and rights, and own property, all under the "legal fiction" of the entities being legal persons–this is typically described as the entity having "separate/independent legal personality";
- the investors, managers and representatives of the entities ordinarily[6] will not have "personal liability" for the organization's obligations (though, of course, they can still lose the capital they invested into the entity)--this is typically described as "the limited liability doctrine"; and
- the entities will ordinarily[7] not be liable for the personal obligations of their respective investors, managers and representatives.

Accordingly, one legal risk mitigation for DAOs and Multisigs is to simply incorporate them as traditional state-chartered entities. Wyoming, for example, has perhaps the most well-known legal framework permitting a Wyoming LLC to be deemed a "DAO" and be expressly authorized to use smart contract tooling as part of its governance structure.[8]

However, many DAOs and Multisigs have chosen, and will continue to choose, not to incorporate, which is seen in pro-decentralization communities as having many downsides:

- State-chartered entities require rigid formalities of paperwork, franchise tax payment and other matters–these are frictions which may limit the fluid participation rules that many DAO/Multisig participants value.
- Incorporation makes anonymous participation in DAOs and Multisigs more difficult, as most jurisdictions require all equity holders to be identified through "Know Your Customer" ("KYC")

[6] It is important to recognize that the "limited liability" conferred by state-chartered entities, although powerful, is not absolute. Courts may still hold shareholders liable for the acts of their corporations if the corporation is being used as their "alter ego," and not meaningfully separated. Similarly, management may be held liable for corporate actions if they can be proven to have knowingly undertaken or "aided and abetted" unlawful acts in its name. In all cases, limited liability will only be available if the corporation is generally "engaging in lawful acts."

[7] The equitable doctrine of "reverse-piercing the corporate veil" can be used to hold a corporation liable for the obligations of its shareholder where there is inadequate formal separation between the two.

[8] https://sos.wyo.gov/Business/Docs/DAOs_FAQs.pdf

laws, and even the few that do not–such as the United States at the federal level and Delaware at the U.S. state level–are expected to promulgate KYC requirements soon.

- Perhaps most importantly, if the ambition of DAOs is to be "autonomous"–in the sense of being 'self-sovereign' (highly resistant to extrinsic censorship, not dependent on intermediaries)–then it would be unacceptable for a DAO's members that the existence of the DAO depends upon the grant of a "state charter" that can be somewhat arbitrarily revoked by governmental authorities.
- Finally, a true DAO's members would not want to consent to a particular government having jurisdiction over the DAO–a prerequisite to incorporation as a state-chartered entity.[9]

LeXpunK views DAOs and Multisigs in their truest form as *unincorporated associations*. Although the term "unincorporated association" is legally ambiguous and sometimes refers to a specific entity type, we use the term to refer to a superset of many unincorporated organization types: partnerships, joint ventures, not-for-profit associations, investment clubs, etc. Roughly speaking, unincorporated associations are formed whenever two or more persons join together, usually under a common name, for the accomplishment of one or more common purposes.[10]

The remainder of this Manual, as well as the details of the LeXpunK Legal Defense Protocol, are directed at classifying and analyzing the risks and consequences involved in DAOs/Multisigs when viewed as unincorporated associations. As we will see below, unincorporated associations sometimes, like corporations, have a legal personality separate from their members and sometimes do not, depending on the applicable law, the association's likeliest categorization under that law, and the specific facts and circumstances involved in a given case.

## 4. Unincorporated Association Type 1: General Partnership

### *Nature of General Partnerships*

A "general" or "unincorporated" partnership (hereinafter, simply "***partnership***")[11] is typically defined as "an association of two or more persons to carry on as co-owners of a business for profit".[12] A partnership is formed whenever two persons associate to co-own a business for profit, *whether or not the associating persons consciously intend to form a partnership.* The right way to think of partnerships is as a 'default' categorization imposed by the law on business co-ownership arrangements to determine the minimum legal responsibilities of business co-owners to third parties and the default internal governance rules governing business co-owners' relations with each other, even if the co-owners intended to have fewer responsibilities or to leave their governance rules vague.[13]

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[9] *See* Gabriel Shapiro and Sydney Abualy, "Wyoming's Legal DAO-saster". *See also* Gabriel Shapiro, "Defining Real and Fake DAOs" and Andrea O'Sullivan, "Reforming Florida Law So DAOs Are Not DOA" .

[10] 6 Am. Jur. Proof of Facts 3d 679

[11] Note, some jurisdictions refer to general partnerships as "unincorporated associations". Our terminology in this Manual is different–i.e., we view general partnerships as *one type of* unincorporated association.

[12] Uniform Partnership Act 1997 ("***RUPA***").

[13] If co-owners enter into an express written partnership agreement, they are free to customize their governance rules rather than sticking with the default rules imposed by law. However, they cannot reduce their minimum responsibilities to third parties (unless a particular third party agrees to such a reduction, eg, via a negotiated commercial contract limiting the co-owners' liabilities to that specific third party).

*DAOs/Multisigs as Partnerships*

Many DAOs and Multisigs could potentially be deemed partnerships. Consider, for example, the infamously hacked "The DAO" on Ethereum. This DAO was essentially an on-chain venture capital fund, i.e., it involved people exercising a kind of joint or *pro rata* control over a pool of ETH which was to be used to make venture-capital-style investments in promising new projects. Evaluating investment opportunities, negotiating investment terms and making and liquidating investments is indeed a "business," and one reasonable interpretation of the DAO membership process is that each DAO member was contributing capital to that business to become a co-owner of that business along with the other DAO members. Thus, "The DAO," and many other DAOs like it, could be persuasively argued to constitute partnerships.[14]

On the other hand, many DAOs (including even "The DAO") lack at least one of the hallmarks of partnerships: the so-called principle or right of "*delectus personae*" ("choice of persons"). This principle is meant to signify that partners have the right to select their co-partners (*i.e.*, that the admission of a new partner to a partnership requires unanimous approval of the old partners).[15] This is especially true for 'protocol DAOs' such as the DAOs for Curve and MakerDAO–their governance tokens trade widely and can be acquired by anyone and used to participate in the DAO without the rest of the DAO members even knowing who those persons are, no less approving their membership. On the other hand, more recent variations on the venture-capital-fund-on-the-blockchain theme (which generally utilize a 'Moloch DAO'-style smart contract) do feature non-transferability of DAO voting interests and permissioned membership (albeit rarely requiring approval to be *unanimous*).[16]

Similarly, many Multisigs might also be partnerships. Consider, for example, a hypothetical Multisig composed of the "core developers" for a protocol. This Multisig might periodically receive funding, in the form of tokens, from a DAO, or might directly receive a portion of revenues generated from fees charged to users from an on-chain instance of a DeFi protocol. Such Multisigs could sometimes be seen as constituting a pool of assets co-owned by the multisignature private-key owners who are operating a software research and development studio for profit, with the primary "client" of that business being the DAO or the users of the relevant protocol instance. On the other hand, some Multisigs style themselves as stewards of assets for a DAO or for a community, and this may be a reason to analogize them more to trusts or other types of business entity–more on this below.

