

Joint Ventures for Domain Name Development - With Zak Muscovitch

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If you are a domain name investor, you likely have some phenomenal domain names that have yet to be developed. And if you are a great developer, you are likely looking for an opportunity for your blood, sweat, and tears to make a real difference in a venture that you directly benefit from. Those are the makings for a successful joint venture. In this show, you will learn about many of the critical aspects when forming a joint venture. Stay tuned.

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Here's your program.

Michael Cyger: Hey everyone. My name is Michael Cyger, and I'm the Publisher of DomainSherpa.com - the website where you come to learn how to become a successful domain name investor and entrepreneur directly from the experts.

Every conference I go to I meet successful domain name investors who have phenomenal single-word domain names that define an industry, a product, or a service, but do not have the expertise or the time to build the business themselves. What they need is a phenomenal developer - one that can take an idea, process map the whole business, and then code it up to make a reality. Those are the makings of a successful joint venture, but each side is understandably tentative about forming a legal relationship.

What are the proper milestones, the metrics?

What thresholds should you have to make sure that everybody is holding up their part of the bargain?

How do you ensure that the assets and contributions that you are providing to this venture are not a waste?

That is what we are going to answer on today's show, and I am pleased to welcome today's Sherpa, Zak Muscovitch, an Internet and IP Lawyer at The Muscovitch Law Firm.

Zak, welcome to the show.

Zak Muscovitch: Thanks for having me. It is a thrill to be here, and I am so glad to be counted as a Domain Sherpa with your other distinguished guests.

Michael: Well, let's see how you do on answering some questions, Zak.

Zak: Okay, give it a shot.

Michael: All right, it is great to have you here. I want to start by saying that this show is not specific legal advice for you, the audience. It is not comprehensive. It does not address the specific needs that you have for any joint venture going forward. You need to seek the legal advice of an attorney

that specializes in IP and Domain Name Law, but this show should provide general information about the topic, which I have often wondered about. So, let's start with a basic question, Zak. What is a joint venture?

Zak: Sure. Well, a joint venture can take many forms, but within the context of domain development, it generally involves two parties. One party that contributes the domain names to the joint venture and another party that contributes the effort and the expertise to the joint venture. And when both two parties get together and each contribute either the domain names, the time, and the expertise, that together is what we call a domain name development joint venture.

Michael: Okay, and so that is one type of joint venture. How is that different than, say, a partnership?

Zak: Sure. Well, joint venture is a seemingly complex term, but it really is nothing more than a form of partnership. Both terms can be interchangeable within some contexts, but the way we use joint venture for domain name development generally infers a certain kind of a structure where the parties do not necessarily become formal partners on day one and they do not share in all the assets necessarily as partners would. Rather it is an incremental approach where the parties both start off at a certain point and then end up potentially partners or shareholders within a corporation.

Michael: Ah, okay, so that makes sense. So, a partnership sort of makes people feel like they are some sort of joint ownership from the beginning. Maybe it is 50-50, maybe it is 80-20, but starting off from day one, they are partners on a venture, whereas a joint venture may not start out as a partnership, but hopefully it will end as some sort of partnership if things go well.

Zak: Exactly.

Michael: Oh, perfect. Okay. All right, now, Rick Schwartz had started a venture, an idea - I am not sure what to call it - in the past called JointVentures.com, where he was trying to take great domain name assets and then find people to lease those assets. He called it Joint Ventures, but if I

have a domain name and I just lease it for a hundred dollars a month or a thousand dollars a month, is that a joint venture?

Zak: Yeah. Well, actually, I had the pleasure of watching you interview Rick Schwartz on the Joint Ventures topic, and yes, a leasing arrangement is a kind of a joint venture. It is not the first kind of structured joint venture that would come to my mind, but 'joint venture' is a very loose term and it can encompass a leasing type of arrangement as well. Basically, within that context, it is any business arrangement where both parties are contributing something to an objective.

Michael: Okay. And if we zoom out of the process, up to sort of the 30,000-foot level, we have, in one hand, an investor who has an asset - a domain name - and on the other hand we have someone who can add value to that domain name. Maybe it is developing, maybe it is marketing, or some other service that they can provide.

Zak: Yeah.

Michael: What are the typical stages to forming a joint venture, starting with: "We just met at a conference," and ending with: "We have a legal agreement"? How do you get from point A to point B?

Zak: Right. Well, I mean from a high level perspective, there is really two approaches. The first approach is: let's say I met you at a conference and we had a coffee, and we discussed you had domain names and I had development expertise. And you gave me access to your domain name server and I started developing it, and then we shared profits, and that is it. That is the first approach - very formal. Nothing more than that is required, and that is concerned a joint venture. The approach that people come to me for, as a lawyer who specializes in domain names and Internet law, is to formalize that, document it, and provide some advice on specific issues that I have seen in my experience that arise that protect the interest of both parties. So, really, the first stage is, generally speaking, when two people - a domainer and a developer - get together and have a meeting of the minds where they agree to proceed on a project that can involve a single domain name or a whole portfolio of domain names.

