



Top Ten "Must Have" Provisions for Nonprofit Meeting Contracts

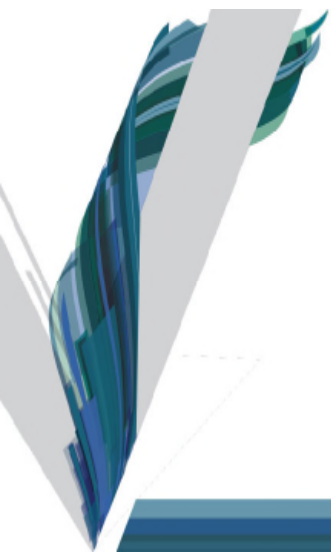
Thursday, August 6, 2015, 12:30 – 2:00 pm ET
Venable LLP, Washington, DC

Moderator

Jeffrey S. Tenenbaum, Esq., Partner and
Chair of the Nonprofit Organizations
Practice, Venable LLP

Speakers

Lisa M. Hix, Esq., Partner, Venable LLP
Kirsten Olean, CMP, CAE, Director of
Meetings, American Society for
Microbiology



Presentation



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Upcoming Venable Nonprofit Events

[Register Now](#)

- **September 10, 2015** – [Somebody's Watching Us: Considerations for Nonprofits Operating under Increased Government Scrutiny](#)
- **October 15, 2015** – Thriving Amidst Turmoil and Change: What All Nonprofits Can Learn from Nonprofit Turnarounds *(details and registration available soon)*
- **November 17, 2015** – [The DOL's Proposed Changes to the FLSA White-Collar Exemption Criteria: What Nonprofits Need to Know about the Current Rules, Where Things Are Heading, and How to Avoid Employee Classification Traps and Pitfalls](#)

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Four Broad Categories of Provisions

1. Credit for Room Block/Pricing
2. Extraordinary Events: Warranties and Force Majeure
3. Cancellation/Underperformance
4. Liability

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Background

- **Fundamental Principle:** Negotiation posture is everything
- Your negotiation posture will determine your ability to address the points we will discuss today
 - Maximize position by leading with your own contract or addendum draft
 - Know which contract points are central for your organization
 - Competition reaps savings – consider RFPs



Provision #10

Credit for Rooms, Room Rates



#10: Credit for Rooms, Room Rates

- **Rates**
 - Lowest rate available
- **Additional Fees**
 - Corkage, package receipt, service charges
- **Clearly list room block size and room rate**
- **Include dates/deadlines for room block adjustment** – flow down to attrition

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#10: Credit for Rooms, Room Rates

- **Guarantee the Most Favorable Future Rates**
 - State that Lowest Room Rate Available
 - *Guaranteed Lowest Published Rate*
 - Include internet sales and monitor
 - If there is a *lower rate*:
 - Match for entire group
 - Remove advertisement
 - Remember to *link to penalties!*

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#10: Credit for Rooms, Room Rates

"Association will have the opportunity to compare the Association Program "Registered Participants List" against the Hotels in-house guest list during the Program. Any guest listed on the Association "Registered Participants List" that is in-house, regardless of room rate paid, will be credited to the Association Room Block."



Provision #9

Failure to Enter into
Convention Center Agreement



#9: Failure to Enter Into Convention Center Agreement

"The Hotel agrees that the performance of all terms and conditions of this Agreement by Association are contingent upon the successful negotiations with and the availability of function and exhibit space at the _____ Convention Center for Association's Program. The Hotel also agrees that Failure or inability to contract for Convention Center space, or the termination of the Convention Center contract, shall excuse Association's performance of all terms and conditions under this agreement by Association are contingent upon the Agreement."



Provision #8

Warranty of Condition



#8: Warranty of Condition

"Should the Hotel or its surrounding area suffer a substantial deterioration in the quality of its facilities or services, Association shall notify the General Manager of its concerns in writing. Should the General Manager be unable to correct the deficiencies of the facilities or services to Association's expectations, Association may cancel this Agreement without liability upon written notice to the Hotel and seek appropriate penalties from the Hotel."



Provision #7

Force Majeure



#7: Force Majeure

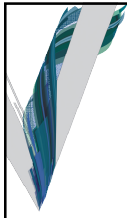
- Force Majeure Considerations
 - Standard force majeure clauses usually aren't enough
 - Need to tie force majeure to occurrences preventing a substantial number of attendees from participating and/or getting to the meeting site
 - Prefer capturing this in the contract rather than leaving to chance



#7: Force Majeure

"The performance of this 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, impossible, or commercially impracticable to hold the Event or provide the facility.

The contract may be terminated or performance excused by either party without penalty for any one or more reasons by written notice from one party to the other."



Provision #6

Cancellation – Calculation of Penalties

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#6: Cancellation – Calculation of Penalties

- Tiered cancellation tied to notice date
- Beware: Know exactly what's included in calculating lost revenues
- If possible, base on "room revenue profit," not ancillary revenue

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#6: Cancellation – Calculation of Penalties

Formula: *“Room Revenue Profit: 75% of Group's single room rate, excluding service charges, surcharges, commissions, rebates, as well as state and local taxes unless required by law, less rooms resold and less rooms unavailable for sale.”*

First Sale: *“Hotel agrees to sell rooms released by Association before any others.”*



#6: Cancellation – Calculation of Penalties

1. Determine the **Maximum Cancellation Charge** by multiplying the number of rooms blocked per night by the applicable percentage in the scale.
2. Determine the number of **Unsold Rooms Available For Sale** in the Hotel by subtracting complimentary, out of order rooms, and total occupancy from Hotel's total inventory.
3. For each night, Group will pay the sum of the amount equal to the lost profit on the rooms revenue: 75% of Group's single rate times either the **Maximum Cancellation Charge** or **Unsold Rooms Available for Sale** for the night, whichever is lower.



#6: Cancellation – Calculation of Penalties

Timing of Payment/Basis of Damages:

"Damages will be payable thirty (30) days after the final date of the Program, after receipt of an undisputed written verification of occupancy levels achieved and rooms resold, provided that rooms and space being held for Group's program or its Attendees remain unsold, as measured against the Hotel's average occupancy for that particular period of year, based on Hotel's prior three-year average occupancy rates for that period."



Provision #5

Cancellation – Mitigation of Penalties



#5: Cancellation – Mitigation of Penalties

- Cancellation Clause Tips
 - Include duty to mitigate
 - Tie timing of payment to proof of mitigation
 - Consider clause giving credit for rescheduled meeting



#5: Cancellation – Mitigation of Penalties

"The Hotel shall attempt to mitigate its losses by reselling Association's canceled rooms. If the Hotel is able to replace this canceled business, the collected amount will be credited to Association. If only a percentage of the lost revenue is recovered, the difference between this figure and the fee will be credited to Association. The Association shall be credited for all rooms resold over the Program Dates."



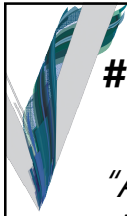
#5: Cancellation – Mitigation of Penalties

"Association will not owe any damages if the Hotel meets or exceeds its average occupancy level for that particular period of the year."



