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## Important Legal Issues for Executive Directors National Sheriffs' Association

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# Agenda

- Duties of Association Boards
- 501(c)(3) Lobbying Rules
- Hotel & Meeting Contracts
- IRS Form 990



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## Legal Duties of Association Boards



## Sources of Legal Duties

- Relevant state nonprofit corporation act
- Relevant state common law
- Articles of incorporation
- Bylaws
- Board policies and procedures
- Unwritten common practices



# Governance Requirements

## NONPROFIT CORPORATION LAW

- The applicable state nonprofit corporation statute sets forth the powers, limitations and responsibilities for board members.
- Most such laws make clear that it is the corporation's board of directors that is charged with the ultimate responsibility and control over the organization.



# Governance Requirements

## NONPROFIT CORPORATION LAW

- Roles of board members are defined by state law, articles of incorporation, bylaws, board policies manual, and common practice.
- Board sets the mission and policy of the organization.
- Boards are generally only allowed to act in a meeting.
- Power of association boards is generally paramount over power of members.



# Governance Requirements

## COMMON LAW

- Each state's common law requires that corporate board members fulfill:
  - Fiduciary duty of care,
  - Fiduciary duty of loyalty, and
  - Fiduciary duty of obedience.



## Board Member Roles and Responsibilities

### DUTY OF CARE

- Standard is that of “ordinary and reasonable care,” or what would an ordinarily prudent director do in the same or similar circumstances?
  - Very subjective
  - Tied to reasonableness
- Business judgment rule — bad decisions are more easily defended than ignorance; court will not view decisions from benefit of hindsight, but, rather, from the perspective of the directors making the decisions at that time.





## Board Member Roles and Responsibilities

### DUTY OF CARE

- Compliance with fiduciary duty of care:
  - Review all materials provided to you in advance of meetings;
  - Ask questions;
  - Avoid actions/discussions outside of the formal meeting setting;
  - Be familiar with the organization’s articles, bylaws, and procedural documents;



## Board Member Roles and Responsibilities

### DUTY OF CARE

- Compliance with fiduciary duty of care, continued:
  - Rely on experts when appropriate (but such reliance does not excuse willful ignorance);
  - Ascertain that all minutes (particularly recorded votes) are accurate;
  - Insist on legal/accounting expertise when necessary;
  - Attend association meetings regularly, read publications, be involved.



## Board Member Roles and Responsibilities

### DUTY OF LOYALTY

- Duty to avoid conflicts of interest — up to board (or committee of the board) to determine whether conflict exists
- Undivided allegiance
- Recusal or resignation
- Business dealings with association
- Business dealings with competitors
- Corporate opportunities doctrine



## Board Member Roles and Responsibilities

### DUTY OF LOYALTY

- Compliance with fiduciary duty of loyalty:
  - Establish and follow conflict of interest policy;
  - Disclose actual, apparent, and potential conflicts of interest through regular disclosure statements; and
  - Deliberate as a board or through a committee of the board to determine appropriate responses to actual, apparent, and potential conflicts of interest.



## Board Member Roles and Responsibilities

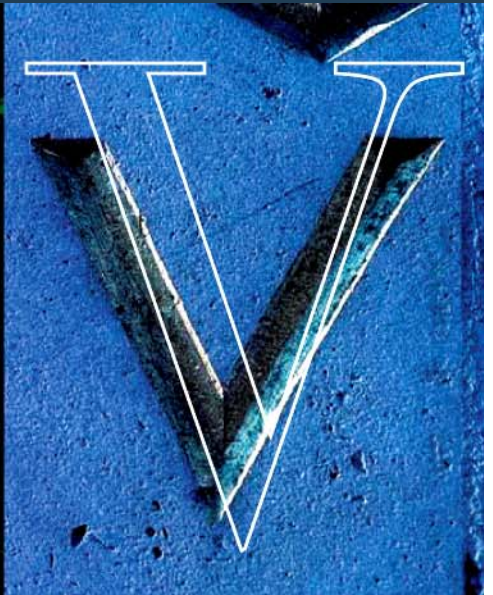
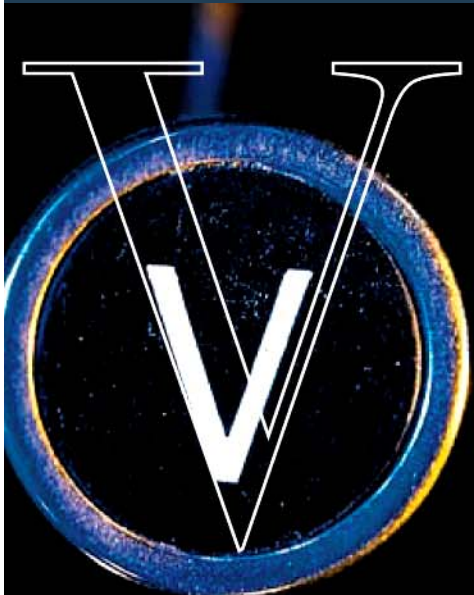
### DUTY OF OBEDIENCE