Michael: Okay, and so if you are the developer and I am the domain owner, we get together and we have a conversation. Then maybe we document the conversation in an email so we both can look at what we talked about, but when it is in writing maybe it means something different. Maybe it is a little bit more formal than what you and I just talked about. How do we go from an email? What are the general steps? And we will get into the detail, but what are the general framework steps to go from that conversation and then email to a legal document?

Zak: Well, I am always very happy when I get involved at that stage, when the two parties have exchanged emails and come to meeting the minds of both; the general terms or the general parameters of their project, and they could say, "Okay, these are the general ingredients, Zak. Can you take it from there and talk to us about the other issues that you see, some of the considerations maybe we have not thought of, and then could you put it into a document and recommend a structure for us to go forward?" And so, it is very helpful when the parties put it in writing. Even if it is in basic form, the general ingredients of a joint venture.

Michael: Okay. So, conversation, then an email, then involve maybe an attorney or a lawyer at that time, and then you can take it and put it into a term sheet and work through any other additional issues that you have seen in the past. And that is an important thing. I know that I have never done a joint venture, so I do not even know what kinds of issues I should bring into a legal document. But you have done this a number of times, so you can help guide the conversation around: "Have you discussed A, B, and C?"

Zak: Right.

Michael: And then, eventually, you end up at a legal document.

Zak: Sure, and that raises two other possibilities. One is that sophisticated or experienced joint ventures might develop a term sheet on their own and present it to me and ask me to further document it in a contract or set of agreements. The other thing is, is that one or both the parties can come to a domain name lawyer, and that lawyer can create a term sheet with them, in

consultation with them. And a term sheet is a really great document, because what it does is it essentially lists all the terms, otherwise known as deal points that will eventually go into a contract, because it is always best to sort out and agree upon the basic terms in a term sheet or a set of deal points prior to incorporating it into a much longer, more comprehensive agreement.

Michael: Yeah. Now, that is a cool point that you bring up, Zak, because you have done this a number of times before. How many times have you put together a joint venture-type deal in the past?

Zak: Well, I have been practicing domain name law for about fourteen years, I am shocked to say, and these kinds of joint ventures come up with regularity and increasing regularity due to changes in the domain name market, which maybe we will talk about as well. But basically, I do this on a daily basis. There is always an agreement that I am doing. Whether it is a formal joint venture or a shareholder's agreement, it is something involving a business relationship between two or more parties regarding development of websites.

Michael: Yeah. And so, I like the idea of involving somebody who has experience in a joint venture early in the process, but my hesitation to doing that, Zak, is if I was thinking about using you as my attorney, representing my interest, sort of like a real estate broker representing my sale interest, I would not necessarily want you to be involved in the other party's interest in the term sheet, because you may bring up something that is more beneficial for them and less beneficial for me. How do you resolve something like that when somebody asks you to be involved early in the terms?

Zak: Right. Well, that is a very good an important issue and, generally speaking, I only like to work for one party. It makes my duties and obligations a lot clearer and I am able to provide better service to one party. On rare occasions, two parties will come to me and ask me to prepare documentation based upon agreements they had reached, and in every such case they will have to seek independent legal advice, because I am just not able to counsel two parties on the same deal as effectively.

Michael: Right. Okay, that makes sense. So, I want to take a moment, Zak, and ask you a few questions about you personally. You mentioned that you had been practicing law for fourteen years and done a number of joint ventures. Back when I first introduced you on the show, I put the little title up that said, "Zak Muscovitch, DNAttorney.com." And of course, all of the domain name investors are thinking: "Great, Domain Name Zak." When did you actually acquire the killer domain name DNAttorney.com?

Zak: Well, you know, I have never been asked that question, but I actually have an interesting answer to that. I forget the exact number of years. It has been maybe about eight or nine years, perhaps, since I got it. It was actually given to me because I helped a client with a domain name issue, if I recall correctly, and out of the goodness of his heart, he thought I should have this domain name and transferred it to me.

Michael: That is very nice.

Zak: Yeah. At the time, I did not fully appreciate what a great domain name it was, but it has really grown with me, and so I am proud to have DNAttorney.com now.

Michael: Boy, it is a good thing that you did not let that drop in the middle years, where like: "Hey, how much is a domain name worth?" I interview people all the time that talk about that.

Zak: Yeah, those periods are scary in hindsight, yes.

Michael: Do you own an investment portfolio of domain names yourself?

Zak: No. My interest in domain names is purely as a professional. I have dabbled in registering domain names, but I have not been as successful as most of your viewers. I started getting into Internet Law back in 1996, and I am embarrassed to say a few of the domain names I thought would have value back at that time. I think I registered RobotFishing.com and RobotHunting.com. I thought it would be the next big thing. Boy, was I wrong.

Michael: Now, if you had only gotten RobotCars, then, you know, Google might have wanted to buy that off you. I hear that cars are actually driving around the Bay Area unencumbered by people controlling them to shuttle employees between locations. It is unbelievable.

Zak: That is right. Well, listen. The reason I got into Internet Law is because I am very excited about technology and I love new technologies and I always have, so those kinds of stories are of great interest.