*Partnerships as Legal Persons (or Not)*

A common misunderstanding of partnerships–even among many lawyers–is that partnerships always lack a separate legal personality and never limit the personal liability of partners. Although this was true of

[14] This is a widely held view among practicing 'cryptolawyers' and cryptolaw scholars. *See* e.g. Stephen Palley, *How to Sue A Decentralized Autonomous Organization*, CoinDesk (Mar. 20, 2016), Matt Levine, "Blockchain Company Wants to Reinvent Companies" and Laila Metjahic, "DECONSTRUCTING THE DAO: THE NEED FOR LEGAL RECOGNITION AND THE APPLICATION OF SECURITIES LAWS TO DECENTRALIZED ORGANIZATIONS".

[15] *See* Sydney R Wrightington, *The Law of Unincorporated Associations and Similar Relations*.

[16] *See* the Metacartel Ventures DAO Whitepaper.

"common law[17] partnerships" and still remains true in some jurisdictions (for example, the United Kingdom), many jurisdictions (for example, many U.S. states) have passed *statutory* law which trumps the common law treatment of partnerships and thus gives partnerships many (but, to be clear, not all) of the same benefits as incorporated entities.

Under the common law, a partnership is not a "legal person" separate and distinct from its partners. Instead, a common-law partnership is an "aggregate of persons acting with a common purpose, sharing profits and losses, and holding partnership assets in joint ownership."[18] This traditionally carried various (mostly adverse) legal consequences–for example, that partners are jointly and severally liable for activities of the partnership and that partnerships cannot sue or be sued in their own name, but must join all partners as plaintiffs or defendants (*see below under "Partnership Litigation and Liabilities"*).

Modern business statutes alter the common law in many jurisdictions. Nearly all U.S. states have passed statutes implementing the RUPA model partnership law, which provides that "[a] partnership is an entity distinct from its partners"[19] and that "[p]roperty acquired by a partnership is property of the partnership and not of the partners individually."[20] A few holdout states (most notably, New York and Massachusetts), retain an older statute (UPA) which treats partnerships as an aggregate of persons for some purposes (for example, in apportioning liability among partners) and as entity-like for other purposes (for example, in ownership & control of partnership property).

As a consequence of this modern statutory framework, where applicable, partnerships offer many of the advantages of incorporated business entities but still lack certain major features of entities (such as limited liability).

*Partnership Duties-A "Punctilio of the Honor Most High"*

Partners are generally held to owe one another "fiduciary duties". Under the common law, these duties were non-waivable and non-modifiable, and essentially constituted the highest form of legal duty possible. The most famous description of common-law fiduciary duties comes from Justice Cardozo's opinion for the New York Court of Appeals in the case of *Meinhard v. Salmon*:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions ( Wendt v. Fischer, 243 N.Y. 439, 444). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

[17] The "common law" is the body of law created by judges and similar quasi-judicial tribunals by virtue of being stated in written opinions. It is prevalent in the United Kingdom, past and present United Kingdom territories, and the United States. Wikipedia,"*Common Law*," https://en.wikipedia.org/wiki/Common_law
[18] Silliman v. DuPont, 302 A.2d 327, 331 (Del. Super. Ct. 1972), judgment aff'd, 310 A.2d 128 (Del. 1973).
[19] RUPA, § 201(a).
[20] RUPA, § 203.

"A punctilio of the honor most high"--that is a high standard indeed. Many DAO and Multisig members would likely be surprised to learn that they owe their fellow DAO and Multisig participants such lofty duties, but that is a very real possibility in the event that DAOs and Multisigs are deemed to be partnerships. Even under modern partnership statutes like RUPA, partners continue to owe one another fiduciary duties, albeit that under these statutes the fiduciary duties of partners are described less floridly than they were by Cardozo in analyzing common law partnership principles.[21]

*Partnership Litigation and Liabilities*

Under the common law, a partnership is not a legal entity, and thus the partners are jointly and severally liable for the performance obligations, debts and other liabilities of the partnership. Under this dreaded rule, liability of each partner is both *unlimited* (i.e., can be paid out of each partner's personal wealth rather than being limited to partnership assets) and *non-pro-rata* (i.e., a partner's proportionate liability for a plaintiff's damages can exceed the partner's proportion of partnership equity, although a partner who 'overpays' in this manner may be able to collect from other partners by suing them for "contribution").

Albeit joint and several liability is a major disadvantage of common-law partnerships as compared to entities, for a time, partnerships did provide certain defensive advantages: For example, a plaintiff suing a partnership would have to identify all partners and name them as defendants in the lawsuit, but if a certain partner was not subject to the jurisdiction of the relevant court, that partner could, as a practical matter, escape liability. However, most common law jurisdictions patched these procedural issues with "common name" statutes enabling partners to sue and be sued in the partnership's name.[22] Thus, common-law partnerships should now be assumed to impose the major burden of joint and several liability without offering any offsetting tactical advantages.

Unlike with legal personhood and partnership duties, modern statutory frameworks retain the "aggregate theory" of partnerships for purposes of assessing partners' liability. Thus, even statutory partnerships retain this major drawback of the failure to form a business entity. However, under these statutes, the impact of joint and several liability is mitigated by modernistic procedural hurdles against holding individual partners liable for partnership activities in a disproportionate or unfair manner.

Under these statutes, even if the partnership is not recognized as a distinct entity, a plaintiff typically must seek to sue the partnership and collect any damage out of the partnership property before the plaintiff can sue individual partners and seek to collect against their respective non-partnership property–in effect, partners serve as joint and several *guarantors* of the partnership's liabilities in these jurisdictions rather

[21] § 404. General Standards of Partner's Conduct, Rev. Uniform Partnership Act Section 404 (2021-2022 ed.). As compared to the Cardozo description, RUPA does contain the following helpful clarification: "A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest." (§ 404(e)).

[22] § 14:3. Joint liability at common law, Partnership Law & Practice § 14:3 (2021-2022). When all members of an unincorporated association in New York can be proven liable for a given matter, a plaintiff may sue a designated president or treasurer as a proxy for the members' combined liabilities instead of pursuing a series of discrete actions.. NY Gen Ass'ns. L. § 13 (2020).

than (as under common law) having direct and immediate joint and several liability for the partnership's liabilities.[23]

Practically speaking, this is a major mitigation of the joint and several liability doctrine, and makes modern-day partnerships formed in RUPA jurisdictions significantly less risky than is often portrayed by commentators who are only familiar with pure common-law theories of partnership liability..