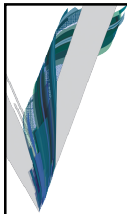
Provision #4

Cancellation – Credit for
Rebook



#4: Cancellation – Credit for Rebook

"Association will not owe any damages if the Association reschedules another meeting of equal or greater value for the Hotel within eighteen (18) months from the date of the Program."



Provision #3

Reverse Penalty for
Cancellation



#3: Reverse Penalty for Cancellation

"The Hotel cannot cancel, terminate, or reduce the room block for this agreement for the sole purpose of making the facilities available to a larger group/entity willing to pay more than the amounts agreed upon herein or to engage in elective construction on or about the premises leased to Association. Failure by the Hotel to provide the space and/or services as agreed, or breach of any representation or warranty by the Hotel, shall render the Hotel liable to Association for all direct and indirect damages, expenses, attorneys' fees, and costs incurred by Association on account of such breach. "



#3: Reverse Penalty for Cancellation

- Include "Reverse Cancellation"
 - Hotel must pay damages, equal to room rate, for relocation
 - Specify the point, such as 25% of room block, which triggers reverse cancellation damages



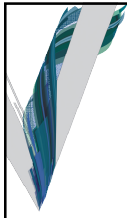
Provision #2

Attrition



#2: Attrition

Basis of Calculation: *"Damages, if any, will be based on the cumulative Room Block in effect at the time (cancellation damages will not be calculated per night, but on cumulative Room Block performance, as measured against the applicable cancellation fee set forth above), reflecting any reductions made."*



Provision #1

Indemnification

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#1: Indemnification

- Indemnification
 - Reciprocal – each party indemnifies the other for (is responsible for) its own negligence (mutual)
 - Limited to control – what each party is asked to cover is within its control
 - Limit scope to insurance coverage
 - Include defense costs
 - Consider alcohol indemnity

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#1: Indemnification

- Indemnification
 - “Sole,” “Gross,” or “As Determined by a Court”
 - Coverage of third-party negligence
 - Meeting attendees (except perhaps board members, etc.)



#1: Indemnification

- How to Manage Liability Assumed
 - Flow down to third parties
 - Caterers
 - Transportation
 - Independent Contractors
 - Waivers
 - Golf tournament, etc.
 - Insurance
 - Flow this down, too
 - Consider cancellation insurance



Questions?

Jeffrey S. Tenenbaum, Esq., Partner, Venable LLP

jstenenbaum@Venable.com

t 202.344.8138

Lisa M. Hix, Esq., Partner, Venable LLP

lmhix@Venable.com

t 202.344.4793

**Kirsten Olean, CMP, CAE, Director of Meetings,
American Society for Microbiology**

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Speaker Biographies



Jeffrey S. Tenenbaum

Partner

Washington, DC Office

T 202.344.8138 F 202.344.8300

jstenenbaum@Venable.com

AREAS OF PRACTICE

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

INDUSTRIES

Nonprofit Organizations and Associations
Financial Services

GOVERNMENT EXPERIENCE

Legislative Aide, United States House of Representatives

BAR ADMISSIONS

District of Columbia

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is a highly accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, 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 in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, one of only eight in the 2013 rankings, one of only nine in the 2014 rankings, and also one of only 10 in the 2015 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member 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. Mr. Tenenbaum was listed in the 2012-15 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014 and 2015 editions of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

REPRESENTATIVE CLIENTS

AARP
Air Conditioning Contractors of America
Airlines for America
American Academy of Physician Assistants
American Alliance of Museums
American Association for the Advancement of Science
American Bar Association
American Bureau of Shipping
American Cancer Society
American College of Radiology

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association Executives

New York Society of Association Executives

American Friends of Yahad in Unum
American Institute of Architects
American Institute of Certified Public Accountants
American Society for Microbiology
American Society of Anesthesiologists
American Society of Association Executives
America's Health Insurance Plans
Association for Healthcare Philanthropy
Association for Talent Development
Association of Clinical Research Professionals
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
Association of Private Sector Colleges and Universities
Auto Care Association
Biotechnology Industry Organization
Brookings Institution
Carbon War Room
The College Board
CompTIA
Council on Foundations
CropLife America
Cruise Lines International Association
Design-Build Institute of America
Endocrine Society
Erin Brockovich Foundation
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Global Impact
Goodwill Industries International
Graduate Management Admission Council
Habitat for Humanity International
Homeownership Preservation Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
Institute of International Education
International Association of Fire Chiefs
International Sleep Products Association
Jazz at Lincoln Center
LeadingAge
Lincoln Center for the Performing Arts
Lions Club International
March of Dimes
ment'or BKB Foundation
Money Management International
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Coffee Association
National Council of Architectural Registration Boards
National Council of La Raza
National Defense Industrial Association
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy

NeighborWorks America
NTCA - The Rural Broadband Association
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America
Romance Writers of America
Telecommunications Industry Association
Trust for Architectural Easements
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United Nations High Commissioner for Refugees
United States Tennis Association
University of California
Volunteers of America
Water Environment Federation

HONORS

Recipient, New York Society of Association Executives' Outstanding Associate Member Award, 2015

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-15

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.), 2012-15

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-15

Served as member of the selection panel for the inaugural *CEO Update* Association Leadership Awards, 2014

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

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

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

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

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, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, 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 book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE 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 contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 700 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 700 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.



Lisa M. Hix

Partner

Washington, DC Office

T 202.344.4793 F 202.344.8300

lmhix@Venable.com

AREAS OF PRACTICE

Tax-Exempt Organizations
Tax and Wealth Planning
Regulatory

INDUSTRIES

Nonprofit Organizations and
Associations

BAR ADMISSIONS

District of Columbia

EDUCATION

J.D., Duke University School of
Law, 2004

*Duke Journal of Comparative and
International Law*

B.A., Political Science, Smith
College, 1996

MEMBERSHIPS

Chair, ASAE Legal Symposium
Planning Committee

ASAE Legal Section Council

ASAE Association Law "Tool Kit"
Task Force

ASAE Technology Resources
Committee

Ms. Hix concentrates her practice on counseling charities, trade and professional associations, and other nonprofits on a wide range of legal topics, including tax exemption, intellectual property, corporate governance, and antitrust, among others.

Ms. Hix has broad experience in the nonprofit sector, having served in various capacities at nonprofit organizations, including as the Founding Executive Director of the Memorial Institute for the Prevention of Terrorism (MIPT) and Development Director of East Harlem Block Schools. This experience has included representation before Members of Congress and federal agencies. She also worked in the nonprofit practice of a large national law firm for four years before joining Venable. Ms. Hix is the former Chair of the American Society of Association Executives (ASAE) Washington, DC Legal Symposium, a former member of the ASAE Legal Section Council, and current member of the ASAE Finance and Business Operations Committee.