Michael: Yeah, and I am sure some of my audience is going to wonder. You have an accent. It does not sound like you are from Texas.

Zak: Right. Well, I could ask you the same thing, but yeah.

Michael: I am definitely not from Texas.

Zak: Yeah. Well, I guess nobody ever hears their own accent, but to give you some background, I am from Toronto. I live and work in Toronto, and I am privileged to have clients all over Canada, but also all over the world because, as you know, domain names and domain investing and domain business is very much International.

Michael: Definitely. And are you able to draft and execute legal documents for parties in the United States, in Russia, and in Europe even though you are located in Canada?

Zak: Well, typically the deals that I work on that involve buyers and sellers or lessors and lessees are International agreements, and so yes, I do get involved in those kinds of agreements. But if there is an issue that involves local law, then we consult with a local attorney who is able to provide that jurisdiction specific advice.

Michael: Okay. All right, so let's take an example of a domain name owner and developer coming together to form a joint venture. For any agreement to be made between the two parties, you need to make sure you have a verbal agreement to the terms of the venture. You sent me a term sheet with 36 items identified. It was a fantastic term sheet that allowed me to sort of think

through my thought process around the questions that I wanted to ask you. As I mentioned earlier, this is not a show that is intended to provide specific advice to any person that is watching this show, and it is not fully comprehensive and people need to consult an attorney in order to have all of their legal rights represented properly. But Zak, I thought this was a great area. We are only going to be able to tackle, in the hour or so, a few of the items and dig into them. Would you mind if I posted all 36 items below this show for people to take a look at and make sure that they are thinking through all the appropriate aspects of a joint venture going forward?

Zak: Absolutely, and of course your viewers should be aware that this is not tailored to their specific situation. It is not comprehensive. It is just an example of some of the kinds of terms that may be considerable for a particular joint venture.

Michael: Cool. All right, so I want to ask you about a few of them. Domain name owner and contact information is clear from the list that I have here. You want to make sure that you get the legal entity or the person's name and the address, and communication channels clearly identified in agreements so that you know how to serve notices or what have you. Developer name and contact information is clear. Let's talk about the term of the agreement. What does 'term' mean and what is a typical term for a joint venture agreement?

Zak: Okay. Well, that is a confusing term actually, because it has a couple different meanings depending on the context. And so, terms can mean the points or aspects of a deal. So, when we talk about the terms of an agreement, we are talking about aspects of it or points of it, so to speak. But Term, in those contexts within a joint venture agreement, refers to the duration of the agreement. So, for example, a Term could be agreed upon to be five years, or it could be two years, or it could be at various stages and go through evolutions over the course of a Term. So, that is what Term means within this context.

Michael: Okay, so if we talk about term duration, and we will get into the terms - that individual details - of the agreement later, but we will talk about just the duration right now. What is a typical duration that you have seen?

How long does a joint venture need to be up and running in order to figure out if it is working or not?

Zak: Right. Well, most joint ventures approach a particular joint venture with the intention that it will be an indefinite relationship between the domain owner and the developer, and so we go in with that expectation. But that does not necessarily mean that the term is going to be indefinite because what we want to do is insert some safeguard so that we have kind of a 'getting to know you' period. A probationary period where the parties can see if they work together and the parties can see whether they produce results. So, generally speaking, we try to create at the frontend of this term a fixed period that has certain thresholds that have to be met, particularly by the domain developer. So, for example, we could say, "Michael, you are going to contribute the domain name ABC.com to this joint venture and me, Zack, I am going to contribute the development expertise." Then you say, "Well, that sounds great, but I do not want to tie up my domain name for five years or two years, or indefinitely, unless I see that you are really producing results. And for me, results means revenue, or at least increased traffic, and it has got to be better than what I am doing on my own. Otherwise, I want to be able to pull back this domain from the joint venture." And so, depending on the nature of the business and the nature of the website, we will select a term. So, it could be, if it is a very sophisticated project that we know is going to take a year to ramp up and create text and get content together, maybe there will be a year just at the very beginning where we do not even expect any results, and then another year or two after where we are expecting results. So, it really depends on how sophisticated the project is and how much work is involved.

Michael: Yeah, great point. So, I want to reiterate that a joint venture is a long-term partnership that hopefully the parties will become some sort of partners in the process and that that is the intended expectation of forming a joint venture. It is not: "All right, I will give you a trial period. And if you can make this work, then let's talk about it." It is actually forming a long-term relationship between two or more parties.

Zak: Sure, and you know what? That raises the important point about: "What is the objective at the end of the joint venture," because we talked about how there is an expectation of being indefinite, but it can take two different forms,

Michael. So, for example, some developer might be just happy, and we will talk about this more; about getting a share of the revenues - the profits - from the joint venture, but another one will not be happy with that. He will actually want to take an ownership share eventually in this domain name, and so that is really the ultimate goal; is for them either to either share in revenues and/or become joint owners in the domain name.