Even in RUPA jurisdictions, however, partnerships remain riskier than incorporated entities. Although RUPA partnerships are treated as entities for most purposes, when the partnership is insolvent, partners can still be held personally liable for the partnership's obligations. Thus, if a DAO is deemed a general partnership, the DAO's members are always at more risk of being "jointly and severally liable" for the obligations of the DAO (serving as *de facto* guarantors of its debts) than if the DAO were an incorporated entity.[24] This is a key point because it means that an individual DAO participant, upon being deemed a partner of a DAO-related partnership, may be held liable for *all* of the DAO's liabilities, including a monetary judgment entered against a DAO in a lawsuit. It is not hard to imagine a situation in which joint and several liability becomes a problem for a DAO in which some participants are anonymous and some are not – plaintiffs will be incentivized to target those DAO participants whose identities are known, which may entail that they have greater than *pro rata* liability for the DAO's obligations–in such circumstances, the anonymity of some DAO participants can constitute a free-rider tax on the non-anonymous DAO participants.[25]

In Delaware and Wyoming, a lawyer may represent members' collective interest using the unincorporated association's title, its "common name," as a proxy.[26] An unincorporated association in these states may sue or be sued, and there is no mandatory hierarchy in the collection of damages against the assets of it or its members. Both Delaware and Wyoming have adopted exceptions to the "common name" model for unincorporated associations that are pursuing a "nonprofit purpose."[27] Such nonprofit unincorporated associations gain legal status, meaning they may incur liabilities and be represented separately from their membership.[28]

5. Unincorporated Association Type #2: Joint Venture

A "joint venture" is essentially a general partnership in which "the business" that is "co-owned" by the members has a very limited scope–i.e., the common enterprise is devoted to "a single business purpose" or "a single business transaction". Since joint ventures are just narrow-scoped partnerships, not all

[23] For example, under New York law, when all members of an unincorporated association in New York can be proven liable for a given matter, a plaintiff may sue a designated president or treasurer as a proxy for the members' combined liabilities instead of pursuing a series of discrete actions. (NY Gen Ass'ns. L. § 13 (2020)) While this proxy action is ongoing, a plaintiff cannot sue individual members regarding the same legal matter. (NY Gen Ass'ns. L. § 16 (2020)). If a plaintiff is awarded damages in the final judgment of the proxy action and the association has insufficient assets to pay, the plaintiff may then sue individual members for remaining damages. (*Id.*)
[24] Revised Unif. Partnership Act § 307 (1994).
[25] The implications of anonymity are discussed in more detail later in this Manual.
[26] *Citizens Bank v. Design-A-Drape, Inc.*, No. CIV.A. 07C-03-385RRC, 2008 WL 3413329, at *3 (Del. Super. Ct. July 30, 2008); Wyo. R. Prac.& P. 17(b)(4) (2019).
[27] Del. Code tit. 6 § 1906 (2019); Wyo. Stat. § 17-22-106 (2018).
[28] Del. Code tit. 6 § 1906 (2019); Wyo. Stat. § 17-22-106 (2018).

jurisdictions distinguish between "joint ventures" and "general partnerships" and even jurisdictions that do distinguish them treat the two association types very similarly (for example, imposing joint and several liability on joint venturers just as they do on partners). For jurisdictions which do appreciate this distinction, a DAO like ConstitutionDAO–which was devoted to a single business transaction/purpose of acquiring ownership of a historical original copy of the U.S. Constitution in a then-upcoming Sotheby's auction–would be considered a "joint venture" instead of a "partnership". By contrast a DAO like "The DAO"--which had an open-ended venture investment business purpose–would be considered a "partnership" rather than a "joint venture".

Despite their similarities, "[a] joint venture is distinguished from a partnership in that one member cannot bind another unless he has either express authority or authority implied from the necessities of the particular transaction with which the joint venture is concerned." So, if a joint-venturer goes out and incurs liabilities, the joint venture and his fellow joint-venturers will not be deemed liable unless the liabilities were clearly incurred pursuant to the joint venture's narrow purpose. In contract, since partnerships have broader general business purposes, partners are at greater risk of incurring vicarious liability for a broad range of activities by their partners.

6. Unincorporated Association Type #3: Business Trust

A DAO or Multisig could be classified as a "business trust." In this situation, the assets of the DAO or Multisig will be seen as property owner by the trust and managed by trustees for the benefit of beneficiaries. When there is both a DAO and a developer Multisig for the same protocol community, a plausible interpretation may be that the Multisig is a business trust, the assets held by the Multisig are trust property and the Multisig members (as well as potentially other developers they manage or fund) are trustees managing that property for the benefit of the members of the broader DAO. In such a case, the Multisig members may be deemed to have fiduciary duties to every member of the DAO–which, as discussed above in the context of partnerships, may be a much higher level of responsibility to DAO members than the Multisig members realize they have or are prepared to handle. The application of business trust structure to DAOs was extensively discussed in "*If Rockefeller Were a Coder*" by Carla L. Reyes.[29] Although a potentially interesting unincorporated structure, because the formation of a trust requires following certain formalities and does not exactly match the pattern of most DAOs or Multisigs found in the wild, it is unlikely in practice that many current DAOs or Multisigs will be deemed business trust.

7. Unincorporated Association Type #4: Joint Property

What about when a DAO or Multisig is not deemed to be organized around a "common purpose", but rather is merely a method of holding or owning assets? In such cases, a variety of legal interpretations are possible.

If the DAO or Multisig is merely holding property that is owned by others for some limited time or limited purpose (e.g., for purposes of delivering to another when a certain condition is satisfied, or to be reclaimed by the original owner at will), then the DAO ro Multisig may be deemed an *escrow* or *bailment*

[29] 87 Geo. Wash. L. Rev. 373 (2019)

arrangement under the common law. As with partnerships, no specific formalities or written agreements are required to form an escrow or bailment, and the escrow agent or bailee may have implied fiduciary duties.

On the other hand, if property is held by a DAO or Multisig under circumstances where the members are deemed to be co-owners, then the DAO or Multisig may be deemed a "tenancy in common"--essentially an unincorporated ownership arrangement whereby owners have implied rights to co-govern certain property.

Although theoretically interesting, these purely property-based classifications are implausible for most DAOs and Multisigs. The typical DAO or Multisig does not merely hold property–instead, DAOs and Multisigs typically pool tokens and other property with the idea of using the, as capital for some reasonably specific purposes; whether those purposes are business-like or charitable, they will likely cause these organizations to be classified as other types of unincorporated associations (partnerships, joint ventures, etc.), rather than merely being classified as methods of jointly holding or owning property.

