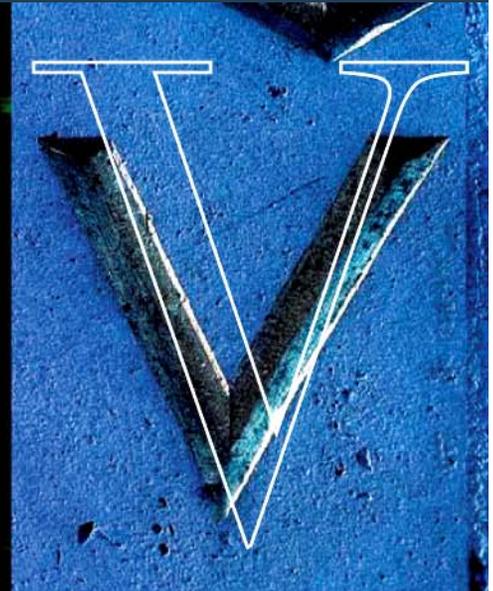
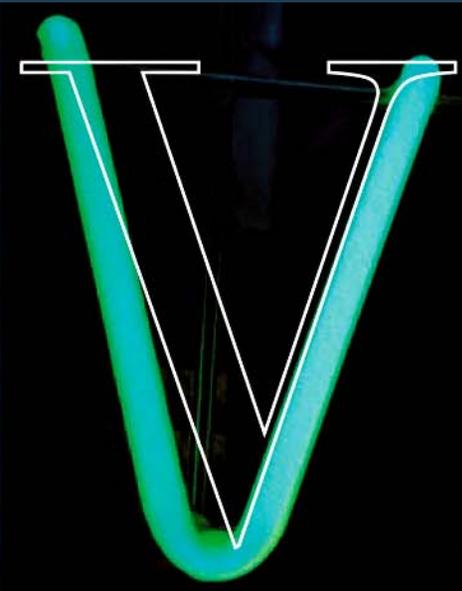
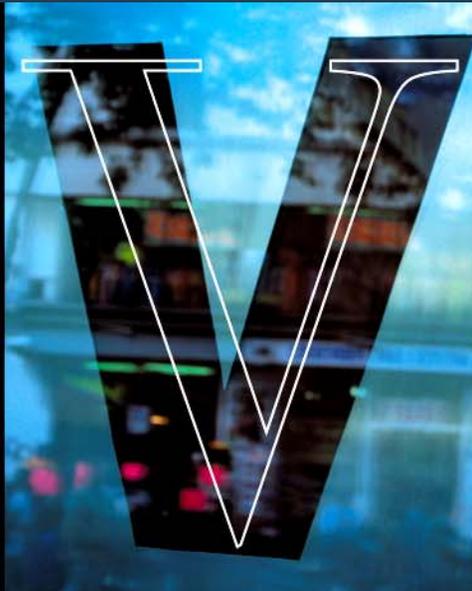
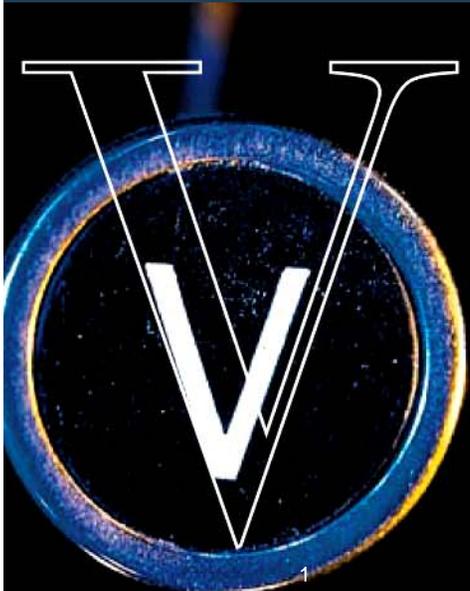


Steering Clear of the Most Common Legal Hazards in Hotel, Convention  
Center, and Meeting Contracts  
July 16, 2009

George E. Constantine, III  
Kristen E. Sitchler  
Jeffrey S. Tenenbaum

Association of Corporate Counsel  
WMACCA Chapter



## Overview

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



## Hotel Contracts

- Two primary types of agreements:
  1. Group reservation agreements;
  2. Agreements to make space available for reservation by meeting attendees.
- Our discussion will focus on the latter of the two.



# Hotel Contracts

1. What are the organization's obligations for room nights?
  - 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

## 2. 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

3. How do I protect my client 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

4. What should I do about this obnoxious form cancellation clause?
  - Look to timing of the payment obligation, duties to mitigate, and timing of when payments increase.
  - Mitigation vs. Liquidated Damages
  - Need express exception for cancellation based on force majeure and actual or anticipatory breach by hotel.



# Hotel Contracts

5. Are there any other points I need to consider?
  - 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 Agreements

1. Is this just a waste of time?
  - 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 Agreements

2. What about situations when the convention center is 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 Agreements

3. How much attention should I pay to strictly “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 Agreements

4. What should I do about terms related to the organization's insurance coverage?
  - 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 Agreements

5. What can I do to manage risks related to strikes and labor disputes?
  - 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 Agreements

1. What should I look out for when dealing with other agreements related to my meeting?
  - 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



## 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



## Speaker Contact Information

- George E. Constantine, III  
202.344.4790  
[geconstantine@Venable.com](mailto:geconstantine@Venable.com)
- Kristen E. Sitchler  
202.344.8221  
[kesitchler@Venable.com](mailto:kesitchler@Venable.com)
- Jeffrey S. Tenenbaum  
202.344.8138  
[jstenenbaum@Venable.com](mailto:jstenenbaum@Venable.com)





## Speaker Biographies



## Jeffrey S. Tenenbaum

Partner, *Washington, DC Office*

[jstenenbaum@Venable.com](mailto:jstenenbaum@Venable.com)

t 202.344.8138 f 202.344.8300

### AREAS OF PRACTICE

- Tax and Wealth Planning
- Antitrust
- Political Law
- Business Transactions Tax
- Tax Controversies
- Tax Policy
- Tax-Exempt Organizations
- Wealth Planning

### INDUSTRIES

- Nonprofit Organizations and Associations
- Credit Counseling and Debt Settlement

### BAR ADMISSIONS

District of Columbia

### EDUCATION

- J.D., Catholic University of America Columbus School of Law, 1996
- B.A., Political Science, University of Pennsylvania, 1990

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group, as well as its Credit Counseling and Debt Settlement Industry Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished and respected author, lecturer and commentator on nonprofit legal matters. Based in the firm's Washington, D.C. office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting trade and professional associations, charities, foundations, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and arbitration.

Mr. Tenenbaum devotes his full time and attention to the legal issues facing trade and professional associations and other nonprofit organizations, as well as credit counseling agencies and debt settlement companies. His exclusive concentration and his broad-based experience in this unique legal discipline enable Mr. Tenenbaum to provide his clients with pragmatic solutions to their legal challenges on a responsive and cost-efficient basis.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, the inaugural (2004) recipient of the Washington Business Journal's Top Washington Lawyers Award, the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. He also was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by Martindale-Hubbell.

### HONORS

- Fellow, Bar Association of the District of Columbia, 2008-09
- Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006
- Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

## MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

- Recipient, The Center for Association Leadership Chairman's Award, 2004
- Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997
- Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95
- Legislative Assistant, U.S. House of Representatives, 1990-93
- AV® Peer-Review Rated by Martindale-Hubbell

## ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

## PUBLICATIONS

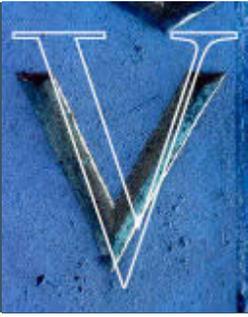
Mr. Tenenbaum is the author of the popular book, *Association Tax Compliance Guide*, published by the American Society of Association Executives, and is a contributor to numerous ASAE & The Center for Association Leadership books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several *Information Background Kits*. In addition, he is a frequent author for ASAE & The Center and many of the major nonprofit industry organizations and publications, having written more than 250 articles on nonprofit legal topics. For a listing of and links to Mr. Tenenbaum's published articles, please visit [www.Venable.com/nonprofits/publications](http://www.Venable.com/nonprofits/publications).

## SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer for ASAE & The Center for Association Leadership and many of the major nonprofit industry organizations, conducting over 30 speaking presentations each year, including many with top Internal Revenue Service, Federal Trade Commission, U.S. Department of Justice, Federal Communications Commission, and other governmental officials. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *The New York Times*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, and other periodicals. For a listing of to Mr. Tenenbaum's past and upcoming speaking engagements, please visit [www.Venable.com/nonprofits/events](http://www.Venable.com/nonprofits/events).

## REPRESENTATIVE CLIENTS

American Academy of Physician Assistants  
American Association of Homes and Services for the Aging  
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American College of Radiology  
Air Conditioning Contractors of America  
American Society for Training and Development  
American Society of Association Executives  
American Society of Civil Engineers  
American Society of Clinical Oncology  
American Staffing Association  
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Independent Insurance Agents and Brokers of America  
Money Management International  
National Association of Chain Drug Stores  
National Coalition for Cancer Survivorship  
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National Fallen Firefighters Foundation  
National Hot Rod Association  
National Propane Gas Association  
National Retail Federation  
National Telecommunications Cooperative Association  
The Nature Conservancy  
Project Management Institute  
Public Health Accreditation Board  
Public Relations Society of America  
Romance Writers of America  
Trust for Architectural Easements



## George E. Constantine

Partner, Washington, DC Office

[geconstantine@Venable.com](mailto:geconstantine@Venable.com)

t 202.344.4790 f 202.344.8300

George Constantine concentrates his practice exclusively on providing legal counseling to and advocacy for trade and professional associations and other nonprofit organizations. He has extensive experience with many of the major legal issues affecting associations, including contracts, tax, antitrust, governance, and political activity matters.

Mr. Constantine has represented exempt organization clients undergoing Internal Revenue Service examinations; he has assisted associations and other nonprofit organizations going through mergers, consolidations, joint ventures, and dissolutions; and he has provided ongoing counseling on numerous transactional and governance matters that are unique to nonprofit organizations.

Mr. Constantine is the former Staff Counsel of the American Society of Association Executives (ASAE), the 25,000-member national society for trade and professional association executives. As ASAE's sole staff attorney, he gained in-depth experience with the many legal issues facing associations. He also represented ASAE's interests before Congress and federal agencies.

### AREAS OF PRACTICE

- Antitrust
- Political Law
- Tax-Exempt Organizations
- Tax Controversies

### INDUSTRIES

- Nonprofit Organizations and Associations
- Credit Counseling and Debt Settlement

### BAR ADMISSIONS

- District of Columbia
- Maryland

### EDUCATION

- J.D., University of Maryland School of Law, 1998
- Recipient, Order of the Coif law school honors society
- Recipient, Judge R. Dorsey Watkins Award for excellence in torts
- B.A., Loyola College, 1989

### PUBLICATIONS

Mr. Constantine is the author of numerous articles regarding legal issues affecting associations and other nonprofit organizations published by ASAE, the Greater Washington Society of Association Executives, the American Chamber of Commerce Executives, the New York Society of Association Executives, and the Texas Society of Association Executives. His article entitled, "New Campaign Finance Disclosure Law Hits the Wrong Target" was published in the

January/February 2001 edition of the *Journal of Taxation of Exempt Organizations*. Mr. Constantine is a frequent lecturer on association and tax-exemption organization legal topics, including corporate and tax issues.



## Kristen E. Sitchler

Associate, *Washington, DC Office*

[kesitchler@Venable.com](mailto:kesitchler@Venable.com)

t 202.344.8221 f 202.344.8300

Kristen Sitchler is an associate in Venable's Washington, D.C. office, where she practices with Nonprofit Organizations and Associations practice group. In her practice, she counsels trade and professional associations, public charities, private foundations, and other nonprofits on a variety of structural and operating issues, including formation, governance, contracts, and tax law, among others. Ms. Sitchler also has experience advising private foundations on grantmaking, and donors on charitable-giving techniques.

Ms. Sitchler is dedicated to providing clients with reliable and thorough advice on the wide array of issues faced by nonprofits, and draws upon her prior legal experience to do so. Before joining Venable, Ms. Sitchler served as a clerk to the Honorable Edward C. Prado on the U.S. Court of Appeals for the Fifth Circuit. Ms. Sitchler's two years on the Fifth Circuit enabled her to develop strong analytical and drafting skills, which she uses to help clients address the legal issues and business transactions that are critical to successfully operating a nonprofit organization.

### AREAS OF PRACTICE

Tax-Exempt Organizations

### INDUSTRIES

Nonprofit Organizations and Associations

### BAR ADMISSIONS

District of Columbia

\*\*\*\*\*  
Texas

\*\*\*\*\*  
U.S. Court of Appeals for the Fifth Circuit

### EDUCATION

J.D., University of Texas School of Law, 2003

Phi Delta Phi

Co-Editor-in-Chief, *Texas Journal of Women & the Law*

\*\*\*\*\*  
B.A., *magna cum laude*, Trinity University, 1999

Phi Beta Kappa

### JUDICIAL CLERKSHIPS

Honorable Edward C. Prado, U.S. Court of Appeals for the Fifth Circuit



[Additional Materials](#)

## Articles

June 15, 2007

### Steering Clear of the Most Common Legal Hazards in Association Hotel Contracts

#### AUTHORS

Jeffrey S. Tenenbaum

#### RELATED INDUSTRIES

Nonprofit Organizations  
and Associations

#### ARCHIVES

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2008 2004 2000  
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Related Topic Area(s): Meeting, Vendor and Government Contracts

Published in the February 2009 edition of *smartmeetings.com*.

Sometimes what seems like an innovative twist to a meeting contract with a hotel can result in unintended consequences for your Association when the language in the agreement doesn't accurately capture the intent of your negotiation. This article examines the language in association hotel contracts that is often the most problematic to understand, and the effects that it can have both on your meeting and on your Association. It also offers suggestions for successfully negotiating these most critical provisions of your hotel contract.

**Attrition/Performance Clauses.** "Attrition" occurs when a meeting is held, but fails to reach expectations, either in number of rooms or the food and beverage revenue to the hotel. A sample attrition clause might look like the following:

*Hotel is relying upon Association's use of 2,610 Total Room Nights. Association agrees that a loss will be incurred by Hotel should there be a reduction greater than 10% in Total Room Nights actually used.*

*Should the room nights actually used by Association be less than 90% of the Total Room Nights, Association agrees to pay, as liquidated damages and not as penalty, the difference between 90% of the Total Room Nights and Association's actual usage of rooms, multiplied by the average group room rate. At the Cut-Off date, you may elect to reduce your room block by up to the 10% allowable shrinkage.*

- Shrinkage is never fun. To avoid the let-down, under-forecast your room block.
- Don't agree to attrition provisions if you don't have to. Instead, attempt to negotiate a "best efforts" provision in the contract, i.e., your Association gets a special group rate in return for using its best efforts to promote the hotel to its meeting attendees. When using a "best efforts" clause, always negotiate a right of first refusal in the event the hotel receives a competing offer of business over the same dates.
- A sample best efforts clause: "Hotel agrees to hold the room block specified in this agreement for use by Association's attendees until the Cut-Off Date. In return, Association will use its best efforts to offer and promote the use of Hotel to its attendees. Association will not be responsible for rooms not used by its attendees unless Association later guarantees the rooms." Avoid use of the terms "reserved" or "reservations."
- If an attrition clause is unavoidable, specify a date before which the size of the room block can be adjusted by the Association without liability. Your group should be able to negotiate a minimum pick-up that represents 75%-90% of your total block.
- Be sure the contract clearly states how the attrition fee will be calculated. Usually this is the difference between the minimum pickup number and the actual number of rooms used by the Association and its attendees, multiplied by an agreed-upon dollar amount. This dollar amount should not be the confirmed room rate, but instead that percentage of the room rate representing the hotel's profit margin on the room.
- The Association should get credit for all rooms used by Association attendees, even for rooms booked outside the block. The Association should also receive a credit for cancellation, no-show, and/or early departure fees charged to individuals. No attrition fee should be assessed for nights in which the hotel is sold out. If the hotel is partially sold out, the attrition fee should be assessed on

the lesser of the number of available rooms or the number of rooms unused by the Association.

