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**OUTLINE**

**ASSOCIATION  
LAW AND GOVERNANCE**

**Howe & Hutton Ltd  
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**Howe & Hutton provides complete legal representation to trade associations.  
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# ASSOCIATION LAW

## I. CORPORATE LAW BASICS FOR NOT-FOR-PROFIT CORPORATIONS

### A. Incorporation under State Not-for-Profit Corporation Law -

1. State Not-for-Profit Corporation Laws - Associations are incorporated under state or D.C. not-for-profit corporation laws, which govern many aspects of a not-for-profit corporation's internal operations.
  - a. *Priority Over Articles of Incorporation or Bylaws* - The articles of incorporation and bylaws of a not-for-profit corporation must comply with the state not-for-profit corporation law. When there are conflicts between the statute and the articles of incorporation or bylaws of a not-for-profit corporation, the statute governs.
  - b. *Obtaining Copies of Laws* - Statutes are readily available from Secretary of State, public libraries and law offices.
2. Articles of Incorporation -
  - a. *Basic Charter* - The articles of incorporation are the basic charter of an incorporated association.
  - b. *Where Filed* - Articles are filed with the Secretary of State in the state where the association is incorporated.
  - c. *Amending Articles* - Articles can usually be changed only by the members in accordance with statute. Articles of Amendment and other documents should be filed with the state when the name or purposes of the association change or other information included in the articles of incorporation requires updating.
  - d. *What's Included* - Typically, articles include corporate name, purposes, office, registered agent, initial directors, duration and incorporators.
  - e. *Corporate Purposes* - Corporate purposes are important for establishing boundaries of corporate activities and for IRS review of tax-exempt status. The IRS also requires that specific dissolution and inurement provisions be included in articles of incorporation of associations, which seek recognition of federal tax exempt status.
  - f. *Priority Over Bylaws* - When there is a conflict between the articles of incorporation and the bylaws of a not-for-profit corporation, the articles of incorporation govern.
3. Bylaws -

- a. *Contract with Members* - Bylaws are a contract between the association and its members, and are not filed with the state of incorporation, although they are filed initially with the IRS when requesting recognition of tax-exempt status.
- b. *What's Included?* - Typically, bylaws contain membership criteria and member termination (very important for antitrust reasons); a discussion of the powers, manner of selection/election and term of office of officers and directors; general information about meetings and committees, and indemnification and insurance provisions; financial and miscellaneous provisions relating to internal affairs of a association; and ways to amend the bylaws.
- c. *Model Bylaws* - Howe & Hutton, Ltd. has produced a set of model association bylaws.

B. Other Corporate Law Issues -

1. Minutes -

- a. *What Should/Should Not Be Included?* - Minutes are the official corporate record of what was done. As a general rule, minutes should contain only action items, with little or no discussion. Having in the minutes a discussion of the reasons for corporate actions can sometimes be useful in subsequent litigation and for precedent or historical purposes. However, the effect of such discussions on litigation is impossible to predict.
- b. *Transcribing Minutes* - Tape recording meetings may be a necessary tool for preparation of minutes, but erase tapes after minutes are transcribed and approved. The minutes are the official record, not the tapes.

2. Membership Dues -

- a. *In General* - Dues cannot be unreasonably high, given the industry.
- b. *Classes of Membership* - Distinctions between classes of members for dues purposes must be reasonable. This may also present a potential IRS issue.

3. Reserve Funds -

- a. *In General* - Excessive reserve funds could, theoretically, cause tax problems for a association, but this is not usually a problem, since such reserves may be accumulated in anticipation of future association purposes.
- b. *Guidelines* - Reserve funds of five times an association's annual budget have been approved by the IRS, and larger funds will likely cause no difficulties if money is being accumulated for a specific purpose (such as construction of a new headquarters, or an industry promotion campaign).

4. Reporting Requirements -

- a. *Annual Reports* - Not-for-profit corporations generally must file annual reports with the Secretary of State in their state of incorporation and states

where they are located or doing business, but there is no such requirement in many states. Know and follow the law of the applicable states.

- b. *Changing a Registered Agent* - Annual reports can be used to change a registered agent in some states; other states require filing a separate form.
- c. *Penalties for Failing to File Annual Report* - The penalty for failing to file a required annual report is generally dissolution of the corporation by administrative act of the Secretary of State. Corporate status can generally be reinstated by filing past-due reports and paying past-due filing fees. Officers and employees can be personally liable for corporate debts and liabilities incurred during the period before reinstatement.

5. Liability of Officers and Directors -

- a. *In General* - While the potential for liability exists, officers, directors and staff members of not-for-profit corporations are seldom sued.
- b. *What Actions May Trigger Liability?* - Officers and directors of not-for-profit corporations can be held liable to the corporation (in a suit by the board or, in some states, individual directors, officers or members) for:
  - *breach of a duty of care to the corporation* (e.g., failing to come to meetings or failing to give sufficient consideration to important matters);
  - *breach of a duty of loyalty to the corporation* (e.g., intercepting and appropriating for personal or other improper use a corporate opportunity).
- c. *Tort Liability* - Officers and directors of a not-for-profit corporation, as well as employees and other volunteers, may occasionally be held liable to third parties under contractual and tort liability theories (torts being civil wrongs, such as libel).
- d. *Liability for Noncompliance with Laws* - Under certain circumstances, officers and directors, as well as employees and other volunteers, may be held liable under federal and state statutes, such as antitrust, civil rights and tax laws.
- e. *Limits on Liability* - Many states have passed laws limiting the liability of not-for-profit corporation officers, directors and other volunteers, though receipt of compensation by such volunteers may cost them this limited immunity from suit in some of those states.
- f. *U.S. Congressional Action* – The Volunteer Protection Act, enacted in June 1997, preempts inconsistent State law except when such law provides additional protection from liability relating to volunteers in the performance of services for a nonprofit organization or governmental entity. The Act is inapplicable to any civil action in a State court against a volunteer in which

all parties are citizens of the State if such State enacts a statute declaring its election that this Act not apply.

The Act exempts a volunteer of a nonprofit organization or governmental entity from liability for harm caused by an act or omission of the volunteer on behalf of such organization or entity if: (1) the volunteer was acting within the scope of his or her responsibilities at the time; (2) the volunteer was properly licensed or otherwise authorized for the activities or practice in the State in which the harm occurred; (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed; and (4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or owner to possess an operator's license or maintain insurance.

The Act prohibits the award of punitive damages against a volunteer unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct or a conscious, flagrant indifference to the rights or safety of the individual harmed.