8. Unincorporated Association Type #5: Unincorporated Nonprofit Association

DAOs and Multisigs with a nonprofit purpose may be classified as unincorporated nonprofit associations–an association type not recognized under common law but recognized by various modern statutes dealing with unincorporated associations. Unincorporated nonprofit associations have been described as "the nonprofit equivalent of a general partnership."[30] They "are often classified as public benefit, mutual benefit, or religious organizations and may or may not be tax-exempt."[31]

The [Revised] Uniform Unincorporated Nonprofit Association ([R]UUNA) has been adopted by 18 U.S. states. It recognizes an "unincorporated organization consisting of [two] or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes" to constitute a separate legal person. In a nutshell, nonprofit associations are treated under [R]UUNA just like partnerships are treated under RUPA, with one key difference: members of a nonprofit association have limited liability. From a legal perspective, this makes nonprofit associations just as good as incorporated nonprofit entities–at least when the law of a [R]UUNA jurisdiction is being applied. Certain states–such as California–have similar laws developed independently from [R]UUNA–while some of the wording and concepts may differ, the key point is that these jurisdictions treat nonprofit associations as limited-liability entities.

[30] Uniform Unincorporated Nonprofit Association Act (2008)
[31] *Id.*

Thus, nonprofit associations provide a seemingly attractive classification option for DAOs and Multisigs. If a DAO or Multisig is classified as a nonprofit association, then its members will enjoy the same limited liability protections as shareholders in a corporation while avoiding many of the pitfalls of incorporation–such as obtaining a state charter, paying franchise taxes, and hiring a registered agent. However, the "nonprofit purpose" limitation on these organizations is significant and can lead to major disadvantages. For example, [R]UUNA expressly requires that a nonprofit association must not "pay dividends or make distributions to a member or manager," subject to certain exceptions such as "reasonable compensation…for services rendered" and "repurchase [of] a membership [or] repay[ment of] a capital contribution made by a member".

This nonprofit purpose requirement does not naturally align with most DAOs' and Multisigs' actual purposes and activities–which, in the experience of the authors, tend to involve a heavy drive to profits. Regardless of whether these profits flow to DAO or Multisig members from direct distributions of profit, maturation of DAO-led investments or metric-driven appreciation of token market prices, it would be difficult to argue with a straight face that profit is not the primary motive in the minds of most members of most DAOs and Multisigs.

In any litigation over whether a DAO or Multisig is devoted to nonprofit purposes, a court would examine all available evidence to ascertain whether a DAO's or Multisig's claimed nonprofit purpose was genuine–including Telegram and Discord chats, tweets, investments made by expressly ROI-seeking venture capital funds, etc. In recent years DAOs and Multisigs have tended to generate enormous wealth far beyond "reasonable compensation for services rendered," and a rich set of evidence would doubtless often reflect a materialistic orientation on the part of their memberships. Meanwhile, some DAOs strongly evince a nonprofit purpose just from their software design alone. For example, it would be very implausible to argue nonprofit association status for MakerDAO–repeatedly characterized by its members as "a plutocracy" of MKR holders and hard-coded to cause price appreciation of MKR by fueling MKR buybacks with surplus system revenues. In such cases, the DAO or Multisig is unlikely to be seen as having a "nonprofit purpose" and its members are unlikely to qualify for limited liability.

Still, for DAOs and Multisigs that are willing to generally retain their capital, limit transferability of tokens and avoid token "pumpamentals", structuring to achieve [R]UUNA status is an option worth considering. For example, a modest Multisig of core protocol developers funded by modest recurring grants from ConsenSys, the Ethereum Foundation and Gitcoin could credibly claim nonprofit association status. Similarly, a grants-focused DAO like the original MolochDAO (which merely gives grants rather than making venture capital investments) could be strongly argued to constitute a nonprofit association entitling its members limited liability.[32]

[32] https://molochdao.com/

9. Unincorporated Association Type #6: Custom Contract Nexus

Another possibility–arguably, the best possibility–is that a DAO or Multisig could be taken on its own terms and deemed to be a bespoke contract-based association. Fundamentally, all legal entities can be seen as a 'nexus of contracts.'[33] On this theory, the well-recognized entity forms–whether statutory (like corporations) or a mix of common law and statute (partnerships)--can be viewed as 'off-the-shelf' contract nexuses. Where the association type can be clearly seen to depart from the default entity arrangements, the association may be deemed to be governed by bespoke contracts instead. Ultimately, this is the strategy embodied in the LeXpunK Defense Protocol, albeit it may not be honored for all purposes (for example, a bespoke contract among DAO members does not necessarily bind non-DAO-members).[34]

10. What Jurisdiction's Law Will Apply to an Unincorporated DAO?

Given that an unincorporated DAO has no place of residence and almost certainly no headquarters, determining which jurisdiction's law to apply is difficult.. The likeliest scenario is that a non-anonymous, individual member of a DAO is sued either in their personal state of residence or in the state in which the plaintiff alleges the member, as part of the DAO, has engaged in sufficient acts to make the member subject to the laws of that state.[35]
When confronted with a matter of a given state's law (e.g., through diversity jurisdiction), a federal court will perceive unincorporated associations through the model used by that state.[36] In most U.S. state litigation, as well as U.S federal litigation, the "common name" model will enable individual DAO or Multisig members to be sued in the name of an unincorporated association, even if the applicable law does not recognize that association as possessing separate legal personality.[37]

For a plaintiff, suing a DAO as an unincorporated association separate from the DAO's members could be a difficult starting point because the DAO has no address (in the real world, at least) at which to serve a complaint, which is a necessary step in commencing a lawsuit; although a court might deem service of the complaint on an individual member of the DAO sufficient to constitute service on the DAO itself.

Any court claiming jurisdiction over a DAO or its individual member(s) will have to decide which state's law applies to the issue of whether the DAO is a general partnership, joint venture, nonprofit association, or other type of unincorporated association. The legal analysis used to make this determination is fact-specific, varies by state, and not entirely predictable.

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[33] https://en.wikipedia.org/wiki/Nexus_of_contracts

[34] But there are circumstances under which non-signatories can be bound to (or bound to respect the circumstances of) agreements. For this reason, it is best if DAOs put all relevant third parties on notice of their custom contractual structures–by advertising, for example, that they are not partnerships–so that the third parties are less likely to be able to successfully claim equitable reliance on common assumptions regarding the liability of partnerships. *See* Emma Cano, Darci E. Cohen and Diane Green-Kelly, "Unsigned Obligations: When Are Non-Signatories Bound?", *American Bar Association 37th Annual Forum on Franchising*

[35] This is called "personal jurisdiction," meaning a court in that state has jurisdiction over the member as an individual and can hear cases implicating them.

[36] Fed. R. Civ. P. 17(b)(3)(A).

[37] *Id.*

One way a DAO might get more certainty on applicable law is to:

- have a charter providing a contractual framework for participation in the DAO (as suggested below and included in the LeXpunK Defense Protocol); and
- include in that charter a choice of law provision, whereby members agree that any disputes relating to the DAO are subject to the laws of a particular state or country.