HONORS

Recognized in *Legal 500*, Not-For-Profit, 2013 - 2015

Selected for inclusion in Washington, DC "Rising Stars" edition of *Super Lawyers*, 2013

PUBLICATIONS

- December 19, 2013, New York Nonprofit Revitalization Act Signed into Law
- October 31, 2013, The New Nonprofit Revitalization Act
- October 16, 2013, New York Legislature Passes Nonprofit Revitalization Act: Comprehensive, Significant Changes to New York Nonprofit Corporation Law on Horizon
- October 15, 2013, Combinations and Alliances among Nonprofit Organizations
- July 30, 2013, New York Legislature Passes Nonprofit Revitalization Act: Comprehensive, Significant Changes to New York Nonprofit Corporation Law on Horizon
- June 25, 2013, Employee Leaves of Absence and Other Accommodations under the Law: What Every Nonprofit Needs to Know
- June 26, 2012, Agreeing to Convene: Spotting and Solving the Most Common Event Contract Pitfalls
- March 20, 2012, All About UBIT: What Nonprofit Leaders Need to Know
- November 18, 2011, The New DC Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- October 24, 2011, Unrelated Business Income Tax for Nonprofits: The Basics

- October 13, 2011, Traps on the Web: Legal Essentials on Social Media, Protecting Data, HR Policies, and More
- October 6, 2011, Nonprofit Strategic Partnerships: Building Successful Ones and Avoiding the Legal Traps
- September 20, 2011, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts
- September 16, 2011, Playing by the Rules: A Fresh Look at Corporate Sponsorship & Affinity Program Income
- August 8, 2011, Cyberspace Risk: The Top Legal Traps for Associations
- June 16, 2011, Sponsorships, Advertising, Endorsements and Cause Marketing: Understanding Critical UBIT Issues for Nonprofits
- May 13, 2011, Online Social Media and Nonprofits: Navigating the Legal Pitfalls
- April 28, 2011, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts
- April 20, 2011, Navigating Nonprofit Partnerships, Joint Ventures and Commercial Co-Ventures: How Arts Organizations Can Avoid the Legal Pitfalls
- March 29, 2011, Dangers and Opportunities: Navigating Nonprofit Partnerships, Collaborations, Joint Ventures and More
- March 8, 2011, Sponsorships, Advertising, Endorsements, and Cause Marketing - Understanding Critical UBIT Issues for Nonprofits
- February 3, 2011, Top Ten Legal Issues for Associations: Common Mistakes, and How to Avoid Them
- December 16, 2010, So You Want To Be On The Internet ®
- December 6, 2010, Mergers, Alliances, Affiliations and Acquisitions for Nonprofit Organizations: Financial and Legal Issues
- November 10, 2010, Legal Issues in Publishing – Copyright and Reprint Requests
- November 3, 2010, Cyberspace Risk: What You Don't Know Could Hurt You
- September-October 2010, The Ins and Outs of Alliances and Affiliations, *Associations Now*
- September 24, 2010, Doing Business in a Changing Economy: Contracts, Liability, and Understanding Risk
- September 21, 2010, Legal Aspects of Social Networking and Online Media Platforms
- September 20, 2010, Best Practices for Negotiating Meeting Contracts in the Current Economy
- August 24, 2010, Association Alliances, Partnerships and Mergers
- May 7, 2010, Combinations and Alliances Among Nonprofit Associations
- January 26, 2010, The Building Blocks for a Successful Nonprofit Merger
- December 15, 2009, Best Practices for Negotiating Hotel Contracts in the Current Economy
- December 15, 2009, Hotel Contract Clauses That Work: Understanding the Fine Print
- April 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- March 12, 2009, IM N, R U? Managing the Nonprofit Legalities of Social Networking and Online Media Platforms
- November 18, 2008, The Ten Most Common Online Legal Pitfalls for Nonprofits...and How to Avoid Them
- September 16, 2008, Obtaining and Maintaining Tax-Exemption for Your Affiliates: The Mechanics, Pros and Cons of Group Exemption

SPEAKING ENGAGEMENTS

- August 11, 2015, "An Insider's Guide to Grant Success" at the 2015 American Society of Association Executives Annual Meeting & Exposition
- August 6, 2015, Top Ten "Must Have" Provisions for Nonprofit Meeting Contracts
- October 31, 2013, What New York Nonprofits Need to Know about the New Nonprofit Revitalization Act
- October 16, 2013, "New York Legislature Passes Nonprofit Revitalization Act: Comprehensive, Significant Changes to New York Nonprofit Corporation Law on Horizon" for the New York Society of Association Executives
- June 25, 2013, Employee Leaves of Absence and Other Accommodations under the Law: What Every Nonprofit Needs to Know
- June 20, 2013, "Preparing an Online Social Media Policy: The Top Ten Legal Considerations for Your Nonprofit" at CAPLAW's 2013 National Training Conference
- June 27, 2012, WMACCA Non-Profits & Associations Forum: "Agreeing to Convene – Spotting and Solving the Most Common Event Contract Pitfalls"
- March 20, 2012, "All About UBIT: What Nonprofit Leaders Need to Know" for the Better Business Bureau of New York
- October 13, 2011, "Traps on the Web: Legal Essentials on Social Media, Protecting Data, HR Policies & More" for the Better Business Bureau of New York
- October 6, 2011, Nonprofit Strategic Partnerships: Building Successful Ones and Avoiding the Legal Traps
- September 20, 2011, "Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts" at Meeting Quest Charlotte
- September 16, 2011, "Playing by the Rules: A Fresh Look at Corporate Sponsorship & Affinity Program Income" at ASAE's Annual Association Law Symposium
- August 8, 2011, "Cyberspace Risk: The Top Legal Traps for Associations," 2011 ASAE Annual Meeting
- June 16, 2011, Sponsorships, Advertising, Endorsements and Cause Marketing: Understanding Critical UBIT Issues for Nonprofits
- May 18, 2011, "Mastering Tradeshow Contracts" at the 2011 Annual Association Law Symposium in Chicago
- May 17, 2011, "Legal Aspects/Issues of Social Media Platforms" for the Kansas Society of Association Executives
- May 13, 2011, "Cyberspace Risk: The Top Legal Traps for Associations," ASAE Finance, HR & Business Operations Conference
- April 29, 2011 - May 3, 2011, "Trends in Law, Practice and Management of Copyright and Licensing of Content" for the Council of Science Editors
- April 28, 2011, "Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts" at ASAE's 2011 Springtime Expo
- March 29, 2011, "Dangers and Opportunities: Navigating Nonprofit Partnerships, Collaborations, Joint Ventures and More" for Better Business Bureau New York
- March 8, 2011, Legal Quick Hit: "Sponsorships, Advertising, Endorsements, and Cause Marketing - Understanding Critical UBIT Issues for Nonprofits" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- February 7, 2011, "Legal Update: What Every Tax-Exempt Association Should Know" for the Commercial Real Estate Development Association
- February 3, 2011, "Top Legal Issues for Tax-Exempt Associations" for the Mid-Atlantic Society of Association Executives
- December 6, 2010, Mergers, Alliances, Affiliations and Acquisitions for Nonprofit Organizations: Financial and Legal Issues
- November 10, 2010, "Copyright and Reprint Requests" to the Coalition of Education Association Publications
- November 3, 2010, "Cyberspace Risk: What You Don't Know Could Hurt You," Nonprofit Risk Management Center
- September 24, 2010, "Doing Business in a Changing Economy: Contracts, Liability,

and Understanding Risk," at the 2010 Annual Association Law Symposium in Washington, DC