- g. *Insurance* - An association should have errors and omissions coverage for itself as well as directors and officers coverage that extends to committee members and staff. The insurance may or may not cover affiliates or chapters. Such coverage is much more readily available than formerly and is still necessary despite state laws limiting director and officer liability. Try to obtain maximum coverage for defense costs in antitrust and employment discrimination cases, plus damages coverage if available. Additionally, review policy wording carefully to ensure coverage of liquor liability, publishers' liability (libel, slander, invasion of privacy, copyright infringement), trademark infringement and breach of contract claims.
- h. *Indemnification* - State law in most jurisdictions also allows and, in some instances requires, not-for-profit corporations to indemnify and to insure officers and directors and other volunteers against liability.

6. *Corporate Action by Electronic Means* - A number of states have passed, and others are considering, amendments to their not-for-profit corporation laws to permit certain corporate actions to be undertaken by electronic means. To date, Illinois, Virginia, Delaware and the District of Columbia have passed laws permitting corporate notices to be given by electronic means and, with varying restrictions and conditions, permitting members of such corporations to vote electronically on corporate matters.

## **II. ANTITRUST LAW BASICS FOR NOT-FOR-PROFIT CORPORATIONS**

### **A. Antitrust Laws in General -**

1. Unreasonable Restraints of Trade - Federal and state government agencies, as well as private plaintiffs, enforce civil and criminal antitrust laws, which generally prohibit unreasonable restraints of trade. Not-for-profit membership organizations, because they bring competitors together, are natural targets.
2. Size - Corporations, big or small, are subject to the antitrust laws to the same degree, although size is often relevant to substantive antitrust liability.
3. Penalties - Penalties for antitrust violations can be severe, including treble damage payments, and prison terms for individuals convicted of criminal violations. More likely exposure for associations is legal defense costs and injunctive relief regardless of damages awards, as well as the time involved and adverse publicity.

### **B. Areas of Concern at Meetings -**

1. Guidelines - A partial list of matters which should not be the subject of any type of agreement among competitors, explicit or implicit, (and which therefore should not even be discussed at association meetings):
  - a. prices to be charged to customers by members;
  - b. division or allocation of markets or customers;
  - c. coordination of bids or requests for bids;
  - d. terms and conditions of sales, including credit or discount terms;
  - e. terms for distribution of products;
  - f. targets for production of products or the level of production;
  - g. specific profit levels;
  - h. the bases upon which prices are determined;
  - i. exchange of price information as to specific customers;

- j. a boycott of or a refusal to deal with a customer or supplier, i.e., group boycott; and
  - k. compilation of approved lists of customers or suppliers.
2. Note - Much conduct that would be illegal if done jointly with another is legal if only one party is involved and acting on its own.
  3. Other Tips - Prepare an agenda and stick to it. Prepare and retain minutes.

C. Membership Requirements -

1. Blackballing - No blackballing of or by competitors is allowed, but a board vote on admission to membership is permissible, as is a requirement that new members be sponsored by existing members, unless such votes and sponsorship requirements are actually used to implement an unreasonable anticompetitive scheme.
2. Geographic Limitations - Geographic limitations on membership that do not discriminate between competitors - for example, that a business must be doing business in a certain city - are permissible.
3. Types of Business Limitations - Reasonable functional definitions of eligibility for membership are permissible (for example, only businesses allowed -- no not-for-profits, government bodies; or manufacturers or distributors only; etc.).
4. Financial Condition Limitations - Exclusions based on financial condition (cannot pay dues), length of time in business (one or two years may be required), and a record of serious criminal conduct can be enforced if properly defined. Good reputation requirements and other exclusions based on ethical considerations may not be legally justifiable, but practical considerations may permit their use.
5. Guidelines -
  - a. *Suspension* - Suspension of action on membership application pending resolution of a criminal prosecution is permissible once a charge has been filed.
  - b. *Voluntary* - Do not force membership in an association or participation in association activities; make it voluntary.
  - c. *Exclusivity* - association members may choose to do business only with members. Encouraging members to deal with other members is acceptable; encouraging them not to deal with nonmembers (or to deal only with members) is not (see “group boycott”).
  - d. *Nonmember Fees* - Charging nonmembers higher fees than members for services rendered by an association is acceptable. In some cases, association services must be provided to nonmembers (just about any service that

provides a significant competitive advantage and cannot be readily obtained elsewhere – decided on case by case basis).

D. Code of Ethics Requirements -

1. Unreasonable Restraints - Code of ethics provisions must not involve unreasonable restraints of trade, advertising restrictions being particularly suspect.
2. Protection of Public - Code of ethics provisions that focus on protection of the public are most likely to withstand an antitrust challenge.
3. Enforcement Procedures - Code of ethics enforcement procedures should provide due process, even though lack of due process alone does not demonstrate that antitrust laws have been violated. Due process involves notice of charges, opportunity to confront opposing witnesses, and opportunity to be heard by impartial body.
4. Penalties - Penalties (fines, suspension, expulsion) must not be unreasonable.

E. Conflict of Interest -

1. Potential "Conflicts of Interest" - Legal and membership problems arise when associations purchase products or services from directors or other "insider" members. Members will sometimes argue that their own products and services are being unfairly excluded from the association's "market."
2. Interested Parties - To avoid problems arising from conflicts of interest, a majority of disinterested directors should approve all association dealings with "insiders," and a record should be created indicating that the association has considered alternatives and has chosen to deal with an "insider" supplier for a valid business reason.

F. Statistics Reporting -

1. In General - Associations may collect statistics on business activity, and permit exchange of information regarding business activity among competitors, under controlled conditions. Such exchanges may not be used to fix prices or otherwise restrain trade. Individual data should not be disclosed.
2. Focus - Generally, the focus of statistics reporting should be on past business activities rather than the future (at least, when sensitive information is being conveyed).
3. Voluntary Participation - Participation must be voluntary. Many organizations limit disclosure of statistics to participants in order to encourage participation.

G. Cooperative Buying and Selling -

1. In General - Cooperative buying and selling arrangements by not-for-profit organizations have frequently been upheld by the courts and antitrust agencies.