However, there is no guarantee that a plaintiff who is not a DAO member would ultimately be bound by this choice of law–nor that even all DAO members would be bound by it, unless formal contracting practices are adopted to gate membership, which will likely be unappetizing to most DAOs. Furthermore, this technique might also have downsides–such as being construed as an admission or acceptance that the specified state or country has general personal jurisdiction over the DAO (and thus that the DAO is subject to its regulations, taxes and other legal requirements).

On the other hand, plaintiffs may also choose to pursue DAO and Multisig members as individuals on the theory that the DAO or Multisig is not a distinct legal entity, and thus that the DAO and Multisig members have individual, personal liability for harms suffered by the plaintiff (or if the plaintiff is governmental, for violation of laws). At least three different sub-approaches are possible; the selected approach may determine which jurisdiction's laws will be applied to the dispute.

Approach #1 is for the plaintiff to assume that the DAO or Multisig is not an unincorporated association. In this case, the plaintiff would sue the individuals whose actions/decisions relatively directly contributed to the plaintiff's alleged harms (or, in the case of a governmental agency as plaintiff, sues the individuals alleged to have personally violated, or personally aided and abetted a violation of, an applicable law). For example, the plaintiff may sue developers who negligently coded a smart contract which was exploited and led to financial damages for the plaintiff. In this case, the plaintiff will likely need to prove that each individual defendant violated laws in that individual's own jurisdiction of residence, unless the plaintiff can prove that the defendant had sufficient minimum contacts with the plaintiff's jurisdiction so as to be subject to the laws of the plaintiff's jurisdiction. Since not all defendants may be similarly situated, this may require the plaintiff to bring multiple actions in multiple jurisdictions in order to maximize the plaintiff's chances of financial recovery.

Approach #2 is for the plaintiff to argue that the DAO or Multisig is a common-law unincorporated association of the kind which imposes joint and several liability on its members (e.g., a partnership or joint venture). This approach is maximally beneficial for the plaintiff–since the plaintiff can sue the entire partnership as an entity while still having the possibility of recovering full damages from any one or more of the partners, including out of their personal wealth. The plaintiff can "forum-shop" by seeking to find a jurisdiction and prospective partner-defendant that combines favorable law with a strong likelihood of the partner having sufficient assets to pay the plaintiff's damages; alternatively, the plaintiff may seke to bring the claim against an under-resourced partner in a favorable jurisdiction, and then seek to enforce the judgment against the partnership against other partners in other jurisdictions to actually collect the successfully claimed damages. The strategic and tactical flexibility available to plaintiffs when they are suing common-law partnerships demonstrates the comparative disadvantages of common-law partnerships to incorporated business entities when the partnership is faced with adversity. However, because of the modernization of partnership law through various statutes that treat partnerships as

quasi-entities (UPA) or entities (RUPA), or which impose various other procedural constraints on joint and several liability, plaintiffs may in practice find it difficult to identify a pure "common law" jurisdiction which will facilitate this level of attack flexibility, and defendants may seek to have disparate actions joined or dismissed on procedural grounds.

Approach #3 is for the plaintiff to argue that the DAO or Multisig is a non-common-law partnership or joint venture, or nonprofit association, having separate legal personality from its members. In this case, the plaintiff would sue the DAO or Multisig itself, whether as a separate legal entity (RUPA) or as an aggregate of individual partners who can be jointly sued "in the name of the partnership" (UPA). In this case, the plaintiff will typically be required to bring suit in a jurisdiction that can plausibly be claimed to be the jurisdiction where the partnership was formed or a jurisdiction with which the partnership has sufficient minimum contacts to establish jurisdiction. If the partnership took steps to clearly communicate that it was subject to a certain jurisdiction (such as filing relevant notices with the relevant state business entity registrar), this could persuade a court to apply that jurisdiction's law in determining issues relating to the internal governance and liability apportionment of partnerships. Only if the plaintiff wins against the partnership, and the partnership has insufficient assets to pay the plaintiff's damages, will the plaintiff be entitled to sue the individual partners to collect against their personal (non-partnership) assets.

In short, unincorporated associations, in the absence of legal structuring, tend to be jurisdictional grab bags–it is hard to determine what jurisdiction's laws will apply to a DAO- or Multisig-related dispute, and thus it may also be hard to predict the outcome of the dispute, as laws and civil procedure vary widely among different jurisdictions.

11. Hiring a Lawyer for DAOs, Multisigs and their Members/Participants

Regardless of the "entity type" or "association type" attributed to an unincorporated DAO or Multisig, the DAO or Multisig (if it has separate legal personality) or some or all of its members in their capacities as such (if the DAO or Multisig does not have separate legal personality) can almost certainly be represented by a lawyer. However, whether the lawyer represents the DAO or Multisig–on the theory that the DAO or Multisig constitutes an unincorporated association with separate legal personality–or merely represents some or all of the DAO's or Multisig's members–will depend on the DAO or Multisig is best classified as well as how the DAO and Multisig members weigh various strategic and tactical considerations.

For a DAO or Multisig to be represented by a lawyer (rather than the lawyer merely representing some or all of the DAO's or Multisig's members), the following conditions must be satisfied:

- the DAO or Multisig must constitute a separate legal person under applicable law–this would be true of RUPA partnerships in most U.S. states,, but may not be true in other jurisdictions viewing DAOs and Multisigs purely through the lens of common law;
- the members must have a process to:
    - agree to hire the lawyer;
    - authorize the DAO or Multisig to enter into an agreement with the lawyer;
    - provide continued direction to the lawyer, on behalf of the DAO or Multisig with respect to the representation as it proceeds; and
    - provide a method for paying the lawyer.

These steps could be straightforward enough for some DAOs and Multisigs, but there are a number of issues unique to DAOs and Multisigs which could complicate the process and should be considered as far in advance as possible. (*See* below - *"The Impact of Anonymity on Hiring a Lawyer"* and "*Attorney-Client Privilege for DAOs/Multisigs"*).

In part because of the aforementioned modernization of partnership law–which treats partnerships as quasi-entities instead of an aggregate of persons–it is well established that lawyers may represent general partnerships. Rule 1.13(a) of the American Bar Association's Model Rules of Professional Conduct governing U.S. lawyers – adopted almost verbatim in all relevant jurisdictions – states that an entity operates through its "constituents."[38] Constituents are defined to include officers, directors, employees, and shareholders as well as those who fulfill analogous positions in entities that lack them.[39] Members, launch team devs, and those who manage funds or smart contracts may be considered constituents of their DAO.

In most jurisdictions, when a lawyer represents an unincorporated DAO recognized as a general partnership, the persons who are deemed partners will be considered agents communicating the will of the partnership, which is the lawyer's actual client.[40] Because the partnership is the lawyer's client, not its constituents, the lawyer must advocate in the entity's best interests, not necessarily in the interests of the individual partners (who may be various kinds of participants in the DAO).