- September 21, 2010, "Legal Aspects/Issues of Social Networking and Media Platforms" at the Texas Society of Association Executives Annual Conference
- September 20, 2010, "Best Practices for Negotiating Meeting Contracts in the Current Economy" at the Texas Society of Association Executives Annual Conference
- August 24, 2010, "Association Alliances, Partnerships and Mergers" at the 2010 Annual Meeting & Expo of the American Society of Association Executives (ASAE)
- August 14, 2010, "Overview of Association Law" at the National Institute of Governmental Purchasers Annual Conference
- August 4, 2010, "Avoiding Legal Pitfalls When Using On-Line Social Media" for the Indiana Grantmakers Alliance, in collaboration with various State Grantmakers Alliances
- April 13, 2010, Legal Quick Hit: "Best Practices for Negotiating Hotel Contracts in the Current Economy" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- December 10, 2009, Two presentations on hotel contracts at PMPI's 4th Annual Mid-Atlantic Conference and Expo (MACE)
- September 25, 2009, American Society of Association Executives (ASAE) Annual Association Law Symposium
- June 22, 2009, Building Member and Supporter Buy-In Through Improved Governance Practices
- June 9, 2009, Legal Quick Hit: Copyright Law Basics and Pitfalls for Nonprofits
- April 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts
- November 18, 2008, Association of Corporate Counsel Webcast: The Ten Most Common Online Legal Pitfalls for Nonprofits ... and How to Avoid Them
- 2008, "Developing Security Policies and Procedures to Protect Member Data" at the 2008 ASAE Association Technology Conference & Expo, Washington, DC
- 2007, "Legal Considerations in Nonprofit Mergers" at the Association of Corporate Counsel "Legal Quick Hit"
- 2007, "Overtime for Employees on Travel" at the Association of Corporate Counsel "Legal Quick Hit"
- 2007, "Board of Directors' Responsibilities" at the 2007 Society for Women's Health Research Board Orientation, Washington, DC
- 2007, "Update on Hotel Contracts: Attrition and Other Key Issues" at the Association of Corporate Counsel "Legal Quick Hit"
- 2007, "Intellectual Property Challenges in the Life of an Association" at the 2007 ASAE Annual Association Law Symposium, Washington, DC
- 2007, "Understanding and Managing Fiduciary Responsibility" at the 2007 Finance and Administration Roundtable, Washington, DC
- 2006, "Contracts Insurance & Liability: What Every Meeting Professional Should Know" at the 2006 ASAE Meetings Management Institute Issues in Hotel Meeting Contracts, ASAE Hotel Operations Program, Washington, DC
- 2006, "Opening General Session Panel: The Year in Review - Legal Style" at the 2006 ASAE Finance & Business Operations Symposium, Baltimore, MD
- 2006, "Legal Issues for Nonprofit Organizations" at the American College of Cardiology, 2006 General Scientific Session, Atlanta, Georgia



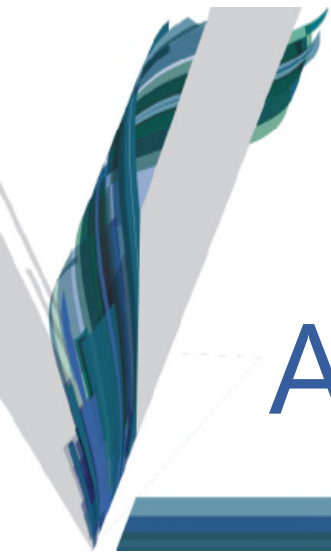
Kirsten Olean, CMP, CAE

Kirsten Olean, CMP, CAE, is Director of Meetings at the American Society for Microbiology (ASM), a position she assumed in October 2014 after 17 years at the Association of American Medical Colleges (AAMC). As director, Kirsten provides strategic leadership for the programs of ASM's Meetings Board, as well as oversight and direction to a staff of 17 that includes program management, marketing,

logistics and exhibits.

A member of PCMA and ASAE, Kirsten is a frequent author for local and national industry publications, and an invited and selected speaker at industry meetings. She has extensive volunteer service to PCMA, including serving as President of the Capital Chapter and Chair of the Achievement Awards and Recognition Committee. She began a three-year-term on the PCMA Board of Directors in January 2015.

Kirsten received a bachelor's degree in political science and Spanish from Bucknell University. She earned her CMP designation in 2001 and her CAE designation in 2010. She completed the US Chamber of Commerce's Institute for Organization Management, earning her IOM designation in 2010.



Additional Information



ARTICLES

April 2, 2015

BOYCOTTS AND ASSOCIATION MEETINGS: MANAGING YOUR ORGANIZATION'S RISK

AUTHORS

George E. Constantine

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Nonprofit Organizations
and Associations

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As is often the case when a state or municipality enacts a controversial law or policy, the enactment of Indiana's Religious Freedom Restoration Act has sparked numerous calls for organizations to pull meetings and other activities out of the state as a form of protest. Many groups—like the Disciples of Christ, as reported by the *Washington Post*—have already decided to cancel their Indiana conventions as a result of the new law.

While an organization may face significant membership pressure to move a meeting out of a state where a boycott is underway, executives need to be mindful of how such a pull-out will affect the organization's finances. Association meetings entail numerous contractual obligations—hotels, convention centers, transportation, A/V, onsite registration services, and more. Each such contract is a firm promise for the association to pay. For most meeting contracts, a cancellation will almost certainly give rise to damages payable by the association unless the contract contains robust provisions allowing the organization to terminate.

There are approaches to minimize the risk of damages at the outset, however, when negotiating meeting contracts. If your organization or its members have concerns about how local events could impact your organization's meeting attendance based on legislation or policies that your organization or its members oppose, it may be a good idea to negotiate contract terms that address the potential for a cancellation based on an "issues boycott." Logically, such a provision might be included in the "force majeure" section of your meeting agreements—making clear that if legislation or policies are enacted that are contrary to your organization's positions on certain key issues, a cancellation without liability will be permitted. Of course, this sort of provision may not be easy to negotiate; much will depend on how much specificity you are able to place around the potential cancellation. In other words, a hotel is more likely to assent to a provision that is specific and detailed in its description of what type of legislation would trigger the force majeure clause. Further, as courts tend to view force majeure clauses narrowly, a clear, specific definition will serve the association well in the event of a court dispute.

An alternative approach would be to highlight in a separate clause (outside of force majeure) a statement that the association will be relieved of its obligations under the contract if performance would be contrary to your organization's mission.