- Articles, bylaws, other governing documents must be followed
- Applicable laws and regulations must be followed



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## Lobbying & 501(c)(3) Status



## Lobbying

### CAN MY 501(c)(3) LOBBY?

- Yes – subject to limits on funding sources
- As long as “no substantial part” of the organization’s activities are lobbying
  - Jeopardize tax-exempt status
- May not engage in any political activities



## Definitions

### WHAT IS LOBBYING?

- Each state has its own definitions for disclosure purposes
- Federal Lobbying Disclosure Act has its own definitions
- Internal Revenue Code has its own definitions





## Lobbying

### WHAT IS LOBBYING FOR IRC?

- Attempting to influence legislation by propaganda or otherwise
- Advocating proposing, supporting, or opposing of legislation
- The IRS applies the standard on a case-by-case basis and has provided little guidance to organizations
- Form 990 asks a series of questions to determine substantial part



## Lobbying

### 501(h) ELECTION

- Expenditure limits in exchange for clear definitions
  - Faustian bargain for large organizations
  - Often see organizations try to use 501(h) definitions without limits – not clear IRS accepts this



## Lobbying

### 501(h) ELECTION: DIRECT LOBBYING

- “**Direct lobbying**” is any attempt to influence legislation through communication with a member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of legislation.
- Includes communications by an organization to its members, directly encouraging those members to engage in direct lobbying



## Lobbying

### 501(h) ELECTION: GRASSROOTS LOBBYING

- “**Grassroots lobbying**” is any attempt to influence legislation through an attempt to affect the opinions of the general public or any segment thereof.
- An organization engages in grassroots lobbying when, directly or through its members, it:
  - urges the public to contact legislators,
  - provides the public with contact information for a legislator, or
  - identifies a legislator’s position on a pending legislative matter.



## Lobbying

### 501(h) ELECTION: EXPENSES

- Includes following costs:
  - Researching
  - Preparing
  - Planning
  - Drafting
  - Reviewing
  - Copying
  - Publishing
  - Mailing
- Including any amount paid as compensation for an employee's services attributable to these activities.
- Must allocate portion of administrative, overhead, and other general expenses attributable to "lobbying"



## Lobbying

### 501(h) ELECTION: EXEMPTIONS

- Lobbying does not include providing technical assistance or advice to a governmental body or committee in response its unsolicited, written request, provided that
  - the request comes from more than one member of the body or committee **and**
  - the response is made available to every member of the body or committee



## Lobbying

### 501(h) ELECTION: EXEMPTIONS

- Does not include so-called “self-defense activities”
  - communications concerning decisions that may affect an organization's existence, powers, duties, 501(c)(3) status, or deductibility of contributions
- Does not include nonpartisan analysis, study, or research that may advocate a particular view, provided that
  - presentation of the relevant facts is sufficient to enable readers to reach an independent conclusion **and**
  - distribution of the results is not limited to or directed toward persons solely interested in one side of a particular issue.