New York is an exception to this, because it never implemented RUPA. Thus, New York is an example of a jurisdiction which still governs partnerships by rules more similar to the common law–accordingly, in New York, an attorney's representation of a partnership is considered representation of each individual constituent, who may have potentially different interests.[41] In such cases, a lawyer for the proxy would represent the collective interest of an unincorporated association's membership, which could substantially differ from the interest of the association itself.[42]

12. The Impact of Anonymity on Hiring a Lawyer

Some or all members of a DAO or Multisig may be anonymous. Anonymity could make hiring a lawyer more difficult both for the DAO/Multisig itself and for its individual members. When considering whether to enter a situation involving the complications of anonymity, a lawyer is likely to have the highest level of comfort either: 1) representing an individual non-anonymous DAO/Multisig member; or 2) representing a DAO/Multisig that: (a) is reasonably likely to be considered a legal entity separate from its

[38] ABA Model Rules of Prof'l Conduct R. 1.13(a).
[39] ABA Model Rules of Prof'l Conduct R. 1.13 cmt. [1].
[40] *See, e.g.,*State Bar of Cal. Comm. on Prof'l Responsibility & Conduct Formal Opinion No. 1994-137 https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/1994-137.htm.
[41] Roy Simon, "Does the Lawyer for a Partnership Represent the Partners?", N.Y. L. Ethics Rep. (Sept. 2010) https://web.archive.org/web/20210126175236/http://www.newyorklegalethics.com/does-the-lawyer-for-a-partnership-represent-the-partners/ ("New York still adheres to the original Uniform Partnership Act that took effect in 1914 [the year World War I began], and under that law a partnership has no independent existence but is merely an aggregation of its partners.").
[42] *Martin v. Curran*, 101 N.E.2d 683, 686 (N.Y.,1951).

members; and (b) has members who will doxx themselves to the lawyer and can direct the lawyer on behalf of the DAO/Multisig.

Further complications arise when a lawyer is asked to represent a fully anonymous DAO or an anonymous DAO member individually. While there is no explicit ethical rule prohibiting a lawyer from representing a client whose identity the lawyer does not know, neither is there any precedent providing that doing so is permissible.[43]

There is, however, at least one clear reason for a lawyer to conclude that they should not represent a completely anonymous client. Namely, under rule 1.7 of the American Bar Association's Model Rules of Professional Conduct, a lawyer cannot represent a client as to whom the lawyer has a "concurrent conflict of interest." Such a conflict exists where:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[44]

The above becomes particularly problematic when a lawyer is asked to represent an anonymous DAO member, as the lawyer cannot conduct a conflict check to determine if the member is adverse to another client. For example, the lawyer will be unable to discover if the DAO member, under their actual identity, is suing one of the lawyer's other clients in a separate lawsuit – a scenario in which the clients are considered to be directly adverse. Thus, the lawyer is unable to comply with one of the main 'ethics rules' for the profession, and if it turned out that the anon client was in fact directly adverse to another client of the lawyer, the lawyer could face professional penalties (including suspension or disbarment) and/or malpractice liability to the adversely affected client(s). The only potentially feasible protection against these risks would be if the lawyer had obtained 'advanced conflict waivers' from every client, but such waivers are not always enforceable and may not obviate the lawyer's affirmative duty to conduct a conflicts check.

Some or all of these problems may also arise when a lawyer is asked to represent a DAO that is fully anonymous and must therefore take direction from anonymous members. Arguably, if the lawyer is solely representing the DAO and not its members, then the client is not truly anonymous – at least the identity of the DAO is known. Nevertheless, the lawyer may have reservations about being directed by anonymous individuals.

None of this is meant to say that anonymous DAO members or fully anonymous DAOs will be unable to hire lawyers, only that it may be more difficult for them to find lawyers willing to confront the potential conflict issues. Lawyers who practice "solo" or in small firms may be better able to manage this issue, and the potential risks, than large law firms. In such cases, the lawyer will have very few clients to check

[43] A lawyer may still represent a client whose identity is known to the lawyer but who wishes to remain anonymous–i.e., a lawyer may be used as an identity shield between the lawyer's client and a third party, provided the relevant transactions are otherwise lawful.

[44] ABA Model Rules of Prof'l Conduct R. 1.7.

for conflicts purposes, may know their legal affairs very well and may be able to reasonably conclude that any client is very unlikely to be situated adversely to a potential anon. For example, the lawyer could be confident of this if none of the lawyers' other doxxed clients were currently in adversarial situations with anyone.[45]

13. Attorney-Client Privilege for DAOs/Multisigs

If an unincorporated DAO or its member(s) are sued, the DAO's members may want to discuss the matter with each other. The problem with this is that these communications may ultimately end up in the hands of the plaintiff to be used as evidence in the lawsuit. In U.S. courts, plaintiffs are generally allowed broad discovery of documents and communications in a defendants' possession if these materials may be relevant to the claims in the lawsuit. There are some exceptions to this general principle, a primary one covers communications (whether written or oral) between a lawyer and her client, which are made for the purpose of obtaining or providing legal advice. Such communications are shielded from discovery by the "attorney-client privilege."[46]

A lawyer hired to defend a DAO may therefore advise DAO members not to discuss the case among themselves without the lawyer being present or participating, so that any communications can be protected by the attorney-client privilege. This is the ideal situation, but a DAO may find itself in less-than-ideal circumstances. For example, a plaintiff could sue some members of a DAO as individuals under a theory of joint and several liability while deciding not to sue other members. Can the members who have been sued communicate with each other about the lawsuit without worrying that their discussions are discoverable? Not necessarily, without taking very specific precautions. Can the members who have been sued communicate about the lawsuit with members who have not, without fear of discovery? Absent precautions, the answer is almost certainly "no."

Precautions against the discovery of communications may take two forms. The first is difficult to carry out in practice: If there is a lawsuit against various individual DAO members, and a lawyer who represents all of those members (individually) was present for some or all communications between or among these members, then the communications for which the lawyer was present might be protected by the attorney-client privilege. The same conclusion might hold for communications with members who are not sued *if* the lawyer also represents these members. Obviously, this is a rather convoluted and difficult precautionary strategy to execute for a host of reasons, not the least of which being that individual DAO members might not want to be represented by the same lawyer. Thus, having a single lawyer represent DAO members in their individual capacities and participate in all of their discussions is not a reasonable strategy to pursue for shielding communications from discovery.

There is, however, a second, more practical approach to protecting communications between DAO members regarding a lawsuit or even the threat of a lawsuit. It is based on a legal concept known as the "Common Interest Doctrine." Some courts interpret this doctrine broadly enough to cover common

[45] *See* "*Autonomous Lawyering*", Gabriel Shapiro.
[46] Under U.S. law, the attorney-client privilege applies to communications between a client and the client's attorney that are made for the purpose of seeking or giving legal advice. Generally, such communications are immune from discovery by third-parties.

interests outside of litigation but, for purposes of this Manual, we will focus on the narrower interpretation of the doctrine which allows separately represented parties who are defendants in a litigation (or who believe they may face litigation) to claim privilege as to their communications with each other regarding their defense strategies. This privilege, referred to as the "joint defense privilege," protects communications and work-product from discovery by third parties. It is a best practice for defendants and potential defendants to enter into a written agreement regarding the joint defense privilege. In an attempt to secure this privilege, the LeXpunK DAO/Multisig Legal Defense Protocol includes a form of DAO/Multisig Joint Defense Agreement which can be entered into by members of DAOs or Multisigs in an attempt to maintain attorney-client privilege among themselves and their lawyers.