There are numerous other considerations that come into play—meeting cancellation insurance should be reviewed; a standard contractual approach should be taken with all agreements in connection with a particular meeting; also, when considering whether to cancel, remember that doing so will likely have a negative effect on an association's ability to negotiate meetings agreements in the future, as such negotiations often hinge on an organization's recent meetings history.

Hotel Meeting Contracts

Navigating Legal Issues for Successful and
Profitable Meetings

Presented By

Jeffrey S. Tenenbaum, Esq., Venable LLP
Kristalyn J. Loson, Esq., Venable LLP



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Topics for Today

1. General Negotiation Overview
2. Hotel Contract Issues
3. Convention Center Contract Issues
4. Other Meeting Contracts
5. Questions

Negotiation Overview – A Few Tips

- Your negotiation posture will determine your ability to address the points we will discuss today
 - Maximize position by leading with your own contract draft
 - Know which contract points are central for your organization
 - Consider putting hotel on notice of organizational policies
 - Competition reaps savings – consider RFPs
 - Consider markets, particularly with meeting contracts

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Negotiation Overview – Everything Is Negotiable

- The big lie – “It’s a standard provision.”
- Read everything in the document
- Consider using your organization’s form agreement as the starting point
- Be ready to walk away
- “If you ask for something after a contract is signed, it’s called *begging*.”

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Negotiation Overview – Contracting Basics

Remember the “Four Corners Rule”

- Clear and unambiguous – contract speaks for itself
- Most litigation arises because contracts are unclear
- Otherwise, most disputes are settled

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Hotel Contracts – Provisions to Note

- Rates / Room Block
- Attrition / Cancellation
- Force Majeure
- Warranties
- ADA
- Indemnification / Insurance

6

Hotel Contracts – Room Block

Who Has the Obligation 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.”
- Clearly list room block size and room rate
- Include dates/deadlines for room block adjustment – flow down to attrition

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Hotel Contracts – Room Rates

Guarantee the Most Favorable Future Rates

- State that Lowest Room Rate Available
 - Guaranteed Lowest Published Rate
 - Include internet sales and monitor
 - If there is a lower rate:
 - Match for entire group
 - Remove advertisement
 - Remember to link to penalties!

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Hotel Contracts – Room Rates

Setting Future Rates


- Use a formula with several options. State lesser of:
 - Rack rates quoted one year before meeting date
 - Quoted rate plus X% increase per year (2-3% maximum)
 - X% off the lowest published rack rate for the date of the meeting

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Hotel Contracts – Attrition

Tips for Attrition

- Attrition
 - The difference between the actual number of rooms picked up and the number agreed to in contract
 - Damages assessed based after allowable shortfall (i.e. 80%)
 - Applies to F&B too
- Many hotels will insist upon attrition language, but moving toward more flexibility

 Consider negotiating a “no attrition/penalties” provision

 If not possible, follow steps to mitigate

10

Hotel Contracts – Damages

Lessening the Impact of Attrition

- Keep in mind “duty to make whole”
 - Applies especially to F/B – hotel not out money months out
- Starting point for negotiations – if one side breaches a contract, then the other side is entitled to damages but not penalties
- Implement steps to prevent the “Double Dip”

11

Hotel Contracts – Damages

5 Steps to Prevent “Double Dip”

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.

3. Exclude Fees/Commissions/Taxes: Fees, penalties, or liquidated damages, if any, shall exclude service charges, surcharges, and commissions, as well as state and local sales taxes, unless required by law.

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Hotel Contracts – Damages

5 Steps to Prevent “Double Dip” – cont’d

4. Deduct Costs Saved: If Group 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%

5. Average Occupancy Rate – Not Last Sell: Group 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.

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Hotel Contracts – Damages

Cancellation Clause Tips

- Include duty to mitigate
- Tie timing of payment to proof of mitigation
- Consider clause giving credit for rescheduled meeting
- Include “Reverse Cancellation”
 - Hotel must pay damages, equal to room rate, for relocation
 - Specify at point, such as 25% of room block, which triggers reverse cancellation damages

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Hotel Contracts – Liability

- Force majeure
- Indemnification
- Insurance

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Hotel Contracts – Force Majeure

Force Majeure Considerations

- 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

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Hotel Contracts – Force Majeure

“The performance of this 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, impossible, or commercially impracticable to hold the Event or provide the facility.

The contract may be terminated or performance excused by either party without penalty for any one or more reasons by written notice from one party to the other.”

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Practical Considerations

- Remove “Notify hotel within 10 days of the occurrence of the FM event”
- Strikes
- Construction

18

Hotel Contracts – Liability

Indemnification

Include:

- Reciprocal – each party indemnifies the other for (is responsible for) its own negligence (mutual)
- Limited to control – what each party is asked to cover is within its control
- Limit scope to insurance coverage
- Include defense costs

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Hotel Contracts – Liability

Indemnification

Remove:

- “Sole,” “Gross,” or “As Determined by a Court”
- Coverage of third-party negligence
 - Meeting attendees (except perhaps board members, etc.)

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Hotel Contracts – Liability

How to Manage Liability Assumed

- Flow down to third parties
 - Caterers
 - Transportation
 - Independent Contractors
- Waivers
 - Golf tournament, etc.
- Insurance
 - Flow this down, too
 - Consider cancellation insurance

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Hotel Contracts – Liability

Warranty

Hotel represents and warrants that the Hotel and Hotel's facilities, including services to be provided by Hotel to Group and its attendees pursuant to this Agreement, and the area surrounding the hotel at the dates herein set forth shall be of substantially the same condition and quality as currently exists as of the date of this Agreement. Breach of this warranty can be grounds for cancelling this Agreement.

22

Hotel Contracts – Liability

General Liability Disclaimers

- Not so great for associations
- *“Neither party shall be liable to the other for any special, indirect, incidental, consequential, punitive or exemplary damages, including, but not limited to, lost profits, even if such party has knowledge of the possibility of such damages.”* – damages limitation clauses like this may not be in the association’s best interests; attempt to remove or modify if possible

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Hotel Contracts – Commissions

- Consider out-year consequences
- No post-termination commissions (or reduced)
- Have ability to revise relevant agreements without agent approval
 - Agents try to walk with their commission after cancelling

24

Convention Center Agreements

Key Points

- Convention center authorities are notorious for being intractable on key terms
 - Get your insurance brokers involved
- Still, persistence and attention to detail usually pay off
- Consider an RFP as a first step toward getting more favorable terms
- Work with the convention bureau

25

Convention Center Agreements

Are convention centers 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"
- If center is privately owned, push for mutual indemnification

26

Convention Center Agreements

Managing 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 six months of the event
 - Unions are pushing this for with nonprofits
- Require prompt advance notice
- Have the Center warrant that it will provide replacement workers if a strike occurs

27

Other Meeting Contracts – Exhibitor Contracts

- Eligibility to exhibit
- Cost/payment schedule
- Cancellation
- Exhibit requirements and restrictions
- Disputes among exhibitors
- Hospitality functions
- Objectionable displays
- Responsibility for exhibitor property