**Cancellation.** Cancellation occurs when one party decides to end the agreement. A typical hotel meeting contract might provide the following:

“The Hotel agrees to reserve the contracted guest rooms and/or meeting/banquet space to the exclusion of other business opportunities. Should the organization cancel the contracted guest rooms and/or meeting/banquet space after contract signature, a cancellation fee will be assessed as outlined on the following schedule: Cancellation 0-60 days out: 100% of total contracted guest room revenue and estimated food and beverage revenue based on menu prices at time of cancellation.”

- Without such a cancellation/liquidated damages clause, the hotel would be forced to prove its actual damages in the event your organization cancelled. But note that, under basic principles of contract law, the hotel's damages would be limited to lost profits, not total revenue. At minimum, you would want to re-word the sample cancellation clause above to base damages on estimated lost profit, not 100% revenue.
- Any cancellation fee should be calculated on a sliding scale, so that the farther out from the meeting date the cancellation notice is received, the smaller the fee.
- Cancellation fees should be paid AFTER the event would have been held (30 days after the meeting ends), not upon notice of cancellation.
- If the hotel meets or exceeds its average occupancy level for the week of the event, no cancellation damages should be due.
- The cancellation clause could also be negotiated to provide for a date change instead of a cancellation, for example, by providing that no cancellation fees will be due provided your organization agrees to hold an event of similar size within a certain period of time (typically, one year).
- Be sure to include a parallel provision in the contract to protect your organization in the event of the hotel's cancellation. (See the sample language in the contract addendum provided.)

**Mitigation.** Mitigation is a legal doctrine that requires the person injured to make reasonable efforts to reduce losses resulting from the injury.

- The hotel's form contract will rarely, if ever, include a provision to limit the Association's cancellation or attrition fee liability. Make sure you include such a clause, requiring the hotel to make reasonable efforts to resell unused rooms and function space and reduce the fee by the amount of resale revenue collected.
- The contract should provide that the hotel's exclusive remedy for the Association's termination of the agreement is the payment of a cancellation fee.
- The hotel also should be required to provide proof of its efforts to mitigate damages and evidence that the rooms or function space remain unsold.

**Force Majeure (Termination) Clause.** *Force majeure* literally means "greater force."

- The force majeure clause excuses a party from liability if some unforeseen event beyond the control of that party prevents it from performing its obligations under the contract. Force majeure clauses typically cover natural disasters, war, or the failure of suppliers and subcontractors to perform their obligations to the contracting party.
- A typical hotel-drafted force majeure clause might provide: "Performance of the Agreement by either party is subject to strikes, acts of God, war, or civil disturbances."
- To protect your organization, you will want to add to this list, at minimum, government regulation, terrorism or threats of terrorism, outbreak of disease or illness in the host city, curtailment of transportation facilities preventing or unreasonably delaying at least 25% of event attendees and guests from appearing, or other similar causes beyond the control of the parties making it inadvisable, illegal, or impossible to hold the meeting or provide the facility.
- The contract should permit either party to terminate the agreement without penalty for such reasons.
- The contract should also reference the force majeure clause in any other section of the agreement (attrition, cancellation provisions) that provides for the payment of damages or performance fees.

**Indemnification.** An indemnification clause is a contractual promise to protect a party from financial loss, and a way to shift risk to the party who can best control it.

- A typical form contract will almost always include a one-sided provision requiring your organization to indemnify the hotel. The hotel or meeting venue will typically require your organization to

indemnify the hotel against claims and liabilities incurred by the hotel as the result of the negligent acts or omissions of your organization or its directors, officers, and employees in connection with your organization's use of the meeting space.

- The indemnification clause should be parallel; that is, each party to the agreement should indemnify the other party against all loss, expense or damage arising out of the negligence or willful misconduct of the offending party, or the offending party's breach of the agreement.
- Specify whether indemnifying for negligence or gross negligence.
- You should not agree to indemnify the hotel for the acts or omissions of your event attendees. Push back on this front, as you do not ultimately control your attendees and should not be held responsible for their actions.
- In addition, you should require the hotel to indemnify your organization (and its agents and employees) against claims asserted against them arising from the acts or omissions of the hotel, or its employees, in connection with your agreed-upon use of the space. Note that this promise is worthless without the funds to back it up, and your organization should always insist on evidence of the meeting facility's insurance.

*For more information, contact Mr. Tenenbaum at (202) 344-8138 or [jstenenbaum@venable.com](mailto:jstenenbaum@venable.com), or Ms. Caseman at (202) 344-4495 or [bacaseman@venable.com](mailto:bacaseman@venable.com).*

## Articles

May 30, 2007

### Association Meeting Contract Q&A

#### AUTHORS

Jeffrey S. Tenenbaum

#### RELATED INDUSTRIES

Nonprofit Organizations  
and Associations

#### ARCHIVES

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Related Topic Area(s): Meeting, Vendor and Government Contracts

**Q:** *What are common areas of concern associations should be aware of in meeting contracts?*

**A:** Once the business terms have been agreed on – that is, the specific dates, place, time, and rental rate for the meeting space – it is easy to overlook the provisions in a meeting contract that deal with the "what-ifs." Unfortunately, these are also typically the areas in a contract that contain the most legalese, and that are most likely to cause financial heartburn to your organization should plans go awry. As with all contracts, it is critically important to understand the fine print to protect your organization's interests – and assets. Four such principal areas of legal concern in almost every meeting contract are the cancellation, mitigation, force majeure, and indemnification provisions. Hotels, convention centers, and other meeting venues typically will negotiate these 'worst-case scenario' provisions hotly if you object to their form language, so you'll need to be well armed with knowledge before jumping into the fray!

**Cancellation.** A typical hotel meeting contract might provide the following:

"The Hotel agrees to reserve the contracted guest rooms and/or meeting/banquet space to the exclusion of other business opportunities. Should the organization cancel the contracted guest rooms and/or meeting/banquet space after contract signature, a cancellation fee will be assessed as outlined on the following schedule: Cancellation 0-30 days out: 100% of total contracted guest room revenue and estimated food and beverage revenue based on menu prices at time of cancellation."

Without such a cancellation clause, the hotel would be forced to prove its actual damages in the event your organization cancelled. But, under basic principles of contract law, the hotel's damages would be limited to lost profits, not total revenue. At minimum, you would want to re-word the sample cancellation clause above to base damages on estimated lost profit, not 100% revenue. The cancellation clause also could be negotiated to provide for a date change instead of a cancellation, for example, by providing that no cancellation fees will be due provided that your organization agrees to hold an event of similar size within one year. You also would want to include a parallel provision in the contract to protect your organization in the event of the hotel's cancellation.

**Mitigation.** Again, under basic principles of contract law, the injured party has a duty to mitigate its damages – here, by reselling the space. The hotel or meeting venue should be required to undertake all reasonable efforts to resell any unused or canceled rooms and any unused or canceled function space, and to credit those revenues against any performance clause fees or liquidated damages. The hotel also should be required to provide proof of its efforts to mitigate damages and evidence that the rooms or function space remain unsold.

**Force Majeure.** The force majeure clause is a critically important element in every meeting contract. A typical hotel-drafted force majeure clause might provide (if you're lucky!) that "performance of the Agreement by either party is subject to strikes, acts of God, war, or civil disturbances." To protect your organization, you will want to add to this list, at minimum, government regulation, acts of terrorism, curtailment of transportation facilities preventing or unreasonably delaying at least 25% of event attendees and guests from appearing, or other similar causes beyond the control of the parties. The contract should permit either party to terminate the agreement without penalty for such reasons. The contract also should reference the force majeure clause in any other section of the agreement - such as attrition and/or cancellation provisions - that provide for the payment of damages or performance fees. Note that, under the sample cancellation provision provided above, if your organization were forced to cancel its meeting as the result of a hurricane or other natural disaster, it would still have been on the hook for the cancellation fee.