2. Note - Cooperative buying and selling groups may not be used as a device to unreasonably restrain trade.

H. Tying and Robinson-Patman Act Matters -

1. Tying Arrangements - Tying the sale of one product to another so that a purchaser must take both if he wants either can be unlawful, unless the products are so interrelated as to constitute virtually one product.
2. Robinson-Patman Act - The Robinson-Patman Act essentially provides that when a seller has competing customers, it must sell goods of like grade and quality to them, in the same time frame, at the same price and on the same terms and conditions in order not to give one of them an unfair competitive advantage over the other. Buyers who are favored by sellers in violation of the Act, and who knowingly accept such preferential treatment, may also be in violation of the Act. However, different treatment of different classes of customers will be lawful if the classes do not compete, or if the different treatment can be cost-justified by the seller. Also, sellers can offer a preferential price to a specific customer in order to meet, but not beat, a price offered to that customer by a competitor.

**III. TAX EXEMPT LAW BASICS FOR NOT-FOR-PROFIT CORPORATIONS**

A. Section 501(c)(6) Status -

1. In General - Associations are exempt from federal income taxation under Section 501(c)(6) of the Internal Revenue Code, and therefore pay no tax on dues, program income or investment income.
2. Maintenance of Tax Exempt Status - In order to maintain their federal tax-exempt status, associations must make annual reports to the IRS on Form 990 or Form 990 EZ by the 15th day of the fifth month after the end of the organization's accounting period.
  - a. *990 EZ Form* - Associations with gross receipts less than \$100,000 and total assets less than \$250,000 may use the 990 EZ (short) form.
  - b. *Filing Exemptions* - Associations receiving less than \$25,000 normally in annual gross receipts are not required to file Form 990 or Form 990 EZ, although the IRS recommends such associations file Form 990 if the IRS sends the association a Form 990 packet in the mail. When Form 990 or Form 990 EZ is filed by an association receiving less than \$25,000 normally in annual gross receipts, only a small portion of the Form need be completed, not including financial information.
3. Exemption May Be Lost -

- a. *Commercial Activities* - An association may lose its exempt status if the IRS finds the association's principal purpose is to engage in for-profit or other nonexempt activities.
- b. *Private Inurement* - A association may lose its tax-exempt status if more than an incidental amount of the net earnings of the association "inure" to the benefit of any member or private individual, except as payment for services rendered to the association. Inurement could be found in the following circumstances:
  - when income is directly distributed to the membership (except as a refund of contributions previously made);
  - when valuable services are rendered to individual members or others, the cost of which, either in whole or in part, is borne by other members or general funds of the organization -- legal services, advertising services and employment services, for example.
- c. *Other* - Other factors that may cause the IRS to revoke recognition of tax-exempt status may include an organization's providing certain services only to members or providing services to nonmembers on a discriminatory basis (unless the "discrimination" is simply a higher fee for nonmembers, justified by the fact that nonmembers pay no dues). Recognition of tax-exempt status may also be denied if an association engages in illegal activities, such as violations of the federal antitrust laws or the federal election laws.

B. Lobbying and Political Activity -

1. Effect on Tax-Exempt Status - Lobbying will not generally affect a association's tax-exempt status.
2. Revenue Reconciliation Act of 1993 - This tax act eliminated the deduction for lobbying expenses, as well as the deduction for the portion of membership dues allocable to lobbying and political expenses. This tax act became effective for expenses paid or incurred after December 31, 1993.
  - a. *Requirements* - Associations must either notify their members of the portion or percentage of their dues attributable to lobbying activities and therefore nondeductible, or pay a proxy tax equal to 35% (highest corporate rate) of its lobbying expenses.
  - b. *Notification to Members* - In estimating the percentage of membership dues which will be nondeductible, associations must compare estimated lobbying and political expenses for the year to its estimated membership dues income. Other income is not considered. Notice must be given in writing at the time of dues billing or dues payment, making this difficult.
  - c. *Definition of "Lobbying"* - "Lobbying" activities include:

- Attempts to influence legislation through communications with President, Vice President, cabinet or members of Congress;
  - Attempts to influence legislation through State legislators, Governor, State executive officials;
  - Communications with certain other high-level federal or state employees;
  - Attempts to influence the public on legislative matters, referenda, and elections;
  - Intervention in political campaigns; or
  - Foreign lobbying.
- d. *What's Included in Lobbying Expenses?* - In addition to the "communication" time and expenses, the research and preparation for those communications must be included in the computation as well as an allocation for overhead.
- e. *What's Excluded?* - Communications regarding regulatory matters (e.g., with a federal or state agency) and communications regarding local legislation are excluded from the tax act's requirements.
- f. *Current Challenge to the Law* - The American Society of Association Executives (ASAE) is currently challenging the constitutionality of this law, and will appeal a D.C. federal district court's decision against ASAE.
- g. *State Laws* - Lobbying may also be regulated by various state laws.

3. Lobbying Disclosure Act of 1995 - This act requires organizations that engage in lobbying activities to register with the Secretary of the Senate and/or Clerk of the House of Representatives. The first registration forms were due on February 14, 1996.

- a. *What Must be Reported* - The organization must file semi-annual reports listing: the issues upon which a lobbyist was engaged in lobbying; the houses of Congress and the federal agencies contacted; the employees who have made lobbying contacts; and a good faith estimate of expenses incurred in connection with lobbying for that semi-annual period.

- b. *Exceptions* - There is an exception for organizations whose own employees are engaged in lobbying activities and which incur less than \$20,000 in expenses in connection with lobbying activities during that semi-annual period. In addition, an individual or firm that receives less than \$5,000 for lobbying activities from a client during a semi-annual period is not required to report activities on behalf of that client.

C. Unrelated Business Income Tax -

1. In General - Even though associations are generally exempt from federal income taxes, they must pay taxes on unrelated business income at corporate rates (UBIT). UBIT is intended to foster fair competition between not-for-profit and for-profit corporations.

2. What Income is Subject to UBIT? - The UBIT is levied on the net income from regularly carried on trade or business activities that are not substantially related to the exempt purpose of the association.

- a. *"Trade or Business Activity"* - A "trade or business activity" is any activity carried on for the production of income from the sale of goods or the performance of services. It may be conducted within a larger set of activities that are not commercial and are merely intended to achieve a tax-exempt purpose (for example, advertising income is considered as derived from a trade or business, even if it is derived from ads in a publication also containing articles that advance a tax-exempt purpose).

- b. *"Regularly Carried On"* - An activity is "regularly carried on" if it is conducted "with a frequency and continuity similar to commercial activities of nonexempt organizations." Occasional operating of a trade or business for a short time, as in the operation of a refreshment stand at a county fair, would not be considered an activity "regularly carried on." But activities conducted annually for even a few weeks have been taxed.