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Other Meeting Contracts – Exhibitor Contracts

- Compliance with laws/Americans with Disabilities Act
- Use of intellectual property/music licensing
- Insurance
- Indemnification
- Exhibitor appointed contractors (EAC)
- Access to attendee list
- Violation of rules

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Other Meeting Contracts – Speaker Agreements

- Policy/procedure
- Program description
- Compliance with deadlines
- Program review
- Sample contract
- No promotion or sales
- Cancellation
- License of presentation

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Other Meeting Contracts – Speaker Agreements

- Use a template
- No infringement or defamation
- Ownership of recording/IP rights
- Travel
- Government-funded NFP provisions
- Indemnification
- Insurance

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Other Meeting Contracts – Catering Contracts

- Time to adjust menus
- Indemnification
- Define extra charges
- Cancellation – incorporate costs saved
 - From “90% of estimated charges including food and beverage minimum and room rental charge” to “expenses already incurred not legally cancellable without breach at the time of Group’s cancellation and 100% of Lost Profits for the event”
 - Lost profits = F&B minimum minus Caterer’s total expenses attributable to event (including, but not limited to the costs of food, beverage, all taxes thereon, labor) had the event not been cancelled and had Client met but not exceeded the food and beverage minimum.

32

Final Points

- Read everything
- Be willing to walk away

33

Questions?

Contact Information

Jeffrey S. Tenenbaum, Esq., Venable LLP

jstenenbaum@Venable.com

t 202.344.8138

Washington, DC

Kristalyn J. Loson, Esq., Venable LLP

kloson@Venable.com

t 202.344.4522

Washington, DC

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Your Nonprofit's Next Big Event: Spotting and Solving the Most Common Meeting Contract Pitfalls

June 26, 2014

Presented By:

Jeffrey S. Tenenbaum, Esq., Venable LLP
Kristalyn J. Loson, Esq., Venable LLP
Jesse Raben, Esq., American Psychological Association

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Negotiation Overview – Everything Is Negotiable

- The big lie – “It’s a standard provision.”
- Read everything in the document
- Consider using your organization’s form agreement as the starting point
- Be ready to walk away
- Typically dealing with frontline salespeople on smaller agreements
- **“If you ask for something after a contract is signed, it’s called *begging*.”**

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Practical Negotiation Considerations

- Hotels willing to give on “freebies” – internet, gym, parking
- Allow for a true-up for any reservations on any web-bookings for attrition numbers
- Match lowest room rate available on web if possible

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Negotiation Overview – Contracting Basics

Remember the “*Four Corners Rule*”

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- Most litigation arises because contracts are unclear
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Hotel Contracts – Provisions to Note

- Rates / Room Block
- Attrition / Cancellation
- Force Majeure
- Warranties
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- Indemnification / Insurance

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Hotel Contracts – Room Block

Who Has the Obligation 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.
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Hotel Contracts – Room Rates

Setting Future Rates

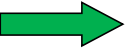

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-  Consider negotiating a “no attrition/penalties” provision
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Tips on Attrition

- Push for 75% if you cannot get removed from contract
- New Orleans/Toronto
- Hold back any payment until you can negotiate another meeting

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Hotel Contracts – Damages

Cancellation Clause Tips

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Hotel Contracts – Liability

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Practical Considerations

- Remove “Notify hotel within 10 days of the occurrence of the FM event”
- They cannot cancel for their strike (even if your people won’t come because they won’t cross the line)
- Construction?
- New Orleans
- Toronto
- APA/ABA Meeting

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Include:

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Convention Center Agreements

Key Points

- Convention center authorities are notorious for being **intractable on key terms**
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Other Meeting Contracts – Exhibitor Contracts

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- Hospitality functions
- Objectionable displays
- Responsibility for exhibitor property

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Other Meeting Contracts – Exhibitor Contracts

- Compliance with laws/Americans with Disabilities Act
- Use of intellectual property/music licensing
- Insurance
- [Indemnification](#)
- Exhibitor appointed contractors (EAC)
- Access to attendee list
- Violation of rules

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Other Meeting Contracts – Speaker Agreements

- Policy/procedure
- Program description
- [Compliance with deadlines](#)
- Program review
- Sample contract
- No promotion or sales
- Cancellation
- [License of presentation](#)

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Other Meeting Contracts – Speaker Agreements

- Use a template
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- Travel
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- Insurance

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Other Meeting Contracts – Catering Contracts

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- Cancellation – incorporate costs saved
 - From “90% of estimated charges including food and beverage minimum and room rental charge” to “[expenses already incurred not legally cancellable without breach at the time of Group’s cancellation and 100% of Lost Profits for the event](#)”
 - Lost profits = F&B minimum minus Caterer’s total expenses attributable to event (including, but not limited to the costs of food, beverage, all taxes thereon, labor) had the event not been cancelled and had Client met but not exceeded the food and beverage minimum.

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Final Points

- Read everything
- Be willing to walk away

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Questions?

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Contact Information:

Jeffrey S. Tenenbaum, Esq.

jstenenbaum@Venable.com

t 202.344.8138

Washington, DC

Kristalyn J. Loson, Esq.

kloson@Venable.com

t 202.344.4522

Washington, DC

Jesse Raben, Esq.

jraben@APA.org

t 202.414.8074

Washington, DC

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Revisiting "Force Majeure" for Association Meetings and Events

March 25, 2013

By: George E. Constantine III and Janice M. Ryan

Summary: From natural disasters to terrorist attacks, associations need to be prepared for the possibility that their events may face major disruptions or cancellations. When you expect the unexpected, you can protect your organization with a solid force majeure clause in your meeting contracts.

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In the wake of recent disruptive events, association executives and counsel are focusing more closely on potential exposures to attrition and cancellation damages in their meeting contracts. Weather-related disasters like Hurricane Sandy provide an all-too-frequent reminder of the devastation that Mother Nature can inflict on the most carefully laid plans. Less anticipated, perhaps, are the significant consequences that associations are currently feeling after the federal government sharply curtailed employee attendance at professional conferences as a result of budget sequestration and public scandal over wasteful agency spending. Appropriately, the contract clause that everyone is reading closely now is the one titled "force majeure."

A force majeure clause is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise. Most force majeure clauses have four elements:

- a list of eventualities that likely would disrupt a planned event (e.g., "acts of God, strikes, natural disasters, acts of terrorism")
- a "catchall" phrase (e.g., "and any other occurrence beyond the parties' control")
- a modifier applying to each of the eventualities and the catchall phrase (e.g., "rendering performance illegal or impossible")

- the operative phrase (e.g., "the parties shall be excused from performance")

Without a force majeure clause, parties faced with disruptive circumstances beyond their control are left to the mercy of the narrow common-law contract doctrines of "impracticability" and "frustration of purpose," which rarely excuse the parties from their obligations under the contract. Instead of relying on the common law, associations can better achieve flexibility for their meetings during times of crisis through a carefully drafted force majeure clause.