**Indemnification.** Finally, a mutual indemnification provision is critical. Indemnification is a promise,

usually contractual, to protect a party from financial loss. Note that this promise is worthless without the funds to back it up, and your organization always should insist on evidence of the meeting facility's insurance. A typical form contract almost always will include a one-sided provision requiring your organization to indemnify the hotel; here, as with the cancellation provision, what's left out of the agreement can be more important than what's included. The hotel or meeting venue will typically require your organization to indemnify the hotel against claims and liabilities incurred by the hotel as the result of the negligent acts or omissions of your organization or its employees in connection with your organization's use of the meeting space. You should not agree to indemnify the hotel for the acts or omissions of your event attendees. In addition, you should require the hotel to indemnify your organization (and its agents and employees) against claims asserted against them arising from the acts or omissions of the hotel, or its employees, in connection with your agreed-upon use of the space.

***For more information, please contact Mr. Tenenbaum at 202/344-8138 or [jstenenbaum@venable.com](mailto:jstenenbaum@venable.com), or Ms. Caseman at 202/344-4495 or [bacaseman@venable.com](mailto:bacaseman@venable.com).***

*This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.*

## AUTHORS

Jeffrey S. Tenenbaum

## RELATED INDUSTRIES

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and Associations

## ARCHIVES

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## Articles

May 2003

### Hotel or Convention Center Contract Provision Guidelines

Related Topic Area(s): Meeting, Vendor and Government Contracts

#### 1. Identity of Parties:

Name the contracting parties (legal names), with acronyms in parentheses, along with their principal place of business.

#### 2. Identity and Location of Meeting:

Name the meeting (e.g., *The 80th ASAE Annual Meeting & Convention*) and its location (Hotel/convention center name and address).

#### 3. Meeting Dates and Dates for Room Block:

Specify all dates from first arrival to last departure (including equipment set-up and dismantling). Note that meeting dates and dates for room block may or may not be the same.

#### 4. Sleeping Room Block/Reservations:

##### a. Number of Rooms:

Specify the number of each type of room (regular rooms and bedroom suites) for each day covered by the contract. Avoid use of the terms "reserved" or "reservations." The association is contracting for the hotel to make certain rooms available for reservation by individual meeting attendees; there should be no express or implied statement that the association is affirmatively reserving or guaranteeing that all rooms will be occupied by meeting attendees.

##### b. Types of Rooms:

In addition to specifying the number of bedroom suites and regular rooms, the contract should also specify the number of single versus double rooms, smoking versus non-smoking rooms, standard versus deluxe rooms, and handicap-accessible rooms needed in your block.

##### c. Rates:

Rate calculation generally depends on how far out your meeting is booked and what you have negotiated. If you are signing a contract *within one year* of your meeting, there should be a commitment to specific room rates. If you are signing *more than one year out*, there are four basic methods frequently used to calculate room rates: i) the current-year group rate plus a negotiated percentage increase; ii) a negotiated percentage off of the published "rack" rate on a specific date; iii) the current-year group rate plus an increase based on the annual percentage change in the Consumer Price Index for Hotel's city or region; or iv) a statement that future rates will be the lesser of the three above calculations. Be sure to specify the date on which the room rates will be determined, to include a clause guaranteeing that the group will receive the lowest rates in the Hotel at the time of the meeting, and to specify current sales tax rates.

##### d. Complimentary and/or Discounted Rooms:

Specify a formula for determining the number of complimentary rooms (e.g., one complimentary room night for each fifty room nights used by meeting attendees during the period covered by the contract); specify that complimentary rooms will be earned on a cumulative (not a per night) basis; specify how complimentary rooms may be earned and used for suites; specify that the dollar amount equivalent to unused complimentary room nights will be credited to the Association's master account; and specify if additional complimentary or discounted rooms will be extended to Association directors, officers, staff, and/or guest speakers.

##### e. Reservations:

Specify the number of reservation cards to be provided to Association; specify reservation method (e.g., by individuals or by the Association; to Hotel directly or to an "800" telephone number; by mail, using a Hotel-supplied reservation card or one produced by the Association; or by a housing list);

require Hotel to confirm reservations with guests within specified time frame; require Hotel to provide (specify via facsimile, mail, etc.) weekly reports to Association on confirmed reservations (specify whether to be listed alphabetically, by arrival date, etc.); specify time before which reservations will be held without deposit, deposit policy for holding rooms after specified time, and refund policy on deposits if adequate notice is given; specify the compensation Hotel will provide for guests whose reservations are not honored (e.g., free sleeping room at comparable, nearby hotel, free transportation to and from substitute hotel, long distance telephone calls to office and family, etc.); and require Hotel to notify Association of guests whose reservations are not honored.

**f. Check-In/Check-Out Times and Conditions:**

Specify daily check-in and check-out times for all days covered by the contract; early check-in and/or late check-out privileges, if any, for specified VIPs; the number of registration stations to be open during each day covered by the contract; and any other negotiated special arrangements (e.g., complimentary hospitality suite on major check-in and/or check-out days to accommodate early arrivals and/or late departures).

**g. Occupancy Reports:**

Require Hotel to provide (specify via facsimile, mail, etc.) Association with a daily occupancy report during the meeting dates and a final occupancy report within a specified number of days after the meeting as to the total number and types of rooms in Association's room block picked up during each day covered by the contract, and when they were picked up (e.g., pickup as of 90 days out, 60 days out, 30 days out, and final pickup). If Association desires an individualized breakdown including guest names, arrival and departure dates, etc., be sure to specify.

**h. Room Block Release:**

Specify a date before which Hotel will not release any unreserved rooms from the room block and after which Hotel may, at its discretion, release any unreserved rooms from the room block. Be sure to specify that even after that date, Hotel will still accept reservations from meeting attendees at the rates and on the terms defined in the contract, on a space available basis.

**i. Attrition/Slippage/Performance:**

Hotels generally insist on the inclusion of clauses that assess fees to replace revenue lost when reservation projections fall short of expectations. Such clauses, commonly called attrition, slippage, or performance clauses, can result in substantial financial liabilities for an unsuspecting association, and, as such, should be given close scrutiny. Attrition refers to the gap between the room block and the number of rooms finally occupied by meeting attendees. Attrition clauses generally require the association to pay the hotel a fixed amount for each room in the block that remains unreserved by the time of the meeting. As long as such clauses state that amount in terms of estimated lost profits (damages), and not in terms of a penalty, they will be enforceable. Note that the legal enforceability of the clause does not have to be tied to *actual* damages suffered by the hotel; a reasonable, predetermined estimate of damages is enforceable. If the inclusion of an attrition clause is unavoidable, be sure to specify a date before which the size of the room block can be adjusted (either at will or within specified parameters) by Association without liability. In the alternative, the adjustment can be tied to Association's current history and a formula can be specified for determining the size of the revised block at a specified date or dates. When determining damages owed to Hotel for attrition, a formula should be specified which is premised on lost profits, not lost gross revenue (room rates). Finally, specify that Hotel has an affirmative duty to "resell" rooms not reserved by the date specified in section 4(h) above, and any damages owed to Hotel will be reduced by any rooms resold.

**5. Meeting/Function Rooms:**

**a. Number of Rooms:**

Specify the number of each type of meeting/function room required for each day covered by the contract.

**b. Types and Sizes of Rooms:**

Specify the types (e.g., banquet hall, exhibition hall, auditorium, foyer, solarium, removable wall capability, etc.) and sizes (specify general size and/or specific dimensions) of each meeting/function room required for each day covered by the contract. Identify meeting/function rooms by name wherever possible. Specify whether or not Hotel reserves the right to move Association to alternative meeting/function room(s). If yes, specify that Hotel will pay for reprinted programs and producing signage to alert meeting attendees as to room change(s).

**c. Times of Use:**

Specify the exact time(s) the room(s) will be utilized, as well as the specific periods of time before and after the meeting/function required for the set-up and dismantling of equipment. In the case of an exhibition, the set-up and dismantling times required by exhibitors may be substantial.