- c. *"Substantially Related to an Exempt Purpose"* - An activity is "substantially related to an exempt purpose" if it "contributes importantly to the accomplishment" of that purpose. The activity itself - not just its resultant

income - must make such an important contribution. Furthermore, if an activity is conducted on a larger scale than is reasonably necessary for the performance of an exempt function, the income from that portion of the activity in excess of the needs of the exempt function is taxable. For example, encouraging the public to use members' services would probably be substantially related to an association's exempt purpose; providing them with specific members' services would not.

3. Activities -

- a. *Associate Dues* - Associate member dues are being scrutinized by the IRS. Do these members have voting privileges, serve on the Board of Directors, participate in activities and committees, etc.? If not, their dues may be regarded as subject to UBIT. The key is participation in activities.
- b. *Credit Cards and Insurance Programs* - One of the most common sources of UBIT for associations is promoting the goods and services of for-profit entities (credit cards, insurance and travel, for example). Besides producing taxable income, such activities can have other legal implications (for example, inability to use special third-class postal rates for mailings containing promotions of credit cards, insurance and travel).

*Tax Court Cases Concerning Affinity Credit Cards.* In two cases involving the Sierra Club and the Alumni Association of the University of Oregon, the Tax Court has held that income from affinity credit card programs was royalty income and not subject to UBIT. The court found the groups did not regularly rent their mailing lists and had rejected other proposals to use their mailing lists when the proposals did not benefit their members or further their purposes. The credit card program furthered their purposes of bolstering the organizations' relationships with their members and elevating member awareness of the organizations. Payments to the organizations were not compensation for services rendered.

- c. *Publications Advertising Income* - Publication advertising income is often the greatest source of UBIT for exempt organizations. With few exceptions, the Internal Revenue Service considers advertising income to be unrelated business income whether it comes from magazines, newsletters or directories, and whether the publications are produced directly by a association or produced for a association by a for-profit firm pursuant to contract. Exceptions recognized by the IRS involve truly passive investment income (generally, royalties) from a publication containing advertising, income from advertising activities not "regularly carried on," and income from a publication substantially produced without compensation.
- d. *Corporate Sponsorship of Events* - If promotional services provided to "sponsors" of association activities are too great, sponsor "contributions" may be considered taxable advertising income. Conversely, if sponsor

recognition provides no promotional benefit to the sponsor, it may not be considered advertising for UBIT purposes. The IRS examination guidelines, among other things, make it clear that:

- Sponsor acknowledgements will not be considered advertising merely because they contain sponsor logos and slogans that do not give comparative or qualitative descriptions of the sponsor's products, services, facilities or company; sponsor locations and telephone numbers and value-neutral descriptions and depictions of a sponsor's products or services and/or sponsor brand or trade names and product or service listing also pass IRS matter.
- Messages or other programming material containing the following will be considered advertising: qualitative or comparative language; price information or other indications of savings or value associated with a product or service; an endorsement; an inducement to buy; or other such calls to action.
- Distribution of a sponsor's product at a sponsored event will not make sponsorship income taxable, whether it is distributed free or sold.
- If any activities by an association constitute advertising, all related activities will constitute advertising.
- The mere existence of a contract for sponsorship will not make sponsorship payments taxable advertising income, even if the contract is for "exclusive" sponsorship of an event.
- If the amount of a sponsorship payment is contingent on attendance at an event or broadcast ratings for an event, the payment will be considered advertising income. But the fact that a sponsorship payment is contingent on an event actually taking place or being broadcast does not, in itself, mean that the payment is advertising income.
- Provision of facilities, services or other privileges by a association to a sponsor or individuals designated by the sponsor (e.g., complimentary tickets, playing spots in golf tournaments or receptions for major donors) in connection with payments will not affect the determination of whether payments constitute advertising income.
- Only the portion of a payment in excess of the fair market value of advertising and any other non-sponsorship benefits, even if separately excludible from UBIT (such as royalties,

qualified trade show revenues) provided to a sponsor may be exempted from taxation as a qualified sponsorship payment.

- The general rules regarding taxability will be applied uniformly to all sponsorship activity without regard to the local nature of the organization or activities or the amount of the sponsorship payment.

*These guidelines and noted change were codified as part of the 1997 Taxpayer Relief Act.*

e. *Taxable Advertising Income* - Taxable advertising income is sometimes difficult to compute, as applicable regulations often require use of formulas. Advertising income is potentially taxable if it exceeds advertising costs, but taxable advertising income may also be reduced by the costs associated with the nonadvertising portion of a publication to the extent they exceed nonadvertising income from the publication. But if members receive the publication for free, a percentage of membership dues may have to be considered as nonadvertising income from the publication in making the latter calculation, using one of three IRS-sanctioned formulas to calculate that percentage:

- If 20% or more of the publication's circulation consists of sales to nonmembers, use the publication's subscription price to nonmembers as the amount of each member's dues paid for a "free" subscription. (If this formula applies, it must be used.)
- If membership dues from 20% or more of the members are reduced in amount X because they do not receive the publication, figure that members who do receive it are actually paying X as a subscription price.
- If (i) and (ii) do not apply (which is usually the case), multiply membership dues by the following fraction:

$$\frac{\text{Total Periodical Costs}}{\text{Total Periodical Costs} + \text{Other Exempt Activity Costs}}$$

- When a publication shows advertising costs exceeding advertising income, it generates a net loss that can be set off against net income from other association unrelated business income activities, including taxable advertising income from other publications.
- IRS regulations permit associations to treat certain *periodicals* on a consolidated basis for unrelated business income tax calculations (in effect, treating them as if they were one periodical). The regulations permit such reporting

only if each consolidated periodical has gross advertising income that generally equals or exceeds 25% of its readership costs *and* production of each periodical is an activity "engaged in for profit." Associations must elect to treat each periodical separately or on a consolidated basis, if it qualifies for such treatment, and cannot change the way in which reporting is conducted from year to year without IRS approval.

4. What' Is Not Unrelated Business Income? -

- a. *Passive Investment Income* - Passive investment income (royalties, dividends, rents and interest) is generally not subject to unrelated business income taxes, but dividends may be taxable to an association if they are received from a subsidiary.
- b. *Income from Donated Services/Goods* - Unrelated trade or business income does not include any income from a trade or business in which substantially all of the work is performed for the association without compensation; or any trade or business which consists of selling merchandise, substantially all of which has been received by the association as gifts or contributions.
- c. *Income from "Qualified Trade Shows"* - Unrelated business income does not include income from qualified trade shows even when exhibitors are permitted to sell or solicit orders from attendees. But strictly supplier shows produce unrelated business income unless they advance an organization's exempt purpose. Virtually all association shows would be considered exempt functions.