Michael: Right, and that is a great point, and any joint venture is going to have different objectives. For example, like an Amazon. You just build it and regardless of whether you make any money, if you get more people coming to your website and using your services, then eventually you will be able to monetize it. So, you may have a goal that in two years you just want a hundred thousand or a million people coming per month, and for that you are willing to share in the value of the domain name or the whole business. Then that is fine. So, the threshold of that probation period that you talk about does not necessarily have to be just monetary, just revenue or profits coming in. It could be some other metric that both parties find valuable.

Zak: Yes, absolutely, and the parties will generally know best what their expectations are. It could be, as you pointed out, a certain level of traffic. It could be a certain level of revenue. Generally those are the two categories that are more tangible that we like to set thresholds for.

Michael: Definitely. So, right under the Term of the agreement, you have stages listed. What are the different stages?

Zak: Right. Okay, so at the beginning, we spoke a little bit about how the difference between a joint venture and partnership could be that, in a partnership, people really expect to be partners from day one in certain assets or in a certain business, whereas a joint venture does not necessarily have to be that way because each party is contributing something different, or each contributes something period. So, the stages are crucial in a joint venture. Let me explain why. Once again, let's say you were contributing a domain name, ABC.com, to this joint venture and I was contributing the expertise in developing it. And you could have gone and hired a developer, such as me, and you would have had to pay that developer, but you have chosen not to do that. Your reason could be to free up cash flow for other projects. It could be

because in order to get someone who is qualified as myself, you need to offer more than an hourly rate or fees. You needed to give the guy a piece of the action. And so, when we get together for this joint venture, you are contributing the domain name and I am contributing the expertise, but I am going to want something more from you, like: "Will you give me a share of the domain name?" And you would be like: "Well, listen; I do not have a problem with that in principle. I would love for this to be so successful that I am getting a lot more revenue than before we were working together, but I am not about to give you a share of my domain name on day one because we have just met. We are just starting to work together. So, how about you earn up to that point?" And so, the first stage really should be a trial period where you are testing whether this arrangement works. You are trying to see whether by involving me in the development of your domain name you are able to realize greater traffic and greater profits. And if that is the case, then you might say, "You know what? Things are going on the right track." Once you know they are going on the right track, Michael, then you are able to say, "Okay, you have earned ten percent of this domain name. You have earned 25%," all the way up, possibly, to 50% of the domain name, and then we are back to being partners, as we have talked about before. And that really will change depending on the value of the domain name. If we are talking about a 10 million-dollar domain name, a month of great work by me is not going to earn me ten percent probably, but it could. It depends on the situation.

Michael: Right. Okay, so basically two stages. There is the trial stage to make sure that mainly the domain owner has the domain. You are contributing the domain, so that is pretty much decided right there, but the developer needs to prove that he or she can contribute an equal asset or some sort of benefits to the joint venture. And then, once you pass the trial period, then you move into an earned percentage - some sort of earned partnership in the joint venture.

Zak: That is right.

Michael: So, I am sure people that are watching this show are going to say, "Well, how do you determine what percentage you own and how do you figure that out?" If I have a domain name, I may think it is worth a hundred thousand dollars. But if I try to liquidate it today in the domain name

aftermarket, it may only be worth 15 or 20 thousand dollars. I have to wait, like Rick Schwartz, for ten years to get that six-figure payday on that domain name. So, we may have a difference in just the valuation of the domain name, and then the developer may show up and say, "Well, my hourly rate is two hundred dollars when I bill out as a contractor." So, how do you bring these two parties together who have potentially inflated views of what their assets that they are contributing to the joint venture are?

Zak: Yeah. Well, it is at that stage of negotiation where many potential joint ventures could very well break down, because the domain owner thinks he is sitting on a diamond mine with this domain name and the developer says that it is worth absolutely nothing and without it being developed, next to nothing. So, often, this is where joint ventures can falter even before they begin, but there are a few different approaches that people found work in terms of how to value each party's contribution. And as you know, domain names are notoriously hard to value in any empirical way. One of the only ways of genuinely valuing a domain name is if, for example, the domain owner had recently acquired the domain name and paid X dollars for it right before the joint venture. Then we know how much the domain is worth, more or less, right? And so, it could be that, let's say, the domain is worth a hundred dollars on that day, and then we set a threshold for earning a dollar a month for the joint venture. Once we hit one dollar a month, then we start doling out interest in the domain name. We could say that if you paid a hundred dollars for the domain name, in order to earn fifty percent of it, you would have to earn fifty dollars as your share of the profits. So, once we earn a hundred dollars on this domain name, then theoretically I could have earned my fifty percent. That is one approach.

Michael: Okay.

Zak: Another approach, which is probably more common because not very often has someone just acquired a domain name prior to entering into a joint venture, is for the domain owner to say, "Look, the reason I am even contemplating a joint venture is because I have been sitting on this domain name, which is potentially terrific. But because I am committed to other projects and because I do not have the expertise, it is just not earning me much money, but it is earning me something. Okay? So, if you are, early

through your development efforts, able to earn me the same, well, you have earned zero for me, right? But anything in excess of that, well, that is something that we could talk about, because that is better than how I am doing now, and so I will credit you fifty percent of the incremental increase that you are providing through your efforts and credit that towards an interest and ownership in the domain name." That is a more common way.