**d. Room Release:**

Some hotels will insist upon a clause providing for the release of unneeded meeting/function space back to the hotel at a specified date. This is common when a meeting is contracted for several years in advance. Specifically, under such a clause, the association would agree to inform the hotel at a specified date (e.g., six months out) as to its exact meeting/function space requirements. At that time, all meeting/function space not required for the meeting would be released back to the hotel.

**e. Rates/Complimentary Rooms:**

In the 1970s and 1980s, hotels generally did not charge groups for meeting space, especially if a meal was held in the room and/or if the ratio of sleeping rooms to meeting space warranted. While this is still the case in some circumstances, ever-increasing labor costs make it increasingly difficult for hotels to "comp" meeting/function space. However it is negotiated, it is important to specify whether or not there will be meeting/function room rental charges, what the specific criteria are, if any, for earning complimentary meeting/function rooms, and what the specific rental charges, if any, will be. If there will be rental charges, either set a firm price in advance or specify a computation method, as described in section 4(c) above. If the latter, be sure to specify the date on which the room rates will be determined, to include a clause guaranteeing that the group will receive the lowest rates in the Hotel at the time of the meeting, and to specify current sales tax rates.

**f. Setup Charges:**

Labor charges and union contracts often dictate whether charges will be levied for the setup of meeting/function rooms. Often separate charges will apply to the setup of each and every chair, table, easel, etc.; these charges can add up very quickly. Be sure to specify the setups, if any, for which the Association will be charged, exactly what these charges will be (or when and how they will be determined, if not set in advance), and on what the charges will be based -- actual attendance, the number of chairs/tables set, sleeping room attrition, etc.

**g. Anticipated Number of Meeting Attendees:**

Specify the anticipated number of meeting attendees, and clarify that this number does not serve as a guarantee, but only as a nonbinding estimate; the Association shall not be liable if this number overestimates the actual number of meeting attendees. Note the distinction between this clause and those described in sections 4(i) above and 6 below.

**h. Service and Staffing:**

Specify the service and staffing level required for each and every function, including the types of services to be provided, the number of trained staff needed, dates and specific time frames, uniform requirements (e.g., black tie, doorman uniform), etc.; specify the costs to the Association, including any minimum charges, and how those costs will be calculated, or the fact that there are no costs; specify whether or not some or all of the facility's employees are unionized, and, if not, that the facility shall promptly notify the Association of any efforts to so organize any class(es) of employees; and include a guarantee by the Hotel of friendly, courteous, competent service.

**i. Equipment:**

Specify the equipment required for each and every function, along with any rental charges, if any, to be assessed (see section 5(f) above regarding setup charges). Attempt to negotiate equipment rental on a complimentary basis. If the facility has to rent equipment from outside vendors to accommodate the meeting/function, specify the rates to be charged, including whether or not that includes a markup, or alternatively, specify that the Association will rent the equipment directly from the outside vendors. Finally, specify the facility's cutoff date for ordering equipment.

**j. Utilities:**

Specify when heat, air conditioning, light, power, and/or water will be turned on and off for every day during the meeting/function, including the setup and dismantling periods. If there will be a charge for utility use during setup and dismantling, or during any other period, specify the rates to be assessed. Attempt to negotiate utility use on a complimentary basis.

**6. Food and Beverage:**

Specify preliminary figures of anticipated attendance for each function at which food and beverage will be served; date(s) for final guarantee(s), including if, how, and when the guarantee(s) can be revised; for what percentage over the guarantee the facility will set; what charges will be assessed, if any, for

meal function attendance attrition and/or cancellation; how far in advance food and beverage prices will be set, including whether facility will guarantee that food and beverage costs shall be at least a specified percentage less than menu prices published on a specified date; how charges will be applied (e.g., per drink, per person, etc.) and any minimum charges; how food and beverage will be served (e.g., passed hors d'oeuvres, buffet luncheon, etc.) (see section 5(h) above regarding service and staffing), including table decor; whether there will be any complimentary food or beverage (e.g., coffee stands, food and beverage for staff, etc.); and whether exhibitors may serve food and/or beverage from their booths, and, if so, whether they must obtain it exclusively through the facility.

**7. Gratuities:**

Specify whether gratuities shall be optional at the discretion of the Association or whether they shall be mandatory. If the latter, describe the facility's policy and formula for calculating gratuities.

**8. Taxes:**

Specify all applicable federal, state, and local taxes, along with their current rates, for all aspects of the meeting/function (e.g., sales taxes, service taxes, etc., and on what they can be assessed -- room charges, food and beverage, service charges, gratuities, parking, etc.)

**9. Parking:**

Specify any parking charges, including rates and how they are assessed (e.g., per automobile, flat rate per day for the group, etc.); whether valet parking will be available, and, if so, during what hours; and whether an "in and out" policy will be in effect (allowing or prohibiting automobiles to go in and out of the garage in a given day without additional charges). Attempt to negotiate parking on a complimentary basis for all attenders, for VIPs, for staff, or for some combination thereof, or alternatively, a discounted rate for some combination thereof.

**10. Transportation:**

Specify whether the facility will provide local transportation (e.g., a shuttle to and from the airport, a shuttle to and from the hotel and the exhibition hall, etc.), and, if so, what charges, if any, there will be for this service. If such transportation will be provided, specify the hours during which it will be available, how it can be accessed, and how many vehicles will be available at any given time.

**11. Promotion and Publicity of Meeting, including Signage:**

Specify the facility's policy, if any, on displaying signs and other promotional materials; what signage the facility will provide during the meeting/function, if any, and at what charge, if any; if and how the facility will promote the meeting/function in advance (e.g., electronic sign outside convention center, advertisements in local newspaper, etc.); and whether Association may use facility's logo in connection with advance promotion of the meeting/function.

**12. Other Services to be Provided by Facility:**

Specify any other services to be provided by the facility (e.g., doormen, bellhops, room amenities, complimentary newspaper delivered to guest rooms, complimentary telephone use -- with no surcharges -- for Association staff, etc.), including a description of the service(s) (e.g., uniformed doormen, USA Today newspaper, etc.) and what charges, if any, there will be for the service(s).

**13. Billing and Payment Arrangements:**

Specify how and when credit will be established; what charges will be applied to the master account and what charges will be billed to individual guests/attenders; the size of a deposit, if any, to be provided to facility, how it will be returned, and a guarantee that it will be refunded in full in the event of termination under section 19 below or cancellation by the facility under section 18 below; when payment will be expected and, if not received by then, what late penalties, if any, will be assessed; any discounts for speedy payment; and that disputed items will not be payable until resolved.

**14. Conferences between Association and Facility Staffs:**

Specify the dates, times, and places of any scheduled conferences between Association and facility staffs (e.g., 7:00 a.m. in the staff room during each day of the convention), including specifically who will represent the facility.

**15. Construction and Remodeling:**

Specify that the facility warrants that the facility will remain in the same or better condition at the time of the Association's meeting as it is at the time of contract signing; will promptly notify the Association of any construction or remodeling to be performed in facility prior to the Association's meeting; warrants that any such construction or remodeling will not interfere in any way with the Association's use of the facility; in the event of such interference, will promptly pay the Association liquidated damages in a specified amount and will provide, without charge, comparable meeting and/or sleeping

room facilities at a comparable or superior nearby facility, along with free transportation to and from the substitute facility(ies), as needed.

**16. Warranty of "Quiet Enjoyment":**

Specify that the facility warrants that there will be no outside distractions that could interfere with the "quiet enjoyment" of guest rooms to be used by Association and its meeting attendees/guests.

**17. Other Meetings/Functions at Same Time:**

Specify that the facility will promptly notify Association of any concurrent or overlapping meetings or other events to be held in facility during the Association's meeting, and that the facility warrants that there will be no outside distractions that could affect the ordinary use of meeting rooms or other facilities by Association and its meeting attendees/guests.