5. Returns -

- a. *Form 990T* - If an association has gross unrelated business income of \$1,000 or more, it must report that income to the IRS on Form 990-T. Categories of income must also be reported now on Form 990, which can tip off the IRS as to possible sources for additional tax revenue.
- b. *Quarterly Estimated Tax Payments* - Associations expecting to pay \$40 or more in unrelated business income taxes during a year must make quarterly estimated tax payments by depositing funds with Federal Reserve banks or other federal depositories prior to the 15th day of the fourth, sixth, ninth and twelfth months of the association's tax year.

6. Other Important UBIT Notes -

- a. *"Debt Financed Property"* - Unrelated business income may include a portion or all of the income from "debt-financed" property, which is property acquired with borrowed funds. Sale of debt-financed property may result in

taxable capital gains. "Neighborhood land" and property used "substantially all" for exempt purposes are not treated as debt-financed.

- b. *Forming a For-Profit Subsidiary* - If an association finds that a substantial portion of its activity consists of unrelated business, the association should consider spinning off a for-profit subsidiary to assume the UBI-producing functions of the association and preserve the association's tax-exempt status. IRS and Congress are wary of improper parent-subsidiary relations, however, and may change the rules in this area.

D. Group Exemptions -

1. In General - Group exemptions are available for affiliated state or local associations through their international, national or state association.
2. Pros & Cons - Group exemptions facilitate obtaining recognition of exempt status for new members of the group and reduce costs to affiliates, but they may impose an administrative burden on the central organization (national or state association).

E. Tax Audits -

1. Frequency - The IRS audits exempt organizations approximately every 10-15 years. Tax compliance audits focusing on unrelated business income have recently been performed on exempt organizations selected at random by the IRS, and such audits will be performed periodically in the future.
2. Attorney and Accountant Involvement - Contact your attorney and accountant immediately upon being notified of a tax audit. Do not volunteer information, but give the agent what is requested, subject to your attorney/accountant's advice.

F. Revenue Acts of 1987 and 1996 -

1. Notices Regarding Contributions/Donations - Requires exempt organizations such as associations to print notices in general "solicitation" materials, including membership dues invoices, stating that contributions and donations to the organization are not deductible for federal income tax purposes as charitable contributions. Notices are not required in bills sent individuals who have ordered goods or services, or for organizations with annual gross receipts not exceeding \$100,000. Membership dues to an association may still be deducted as ordinary business expenses, and dues invoices should say so, subject to the lobbying deductibility restrictions discussed above.
2. Disclosure of Annual Reports - Exempt organizations must disclose for inspection and copying at their headquarters, or provide copies by mail, exemption applications and letters from the IRS and their last three annual reports to the IRS (Form 990 or Form 990 EZ, not 990-T) upon request by anyone. That disclosure includes officer/executive salaries on such forms, and other financial information. Legislation

enacted in 1996 requires exempt organizations to provide copies of their Form 990 returns immediately if a request is made in person at any office of the organization that has 3 or more employees. Requests by mail would have to be satisfied within 30 days.

G. Most Common Exempt Organization Mistakes -

1. Common Errors in the Tax Area - According to one IRS Special Assistant for Exempt Organizations, the most common errors such groups make in the tax area are:
  - a. Failing to report changes in operations and activities to the IRS;
  - b. Overlooking conditions in IRS ruling letters and not heeding IRS audit cautions and requested charges;
  - c. Improper transactions with related organizations;
  - d. Improper allocations of income and expenses between activities and between related organizations;
  - e. Filing incomplete or inaccurate information on tax returns (Form 990 and 990-T), an area of increasing IRS scrutiny;
  - f. Failing to maintain adequate books and records;
  - g. Not complying with applicable lobbying rules and limitations;
  - h. Failing to follow public inspection and fund-raising "solicitation" disclosure requirements, including registration with state regulators;
  - i. Failing to consider UBIT issues;
  - j. Misclassifying employees as independent contractors, another IRS focus.

H. Other Taxes -

1. State/Local, FICA/FUTA - Even though associations are exempt from federal income taxes, for the most part, they are not generally exempt from state/local taxes, e.g., property tax, or from other federal taxes (including FICA and FUTA).
2. Other Exemptions - Some states will not tax association income unless it is unrelated business income, and some states provide other exemptions from state taxes. Check your state law.

**IV. EMPLOYMENT LAW FOR NOT-FOR-PROFIT CORPORATIONS**

A. Wage and Hour Laws -

1. In General - Associations are generally subject to federal and state wage and hour rules. Employees with significant responsibilities and those who regularly exercise significant discretion in the performance of their duties are exempt.
2. Federal Wage/Hour Requirements - Federal law requires time-and-a-half overtime pay for over 40 hours a week worked by non-exempt employees. The Department of Labor IRS or state regulators may challenge any compensatory time arrangement. Few have been found acceptable, and none where compensatory time could be taken in a different pay period. Regulatory audits and challenges to exempt – non-exempt classification typically result from employee complaints (usually seeking overtime).
3. State Law Requirements - Some states have overtime requirements more stringent than the federal law. For example, some states require overtime pay for hours worked in excess of eight hours in a day.
4. Employees Exempt from Overtime Pay Requirements - Exempt from overtime pay requirements are:
  - a. *professional* employees, whose chief responsibilities require knowledge in an advanced field of learning (such as law or accounting);
  - b. *executive* employees, whose primary duty to manage the employing entity or one of its customarily recognized departments or subdivisions, and who direct the work of at least two other employees; and
  - c. *administrative* employees, whose primary duty must be the performance of non-manual work directly related to management policies, and who regularly exercise discretion and judgment in performing their functions. Contrary to popular belief, the fact that an employee is salaried, rather than hourly, is not determinative of exempt vs. non-exempt status.
5. Equal Pay - Federal and state laws also require equal pay for men and women doing equal work. Differences in wages can be justified on the basis of seniority, merit increases, and incentives.
6. Child Labor - Child labor provisions of federal and state law categorize employees by age, and dictate the kind of work an employee in a certain age bracket may perform. Employers who do not adhere to these standards are subject to fines.

B. Employment Discrimination -

1. In General - Associations are subject to federal and state laws prohibiting employment discrimination on the basis of race, color, creed, sex, religion, nationality, age, disability, citizenship, marital status or unfavorable discharge from military service.