Michael: Great, and so the domain owner might also say, "I am earning two dollars per month in parking, and so any revenue about that threshold I will credit you towards some ownership aspect as well."

Zak: Precisely. A portion of that, because the domain owner wants to get credit for that too, because he is contributing something, but yeah, that is precisely the general approach.

Michael: Great. Okay, that makes sense. Another one of the terms is escrow of the domain name, Zak. Why is escrow a good idea or a bad idea?

Zak: Okay. So, this is an interesting dynamic that kind of exemplifies the general kind of frictions in a joint venture agreement between a domain name owner and domain name developer. And the domain name owner says, "Okay, that is great. We are going to work together. I am going to give you access to the DNS and you are going to start working like a beaver, creating this fabulous thing. We are all going to make lots of money. Okay?" And the domain developer says, "Wait, hold on a second. I am the one that is working, slaving away, and developing this thing. And how do I know that I am going to get my share of the ownership at the end of this? Suppose you leave town. Suppose you sell the domain name in the interim. I am left with nothing." And so, the domainer says, "Okay. Well, I am not about to give you your share now on day one, so how about this? How about we approach a third party - an escrow agent?" It could be an attorney or it could be a commercial outlet like Escrow.com, and we place the domain name in there for this reason. We want to provide some security for the domain name developer that if the developer complies with its obligations and performs, there will be the domain name available at the end to dole it out. And from the domain owner's perspective, he is not relinquishing complete control

because it is sitting in a safe place, and he will get it back if the obligations or thresholds have not been met.

Michael: Okay, that makes sense. And one of the things you just mentioned was that the escrow could be at a service like Escrow.com that we all know and many of us use, but it could be at an attorney. Any attorney can serve as the escrow agent as well?

Zak: Absolutely. Essentially, an attorney would hold the domain name in trust. He would prepare an escrow agreement or a so-called trust agreement, and that agreement would setup specific triggers for releasing the domain name back to the original domain name or releasing it to a new entity to be jointly owned, for example, by the two parties.

Michael: Okay, and that is as simple as executing a simple document that says this law firm is holding this asset in trust for this agreement and references it all, just like what Escrow.com does, but like many of us online, when we have to go sign up for something, we probably do not read every single detail. You, as an attorney, or any intellectual property attorney would have an agreement that says those same terms, right?

Zak: That is right. And generally speaking, any attorney or commercial service that provides escrow services would have a quite comprehensive agreement. We may just not read it every time.

Michael: Got you. And the WhoIS information on the domain name. If it is in trust with an attorney, would that change to, say, the attorney's business name and that it is in trust?

Zak: Yeah, in most cases it would, and it would be important in most cases to do so because, essentially, by putting it into trust and having the WhoIS details reflect the escrow agent's name rather than the original domain owner's name. you are letting the public know, whoever looks at the WhoIS record, that this domain name is not owned by the original domain owner, or (Unclear 32:04.4), or it is in some kind of holding panel or it is subject to some kind of agreement. And therefore, if you were to try to buy it from the original owner and you checked the WhoIS, you would see: "Wait a second,

the guy trying to sell it to me is not the reported person on WhoIS." And so, that is why we like to have it like that.

Michael: Makes sense. All right, milestones and thresholds are often the most important terms to agreement. The domain owner wants to see traction. They want to see results in some way, as we have discussed. Maybe it is monetary, maybe it is just traffic, or signups, or what have you. The developer likely wants more time in any case. It is probably infrequent where you set up your expectations and they are met right off the bat. You never know how quickly the search engines are going to index or how well they are going to index. There is a lot of different factors.

Zak: Absolutely.

Michael: How can the two competing issues be quantified fairly in agreement, where the domain owner wants to see results and the domain developer wants more time?

Zak: Well, the beauty of the joint venture arrangement is that even though each party has their own competing interest, as you pointed out, they also have very similar interests. For example, the domain owner likely would be interested in joining forces with the developer if he was doing well with the domain name, right? This is a great opportunity to finally get something going with the domain name. Right?

Michael: Right.

Zak: You are eager to get the deal done. And the developer is like: "When I contacted the guy, he wanted 10 million dollars for the domain name, and so finally I am able to work on a real great domain name without any money down." So, the parties have a lot going to get them to reach an agreement, and that is what drives them.

Michael: Got you. What are some customary development milestones and success metrics associated with a shared interest like that?

Zak: Well, often the domain owner looks to the developer for cues in that respect, because it is really the developer who has coming to the relationship that says, "I have the expertise. I have done this before. I know what I am capable of. I know tools are out there. I know what results are reasonable to produce." So, the developer really is the one that pitches what he can provide in terms of revenue, traffic, signups, and users - whatever it is. And it is important for the developer to be realistic because the domain owner is going to say, "Okay, I like what I hear. Let's record that and make that the kind of threshold for this deal to keep going beyond that point." And on the other hand, a domain owner might say, "You know what? What you are promising is not good enough for me." They might say, "I need you to make it a little stronger. Make your commitment a little higher, because I cannot get this dollar or this number of traffic, it is just not worthwhile for me to get in bed with you like this."

