



Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips, and Common Pitfalls

Thursday, May 17, 2012

12:30 p.m. – 2:00 p.m. EDT

Venable LLP

Nonprofit Organization Practice

Washington, DC

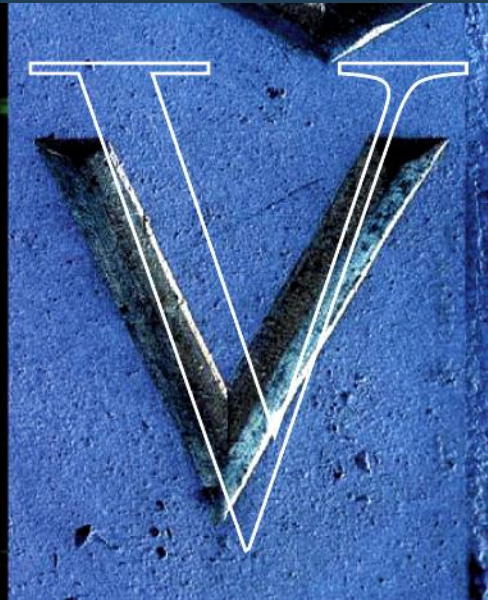
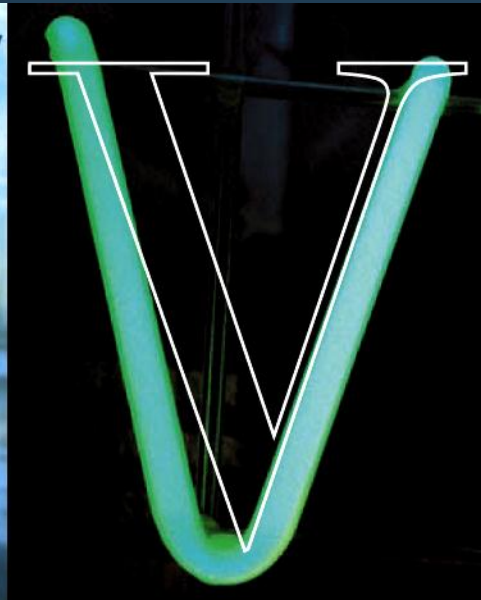
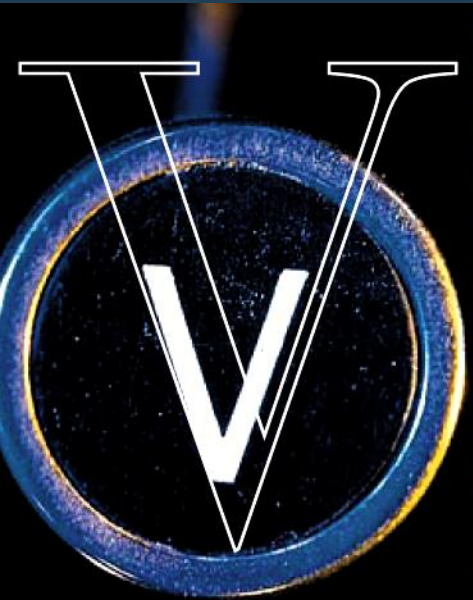
Moderator:

Jeffrey S. Tenenbaum, Esq.

Panelists:

George E. Constantine III, Esq.

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Upcoming Venable Nonprofit Legal Events

June 13, 2012 - [Ten Best Practices for Protecting Your Nonprofit's Intellectual Property](#)

July 12, 2012 - [Nonprofit Chapters and Affiliates: Key Legal Issues, Pitfalls and Successful Strategies](#)

August 2, 2012 - How Nonprofits Can Raise Money and Awareness through Promotional Campaigns without Raising Legal Risks – Details coming soon



Presentation Overview

- Contracting Trends
- Identifying Risks
- Negotiating Contracts
- Key Contract Provisions
- Managing the Internal Contracting Process
- The Top “Take-Aways”



Contracting Trends

- Low or no tolerance for risk or responsibility
 - Renegotiation despite long relationships
 - More legal review
- Pressure on prices
- In-house counsel doing more with less



Identify Risks

- What are the obligations of each party?
- What risks are created by the contract?
 - Tax and tax exemption
 - Antitrust
 - Regulatory
- Know enough to spot the issues and when to ask questions of your tax and/or legal advisors



Contract Drafting and Negotiation – Four Corners Rule

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



Contract Drafting and Negotiation – 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
 - Competition reaps savings – consider RFPs
 - Consider markets, particularly with meeting contracts



Contract Drafting and Negotiation – The RFP Process

- What is an RFP?
- Why does my association need an RFP?
 - Formalizes the process
 - More professional approach to contracting



Contract Drafting and Negotiation – The RFP Process (con't)

- Key provisions
 - Take advantage of your leverage
 - Not just price and timeline
 - Address indemnification, liability, independent contractor
 - Get signature from contractor



Contract Drafting and Negotiation – 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



Key Contract Provisions

- Payment and Ownership:
 - Budget and scope control
 - Ownership
- Risk Allocation:
 - Damages
 - Indemnification
 - Insurance
- Managing Disputes
- Term and Termination



Key Contract Provisions: Payment and Ownership – Scope

- Define “scope” – carefully define what the organization is obligated to do or what you are paying for
 - Particularly important in “soft” contracts – research, writing
- Define material terms, obligations, and defaults
- Avoid disclaimers of warranties



Key Contract Provisions: Payment and Ownership – Payment Terms

- Clear payment terms
 - Fixed price vs. time-and-materials
 - Payment obligations upon termination
- Withhold final payment until all items are delivered – always need an incentive to perform
- Renegotiating prices/payments
 - Consider renegotiation triggers
- Beware of third parties receiving funds due to you



Key Contract Provisions: Payment and Ownership – Budget Management

- Be careful with commissions/exclusivity
 - Housing contracts
 - Ad sales
- Require mitigation of damages
 - Particularly in hotel/meeting agreements



Five Essential Tools for Budget Management with Meeting Agreements



Key Contract Provisions: Payment and Ownership – 5 Essential Budget Management Tools for Meeting Agreements

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.