2. Sexual Harassment - Sex discrimination covers sexual harassment and hostile environment. The statutory and case law in this area is now much more stringent.
3. Pregnancy - Sex discrimination also includes pregnancy discrimination.
4. Americans with Disabilities Act -
  - a. *Application* - ADA applies to employers with 15 or more employees. State laws may apply to smaller employers exempt under federal laws, and they may provide protection for certain employees exceeding that provided by federal law.
  - b. *What's Prohibited?* - ADA prohibits discrimination of "qualified individuals with disabilities." This has been defined to mean an individual who can perform the essential functions of the job with or without a reasonable accommodation.
    - A "disability" is defined as a physical impairment that substantially limits one or more of the major life activities of the individual. Disabled persons also include those with a record of such impairment and those regarded as having the impairment. A disabled person does not include a current illegal drug user. Employers may not ask if an applicant for employment is disabled. Employers also cannot ask about an applicant's health or past medical history. Employers may only ask about the applicant's ability to perform the essential functions of the job. Therefore, employers are encouraged to develop detailed job descriptions of essential functions for each job.
    - Employers may not ask applicants to take a job-related medical exam. Employers may require current employees or individuals that have been extended an offer of employment to take a medical exam.
  - b. *What's Required?* - Covered employers are required to make reasonable accommodations for employees with known disabilities unless the accommodation would cause an "undue hardship" on the employer's business.
5. Employer Liability for Discrimination -
  - a. *By Supervisors* - Discrimination by supervisors is now charged to employers even when the employer is unaware of the discrimination taking place. Even one incident may be enough.

- b. *By Other Employees* - Discrimination by other employees may be charged to employers unless the employer has a comprehensive anti-discrimination plan in place, and makes it known to and accessible by employees.

6. Hiring Process -

- a. *Job Posting* - Objective, job-related criteria for recruiting and selecting employees are required. Referrals and word-of-mouth advertising for positions alone will not meet the requirements of anti-discrimination law if the effect is discriminatory. No discriminatory preferences in advertising are allowed unless they reflect bona fide occupational qualifications (for example, "salesperson" must be used instead of "salesman").
- b. *Applications, Interviews* - Inquiries on application forms and in employment interviews should be job-related only.

Employment applications can and should state that:

- Employment is at will and can be terminated by the employer at any time;
- Falsification or omission of information can lead to refusal to hire or to dismissal;
- The applicant's signature permits the employer to check references, verify information, and obtain reports from consumer reporting agencies.
- The applicant, by signing the form, agrees to hold the prospective employer harmless for any result of the reference check.

Employers should not inquire about the following on application forms or in interviews:

- The applicant's health or medical history;
- The applicant's sex;
- The applicant's height or weight, unless this is a bona fide job requirement;
- Whether the applicant is married, single or divorced;
- Whether the applicant is pregnant, has children, or has made arrangements for child care.
- Whether the applicant has ever been arrested.

- The applicant's age (except to determine whether the applicant meets state minimum age requirements for employment);
  - The date the applicant attended high school;
  - The applicant's military status;
  - The applicant's organization memberships.
- c. *Testing* - Tests used for hiring purposes should be professionally-developed ability tests fairly measuring knowledge or skills required in a job, and must be accessible to persons with disabilities. General medical examinations (but not drug tests) may no longer be required of job applicants until a job offer is made. Use of lie-detector tests in the hiring context is generally prohibited by federal law, so many employers are substituting written psychological tests of questionable validity and, in some instances, legality. Lie detector tests and tests for AIDS may be used post-employment under certain limited circumstances, if state and local law permits. Confidentiality of test results must be maintained and privacy rights respected. In many instances, employers may be better off not testing, even if conducting tests would be lawful.
- d. *Confidentiality of Medical Records* - Under the Americans with Disabilities Act, information about a job applicant or employee's medical condition must be kept separate from other personnel records - on separate forms and in separate files - and it must be treated confidentially.
7. Employee Benefits -
- a. *In General* - Employee benefits, such as pension and profit-sharing plans and insurance coverage, may be major sources of discrimination on the basis of age and/or sex.
- b. *Age Discrimination* - The Older Workers Benefit Protection Act prohibits age discrimination in employee benefit plans unless age-based distinctions are justified by significant cost considerations.
- c. *Pregnancy Discrimination* - Pregnancy discrimination is a form of sex discrimination sometimes seen in connection with employee benefit plans. Under federal law, employers must treat pregnancy as they would any other temporary employee disability for purposes of insurance and leave from work. But some state laws contain more stringent maternity leave requirements (in addition to federal "family leave" requirements).
- d. *Family and Medical Leave* - Family leave requirements are increasingly being adopted at the state level, and there is a federal requirement of at least 12 weeks' unpaid leave for family emergencies, with a guarantee of the same job or an equivalent one upon the employee's return to work and no loss of

employee benefits. Employers with fewer than 50 workers are exempt from the federal mandate. Critical workers in the top 10% of employers' pay scales are not covered; and employees must work for a year, including at least 1,250 hours, to become eligible. Employers can require employees to take accrued paid leave first, provide a doctor's certification of medical emergencies, and report periodically on their status and intention to return to work. Employees are entitled to continuation of group health insurance, at the employer's expense, during the leave period. But if the employee refuses to return to work when the leave period is over, the employer is entitled to restitution of insurance premiums covering that period. Seniority, pay raises, and other benefits that an employee would have first become entitled to during the leave period, had the employee not taken family leave, need not be extended to the employee.

- e. “*COBRA*” - COBRA, for associations with 20 or more employees, and various state laws with lesser requirements, mandate continued health insurance coverage for up to 36 months for employees and their dependents at their expense in cases where insurance for an employee and dependents would otherwise cease due to employment termination, divorce, reduction of hours or death of an employee (in the case of coverage for employee dependents).
- f. *Unemployment Compensation Amendments Act of 1992* - This Act liberalized rollover rules, required qualified plans to permit transfer of rollover amounts into individual retirement accounts or other qualified plans, and imposed a 20% mandatory tax withholding charge on distributions not rolled over. Employers must provide employees with a detailed notice of rights under the Act.
- g. *401(k) Plans* - Employees of nongovernmental tax-exempt organizations again permitted to participate in 401(k) plans, after January 1, 1997.
- h. *Risk Classifications* - Risk classification as part of a bona fide employee benefit plan is permitted under the Americans with Disabilities Act if based on accepted principles of risk assessment.
- i. *Vacation/Leave Pay* - Many employers are "capping" vacation and leave entitlements. Some states prohibit elimination of accumulated vacation time once it is "vested." But "use it or lose it" policies are generally enforceable if an employee receives adequate notice and an opportunity to take vacation or leave before it is lost. Upon termination of an employee, some states require that employees be compensated for earned but unused vacation or leave time (on a pro-rata basis in some situations).
- j. *Review of Employee Benefit Plans* - Congress and the courts frequently change employee benefits law, and review and updating of employee benefit plans by competent legal counsel is strongly recommended.