**18. Cancellation:**

Distinguish this provision from section 19 below, *Termination*. The Cancellation clause should specify that the contract may be cancelled by mutual written agreement of the parties at any time, or by the Association without penalty upon giving written notice to the facility prior to a specified date; that the facility may not cancel the contract for any reason; that the Association may cancel the contract between two specified dates if it pays the facility a specified amount of liquidated damages, and after the latter of the two specified dates if it pays the facility an even higher specified amount of liquidated damages; that the facility must undertake all reasonable efforts to resell cancelled rooms and must credit those revenues against liquidated damages in an amount not to exceed the full amount of such damages; that liquidated damages, if any, shall be payable 30 days after the Association's meeting ends, provided the facility provides proof of its efforts to mitigate damages and proof that rooms being held for the Association's attendees/guests were unsold; and that the Association will not owe any liquidated damages if the facility meets or exceeds its average occupancy level for the week of the Association's meeting.

**19. Termination (Force Majeure):**

Distinguish this provision from section 18 above, *Cancellation*. The Termination clause should specify that the performance of the contract by either party is subject to Acts of God, war, government regulation, disaster, fire, strikes, civil disorder, acts of terrorism, outbreak of infectious disease or illness in the host city, curtailment of transportation facilities preventing or unreasonably delaying at least 25% of meeting attendees/guests from attending, or any other similar cause *beyond the control of the parties* making it inadvisable, illegal, or impossible to hold the meeting or provide the facility; and that the contract may be terminated without penalty for one or more of such reasons by written notice from one party to the other. In addition, specify that the contract may be terminated upon the breach of any *material* term, provided written notice of the termination is given. Finally, specify that the performance of the contract is contingent upon the availability of the facility as the site for the Association's meeting; if for any reason beyond the control of the Association the facility is not available, or is not in acceptable condition, then the contract may be terminated without penalty by written notice from the Association to the facility.

**20. Change of Management/Ownership:**

Specify that the facility shall promptly notify the Association of any change in the facility's management or ownership, and that the Association may cancel the contract without penalty if there is any change in the facility's management or ownership, provided the Association notifies the facility of such cancellation in writing within a specified number of days after it is advised by the facility of the change.

**21. Indemnification (Hold Harmless):**

Specify that each party to the contract will indemnify the other(s) against all loss, expense, or damage on account of (a) any injury to the person and/or property of any member, employee, officer, agent, etc. of the other party(ies) arising out of the negligence or willful misconduct of the offending party, or (b) any breach of the representations and warranties of the offending party made in this contract. Be sure to clarify if the Association is indemnifying the facility for the actions of all meeting attendees, or whether it is limited to the actions of the Association and its employees; if the Association is indemnifying the facility for the actions of its outside vendors; and if the association is indemnifying the facility for all negligence, or merely "gross" negligence.

**22. Insurance:**

Specify that the facility shall carry liability, fire, burglary, or other insurance in such dollar amount as necessary to protect itself against any claims arising from any activities conducted in the facility during the Association's meeting, and that the facility indemnifies the Association as provided in

section 21 above.

**23. Americans with Disabilities Act Compliance:**

Specify that the facility warrants that it complies and shall comply during the Association's meeting with the public accommodations of the *Americans with Disabilities Act*, including but not limited to the wheelchair access provisions. In addition, specify that the facility indemnifies the Association against any claims or other liabilities resulting from its failure to comply with the public accommodations provisions of the *Americans with Disabilities Act*.

**24. Fire, Safety, and Building Code Compliance:**

Specify that the facility warrants that it complies and shall comply during the Association's meeting with all local, state, and federal fire, safety, and building codes; that it maintains and shall maintain during the Association's meeting appropriate procedures and policies concerning fire safety and other safety issues; and that it shall make all such procedures and policies available to the Association for inspection upon reasonable notice.

**25. Security:**

Specify that the facility warrants that it maintains and shall maintain during the Association's meeting appropriate security measures to protect the person and/or property of any registrant, guest, member, employee, or agent of the Association from injury. In addition, some contracts may wish to specify the exact number of trained security personnel a facility will have on duty at any given time during the Association's meeting, where those personnel will be stationed and/or patrolling, the requisite level of training, and/or other more specific security precautions to be taken by the facility.

**26. Music Licensing Warranty and Indemnification:**

Specify that the facility warrants that no musical work protected by copyright will be staged or otherwise performed, via either live or mechanical means, by or on behalf of the facility, during the Association's meeting, unless the facility has previously obtained written permission from the copyright owner or the copyright owner's designee (e.g., ASCAP, BMI or SESAC) for such use. In addition, specify that the facility warrants that it shall be fully responsible for meeting the obligations under such an agreement, including the obligation to report data and pay royalty fees. Finally, specify that the facility will indemnify the Association from and against any claims or other liabilities resulting from a breach of this provision.

**27. Governing Law:**

To help ensure the most favorable outcome in the event of litigation, specify the laws of the jurisdiction by which interpretation of the contract will be governed. Note that there must be some connection between that jurisdiction and the Association (e.g., the state in which the Association is headquartered or incorporated, in which the facility is located, in which the facility or its parent company is headquartered or incorporated, etc.).

**28. Dispute Resolution Procedures:**

If desired (as an alternative to litigation), specify that any disputes arising under the contract will be subject to arbitration. Furthermore, specify what arbitration rules and procedures will be applied (e.g., Convention Liaison Council, American Arbitration Association, etc.), in what jurisdiction will the arbitration occur, whether or not the arbitration will be binding, and in what jurisdiction the arbitration award may be entered into court.

**29. Special Requirements:**

Specify any other special requirements of the Association, including the cost(s), if any.

**30. Standard "Boilerplate" Provisions:**

**a. Warranty of Authority:**

Specify that the signatories to the contract warrant that they have the authority to enter into the agreement and agree to the terms set forth therein.

**b. Binding Agreement:**

Specify that this contract contains all of the terms agreed upon by the parties with respect to the Association's meeting and supersedes all prior agreements, arrangements, and communications between the parties concerning the Association's meeting. In addition, specify that the contract shall be binding upon and inure to the benefit of the Association and its successors. Finally, specify that the contract may be amended at any time by the mutual written agreement of the parties.

**c. Severability:**

Specify that if any term or provision of this contract is found for any reason to be invalid, illegal, or

unenforceable, that finding shall not affect the validity, interpretation, or enforceability of any remaining term or provision of the contract.

## Articles

September 1, 2000

### Association Internet Ventures: Minimizing Your Legal Risks

#### AUTHORS

Jeffrey S. Tenenbaum

#### RELATED INDUSTRIES

Nonprofit Organizations  
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#### ARCHIVES

2009 2005 2001  
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Related Topic Area(s): Antitrust and Trade Regulation, Copyrights and Trademarks, Electronic Communications, Meeting, Vendor and Government Contracts

So your association has been approached by a dot.com company offering a healthy non-dues revenue stream and a great new member service. Perhaps it is an electronic marketplace where your members can buy and sell products and services, an online benchmarking service for use by your members, an online job bank for your industry, or some other member benefit that your members (and possibly the general public) will be able to access online (either via your association's Web site or through another site).

You have met with the company's executives, hammered out the core deal terms, and are ready to reduce your oral agreement to writing. How do you structure the deal from a legal and tax perspective? What structure -- and what contract terms -- are going to minimize your association's liability risks and protect its valuable intellectual property? Is it possible to treat some or all of this revenue as tax-free income? These are critical questions, yet unfortunately, the haste to reach lucrative deals has led many associations to gloss over this indispensable step in the process. The result has been association Internet ventures that do not sufficiently minimize the association's liability risks and protect its interests, do not ensure tax-free revenue, and simply are not structured and documented as well as they could be.