Michael: Yeah, that makes perfect sense. Whenever I start a new venture myself, I always hope for the best and prepare for the worst. What if milestones and thresholds are not met in sort of that trial period of the joint venture? Does the agreement fall apart automatically?

Zak: Well, I would not call it the agreement falling apart, because the agreement is designed and draft with that contingency in mind. So, in effect, the agreement works, regardless of whether the project works. Right?

Michael: Good point.

Zak: And so, we would try to prepare an agreement that gave very specific instructions to each party, possibly also the escrow agent, for what is supposed to happen if certain thresholds are not met. And there could be a grace period, because it is not like you missed it by a dollar and a day and things should end right there. There are grace periods. Maybe there are secondary thresholds that if you do not meet this one, you do not get this percentage, but maybe you get a lesser percentage. There are incentives of increasing. But if those thresholds are not met and if the grace periods have elapsed, then, generally speaking, if it is at the early stage of the joint venture, before there has been any ownership interest acquired by the developer, we would have the domain name revert back to the original

domain name owner and each party would go their separate ways. Often in that situation, there is still some intellectual property or content that has been developed, even in that short interim period. We would have to address who has the rights to that. Often, we have it: "So, you know what? This has not worked out. Domain owner gets their domain back, developer gets the content they created back, and the deal is terminated."

Michael: And that makes sense. Everybody walks away from the agreement with the assets that they provided. Clearly the domain owner is only getting the domain name back, and the developer has put in some things that they cannot tangibly take back - their time, their marketing efforts, links to the domain name, and things like that. But if there was content written or technology coded up, or things like that, they walk away with those technologies that maybe they can use in another business of theirs sometime in the future,

Zak: Sure, or at least the developer is satisfied that the domain owner did not get to keep them for nothing.

Michael: Right. So, back to my earlier question where we talked about escrow. It makes perfect sense if I use you as my attorney and you act as the escrow agent so that if the agreement - I should not say falls apart anymore - comes to a conclusion where the thresholds and the trial period were not exceeded or met, then you would know how to handle the domain name because you have executed the agreement. But what happens if I use a third party escrow service? How do they know to release the domain name back to the registrant? I am sure they do not want to get into the legal details of every single joint venture agreement out there.

Zak: Yeah, good question. So, generally speaking, it is preferable to have a truly independent third party act as escrow agent. In other words, it is not the attorney for either of the two parties. And the reason is, is that although an attorney representing one party can, under some circumstances, act as an escrow agent, that party is not entirely impartial of course because he has another duty to his client. So, ideally, it should be a completely independent third party. Now, let's assume that is that completely independent third party. The skill in drafting the escrow agreement and the joint venture agreement, in

part, is providing clear instructions about what is to happen so that there is no question about what the escrow agent is supposed to do and when. However, as with all things, disputes can arise. And if a dispute arises about whether the agreement truly was breached and whether the domain name should overtake back to the original owner, well, generally speaking, an escrow agent would hold on to it until that dispute is resolved, either by the parties or by order of the court.

Michael: And that makes perfect sense, but in the real world, I am not sure how that would be executed, Zak. So, let's say that I am the domain owner. A year and a half or two and a half years passes and the thresholds were not exceeded in the agreement. Do I then notify the third party escrow company: "Hey, this agreement is no longer valid. Please release the domain name from escrow back to my name"?

Zak: Okay. So, generally speaking, if you were the domain owner, first you would notify the developer. "Look, as we both know and discussed many times, this has not worked out, so the deal is permanently terminated," and then you would ask him to confirm, along with you, to the escrow agent that the domain name can be released. That is a cooperative way of doing it, and that is, generally speaking, the way it would go. However, as I said, if there were a dispute where the domain owner informs the escrow agent: "Release the domain name to me," and the developer says, "No, no, no, not so fast," then the escrow agent would just hold until the dispute was otherwise resolved.

Michael: Okay, that makes perfect sense. Now, to that point, if the parties do not agree, let's say that one of the thresholds was traffic and, as the domain owner, I do not think we reached a hundred thousand unique visitors per month, but the developer provides some sort of information that says that it has, but it is questionable. What is the next step if there is a disagreement about whether certain thresholds were met in the agreement?

Zak: Okay. Well, that would be a business dispute. Like any common business dispute, the parties could try to resolve it through negotiation and reach some kind of compromise or settlement of the issues that could involve them continuing to work together or it could involve termination in

agreement, or they could lawyer up and let the lawyers try to work it out amongst themselves. And if that does not work, then they can go to court. So, it is no different than any other kind of business relationship that falters. There is various ways of dealing with it, and ultimately you can go to court if you need to or often use arbitration clauses. Sometimes it is more effective to use an independent commercial arbitrator to resolve the dispute.

Michael: Right. And I have executed some agreements that is that middle step between the parties negotiate and you lawyer up. You each get your own lawyers. There is that arbitration and in a lot of cases the agreements say you agreed to an arbitration court located in a certain location that will have one person review it and you are bound by the decision of the arbitrator.

Zak: Arbitrator, yes.

Michael: And is that often a case. Do you do that in your agreements as well?