C. Employment Manuals -

1. Guidelines - Employment manuals imposing certain duties on employees have been held to constitute contracts of employment, so that any employer promises contained in such manuals (e.g., promises not to fire without warning, a hearing, etc.) may be contractual obligations. Employment manuals should be reviewed by knowledgeable legal counsel.
2. Disclaimers - Disclaimer language in employment manuals, indicating that an employment contract is not intended, has been given effect by the courts, provided the disclaimer is clear and conspicuously placed, it is properly communicated to employees, and no other communications negate the effect of the disclaimer. However, new disclaimers will not necessarily negate enforceable promises previously made. The law governing manuals may vary from state to state.

D. Termination -

1. Lawsuits - Most lawsuits against associations relating to employment matters arise from employment termination. These may include claims for breach of contract, retaliatory discharge, defamation and employment discrimination on the basis of race, color, creed, sex, religion, nationality, age, disability, citizenship, marital status or unfavorable discharge from the military. Employees are increasingly filing "retaliation" lawsuits claiming they were fired for making or threatening to make claims of discrimination.
2. Guidelines - The best practice is to ensure that proper grounds for termination not only exist, but are communicated to the employee being terminated, and are reflected in written materials that are kept in the employee's personnel file. Warnings, in some cases, should precede termination. Document, document, document!
3. Release - Employers sometimes try to avoid litigation by obtaining a release of claims from terminated employees in exchange for cash separation pay to which the employee would not otherwise be entitled. Federal and state law does not require severance pay (beyond accrued earnings and pay for accrued leave) unless, by contract or otherwise, an employee has been promised such a payment. So conditioning severance pay on signing a release of claims (or at least a document indicating the employee understands he or she is being terminated for valid reasons) is a useful tactic. Releases effective to waive the protection of the Older Workers Benefit Protection Act must contain additional provisions. A terminated employee can still file an EEOC claim under the ADEA, but should not be able to recover monetary damages if a valid waiver was previously signed.

E. Retaliatory Discharge and Free Speech -

1. In General - Firing an employee for refusing to violate the law, for informing governmental (or, in some states, corporate) authorities about an employer's illegal

or unsafe activities ("whistleblowing"), or for exercising certain legal rights (e.g., filing a worker's compensation claim, serving on a jury) can result in claims for retaliatory discharge.

2. Free Speech - Firing an employee for exercising the right to free speech on matters of public concern can result in claims for discharge in violation of public policy. They are not usually successful against associations.

F. Immigration -

1. In General - The (federal) Immigration Act requires employers to check on the citizenship status of new hires. Only persons providing certain specified documents evidencing citizenship may be hired. I-9 forms must be obtained at time of hiring and retained for three years after termination. Discrimination against individuals who "look alien" is prohibited by law. Additionally, under laws enacted in 1990 and thereafter, employers are prohibited from refusing to accept facially valid documents or requiring employees or applicants to submit more or different documents than federal law specifies.

## G. References -

1. Defamation Lawsuits - Employers have occasionally been sued for defamation and on other legal theories in connection with responding to requests for references. Both providing a bad employee reference and providing no reference (or a minimum explanation for discharge such as "for cause") have resulted in lawsuits against employers. Former employees may sue for "defamation by silence." Subsequent employers may sue for failure to warn in some instances. Get good legal advice regarding how to respond to such inquiries.
2. Qualified Privilege - Most courts have affirmed an employer's qualified privilege to be open and honest in discussing former employees when responding to inquiries from potential employers, as long as the discussion remains restricted to job performance. Many states have passed laws in this regard in recent years.
3. Procedures - Employers should channel all inquiries through one person to ensure that an untrained individual will not make improper comments. When providing a limited reference, the person assigned to handle inquiries should preface remarks by saying, "It is our policy to only provide...." Another way is to get the employee's agreement at the time of termination as to the reference to be provided.

## H. Employee Files -

1. Right to Inspect - In some states, by state law employees have a right to inspect and copy their personnel files. Check your state's law.

## I. Withholding and Employment Taxes -

1. In General - Associations are subject to withholding and employment tax payment requirements to the same extent as other employers (except in the case of a few states' withholding requirements). Association executives may be held personally liable if taxes are not withheld or paid by the association in accordance with laws applying to income and employment taxes.
2. Independent Contractors - Withholding is not required for "independent contractors," but true independent contractors must be independent of general direction as to the manner in which a job is to be performed. The IRS uses a recently revised multi-point test in identifying true independent contractors.
  - a. *IRS Reclassification* - Furthermore, the IRS has been very restrictive in its interpretation of the requirements for independent contractor status, reclassifying workers as independent contractors in many recent rulings, such as one that involved seminar instructors for an organization that provided continuing education workshops and seminars. According to a recent court case, the IRS can reclassify workers as employees for any year if employers have treated them as such at any time since January 1, 1979 and the IRS test is not satisfied. But if an employer has consistently treated a

worker as an independent contractor since January 1, 1979, with a reasonable basis for doing so, the IRS cannot reclassify.

- b. Some states also have their own separate requirements for recognition of independent contractor status. States typically use a 3-part "ABC" test.

J. Smoking -

1. Duty to Provide a Smoke-Free Workplace - Employers have a duty to provide a safe workplace for their employees, and may be required to provide a smoke-free workplace for employees who are especially sensitive to smoke. (They may even be held liable for physical ailments individuals claim to suffer because of exposure to cigarette smoke.)
2. Prohibitions on Smoking - Employers, at present, can generally prohibit smoking in the workplace.
3. State, Local Ordinances - There are many state and local laws establishing various non-smoker rights in the workplace and, in at least 15 states, smoker rights outside the workplace.

V. **LEGAL ISSUES -- PUBLICATIONS AND INTELLECTUAL PROPERTY**

***NOTE: The copyright and trademark issues applicable to printed publications are equally applicable to electronic publications (e.g., Web Pages).***

A. Libel -

1. Publication - Association staff should be aware of libel problems in connection with their publications. Publishing a libel that one has not originated can be just as hazardous as originating one. Internet web sites have increased this potential liability. Have firm rules for web site use.