The following is a brief (and non-exhaustive) list of ten key legal issues to pay special attention to as your association negotiates and drafts the contract for its next Internet venture:

- **Due diligence and quality control.** Do your homework on your potential Internet suitor. Do business background checks; check references; request key legal, financial, corporate, and insurance documents; test ventures set up for other clients. Avoiding negligence in the selection process -- and on an ongoing basis -- is key to avoiding liability for the errors and omissions of the vendor. In addition, be sure that your association retains the ability to review and approve all aspects of the Internet site, including future changes to the site.
- **Independent contractor relationship.** While it is certainly permissible for your association to structure the deal as a partnership or joint venture, if you do, you may be liable for virtually everything that happens in connection with the venture. In addition, the character of the income will pass through to your association, eliminating the ability to structure otherwise taxable unrelated business income as tax-free royalty income. Merely endorsing a venture owned and operated by the vendor -- with certain rights, revenues and services flowing to your association -- may be a more desirable approach.
- **Consider using a taxable subsidiary if appropriate.** If a partnership or joint venture is desired -- or if the potential liability risk connected with the venture is particularly high -- consider shifting the association's ownership and duties (in whole or in part) to a taxable subsidiary of the association. If properly structured and operated, this will shield your association from liability and can permit the subsidiary to earn unlimited taxable income with no risk to the association's tax-exempt status. The after-tax profits can then be paid to the association as tax-free dividends.
- **Intellectual property and links to other sites.** Be sure that the contract provides for: the assignment (or at least perpetual, irrevocable license) to your association of all key copyright, trademark, patent, and domain name rights created under the agreement; your association's ownership and control of the "look and feel" of the Internet site and all content on the site; restrictions on the use of your association's name, logo and membership list by the vendor; the confidentiality and security of association membership data and other information; and a warranty by the vendor that it will use no infringing or otherwise illegal material in the creation or operation of the site. Also be sure that appropriate hypertext links on the site are required (such as a link to

your association's Web site), and that all other links are prohibited without your association's prior consent.

- **Term, termination and transition.** Like all contracts, the provisions spelling out the initial term of the contract, whether and how the term will automatically renew, and when and how the agreement can be terminated are critical. Be sure that provision is made both for voluntary termination prior to the end of each term and for automatic termination upon certain conditions. Upon termination of the agreement, be sure that your association is able to transition the site, to the extent possible, to another vendor. The intellectual property issues discussed above are often key in this regard, including your association's continued use of the site's domain name.
- **Control of data, confidentiality and noncompetition.** Be sure that the contract provides that your association will be the sole owner of all data generated by the site and under the agreement (e.g., valuable click-stream data about your members and their purchasing habits) and that all such data will be subject to strict confidentiality requirements. Be sure that the vendor's right to use such data is limited (as appropriate) during the term of the agreement, and that the vendor has no right to use the data after the agreement is terminated. In addition, the contract should contain a broad confidentiality provision applicable to both parties. Finally, if appropriate, the agreement should prohibit the vendor from entering into a similar agreement with a competing association during the contract term. The vendor may require the same of your association.
- **Performance obligations, performance standards, and technical support.** The contract needs to be very clear about the precise obligations of both the vendor and your association under the agreement. Err on the side of being more rather than less specific. In addition, be sure that specific performance standards for the Internet site are detailed in the agreement, and spell out what happens in the event the vendor fails to meet such standards. Also be sure to spell out what technical support the vendor will be obligated to provide to your members or other users of the Internet site (e.g., through a toll-free telephone number or e-mail address), as well as to your association itself, at the vendor's expense.
- **Fees, expenses and payments.** The contract needs to be clear and specific about how and when the vendor will be compensated (e.g., by your association or through fees generated by the site), how and when your association will be compensated, and whether and how either party will be reimbursed for out-of-pocket expenses. In addition, it is important for your association to require regular reports from the vendor detailing the revenues and activity of the site, and for your association to maintain the right to review the vendor's relevant books and records for audit purposes. Finally, attempt to structure your association's revenue stream(s) in a manner that will minimize your tax liability. This may require separate agreements for the tax-free licensing of intellectual property and the taxable provision of marketing or administrative services.
- **Antitrust.** For antitrust purposes, on B2B sites and other auction-type e-commerce sites where buying and selling will occur, firewalls should be established to prevent each seller on the site from being able to view the prices or fees offered by other sellers. In addition, there should be no limitations imposed on the number of buyers or sellers permitted to utilize the site, and there should be no conditions placed on buyers or sellers that require them to conduct business only through the site.
- **Representations and warranties, liability limitations, indemnification, and insurance.** The contract should include sufficient representations and warranties by the vendor that its software, Internet site, and everything else it brings to the venture does not infringe any intellectual property or other rights of third parties, does not violate any applicable laws and regulations, and will perform as promised. The contract also should limit the association's liability and damages to the maximum extent possible. In addition, be sure the contract provides for full indemnification of your association for all of the vendor's acts and omissions, and that this is backed up with insurance maintained by the vendor in specified amounts, with your association named as an additional insured. Also be sure your association's own insurance provides coverage for your risks.

For more information, contact Mr. Tenenbaum at 202/216-8138 or [jstenenbaum@venable.com](mailto:jstenenbaum@venable.com)

## AUTHORS

Jeffrey S. Tenenbaum

## RELATED INDUSTRIES

Nonprofit Organizations  
and Associations

## ARCHIVES

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2008 2004 2000  
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## Articles

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1999

### **Boycotts: Generally Not a License for Meeting Contract Termination**

Related Topic Area(s): Meeting, Vendor and Government Contracts

Over the past decade, meeting sponsors have been increasingly boycotting cities and states to express displeasure with local and state policies. Boycotts have been undertaken to protest a state's failure to pass the ERA Amendment, to protest a state's failure to honor Martin Luther King's birthday, to protest statutes limiting homosexuals' rights, and to protest high hotel occupancy taxes, among other reasons.

Whether an organization boycotts a particular city or state is the choice of the organization. However, the organization should be aware that, absent contractual language to the contrary, it may remain subject to liability if one or more meeting contracts exists. For example, contractual language that would be helpful would provide that a state's non-recognition of federal laws or the enactment of laws that directly conflict with the mission of the association will permit the association to terminate the contract without penalty.

While a boycott may be legal under the antitrust laws if it is being undertaken to express dissatisfaction with the political policies of a particular location, the political motivation will not necessarily justify an organization's failure to honor its contracts. Whether an organization will be liable under the contract will depend on both the specific language of the contract and the gravity of the political issue.

Under circumstances where the political turmoil in a particular location could so substantially and adversely affect attendance at a meeting or exposition, termination of a contract may be warranted, depending on the wording of the contract. This is a very high standard, and generally a difficult one to prove. Absent a contractual "escape hatch," an organization that boycotts a particular location for political reasons will likely be liable for breaching any existing contracts to hold its event at that location.

An organization may have sound political reasons for not holding its meeting or exposition in a particular locale, but those political reasons will not generally justify breaching otherwise valid contracts. Accordingly, before entering into a boycott, an organization's contractual obligations should be reviewed to determine what, if any, exposure it may have under existing contracts if it carries out the boycott.



## **THIS IS A MASTER ADDENDUM — SAVE AS NEW DOCUMENT BEFORE EDITING.**

### **ADDENDUM**

This Amendment is made to the contract (as adjusted) between ABC Nonprofit (“ABC”) and the \_\_\_\_\_ Hotel (“Hotel”) regarding ABC’s scheduled meeting (the “Event”) for \_\_\_\_\_. This Amendment along with the original contract (as adjusted, hereinafter jointly referred to as the “Agreement”) represents the entire agreement between ABC and Hotel regarding the aforementioned Event.

**Cancellation:** In the event that Hotel breaches this Agreement and does not provide the rooms or facilities as required hereunder, Hotel shall pay to ABC within thirty (30) calendar days after such breach, as liquidated damages, an amount equal to the amount that ABC would have been obligated to pay to Hotel had ABC breached this Agreement. Notwithstanding any other provisions to the contrary, in the event that ABC cancels this Agreement, no cancellation fees shall be due from ABC provided that ABC agrees to hold an event of similar or greater size (measured by expected revenues to Hotel) within one (1) year of the date on which the Agreement is signed.