Zak: Very often we do. I mean there are pros and cons for deciding to insert a clause that says that disputes are going to be decided by courts or arbitrators. Some people think that they prefer to have an arbitration clause rather than a court clause in the agreement because they think that it is faster and cheaper. That is not always the case, but the thinking is, at least, that instead of having to wait for a long trial date, we could hire a former retired judge and get a trial date in two or three months, pay him a fee, and we could get this resolved much faster than many court systems.

Michael: Yeah, okay, that makes sense. How do you make sure that you are entering a joint venture with someone who is not litigious, who is not going to go immediately to a lawyer and try and fight you ever step of the way, and you want somebody that is going to be a partner that is going to go work with you and that is going to communicate well? When you have not met this person before and you are coming together, how do you make sure that you find somebody that is not litigious?

Zak: Well, I think, generally speaking, joint venture agreements are serious commitments by both sides, and I think, for any kind of serious business, you would not just enter it into a stranger. You might be tempted to, but you

would perform the normal due diligence you would on any person you intend to do business with. You might look to see about their past projects. You might seek the people they have worked with. If you are really suspected, then you would see if they have been part of any court cases and look up their name in the court databases.

Michael: Oh, so you can do that sort of thing.

Zak: Check and see if they have ever been in bankruptcy. You could Google them and look them up in the social media. Get a picture of who you are about to do business with. So, those are the kinds of things that you would want to check before you do business with anybody.

Michael: Great points. All right, and clearly that is not a comprehensive due diligence checklist either, but that gives people an idea of what should be done prior to entering a legal agreement with somebody for a long term. And again, this is an indefinite relationship that you are forming with the intention of, and so things like that should not be entered into willy-nilly or without any thought associated with it.

Zak: Absolutely, because we could go through endless precautions in terms of writing a great legal agreement, but ultimately it is the quality of the person you are doing business with, which matters as much or more.

Michael: Definitely. Should the parties form a legal entity right from the beginning of the joint venture? In other words, should you form a C Corporation or an LLC, or one of the other legal entities?

Zak: Yeah, the parties could. They could do that on day one, but generally speaking, I tend to recommend that they do not. And the reason is, is that it is easily done to incorporate a company, register a company, etc., but really we do not need that company on day one because the domain is probably going to be put in escrow, and so we do not need the company for that because it is going to be with a third party escrow agent. And the developer is going to be contributing its own time and effort. And once they incorporate and they become shareholders and members together on day one, it is a lot harder to extricate them. There are legal fees. There is paperwork to do. Why? Why do

it on day one in most cases? So, I tend to leave that to the stage where we actually are doling out interest in the domain name. And it is crucial at that point because, as you know, a domain name can only be registered really to one person, and so we need to create an entity to own that domain name, and then we distribute shares in that entity in many cases.

Michael: Okay. And would you actually detail that in the joint venture agreement that when this trial period meets these thresholds then shares in the domain name will be distributed through the formation of a legal entity, and sort of detail that much?

Zak: Precisely. We would use language very similar to what you just said.

Michael: Jeez, boy, when I start talking legalese, that is not a good sign, is it, Zak?

Zak: Pretty good. We would say exactly that. We would say, at this stage, we would incorporate this corporation. These persons would be the officers or directors. These would be the shares issued on such and such a date, etc. Sometimes we do it that way. Other times, every deal is different. I have seen it done other ways, where we issue the shares. We create a corporation and issue the shares on day one, but those shares are held in trust or in escrow pending the developer earning them.

Michael: Makes sense. I think one of the biggest fears of any developer joining into a venture is that they are meeting all of the thresholds and requirements of the agreement, but the owner suddenly receives an outrageous offer. A six-figure when they thought the domain was valued at five figures, or seven-figure if the domain was valued at six figures, and the owner then wants to sell the domain name. From a developer perspective, they have invested a lot of time. Maybe they have got some cost that they could have been doing something else that was significant at the same time. How do you handle a situation where the owner wants to sell, but it is before thresholds are even considered for share distribution in the domain name?

Zak: Very, very tricky situation. Well, first we will start from the premise that listen, the two parties have committed to each other, and so whatever

they have committed to, they are stuck with for better and for worse. So, if the domain owner has committed to going along this development path the developer and has committed to the possibility of the developer earning an ownership share of the domain names, the domain name owner cannot sell on his own accord (Unclear 49:05.5) any price he wants, because he is bound by this preexisting contract. Now, that being said, it is pretty hard for the domain owner not to want to go for a deal like that, right? And as much as he would like to take all the money for himself, he has got to compensate the developer. And so, what we tend to do is to say: "Look, Mr. Domain Owner, if you get an offer that is over X dollars that obviously makes you very, very happy. You would really want to take it. You are going to be so happy that you are going to compensate the developer too." And for the developer, that might be to some extent a windfall that he happened to go into a JV at the right time with the right domain with the right guy. Everything has worked out. Maybe he is going to get more out of that than he deserves, considering the amount of time he has put in, or maybe not. Maybe the developer says: "Look, if I can get just ten percent of the purchase price during the first three months, I will be happy. If I have been working on it a year, maybe I need to get fifteen or twenty to make it worthwhile." So, we basically look at what point the number comes in. And if it is as a point where the developer has not earned any equity, usually the developer will still get a little taste of this deal, as consideration for their effort. If it is at a point where the developer has already earned equity or earned shares in the domain name, well, it might be that if he has fifteen percent at that point in time, that is all he gets of the domain purchase or maybe he receives some kind of increased amount or bonus for this happening on his watch.

