

Top Ten Legal Issues for Associations: Common Mistakes, and How to Avoid Them

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Lisa Hix
Nonprofit Organizations Practice
Venable, L.L.P.
Washington, DC



Mistake #10

Failing to Get Ahead of
Social Media



Watch the world premiere of the YouTube Symphony Orchestra's "Internet Symphony" mashu

Disgusting Dominos People



0:44 / 2:28    

★★★★★ 7,053 ratings

930,390 views

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Conduct a Social Media Audit

- Listservs
- Facebook Pages
- Twitter Accounts
- Blogs
- Both on Your Site and on Third Party Sites



Creating and Implementing An Effective Social Media Policy

Important to train before incidents occur and set up clear communication guidelines for

- Board
- Members
- Employees

- Apply to:
 - Postings on **organization-sponsored** sites, blogs, etc.
 - Postings **which could be attributed to the organization**



Core Areas

- Speaking with the Association's Voice – Clarifying who/when you can speak on our behalf
 - Using name/logo
 - Listing affiliation
- Emphasizing the sensitive areas:
 - Discrimination and harassment
 - Privacy and confidentiality
 - Infringement
 - Disparaging or false information
 - Antitrust



Employee-Specific Concerns

- Interaction with members and volunteers on social networking sites
- Limit expectation of privacy by stating what will be monitored
- Make explicit that out-of-office conduct can lead to termination



Social Media Policy Basics

- **Guidelines on Conduct**
- **General disclaimer and limitation on liability.** Include a general disclaimer of third party conduct and limitation on the association's liability.
- **Take-down policy.** With interactive forum functionality, associations should have a take-down policy for removal of any defamatory, infringing, or incorrect content.
- **Be careful with sweepstakes.** For any promotion involving a sweepstakes or contest, the association should include a provision(s) setting forth the scope of permissible participants (by state) and terms and conditions for any contest or sweepstakes.



Mistake #9

**Failing to Document What You Own
... and Protect Against
Infringement**



Who Owns Your “Intellectual Capital?”

- **Employee Works**
- **Vendors**
 - Website Designers
 - Photographers
- **Authors and Speakers**
 - Articles
 - Speeches, handouts and PowerPoint presentations
- **Volunteers & Committees**
 - Standards
 - Position papers
 - Articles



How Do We Address This?

Four Options

- **Assignment**
 - Transfer of all copyright ownership
 - Association may use in any form, at any time

ABC hereby assigns all right, title and interest ...

- **Shared Ownership**
 - Approval prior to use?
- **Implied License**
 - Narrowly Construed and Subject to Interpretation
- **License**
 - Limited by scope, but can be very broad



Securing Rights - License

- Define **Future Uses**
 - Create updates and derivative works?
 - Publish in magazine and online?
- Define **Geographic Area**
- **Exclusive or Non-Exclusive**
- **Perpetual or Limited** in Duration
- Define **Payment** (or Non-Payment) Terms



Practical Tips

- Obtain Licenses from All Authors and Speakers
- Adopt a standard policy and practice for all **volunteer** and **committee** work.
 - Volunteers sign from outset of work
- All **authors** sign standard agreements
 - Obtain right to publish AND post online
- **Speakers** grant rights to post online
- **Paid Contractors** agree to standard assignment
- Allowing others to use articles
 - Clearly **define use and duration**
 - Ensure you **have what you give away**



Mistake #8

Failing to Limit Use of
Corporate Identity



Apparent Authority — *Ultra Vires*

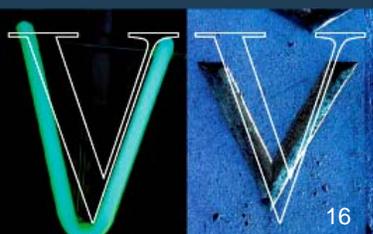
- As long as a board member/employee reasonably appears to be acting with the Association's approval, the Association may be **liable** for the board member's/employee's actions
- Often it is **no defense** to say that the board member/employee was not acting within the scope of his/her actual authority



Limit Apparent Authority And Protect Corporate Identity



- Limit individuals who have authority to speak on organization's behalf
 - Create process for gaining authorization to speak on organization's behalf
- Set strict parameters on use of Association letterhead
 - *Hydrolevel Case*
- Set strict parameters on contracting authority, entering into commitments
- Limit use of Association's name



Again ...