14. Putting it All Together: Using the LeXpunK Defense Protocol for DAO/Multisig Legal Defense

The mission of LeXpunK is to bring devs and lawyers together to craft avant-law solutions. This means meeting DAOs and Multisigs where they live. We do not seek to domesticate DAOs by turning them into entities or "wrapping" them in conventional business forms. On the contrary, we seek to preserve a risk-mitigated space for technological creative freedom by offering tools and methods that stay true to the spirit and culture of crypto while bringing legal risks down to acceptable tolerances. The resulting package will not be risk-free—for that, don't do DeFi--but should increase DAO/Multisig's viable defense preventions and countermeasures against a broad range of potential legal threats.

*14.1 LeXpunK DAO/Multisig Joint Defense Agreement*

> At its core, a Joint Defense Agreement (JDA) is an agreement between parties that each have their own representation but share common legal interests. A JDA allows parties to share confidential information without waiving legal privileges or protections, such as the attorney-client privilege or work product protection. In the event that two parties are named as defendants in a lawsuit, and each party has its own lawyer, the defendants may enter into a JDA so that the lawyers or clients can communicate with each other without the waiver of privilege or confidentiality. Such an agreement may also be entered into prior to the onset of litigation as a precautionary measure, perhaps when parties work together on a project or protocol design.
>
> We've drafted an iteration of a JDA, a DAO/Multisig Joint Defense Agreement, intended for DAO or Multisig members who could reasonably be expected to be named as co-defendants in a civil lawsuit in connection with their past, current, or future DAO/Multisig-related activities.[47] By entering into the joint defense agreement, DAO/Multisig members formally recognize their mutual interest in defending against an actual or prospective plaintiff's claims and their belief that entering into the agreement is necessary for effective legal representation.
>
> A few key features of the DAO/Multisig Joint Defense Agreement:

[47] Although less common, plaintiffs can also enter into joint agreements protecting their communications. The JDA also covers this possibility.

- It accommodates both DAOs and Multisigs.[48]
- It is agnostic on whether or not the DAO/Multisig constitutes a separate legal entity, providing flexibility for the parties to consider their DAO/Multisig to be "an aggregate of individuals" or "a separate legal person", as desired.
- It is agnostic on whether all or merely a subset of the DAO/Multisig members wish to enter into the agreement. Thus, a "clique" within a given DAO/Multisig may enter into the joint defense agreement, without needing to get all of their fellow DAO/Multisig members to also participate. Alternatively, a DAO/Multisig may require every member to enter into the joint defense agreement before they may become members.[49]
- It is agnostic on whether a specific "governing law" will be specified to govern the interpretation and enforcement of the agreement. Although "choice of law" clauses are almost *de rigueur* in modern contracts (they ensure the agreement's enforceability and interpretation only have to be assessed against a single jurisdiction's laws, and thus foreclose certain potential meta-disputes), the unique properties of DAOs and Multisigs (global, digital, potentially conducted anonymously, potentially having goals rooted in civil disobedience) suggests a more nuanced calculus–some DAOs/Multisigs may not wish to expressly associate themselves with a particular jurisdiction and thus may wish to leave "choice of law" completely open to dynamic jurisdictional arguments.
- Similarly to choice-of-law, it is agnostic on whether a specific venue will be pre-agreed as the forum for disputes among the DAO/Multisig members concerning the agreement.
- It provides that any disputes concerning the agreement occur amongst the DAO/Multisig members should be resolved by binding confidential arbitration rather than in court.
- It provides verbiage that can accomodate pseudonymous parties–note, however, that the addition of pseudonymous parties increases the uncertainty of the agreement and could potentially affect its enforceability.
- It enables additional parties to join the agreement after the initial agreement is signed, through a separate form of joinder agreement.
- It includes a copy of the standard, open-source Waypoint Non-Disclosure Agreement. Parties to the joint defense agreement can require prospective DAO/Multisig members to sign the NDA in advance of receiving a copy of the joint defense agreement. By doing so, the DAO/Multisig members would ensure that if the prospective party ultimately chooses not to join the joint defense agreement, they are nevertheless required to keep the terms and existence of the joint defense agreement confidential.

[48] Note, however, that as currently drafted a single joint defense agreement cannot cover *both* a DAO *and* a Multisig. Adding this dual-purpose option would introduce too much complicated bracketing into an already fairly heavily bracketed form agreement. Naturally, though, the same group of people can enter into two agreements with one another–a DAO joint defense agreement *and* a Multisig defense agreement. This might be appropriate in situations where a protocol DAO is paired with a dev Multisig, with the former having broader membership than the latter.

[49] Obviously, the joint defense agreement can only be a prerequisite to DAO/Multisig membership if DAO/Multisig membership is permissioned–in contrast, this approach would not work well for large, permissionless protocol DAOs. Overall, legal membership-gating is probably best reserved for small Multisigs, in which new signers must be approved by a majority of the current signers.

Importantly, the advantage of the DAO Defense Agreement based solely on the joint defense privilege is that there need be no concession of common enterprise, only that members may share similar interests in defending an actual or threatened lawsuit.

### *14.2 LeXpunK DAO Charter*

The LeXpunK Model DAO Charter is intended for unincorporated DAOs that wish to seek to put in place risk mitigation measures against some of the risks of vicarious liability and potential intra-DAO fiduciary duty claims that may arise in unincorporated associations.

The DAO Charter utilizes a "qualified code deference" philosophy of DAO participation, in which DAO members agree that, to the maximum extent permitted by law, the results of the operation of the relevant smart contract system should be legally binding on all the DAO members.[50] This would entail, for example, that non-developer DAO members cannot sue developer DAO members as the result of a code or design error enabling an economic exploit in which DAO members suffered financial losses. Optionally, the DAO Charter can provide that code will not be deferred to in the event of "Material Adverse Exception Events"--a term which can and should be customized for each DAO, but which may, for example, provide that the DAO members need not defer to the outcome of the smart contract system to the extent it was adversely affected by a consensus attack on the underlying blockchain system.