## State Lobbying

### REGISTRATION

- Source of Funding:
  - Does funding for association come from state funds?
  - Are there limits on the use of such funds for lobbying
- Registration Requirements
- Gift & Ethics Rules





## State Lobbying

### WHO HAS TO REGISTER?

- Different definitions of lobbying:
  - Legislative branch
  - Executive branch
  - Legislation versus regulation
  - Specific covered officials



## State Lobbying

### STATE LOBBYING REPORTING

- Types of Information
  - Contacts
    - Individuals or agencies
  - Amount spent on lobbying
    - Internal costs
    - Gifts
  - Subjects lobbied



## State Ethics Rules

### GIFTS

- Scope
  - Typically applies to “anything of value”
  - Meals
  - Tickets
  - Lodging
  - Events



## State Ethics Rules

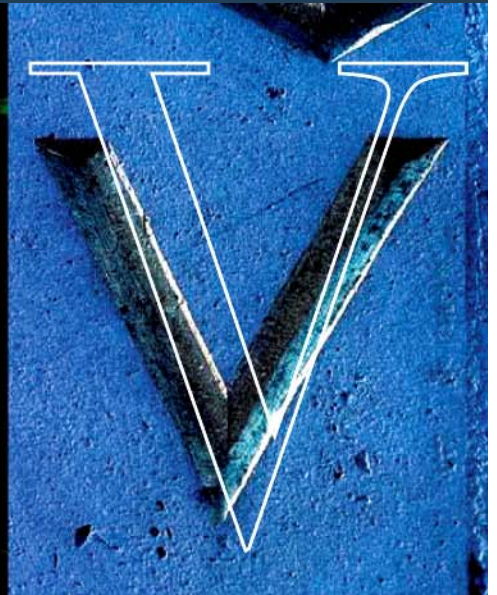
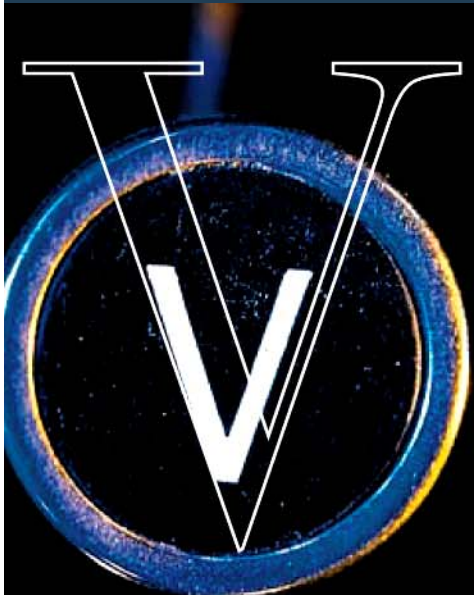
### EXEMPTIONS

- Common Exemptions
  - Receptions
  - Widely attended events
  - Gifts of *de minimus* value



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## Hotel & Meeting Contracts



# Hotel & Meeting Contracts

## OVERVIEW

1. Hotel Contract Issues
2. Convention Center Contract Issues
3. Other Meeting Contracts
4. General Negotiating Tips
5. Conclusion/Questions



## Overview of Issues

### FOUR CORNERS RULE

- Clear & Unambiguous – Contract Speaks for Itself
- Most Litigation Arises Because Contracts Are Unclear
- Otherwise, Most Disputes Are Settled
  - Example: “Reserved by Group”



## Overview of Issues

### BASIC CONTRACTUAL ELEMENTS

- Rates:
  - Rooms Rates
  - F & B
- Penalties
  - Attrition/Cancellation
  - Mitigation & Right to Audit





# Hotel Contracts

## TYPES OF AGREEMENTS

- Group reservation agreements
- Agreements to make space available for reservation by meeting attendees

Our discussion will focus on the latter of the two



## Hotel Contracts

### ROOM NIGHT OBLIGATIONS

- Often the parties will understand the relationship to be one in which the organization is not reserving all the rooms set aside, but the plain language of the agreement is contrary to that understanding.
  - “...make available for reservation by Group meeting attendees.”



## Hotel Contracts

### ATTRITION CLAUSES

- Should I have an attrition clause?
  - Depends on the language elsewhere and hotel's position.
  - Most hotels will insist upon attrition language.
  - Negotiate beyond strict percentage terms.
    - Based on cumulative room nights rather than each night.
    - Tied to mitigation provisions.