**Mitigation:** Hotel shall undertake all reasonable efforts to resell any unused or canceled rooms and any unused or canceled function space, and will credit those revenues against any penalties, performance clause fees, payments, or liquidated damages, which amounts, if any, shall be due and payable thirty (30) days after the dates of the Event, provided Hotel provides proof of its efforts to mitigate such penalties, fees, payments, or damages and proof that rooms and space being held for ABC’s Event or its attendees and guests remained unsold. ABC shall not owe any penalties, fees, payments, or liquidated damages if Hotel meets or exceeds its average occupancy level for the week of the Event. In the event that ABC pays to Hotel any liquidated damages, cancellation fees, attrition fees, or other similar fees, Hotel shall not be entitled to and agrees not to seek additional damages from ABC. Notwithstanding any other provisions to the contrary, in the event that ABC fails to meet minimum performance levels under this Agreement (whether for insufficient guest room pick-up, food and beverage utilization, or some other reason), no penalty, attrition, liquidated damage, or other fees shall be due from ABC provided that ABC agrees to hold another event (the size of which shall be such that the revenue to the Hotel for such event will be approximately equal to the difference between Hotel’s minimum expected revenue and the actual revenue generated by the Event) within one (1) year of the date on which the Agreement is signed.

**Guest Room Utilization Calculations:** Hotel represents and warrants that each of the following shall count toward ABC’s fulfillment of any minimum room block reservation requirements contained in the Agreement: (1) room nights utilized by ABC attendees who made reservations after the cut-off date; (2) room nights utilized by ABC attendees three days prior and/or three days following the Event dates; and (3) room nights utilized by ABC Event attendees over the applicable dates but not identified in the Hotel records as being ABC guests (confirmation of such individuals’ status shall be made by a

comparison of Hotel guest room records for the applicable room nights with ABC meeting registration records).

**Additional Charges:** No additional charges beyond those stated in this Agreement will be incurred by ABC or its Event attendees for work performed or services or items provided by Hotel, unless Hotel shall have first given to ABC or the pertinent Event attendee a quote for the work, service or item, and obtained prior written consent from an authorized representative of ABC or from the pertinent attendee to have the work completed, or the service or item provided.

**Master Account:** An ABC authorized representative must approve in writing all charges posted to ABC's master account before ABC shall be billed for any such charges.

**Invoice Statement:** Hotel shall upon ABC's request make every effort to have appropriate explanations and back-up data sent along with the pertinent invoice.

**In-House Equipment:** Hotel shall provide, at no extra charge to ABC, a reasonable amount of conference equipment, i.e., chairs, tables podium, note pads, pencils, candies, water, and water glasses, ash trays and other equipment. These complimentary arrangements do not include special setups of extraordinary formats.

**Space Warranties:** Hotel warrants that it shall provide hereunder all conference, banquet, reception, registration and function space(s) properly equipped and maintained including proper heating and air conditioning when and where necessary, lighting, and proper chairs, and tables. All rooms and function space(s) shall be provided by Hotel in such condition as would normally be provided by a first-class hotel and Hotel warrants that in no event shall the overall quality of Hotel, its function space, its guest rooms, and public areas decrease from the levels existing at the time of the Agreement. If in ABC's sole reasonable determination the overall quality of Hotel, its function space, its guest rooms, and public areas has decreased from levels existing at the time of the Agreement, then Hotel shall pay to ABC an amount equal to ten percent (10%) of the total room revenue received by Hotel from Event attendees.

**Lowest Rate:** Hotel warrants that it shall provide to ABC Event attendees the lowest rate offered by Hotel during the Event dates, excluding previously negotiated volume corporate discounts.

**Other Functions:** Hotel shall promptly notify ABC of any concurrent or overlapping conferences, special events, or other attractions to be held in Hotel during ABC's Event. Hotel warrants to ABC that there will be no distractions or disturbances, which will affect the ordinary use of function and meeting rooms, or other facilities to be used by ABC and its attendees.

**Renovation:** Hotel will promptly notify ABC of any significant construction or remodeling to be performed in Hotel during the Event. Hotel will endeavor to keep such activity from distracting or interfering with the use of meeting rooms or other facilities to be used during the Event. If it is reasonably anticipated that there will be a significant interference, Hotel will arrange comparable meeting and guest-room facilities at a nearby hotel.

**Ownership and Management:** Hotel shall promptly advise ABC of any change in Hotel's management or ownership. This Agreement may be cancelled by ABC without penalty if there is any change in management or ownership of Hotel, provided ABC notifies Hotel of such cancellation in writing within thirty (30) days after ABC is advised by Hotel of such change.

**Force Majeure.** The performance of the Agreement by either party is subject to acts of God, war, government regulation, acts of terrorism, disaster, fire, strikes, civil disorder, curtailment of transportation facilities preventing or unreasonably delaying at least 25% of Event attendees and guests from appearing at ABC's Event, or other similar cause beyond the control of the parties making

it inadvisable, illegal or impossible to hold the Event or provide the facility. This Agreement may be terminated without penalty for any one or more of such reasons by written notice from one party to the other.

**Third Party Contracts:** Hotel represents and warrants that its ability to perform its obligations under this Agreement shall not be impeded by any third party contracts or by disputes involving such agreements, including but not limited to labor agreements (including renewals or renegotiations thereof). Hotel shall promptly notify ABC of any potential or actual labor disputes, including but not limited to strikes, slowdowns or other disputes, that may impact the ability of the Hotel to perform its obligations under this Agreement, or the ability of Event attendees to fully enjoy the Hotel and its facilities during the Event. In the event of the existence of such potential or actual disputes that may impact the ability of the Hotel to perform its obligations under this Agreement, or the ability of Event attendees to fully enjoy the Hotel and its facilities during the Event, ABC may, at its option, terminate this Agreement without penalty and collect from Hotel direct damages resulting from such termination and subsequent securing of alternate accommodations.

**Insurance.** Hotel shall carry liability, fire, burglary and other insurance in such dollar amount as necessary to protect itself against any claims arising from any activities conducted in Hotel during the Event, and to indemnify ABC as provided in this Agreement.

**Walk Policy:** If Hotel does not provide a sleeping room to an ABC meeting attendee holding a reservation, Hotel agrees to provide each such attendee:

1. A free sleeping room at a comparable or superior nearby hotel;
2. Free transportation by the most efficient and convenient means possible for the attendee to and from the substitute hotel and Hotel;
3. One free long-distance telephone call; and
4. Place the name of the attendee on Hotel telephone list for referral.

**Emergencies:** In the event that Hotel becomes aware of a medical or other emergency pertaining to an ABC Event attendee(s) who is (are) located in Hotel, then Hotel shall immediately notify ABC's staff of the name of such attendee and the nature of the emergency.

**Indemnification:** Each party to this Agreement shall, to the extent not covered by the indemnified party's insurance, indemnify, defend, and hold harmless the other party and its officers, directors, agents, employee, and owners from and against any and all demands, claims, damages to persons or property, losses, and liabilities, including reasonable attorneys' fees (collectively "Claims") arising out of or caused by the indemnifying party's negligence or willful misconduct in connection with the provision and use of Hotel as contemplated by this Agreement. This paragraph shall not waive any statutory limitations of liability available to either party, including innkeepers' limitation of liability laws, nor shall it waive any defenses either party may have with respect to any Claim.

**General Provisions:**

1. No waiver of any breach by either party hereto of any term, condition, or obligation hereunder shall be deemed a waiver of the same or similar breach thereafter.
2. All notices required or permitted hereunder shall be made in writing and delivered by certified mail (return receipt requested) to the persons identified herein as the authorized representatives of the parties hereto.
3. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement. Faxed counterparts and signatures shall be deemed originals and shall be as effective, valid and enforceable as such. Delivery of facsimiles of signatures shall be followed by prompt deliver of the originals to ABC.
4. If any term, condition, or provision of this Agreement shall for any reason be found or held invalid or unenforceable by a court or under any Arbitration(s) provision or award hereunder, such

invalidity or unenforceability shall not affect the remainder of such term, condition, or provision and this Agreement shall survive and be construed as if such invalid or unenforceable term, condition, or provision had not been contained herein. In the event that the terms of this Addendum conflict with the terms of the contract (as adjusted), the terms of this Addendum shall control.

IN WITNESS WHEREOF, the parties to this Agreement have executed this Amendment through their authorized representatives.

ABC NONPROFIT  
A \_\_\_\_\_ not-for-profit corporation

\_\_\_\_\_HOTEL

BY: \_\_\_\_\_

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_

**Disclaimer ¶**

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