The other main purpose of the DAO Charter is to opt out of some of the adverse consequences of potential partnership status. Although the aspects of a partnership pertaining to liability of partners to third parties (e.g., joint and several liability for the actions of the partnership) cannot be opted out of, nevertheless, a partnership agreement may waive, limit or modify the partnership rules pertaining to the rights, duties and liabilities among the partners. The DAO Charter uses this contractual flexibility to:

- disclaim and waive any fiduciary duties owed by DAO members to one another that might otherwise be implied by the existence of the DAO;
- disclaim any right of DAO members to represent one another, or bind one another to liabilities, that might otherwise be implied by the existence of the DAO; and
- disclaim any property right any individual DAO member might otherwise be implied to have in any DAO-controlled assets (e.g., rights of co-tenants as discussed above), other than once those assets are distributed to DAO members by the smart contract system.

### *14.3 LeXpunK Multisig Participation Agreement*

This agreement is intended to be signed by participants in a multisig which serves a broader protocol-based community or DAO. It assumes that multisig participants are willing to stand behind some clearly specified duties while disclaiming broader, more encompassing duties (such as fiduciary duties). These duties have been crafted to align with the open-source software,

[50] Hinkes, Andrew, The Limits of Code Deference (July 19, 2021). The Journal of Corporation Law, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3889630

governance-minimization and neutrality goals that will likely be shared by many protocol DAOs and their contributors and users.[51] It assumes that Multisig members may prefer to be treated as separate individuals rather than a partnership, and thus includes an optional disclaimer of partnership status.[52] Like the LeXpunK DAO/Multisig Joint Defense Agreement, it makes express choice of law and choice of venue optional.

Of course, as with all the LeXpunK form agreements, we strongly encourage review and customization for each Multisig by a fully informed attorney retained by that Multisig's members. Considering the widely varying practices and purposes of Multisigs, this admonishment to only take the Multisig Participation Agreement as a starting point, rather than an endpoint, and to consult with legal counsel about how to customize it appropriately, is even more important for this agreement than the other LeXpunK Defense Protocol forms.

### *14.4 LeXpunK DeFi Yield Disclaimers*

DAOs/Multisigs which are involved in creating DeFi software should be mindful of potential misunderstandings on the part of users, which could lead to misrepresentation, fraud or consumer protection claims brought by users, class-action attorneys or government regulators.

One area of common misunderstanding relates to DeFi "yields" (including "APRs," "APYs" and "interest rates") as described on DeFi front-end interfaces or tweets or articles by DeFi smart contract developers. DAOs/Multisigs working on DeFi would be well advised to clearly disclose the meaning, calculation methods, sources of potential error and update frequency of all advertised yields–a project-specific exercise which should be undertaken by closely tailoring all representations to the actual facts of the relevant DeFi system and user interface.

An additional, more generalizable mitigation technique is to ensure that users understand that, despite using similar terminology and having similar functional effects, DeFi yields are very different from TradFi yields. Whereas when an interest rate is offered by a bank or other mainstream business, that interest rate is a contractual promise to deliver some rate of return on a rate or deposit over some future term, DeFi yields are not contractual promises and do not imply the existence of a legal obligation to deliver the stated amount–instead, the yields merely measure the results of operation of various smart contract systems over some historical term. This "paradigm shift" in the basis for financial returns may not be obvious to users or their attorneys, or to regulators. Accordingly, we have provided the LeXpunK DeFi Yield Disclaimers as a starting point for clarifying the difference between TradFi and DeFi yields (despite use of similar terminology) and to disclaim any implication that DeFi Multisigs/DAOs or their participants are liable to deliver users a promised financial return through DeFi smart contract systems. This

[51] "*Credible Neutrality as a Guiding Principle*" by Vitalik Buterin.

[52] Strategically, Multisig members could determine that they *want* to be characterized as a partnership–for example, because partnership interests are presumed to be non-securities–and thus some Multisigs could rationally choose not to include this 'no partnership' clause. If pursuing such a strategy, it might be advisable for the Multisig agreement to have liability co-contribution provisions added to apportion liability among the Multisig members in the event a partnership-related liability arises.

disclaimer could appear directly alongside any yield descriptions on user interfaces (best) or be incorporated into a DeFi website Terms of Service (somewhat weaker, but still useful).

### *14.5 Additional Techniques*

Certain additional defensive techniques are not (yet) included in the LeXpunK Defense Protocol, but are strongly worth considering. In particular, one of the most common concerns of DAO participants is protection against personal liability and funding availability for regulatory issues. DAO communities should actively explore and engage in pre-planning exercises for funding indemnification for DAO participants and litigation defense efforts. These could include putting aside or earmarking funds for use by DAO participants in defense, limiting discretion in the availability of these funds by establishing standards for extending funding/indemnity as well as the limitations for such funding (i.e. to bad acts/actors) as well as structuring possibilities for additional governance and shepherding of such funding.

#### *A. DAO Defense Entities*

An example of a DAO that is exploring participant risk mitigation as well as defense and indemnification funding through the establishment of legal entities is Lido through a March 8, 2022 governance proposal. These entities have independence and their own mandates - elements of separateness that can give comfort around the certainty of funding (provided conditions for funding are fulfilled) for DAO participants.

#### *B. Foundations, Trusts, Etc.*

Many DAOs have explored using entity types (e.g., foundations, trusts, coops and mutuals) beyond traditional business entities (e.g., corporations, limited partnerships, limited liability companies). Such entities can remain accountable to the DAO by drafting their entity charters to require deference to some or all DAO votes, or such an entity can "fully wrap" the DAO, with each token holder being deemed to have some statutorily recognized role (such as member, beneficiary, or supervisor) within the relevant entity. Regardless of how it is structured, an entity can mitigate some of the traditional limitations of DAOs–e.g., by entering into contracts or doing tax payment and reporting on behalf of the DAO. These entities can be configured to avoid the traditional elements of ownership, profit-oriented purposes and rigidly defined governance structures of some traditional business entities. However, the combination of these entities with DAOs, and the extent to which the limited liability, tax and regulatory benefits of these entities will be enforced under different hybrid entity/DAO structures, remains untested by courts–thus, like the other techniques discussed in this Operator's Manual, these structures should be viewed as part of an experimental defense strategy rather than a guarantee of legal protection; likewise, they often carry KYC, tax reporting and other obligations that might not easily comport with the theory and practice of DAO activity.

*C. Tax Elections*

Despite a DAO being unincorporated, it may be necessary or advisable for the DAO, or certain members of the DAO, to make certain tax elections. Assuming a DAO is a partnership for tax purposes and is not doing business in the U.S. a DAO member could elect to treat the DAO as a foreign partnership under U.S. law and potentially avoid certain reporting and withholding foot-faults relating to the collection of Form W-9s etc. Alternatively, a U.S.-based DAO that is a nonprofit unincorporated association (similar to a charity) could elect to be treated as a Section 501 exempt entity under U.S. law.[53]

[53] Miles Jennings and David Kerr, A Legal Framework for Decentralized Autonomous Organizationshttps://a16z.com/wp-content/uploads/2021/10/DAO-Legal-Framework-Jennings-Kerr10.19.21-Final.pdf