What Courts Have Said

After the terrorist attacks of September 11, 2001, counsel frequently reminded association executives of the need to negotiate a force majeure provision that guards against not only eventualities that make performance "impossible" but also those that make it "inadvisable." The distinction is important because impossibility is an exacting standard, and associations are in a far better position when the concept of inadvisability is included.

However, because courts tend to view force majeure provisions narrowly, judges do not necessarily imbue "inadvisable" with the same meaning that a dictionary does. For example, according to a federal court in Hawaii, "inadvisable" in a meeting contract will not be construed to include "economic inadvisability, even when the economic conditions are the product of a force majeure event," unless there is specific language to the contrary.

In this 2003 case, *OWBR LLC v. Clear Channel Communications, Inc.*, a group cancelled an event that had been scheduled to take place in February 2002. The group cited the force majeure clause in its agreement with the hotel, arguing that its performance should be excused due to travel fears and the economic downturn after 9/11. The court held that the mere fact that the event organizer could show that numerous participants could not attend some five months after a force majeure event did not excuse its performance obligation. The court specifically noted that the clause did "not contain language that excuses performance on the basis of poor economic conditions, lower than expected attendance, or withdrawal of commitments from sponsors and participants." It emphasized that "fear and uncertainty should not be enough to excuse performance under the agreement."

Therefore, association executives and counsel should not rest comfortably simply because they have negotiated excuse of performance when a force majeure event makes performance inadvisable.

Similarly, they should not make the mistake of overestimating the breadth of the "catchall" phrase in a force majeure clause. Courts will commonly use principles of contract interpretation to limit its scope. For example, a District of Columbia court declined to interpret the following catchall phrase as broadly as an association sought in a case involving a meeting that was cancelled because of unanticipated scheduling changes outside the association's control:

The parties' performance under this Agreement is subject to acts of God, war, government regulation, terrorism, disaster, strikes (except those involving the Hotel's employees or agents), civil disorder, curtailment of transportation facilities, *or any other emergency beyond the parties' control*, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement.

In this case, the National Association of Postmasters of the United States sought to invoke force majeure to excuse its performance after the government rescheduled the annual Rural Mail Count to February, when the association's annual leadership conferences were scheduled to be held. Due to the postmasters' rescheduled work obligations, it was determined that a substantial number would be unable to attend the conferences. The association argued that this circumstance constituted an "other emergency beyond the parties' control" that made it inadvisable to hold the events.

The court disagreed, denying that the rescheduling was an "emergency." It narrowly construed the catchall language in light of the contract interpretation principle of *ejusdem generis* so as to "embrace only objects similar in nature to those objects enumerated by the preceding specific words." The court went on to state that the specific events named in the contract (terrorism, disaster, strikes, and so on) are different in character from the change to the federal mail calendar, and so the catchall phrase would not allow excuse of performance in this situation.

Key Negotiating Points

Since courts take such a narrow view of force majeure provisions, it is especially important to anticipate and specify in the contract the circumstances most likely to prevent your meeting from being held.

Consider the location of the meeting and any special needs or responsibilities of the organization and meeting participants. In addition to including a detailed list of specific eventualities that could interfere with the meeting, it also is advisable to tie force majeure relief to objective standards where possible (for example, occurrences that prevent or delay attendance by at least 25 percent of participants). Of course, not all potential events can be specified or anticipated in the contract,

and including a catchall phrase remains important, even in light of court decisions construing those phrases narrowly. Beware of restrictive language or phrasing that may unduly limit the scope of the clause.

Lastly, although a force majeure clause should always allow for cancellation of a meeting without penalty, cancellation is not always the association's preferred course of action. There may be circumstances in which going ahead with the meeting is preferred, even if the force majeure event will likely result in lower-than-expected attendance. However, groups that fail to meet minimum room or food-and-beverage commitments will often risk incurring significant attrition fees. To help make going forward a viable option, the force majeure clause should be drafted to excuse liability for underperformance (failure to meet minimum guarantees) in addition to nonperformance (cancellation).

A carefully negotiated force majeure clause is an important tool for reducing liability risk associated with cancelling or scaling back a meeting in response to natural disaster or other disruptive circumstances outside the association's control. In contract negotiations and review, counsel should take into consideration that courts have consistently viewed the scope of these provisions narrowly. It is essential to broadly anticipate and specify events that might disrupt your meeting and to avoid restrictive language that might undermine your association's ability to benefit from the force majeure clause's protections.

*George E. Constantine III and Janice M. Ryan practice law at Venable LLP in Washington, DC.
Emails: geconstantine@venable.com, jmryan@venable.com*

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GUIDELINES FOR NONPROFITS FOR CREATING ENFORCEABLE CONTRACTS ONLINE

Overview

While bright line rules regarding online agreements are still being developed, courts generally apply traditional contract principles to online contracts. Every online agreement requires an offer, acceptance, and consideration in order to establish an enforceable contractual relationship. State and federal statutes that address online contracts reflect this approach, such as the **Uniform Computer Information Transactions Act** adopted by Maryland and Virginia. This thinking is also shown in related U.S. Federal laws such as the **Electronic Signatures in Global and National Commerce Act**. The following QuickCounsel identifies the key issues that in-house counsel should consider when creating online agreements, and provides advice on how to properly address those issues.

Make an Offer: Notify Contracting Parties that the Terms are Binding

Definition of offer. An offer is a manifestation of willingness to enter into a binding legal relationship. The essential terms must be sufficiently communicated to the offeree in order to invite valid acceptance.

Content of notice of offer. Compose the terms with simple and unambiguous language that fully discloses all material rights and obligations, and clearly expresses that a binding legal relationship arises upon the contracting party's acceptance.

Practice tips for making offers:

- Write the terms in a font that is easy to read and language that is not susceptible to more than one reasonable interpretation.
- Consider also offering a summary of key terms in a notice, especially for material and closely scrutinized (contentious) terms, such as arbitration and forum selection clauses.

Prominence of notice. Ensure that all terms are visibly, conspicuously and prominently displayed and, when presented through a website, available on or through a link from the website's primary page (and all other pages, if possible).

Practice tips for providing adequate notice of the offer:

- Configure (or try to configure) the webpage so that all terms are viewable upon uploading the page without needing to scroll, download information, access or install software, or make payments for purchases.
- Allow contracting parties to easily read and navigate the terms. They should not be pressured to rush through the terms by web-page timeouts, and they should have the opportunity to read the terms as often as they would like before acceptance.
- Display the terms on the same screen and near the "accept" button. Offer contracting parties the option to decline as prominently and by the same method as the option to agree.
- Consider highlighting important terms in a different color or font size.
- Ensure the terms remain accessible online after contract formation.
- Separate the terms from marketing text, and make sure they do not contradict other statements made elsewhere on the website.

Customizing notice. Consider whether the target consumer base or audience has special characteristics that may undermine the effectiveness of notice, such as an international consumer base or audience likely requiring notice in multiple languages.