## Hotel Contracts

### ATTRITION CLAUSES – HOW TO PROTECT YOURSELF

- Consider Negotiating Without Penalties
- If Damage Provision Required, Follow These Steps



## Hotel Contracts

### ATTRITION CLAUSES – DAMAGES

- Hotel has an obligation, as a matter of law, to **resell unused rooms**
- Hotel **may not**, as a matter of law, end up in a **better financial position** because you cancelled/under performed than it would have if the contract was fully performed.



## Hotel Contracts

### ATTRITION CLAUSES – HOW TO PROTECT YOURSELF

**Double Dipping:** Occurs when the hotel gets the liquidated damages, yet retains the ability to resell the canceled rooms.

1. **Mitigation Clause:** Hotel shall undertake all reasonable efforts to resell canceled rooms, and will **credit** those revenues against the liquidated damages in an amount not to exceed the full amount of such damages.
2. **Timing of Payment:** Damages, if any, shall be due and payable **X days after [original meeting date]** provided the Hotel provides proof of its efforts to mitigate damages and proof that rooms being held for Group's attendees were unsold.



# Hotel Contracts

## ATTRITION CLAUSES – HOW TO PROTECT YOURSELF (2)

3. **Exclude Fees/Commissions/Taxes:** Fees, penalties, or liquidated damages, if any, shall exclude service charges, surcharges, commissions, and rebates as well as state and local sales taxes, unless required by law .
4. **Deduct Overhead/Profit Margin:** If Association is required to pay an attrition fee, the fee shall be **calculated by multiplying X% of the Single Room Rate** by the difference between the number of actually used rooms and the **Room Block Target** with **credits from guaranteed no-shows, cancellations, and early departure charges, if applicable.**
  - ▶ **Guest Rooms 70 - 80%**
  - ▶ **F & B – 30-40%**



## Hotel Contracts

### ATTRITION CLAUSES – HOW TO PROTECT YOURSELF (3)

5. **Average Occupancy Rate – Not Last Sell:** Association shall not owe any fees, penalties, or liquidated damages if Hotel meets or exceeds its **average occupancy level for that particular period of the year.**

**Example: Hotel has 100 rooms, but only sells 50 on an average night.**

**Room Block: 40 Rooms – Cancelled**

**Rooms Sold: 45**

**Last Sell: 0 Credit (55 Rooms Remain Unsold)**

**Average Occupancy: Pay for 5 Rooms**





## Hotel Contracts

### ATTRITION CLAUSES – HOW TO PROTECT YOURSELF (4)

- Negotiate Attrition Based on Cumulative Room Nights Rather Than Each Night
- Consider Clause Giving Credit For Rescheduled Meetings
- How do You Establish “Average Occupancy”?
  - Hotel ledgers



## Hotel Contracts

### FORCE MAJEURE

- How do I protect the association in the event of occurrences beyond our control?
  - Standard force majeure clauses usually aren't enough.
  - Need to tie force majeure to occurrences preventing a substantial amount of attendees to participate and/or get to the meeting site.
  - Prefer capturing this in the contract rather than leaving to chance.



## Hotel Contracts

### OTHER ISSUES

- Indemnification and liability apportionment — liable for actions of guests?
- Lowest published rate, reservations after the cut-off date, compare group attendee list with hotel guest list.
- New and renovated properties.



## Convention Center Contracts

### IS THERE ANY POINT?

- Convention center authorities are notorious for being intractable on key terms.
- Still, persistence and attention to detail usually pays off.
- Consider RFP as first step toward getting more favorable terms.



## Convention Center Contracts

### ARE THERE LEGAL LIMITS ON CONTRACTS?

- May be limited by state or municipal restrictions on matters related to indemnification and liability
  - Don't take their word for it; review the code.
  - Consider a catch-all statement obligating the center to indemnify “to the fullest extent permitted by applicable law.”



## Convention Center Contracts

### BUSINESS TERMS

- Need to work closely with meeting and event planners;
- Convention center agreements frequently include confusing cross-references and schedules on items that are key to a meeting's success (such as, move in and move out times, specific room reservations, etc.)