- Limit use of title, e.g., “Chairman of Board”
- Limit use of **logos and trademarks**
- Prohibit employees and members from using organization’s **name in any online identity** (e.g., username, screen name)



Mistake #7

Losing Sight of Antitrust Basics



Antitrust

- Contract, combination or conspiracy unreasonably in **restraint of trade**
- Must be some form of agreement to unlawfully restrain trade — agreement **need not be formal**



Antitrust

- **Membership restrictions and termination**
 - Standards for membership must be **objective and reasonable** – “at discretion of the Board”
 - Exclusionary membership practices that **affect a market participant’s ability to compete**, however, may raise antitrust issues.
- **Limiting Access to Member Benefits/Meetings**
 - If certain benefits are **essential or material to compete**, then required to provide access upon **payment of a reasonable fee** (can be a higher fee).



Antitrust

- **Standards/Certification**
 - Must be based on **sound, objective justifications**
 - Must be **reasonably related** to the goals it is intended to achieve
 - Must incorporate **reasonable procedural safeguards** to ensure that participants are not arbitrarily discriminated against

- **Collection of Data and Statistics**
 - Does not include information about **future prices** or other **future forecast information**
 - Reported in an **aggregated form**
 - Avoid joint discussion and analysis of the data by association members.



Recent Antitrust Investigations/Lawsuits

- National Association of Music Merchants (“NAMMM”)
 - In March 2009, the Federal Trade Commission settled charges that NAMMM enabled and encouraged the exchange of competitively-sensitive pricing information among its members, resulting in member coordination of pricing and the establishment of minimum advertised prices.
- National Association of Realtors (“NAR”)
 - In May 2008, the Department of Justice settled with NAR over allegations that NAR’s policies and rules hindered competition from real estate brokers who used internet tools to offer customers better services at a lower cost.
 - Under the terms of the agreement, required to repeal their rules that withheld listings from non-members.



Mistake #6

Failing to Adequately Manage Chapters and Affiliates



Risk from Affiliated Entities

- How much separation is “right” for you?
- Are you **liable** for their activities?
- **Reputational** risk



Affiliation Agreements Considerations

- Consider group exemption (for chapters)

- Consider an affiliation agreement
 - Set guidelines for **activities**
 - Set guidelines for **governance**
 - Set guidelines on use of **name/mark**

- Plan for bumps in the road
 - Withholding membership payments

- Contemplate the break-up
 - Restrictions on use of **intellectual property**
 - Restrictions on **use of name, or any part thereof**
 - Use of **funds post-dissolution**



Multiple Tax-Exempts

Important for political, non-charitable and “high risk” operations

- Observe **corporate formalities**
 - Overlapping Board okay
- Track **staff time and costs**
- Consider a **cost sharing agreement**
- Watch for issues with “**framing**” on website and joint promotions
- Beware of 501(c)(3) vs. 501(c)(6) **education**
- Beware of **programs limited to 501(c)(6)’s members**
- Beware of **loans**



Mistake #5

Letting Governance Slip Away



What Governs a Nonprofit Entity?

Nonprofit Corporation- State Nonprofit Corporation Law (statute and common law)

- Incorporation subjects organization to **state corporate laws** (defines requirements for organizing documents and decision-making)
 - Maintain filings!
 - Check governing documents for state law compliance.
- Grants organization “**corporate shield**” so long as operations are consistent with state corporate requirements



Consistency with State Requirements

- Board, **Ultimate Decision-Making Body**
- **Business judgment rule** — bad decisions are more easily defended than ignorance; it is the (due diligence) process that matters most
 - Must **Meet and Deliberate**
 - Act in Best Interests of Organization
(**Conflicts/Recusal**)
 - Must Document through **Minutes**



Corporate Governance

- Emphasis on increased **transparency and accountability**
 - Heightened focus on governance in IRS **Form 990**
- **Reputational risk paramount** -- poor governance, once exposed, leads to loss of public confidence
 - Increased **audit** risk?
- Legal risks associated with **failure to comply** with articles of incorporation and bylaws, and state nonprofit corporation law (of state of incorporation)



Mistake #4

Not Having a Contract
Management Plan



Maximizing Your Position

- 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.
 - **Competition reaps savings** – consider RFPs
 - **Consider markets**, particularly with meeting contracts.



Contract Roadmap

Scope

Payment

Ownership

Responsibility (when things go wrong)

Term and Termination



Contract Checklist

- **Scope** - litigation arises over lack of clarity :
 - What is being done?
 - When will be done (milestones)?
 - What will be delivered?

