1. How much do the parties need limited liability? This may be an overwhelming concern -- thereby eliminating the general partnership option.
2. To what extent will the company/client want to be actively involved in the management of the venture? Would they be comfortable with being a passive investor? If active participation is desired, that may eliminate the limited partnership option -- unless the company/client is the general partner.
3. To what extent do the parties envision the ultimate payoff from the venture resulting from a future public offering of stock? If that is the main intention, a regular corporation may be the clear best choice.
4. Will the venture itself have employees and operate from offices or a facility? If so, that may make the contractual form unattractive because of the need to negotiate allocations of overhead, employee costs, etc. A separate entity that would clearly be the employer and the owner/lessee of the facility may be better.
5. To what extent will the parties compete with one another after the venture?
6. To what extent does the payoff from the joint venture depend on future licensing? If that is what the parties intend, they may find that potential licensees are more comfortable dealing with a corporation or LLC than the other entities. Similarly, if the joint venture is planning to license technology from others, licensors may be more comfortable with the corporate licensee than the other forms.
7. To what extent is either the pass-through of losses or the accumulation of money in the venture with the lowest possible tax important? If the former, a pass-through entity, such as a partnership or LLC will be necessary. If the latter, the corporation is the only choice as the other forms pass through profit to members or shareholders (even if not actually paid).
8. What kind of capitalization is needed? What would the parties providing capital expect in return? Structures of various classes of shares are available in all the entities except for general partnerships. If investors expect to be passive and have no interest or expertise in the business, a limited partnership or corporation is likely the best choice, although a manager-managed LLC is also an option.
9. To what extent is potential tort liability of the business and its products a concern? What kinds of liability could be easily covered by reasonable insurance?
10. To what extent is the law of a particular state a benefit? Is choice of law an issue? While some states have well developed corporate law, others have focused on particular areas of home concern -- water rights, oil and gas leases, etc. The state of incorporation may be freely chosen, but choice of law for a limited partnership must bear at least a reasonable relation to the business. If a particular entity, say an LLC, is selected as the best fit, which of the available state laws have the most favorable default rules for the business structure?
11. Are the parties committed to a long-term venture, or is this more of a test? For example, is part of the intent of engaging in a joint marketing or development project to see how well the parties work together? That would appear to suggest that an informal contractual relationship would be better rather than creating an entity that would then have to be dissolved if the parties went their separate ways.
12. Are there any strong personal feelings that need to be taken into consideration? This may be the most important factor. After all is said and done, just about all of the objectives of the parties can be met with at least several, and possibly all, of the possible choices of entity. If the parties have been talking about a "new corporation" or a "partnership," it may be appropriate to use that structure. As corporate counsel, however, we do owe the parties an explanation of the legal choices of entity. For example, the parties may have been talking about a "corporation" not being aware of the option of an LLC, or a "partnership" without being aware of the option of a limited partnership.