Michael: And do you decide those percentages or what the bonuses are before you enter into this, or have you done some joint ventures where it is a negotiation in order to terminate the agreement early?

Zak: Well, generally speaking, it is good to have provisions in there that would set out a formula for what happens with that contingency. I mean it does not often happen that a domain receives a great off in mid-development in the joint venture, so that does not happen very often, but it is always preferable to have these worked out at the beginning. At the end of the day,

often these things resolve through negotiation, because if there is enough money on the table, there is enough to go around to treat everybody fairly.

Michael: Yeah, good point. What if the website is meeting the requirements of the agreements? It is hitting the thresholds that both parties agreed to before, but it appears like the developer has slacked off. It is growing, but the developer is not adding any new features or functionality, or things like that. Is that a situation that you have seen where the domain owner is unhappy with the agreement, but the developer is saying, "Well, I am happy because I do not have to do any more work and it is continuing to hit the requirements that we agreed to"?

Zak: Well, generally speaking, it takes an active and vigorous developer to meet those thresholds. If that is not the case, that means the thresholds were not ambitious or active enough to begin with. So, you could often see a situation where thresholds are being met and the developer is leaning back on it laurels. It is more common, I think, to see a situation where they have entered into an agreement, often with the help of an attorney, the developer is not contributing to the project on a daily basis, as you ought to have it, as he promised, and the domain owner is saying, "Well, my domain name and website is dying on the vine. I could have gone in bed with another developer. I could have done anything else with this, and now I am stuck with you. You are not doing everything. You are not working on this on a daily basis." So, often, we include provisions in these agreements that require the lights to be on, so to speak. You have got to be working on it X hours, or there has got to be constant improvement, and things like that. So, we do not just allow people to sit on their laurels.

Michael: Yeah. All right, great point. There are so many other provisions here that I would like to ask you about, Zak, but I think you have done a great job providing an overview for what a joint venture is and the major aspects involved in the legal agreement of a joint venture. So, here is the final question that I have for you before I wrap up with some final advice to readers. I have heard that you, as an attorney, have beat Google three times in UDRP cases.

Zak: Yeah.

Michael: Which is to be congratulated, I think, because Google is a behemoth and they can probably afford more attorneys than they want or need. What were some of those domain names that you were able to successfully defend?

Zak: That is right. Aside from doing Internet and domain name-related business deals, I have handled probably over seventy different UDRP cases and other different kinds of arbitrations, and several presences in court cases as well. And amongst those, I have managed to beat Google three times. Three separate cases. If I recall correctly, one was Groovle.com, then came Goggle.com, and then Google.com. And so, Google only had, I believe, four or five lawyers working on each case. It was not a fair fight.

Michael: And was there one legal tactic that you used in all three cases, or was each one independent and required separate proof that it was not a case where the registrant was trying to take advantage of the brand that Google has created?

Zak: I used the same ingredients in every case. Hard work, creativity, and passion, and those work every time. I mean it is fortunate when you succeed in a case, but often we go with the cards we have been dealt. So, cannot take the credit; it is also the facts that help win cases.

Michael: All right. I want to ask the audience: if you have additional questions, you can post them in the comments below this video and I will ask Zak to come back and answer as many as he can. Now, having said that, this is not a forum for personal legal advice. Zak cannot provide advice to everybody individually. He just does not have enough time, unfortunately for us. In addition, we are not clients of Zak, so he cannot legally provide any. I believe that the board that you have agreed to follow - the ethics - does not allow you to provide legal advice unless somebody is a client of yours. Is that correct, Zak?

Zak: That is generally correct. I mean everyone is welcome to reach me through DNAttorney.com, by email, by chat, and/or by telephone. I am generally always available and happy to provide some general guidance, but

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in terms of asking specific question about specific legal issues, that I am afraid you need to be a client.

Michael: Okay, but general legal advice. If they have a question that: "Hey Zak, in general terms, do I need to do this or that," is that something that they can ask in the comments below?

Zak: Go ahead. I am pretty good at giving the right kind of general answers.

Michael: All right, and if you cannot answer, then you will just put: "Give me a call or contact me through DNAttorney.com."

Zak: That is right.

Michael: All right.

Zak Muscovitch, Internet and IP Lawyer at The Muscovitch Law Firm and DNAttorney.com. Thank you for coming on the show, sharing your knowledge about joint ventures and forming long-term, indefinite relationships between two parties, and thanks for being a Domain Sherpa.

Zak: Oh, it is a real privilege and honor. It is such a thrill to be here with you. Thank you so much, Michael.

Michael: Thank you. Thank you all for watching. We'll see you next time.

Watch the full video at:

<http://www.domainsherpa.com/zak-muscovitch-dnattorney-interview/>