- **Payment** - tie payment to **satisfactory delivery** of deliverables according to the timeline (beware of prepayment and maintain performance incentives)

- **Ownership** - copyright **vests in the creator**, even if you contracted for the services – so make it clear
 - Do you want the **end product, or everything created?**



Contract Checklist

Responsibility (when things go wrong)

- **Reciprocal** - A reciprocal clause is desirable where each party indemnifies the other for (is responsible for) its own negligence (mutual indemnification).
- **Limited to Control/No Third Party Coverage** - What each party is being asked to be responsible for is within its control (or flow downstream)
- Includes **Defense Costs**
- No “**Sole,**” “**Gross,**” or “As determined by a court”

Term and Termination

- Beware of “**Evergreen Provisions**”
- Note when **notice of non-renewal** is due
- Note **notice period** and grounds for termination



Mistake #3

Failing to Focus on the Three
Most Important Clauses in
Meeting Contracts



Force Majeure

Five Key Components – Force Majeure

1. **Delineated Risks** (terrorism, threats of terrorism, government travel advisory, etc.)
2. **Preventing or delaying at least 25%** of Attendees and guests from appearing at the event,
3. **Or other similar cause beyond the control of the parties**
4. Making it **illegal, impossible, or commercially impractical** to hold the event or perform the services
5. This contract may be **terminated or performance excused** by either party without penalty for any one or more of such reasons by written notice from one party to the other
6. Return all **deposits**



Condition of Facilities Warranties of Services

Warranty of Services

Hotel represents and warrants that the Hotel and Hotel's facilities, including services to be provided by Hotel to Association and its attendees pursuant to this Agreement 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**

Deterioration of Quality

Should the Hotel suffer a **substantial deterioration in the quality of its facilities or services or the surrounding area**, 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.**



Penalties Attrition and Cancellation

- Have allowable “slippage” – usually 20%
- Require hotel to resell rooms
- Pay only a % of room cost
- “Average occupancy,” not last sold
- Don’t pay penalty until after meeting event
- Have right to audit
- Credit against future booking



Mistake #2

Failing to Understand UBIT & Its Exceptions



Is the Income Taxable?

- Unrelated Business Income Tax (UBIT)
 - It is a **trade or business**,
 - It is **regularly carried on**, and
 - It is **not substantially related** to furthering the exempt purpose of the organization.

- Taxability of the income received will **depend on contents of contract, reality of relationship**

- **Educational event** registration fees — ALMOST NEVER
- **Conference and Trade Show Revenue** – ALMOST NEVER
- **Advertising** — ALMOST ALWAYS
- **Consumer products unrelated to mission** – ALMOST ALWAYS
- **Job referral activities** – ALMOST ALWAYS



Corporate Partnerships Maximizing Income

Qualified Sponsorship Payments

- Goods or services, or other benefits, the total value of which does not exceed **two percent** of the sponsorship payment; and
- **Recognition**, i.e., use or acknowledgment of the sponsor's name, logo, or product lines in connection with the nonprofit's activities



Corporate Sponsorship Income

Permissible forms of use or acknowledgment:

- Use or acknowledgment of the **name or logo** (or product lines) of the sponsor's business, as long as use is not qualitative or comparative
- List of **sponsor's location, telephone number**, and/or internet address, including a **hyperlink** from the exempt organization's web site to the sponsor's web site
- Product **samples okay**



Corporate Sponsorship Income

- Unlike Sponsorship Payments, Payments Received for Advertising are Characterized as UBI
- Characteristics of Advertisements Include:
 - Comparative or qualitative language
 - Price, savings or value information
 - Endorsements
 - Inducement to buy
- A hyperlink may convert acknowledgment to advertising



What is a Royalty?

- Name, mark and mailing list
- Third-Party Product
 - e.g. affinity card, not medical journal
- No active promotion (or quantify value and pay tax)
 - Announcement letter okay
 - Quality control measures okay



Acknowledgment vs. Advertising

Banners

- 2000 EO CPE, the IRS stated that “a moving banner is probably more likely to be classified as an advertisement.”
- Fees based on “pay-per-view” or “pay-per-click” measures are also likely to be characterized as advertisements.



Mistake #1

Failing to Implement
Employment Safeguards



Employment Liability

At-Will Status

- Employee handbook, offer letters, etc.

Terminations

- Use of progressive discipline
- Review process prior to termination
- Exit interviews

Performance reviews and counseling

- Regularity and content of reviews
- Documentation of counseling
- Consistency of disciplinary action



Employment Liability Key Areas of Risk

Exempt vs. non-exempt designation

Wage and hour compliance (FLSA)

- Use of flex time
 - Same work period, 1 1/2 time
 - Comp time to prevent over 40 in 1 week
- Travel time
 - During business hours, compensable
- Required attendance at meeting functions
- The “answer the phone during lunch” problem
- Keep records



Employment Liability Steps to Mitigate Risk

- Routine supervisor training
- Increased documentation of performance management and progressive discipline
- Pre-termination review by counsel
- Legal review of existing HR policies, employee handbook

Perception of fairness is key!



Questions and Discussion

Lisa Hix
Venable LLP
575 7th St., NW
Washington, DC 20004
(202) 344-4793
lmhix@venable.com

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