Key Contract Provisions: Budget Management – 5 Essential Tools for Meeting Agreements (con't)

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



Key Contract Provisions: Budget Management – 5 Essential Tools for Meeting Agreements (con't)

4. **Deduct Overhead/Profit Margin**: If Association is required to pay an attrition fee, the fee shall be calculated by multiplying X% of the Single Room Rate by the difference between the number of actually used rooms and the Room Block with credits from guaranteed no-shows, cancellations, and early departure charges, if applicable.
 - » Guest Rooms – 75-85%
 - » F & B – 20-40%



Key Contract Provisions: Budget Management – 5 Essential Tools for Meeting Agreements (con't)

5. Average Occupancy Rate – Not Last Sell:

Association shall not owe any fees, penalties, or liquidated damages if Hotel meets or exceeds its average occupancy level for that particular period of the year.

- How do you establish “Average Occupancy?”
 - Hotel ledgers
 - Have a formula, such as last three years



Key Contract Provisions: Payment and Ownership – Intellectual Property

- Association name, trademarks, logo, mailing list, copyrighted information
- Association trade secrets and confidential information
- Who owns what is being created?
- What if a contractor provides something that is owned by a third party?



Key Contract Provisions: Risk Allocation – Damages

- Increase of proposals to cap damages to the value of the contract
 - Evaluate potential maximum harm and costs to repair in the event of breach
- More suggestions to limit damages to actual damages
 - Consider possible exclusions



Key Contract Provisions: Risk Allocation – Indemnification

- **Indemnification**. Compensation. Making reimbursement to another for a loss already incurred.
- Can apply to negligence, IP, breach, data breach, etc.



Key Contract Provisions: Risk Allocation – Indemnification (con't)

AVOID

- “Sole,” “Gross,” or “As determined by a court” – limits provider’s responsibility
- Coverage for third party’s acts, omissions, negligence, etc.
- No provider indemnification
- Any occurrence related to a meeting



Key Contract Provisions: Risk Allocation – Indemnification (con't)

CONSIDER

- Reciprocal/mutual – each indemnifies the other for its own negligence
- Control – each party is responsible only for what is within its control
- Includes defense costs
- Limit scope to insurance coverage



Key Contract Provisions: Risk Allocation – Special Indemnification Considerations

- Consider duty to defend
 - Choice of counsel (insurance may limit)
- Consider how long the indemnity obligation should survive beyond termination of the contract
- Government agencies
 - Consider “to the maximum extent allowed by applicable law” clause
- Intellectual property infringement



Key Contract Provisions: Risk Allocation – Limiting Third-Party Reliance

- Endorsements
 - Clear language that association does not endorse provider's products or services
- Warranties
 - Avoid disclaimer of warranties by provider



Key Contract Provisions: Risk Allocation – Managing Liability and Indemnification Obligations

- “Flow down” to third parties, contractors
- Waivers
- Insurance



Key Contract Provisions: Insurance

- Secure and maintain coverage
 - Understand scope and coverage
 - Consider event insurance
 - Cancellation insurance
- Coverage types and amounts should correspond to indemnification obligations and potential liability exposure
- Reassessments
 - Reconsider risks as activities (and potential liabilities) expand
 - Monitor legal developments affecting kinds and amount of potential liability



Key Contract Provisions: Insurance (con't)

- Who should be insured?
 - Use legal name for nonprofit organization and identify trade names or other identifiers
 - Subsidiary, parent, and affiliated organizations
 - Directors and officers
 - Employees
- Document that your providers have it
 - Additional insured
 - Notice of cancellation
- Important nuances
 - Waiver of subrogation



Key Contract Provisions: Dispute Resolution

- Litigation
 - Inclusion of venue and choice of law
 - Attorneys' fees and costs
- Mediation
- Arbitration
 - Inclusion of venue and choice of law
 - Choice of arbitrator(s)
 - Expenses



Key Contract Provisions: Term and Termination

- Avoid long-term deals
- Seek no-fault exit provisions
- Avoid long-term renewals
- Think carefully about “automatic” renewals
- Provide for termination upon breach (watch for long “cure” periods)



Managing the Internal Contracting Process

- Reevaluate the current review process
 - Identify types of lower risk contracts that can forgo legal review
 - Identify certain dollar thresholds for requiring contract review



Managing the Internal Contracting Process (con't)

- Use contract templates and guidelines for non-legal staff
- Implement and communicate the revised process
- Seek review and counsel from outside legal, fiscal, and other advisors



The Top “Take-Aways”

1. Negotiate a contract that has clear terms that address and manage potential liability and risk
2. Push back when reasonable on clauses for limitation on liability and indemnification
3. Minimize cost overruns by narrowing attrition and cancellation clauses
4. Reexamine and revamp internal contracting procedures



Questions and Discussion

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