## Convention Center Contracts

### INSURANCE ISSUES

- Waiver of subrogation, duties to provide certificates of insurance and to name the center as additional insureds have significant consequences
- Consult with broker if necessary and determine additional premiums or other costs that may need to be paid in order to comply



## Convention Center Contracts

### LABOR ISSUES

- Include a provision that your organization can terminate without liability if a strike/threat of a strike occurs within 6 months of the event.
- Require prompt advance notice, disclosure of contract renewal dates.
- Have the center warrant that it will provide replacement workers if a strike occurs.





## Other Meeting Contacts

### THINGS TO LOOK FOR

- Watch for subcontractors — destination management companies and transportation companies are notorious for using subcontractors and seeking not to be liable for their negligence.
- Seek contractors with a track record; take due diligence steps to confirm long-term viability



## Meetings

### FINAL POINTS

- Start with the RFP
- Everything is negotiable
- Warranty
- Liability issues
- Payment terms
- Intellectual property
- Term and termination
- Read everything
- Be willing to walk away
- “Special” considerations



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## IRS Form 990



## Concept for the New 990 and Schedules IRS Guiding Principles

- Enhance transparency to provide the IRS and the public with a realistic picture of the organization, along with the basis for comparison to other organizations
- Promote compliance by accurately reflecting the organization's operations so the IRS may efficiently assess the risk of noncompliance
- Minimize the burden on filing organizations



## Public Disclosure

- The Form 990 is subject to public disclosure
- Forms 990 are widely available on the internet through [www.guidestar.org](http://www.guidestar.org)



## Overview of the Core Form

- Summary page with signature block
- Statement of program services
- Checklist of required schedules
- Checklist of other IRS filings and tax compliance
- Governance, management, and disclosure questions
- Compensation reporting
- Financial reporting – revenue, expenses, balance sheet, and financial statements



## Summary

### SNAPSHOT OF ORGANIZATION

- Highlights
  - most significant activities
  - key financial, compensation, governance, and operational information
- Signature block



# Statement of Program Services

## PART III

- Mission, program services, programmatic changes, and accomplishments in narrative format
  - reformatted
  - upfront so that organization can “tell story” early
- Must describe three largest programs
  - if a Section 501(c)(3), must include:
    - amount of grants to others
    - total expenses
    - revenue





## Governance, Management, & Disclosure

### PART IV

- Rationale: independent boards and well-defined governance and management policies increase likelihood of tax compliance, safeguarding of charitable assets, and serving of charitable interests
- Self-regulation and internal controls
- Transparency and accountability



# Board Management

## PART VI

- Independence of board members
  - total number of voting board members
  - number of voting board members that are independent
  - relationships between officers, directors, and key employees



# Board Management

## PART VI

- Any delegation to a management company
- Any material diversion of assets
- Minutes taken at board and board committee meetings



# Board Management

## PART VI

- Board receives a copy of Form 990 before filed
- What process to review Form 990



# Policies

## PART VI

- A written conflict of interest policy
  - officers, directors, and key employees required to disclose each year interests that could give rise to conflicts
  - monitor and enforce its conflict of interest policy



# Policies

## PART VI

- Maintain a written whistleblower policy
- Maintain a written document retention and destruction policy
  
- Note – broader than SOX requirement



# Disclosure

## PART VI

- Make its Form 1023 available
- Make its governing documents, policies, and financials available



# Members & Chapters

## PART VI

- Does the organization have members?
- Do these members elect the directors?
- Are any decisions subject to approval by the members?





## Compensation

- Maintain compensation review policy - follow the procedures for the “rebuttable presumption”
- IRS safe harbor process
  - independent body
  - comparability data
  - documentation of decision



## Key Employees

- Key employee” definition
- \$150,000 test
  - Employee had reportable compensation of more than \$150,000
- Responsibility test
  - Employee had or shared organization-wide control or influence similar to an officer, director, or trustee
  - or
  - Employee managed or had authority or control over at least 10% of the organization’s activities
- Top 20 test
  - Employee one of “top 20” highest paid



## Legally Required?

- Not all policies legally required
- This point clarified on Form 990 itself
- Presumption of wrongdoing, however, if not in place?



# Legal Issues for Executive Directors

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