Practice tip for when agreements will likely be made with people in foreign jurisdictions:

- Evaluate **foreign legal requirements for contract formation** to ensure compliance. Be cognizant of content restrictions, language requirements, and limitations on advertising and other promotional activities.

Acceptance: Require Electronic Signature to Affirmatively Manifest Assent

Definition of acceptance. Acceptance is a manifestation of assent to the essential terms based on words or conduct. Electronic acceptance can be effective when sent or communicated, not when actually received or acknowledged.

Assent by electronic signatures. Electronic signatures are an "electronic sound, symbol, or process attached to or logically associated with" an electronic document and "executed or adopted by a person with the intent to sign" the electronic document. Electronic signatures have the same legal effect as ink signatures.

Practice tips for inviting valid acceptance:

Acceptable methods of acceptance. Require the contracting parties to accept the terms by a method that affirmatively signals assent:

- **Click-through processes**, such as checking an onscreen box or scrolling the agreement before clicking "I accept".
- Typed signature at the end of an electronic document or email.
- Automated electronic signature processes that allow for verification by both parties.
- The contracting party expressly affirms that manifesting assent to the terms by the required method constitutes an "acceptance" and gives rise to a contractual relationship.
- The contracting party expressly acknowledges that using a website or online service after being provided sufficient notice of the terms and failing to reject them constitutes "acceptance".

Attribution. In anonymous situations, such as many online transactions for general audience sites, consider using security procedures designed to ensure the authenticity of electronic signatures in order to attribute the electronic signature to the party against whom the contract is sought to be enforced.

Practice tip for ensuring attribution:

- Document related security procedures and regularly review them to ensure effectiveness and compliance.

Consideration: Mutual Binding Promises Required for Enforceability

Definition of consideration. Enforceable contracts must be supported by consideration—a mutual exchange of promises that represent binding legal obligations.

Illusory promises. A promise is "illusory" when at least one party retains an "unlimited right to decide later the nature or extent of his performance". Therefore, an illusory promise lacks consideration and is unenforceable.

Practice tip for avoiding term invalidation:

- **Avoid unilateral amendment rights.** Terms that permit one party to unilaterally modify the agreement create an illusory promise that is unenforceable.

Additional Enforceability Considerations

Unconscionability

Definition of adhesion contracts. Unilaterally imposed terms of use can sometimes be viewed as contracts of adhesion – agreements drafted and imposed by a party with superior bargaining power on a weaker party, usually a consumer, who adheres to the contract with no real choice about its terms or opportunity to engage in meaningful negotiation.

Practice tip for avoiding contracts of adhesion:

- A court may be less likely to conclude that an agreement is a contract of adhesion when the offeree must accept the terms by one of the methods described above that clearly and affirmatively signal assent. The more control the offeree appears to have over the acceptance process, the less likely the court will be to view the terms as being forced upon a weaker and disempowered party.

Shock the conscience standard. Contracts of adhesion are unenforceable when their terms "shock the conscience." Courts determine whether terms cross this threshold on a case-by-case basis depending on the unique facts. Generally, excessively harsh or one-sided terms will be invalidated.

Practice tips for avoiding term invalidation:

- Keep in mind that class action waivers, arbitration requirements and inconvenient forum selection clauses have been identified as examples of controversial terms. Arbitration clauses and forum selection clauses are most heavily scrutinized by the courts.

Balance business interests with fairness to the consumer. Consider whether there is a legitimate business justification to use any of the foregoing terms, such as lowering transaction costs. Even if such a justification exists, evaluate whether it would be substantially unfair to include any of the foregoing terms in an agreement with a consumer of average sophistication.

Violations of Public Policy

Illegal provisions. Terms that are illegal, such as usurious finance charges, are unenforceable. Ensure the terms do not violate state or federal laws.

Unfair trade practices. Terms that violate local and federal **consumer protection laws** are unenforceable. Do not make false representations about the goods or services, and review federal and state consumer protection laws for compliance.

Record Retention Requirements

Maintain electronic records. Retain a copy of all electronic agreements, including evidence of electronic signatures.

Practice tip for memorializing electronic signature requirements:

- Document any electronic signature requirements that are not apparent from reading the terms displayed onscreen to contracting parties. For example, explain in writing that contracting parties cannot accept the terms without first clicking an "I agree" button, and keep this document (and the date of acceptance and the identity of the acceptee) on file.

Accessibility and accuracy requirements. Storage of an electronic record will satisfy legal record retention requirements if:

- The electronic copies accurately reflect the actual agreement between the parties:
 - Given that websites are often redesigned, website proprietors must keep records showing what version of their electronic agreements applied to what contracting parties at what time;
- The stored records remain freely accessible for later reference; and
- Both parties may download, store or print the agreement without interference.
- Records can be kept in electronic-only form, if they meet the above requirements. Such records will also satisfy court evidentiary rules or other rules of law that require transaction records to be kept in original form.

Secondary procedures. Back-up the records with other electronic copies and encourage contracting parties to maintain their own records.

Verify the Identity of the Contracting Parties

Anonymity. Among other issues, the sometimes anonymous nature of online contracting complicates efforts to ensure that the contracting party has the legal capacity to consummate a binding legal relationship, and that he or she is not located in a country subject to export sanctions or other legal requirements, such as age. Consider using different approaches to verify counterparty location and identity.

Commercial identity verification service. These services require a contracting party whose identity is to be confirmed to provide specific personal data to an online identity verification firm for contracting purposes. The firm searches public and private databases for information about that person and requires him to answer questions based on matched records. An identity score is then calculated and the identity of the contracting party is either given the "verified" status, or not, based on the score.

Digital certificate. This device is an electronic document that verifies the authenticity of an encrypted digital signature. The certificate can include name, address, organization affiliation and other information.

Other verification methods. Consider requiring contracting parties to provide other information, such as address or birthday, in text boxes displayed on the computer screen.

Security procedures. These services should supplement, not replace, the internal security procedures designed to ensure the authenticity of electronic signatures that were mentioned above.

Amending an Existing Electronic Agreement

Notice of amended terms. Like with the initial terms, provide adequate notice of the revised terms and inform contracting parties that they may terminate the agreement or affirmatively accept the terms by electronic signature.

Timing. Provide contracting parties with a reasonable amount of time to consider their options, such as 30 days.

Renewals. Consider tying the amended agreement to the effective date of a renewal term.

Closely scrutinized amendments. Courts may be more likely to invalidate amended terms that are presented to customers who receive ongoing services, or when the revised terms expand a company's right to disclose personal information about its customers.

Practice tip to avoid amended term invalidation:

- Consider using a click-through process to obtain clear proof of assent to the new terms.

Conclusion

In-house counsel should remember that traditional contract law principles generally govern online contract formation notwithstanding the fact that some state and federal legislation has been passed that specifically addresses online contracts. When drafting online agreements, therefore, keep in mind the above issues and recommendations in order to maximize the likelihood of drafting enforceable online contracts.