B. Copyrights -

1. In General - Associations must not violate copyrights, and a copyright notice should appear on all association publications, including mailing lists and membership directories (though the federal requirements for such notice have been weakened). This applies to web sites as well.
2. Compilations - Even a compilation of material in the public domain is copyrightable if the author exercises some subjective judgment and selectivity in choosing items for inclusion in the compilation. This rule permits copyright protection for mailing lists and membership directories under the indicated conditions.
3. Registration - Federal registration of copyrights is recommended upon publication. Registration is required in order to bring suits for copyright infringement, and

substantial legal benefits are lost (e.g., the right to sue for statutory damages and attorney's fees) if registration does not occur promptly after publication.

4. Works Made for Hire - Independent contractors providing creative work for an association will retain the copyrights for that work unless it is assigned to the association, even if the contractor is paid for the work. Associations should have contracts with all independent contractors (including unpaid volunteers) who provide the association with creative work, and the contracts should specifically transfer all copyrights to the associations. Where applicable laws allow designating the work as a "work made for hire," that designation should be specifically included in the contract.
5. Speakers - Get speakers' permission to tape and sell or give away their speeches.
6. Photographs - Get photographers to assign rights to use or reproduce photos.

C. Trademarks -

1. In General - Associations sometimes trademark the names of their publications and important programs, as well as their association logos and other marks used by the association. Domain names are also being trademarked.
2. Descriptiveness - Descriptive terms do not automatically have trademark significance, and trademark protection will usually be denied unless proof is provided that the mark has become distinctive.
3. Protection of Rights - The value of a trademark can be lost if the association fails to vigorously protect its rights in the trademark. Inconsistent use of a trademark can weaken an association's rights in the mark.
4. Actual Use or Intention to Use - Trademark rights are chiefly acquired by virtue of use. However, a good faith intention to use a mark will be sufficient to permit registration for up to six months, with extensions available thereafter for good cause shown.
5. Registration - There is no need to register a mark at either the state or federal level in order to acquire certain legal rights in the mark, but registration can be very useful in enforcement and litigation. Trademark registrations with the federal Patent and Trademark Office must be renewed periodically by filing notices of continued use.
6. Trademark Notice - Only marks registered with the federal Patent and Trademark Office are entitled to be designated with the notice ®. Any owner of a mark may indicate a claim of trademark rights by use of the notice <sup>TM</sup>. Associations use <sup>SM</sup>. Failure to indicate a claim of trademark status or federal registration by use of <sup>TM</sup> or <sup>SM</sup> or ® can limit the ability of a trademark owner to recover for trademark infringement.

7. Trademark Infringement - Nonmembers using association identification marks in advertising may be prosecuted for trademark infringement.

D. Internet

1. Home Pages - Many associations are creating home pages/web sites accessible through the Internet. Copyright and trademark considerations for other association intellectual properties apply here.
2. Public/Members Access - Many associations are establishing sites with information available to all, and other sites restricted to members only.
3. E-Mail - Communication by e-mail provides benefits and entails certain risks with legal and practical implications for associations. Security and confidentiality should always be of concern.
4. Developing Law - Intellectual property, tort, contract and even criminal law is still developing in this fast emerging technology. Proceed carefully, and get good advice.

**VI. MISCELLANEOUS LEGAL ISSUES**

A. Liquor Liability -

1. In General - Courts in many states are extending liquor liability beyond that provided in dram-shop statutes, which apply only to commercial purveyors of liquor. Courts in some states have indicated that social hosts may be liable for serving an underage or obviously intoxicated person. Association-sponsored events subject associations and member hosts to liquor liability exposure.
2. Eliminating/Shifting the Risk of Liability - Liability can be largely (but not entirely) avoided if an association places someone else (for instance, a commercially licensed and well-insured dispenser of liquor) in charge of serving drinks at association social functions. Efforts by a association to monitor drinking can be a Catch 22 situation, but steps taken to discourage drunkenness (such as having nonalcoholic beverages available as an alternative, serving food, using drink tickets, making functions cash bar only, strictly adhering to event cut-off times) can reduce potential liability. In addition, associations should provide transportation for intoxicated guests whenever possible. Consider the use of host insurance for such events.

B. Sunshine and Open Meetings Laws -

1. Requirements - Various state laws require that certain corporate records be available for inspection by members of a not-for-profit corporation (or even the public). Some states have laws requiring that public notice be given for certain meetings, and that members of the public be allowed to attend (subject to space limitations). These requirements are sometimes imposed by government contracting and funding officers, even in the absence of a statutory law. Associations, therefore, should

investigate the requirements that may apply to them. In general, however, associations are private, not public, entities and they are not obliged to have nonmembers in attendance or to provide records to nonmembers [except for Form 990/990-T requests described above].

2. Board of Directors Meetings - Such meetings are typically not open to members or others except by permission of the Board.

C. Record Retention -

1. Establishing a Program - Associations should have a regularly followed document retention (and destruction) program. Such a program minimizes both the legal risks flowing from hastily drafted or misleading documents and the adverse inferences which may arise from the selective destruction of documents in the absence of such a regularly followed program.
2. Guidelines - Records should be retained only so long as they are necessary to the current conduct of the association's business, required to be kept by statute or government regulation, or relevant to pending or foreseeable investigations or litigation. Some records, including most financial documents, annual corporate reports, governing documents, minutes of board meetings, tax returns, pension and profit-sharing plans, exemption letters from the IRS, and copyright and trademark registration certificates, should be retained permanently. Other documents should be retrieved and destroyed on preestablished "pull" dates.
3. Sample Program - Howe & Hutton, Ltd. has published a memorandum regarding record retention with recommended retention and destruction schedules, which we will provide upon request.

D. Games, Lotteries -

1. In General - Associations should be aware that there are federal, state and local laws regulating games of chance, including lotteries, raffles, "Las Vegas nights", etc., a association might conduct to raise money or attract attendees to a function.
2. License Requirements - Applicable state and local laws may require a license for games or lotteries, or may prohibit such activities altogether. Check federal, state and local laws first before proceeding in your home state or at an out-of-state location
3. Federal Restrictions - At the federal level, promotion of games by mail is now lawful, but lottery tickets and other tickets may not be mailed.
4. Unrelated Business Income - Income from games of chance can be taxable unrelated business income for a association unless it's bingo, or the games are being conducted in North Dakota pursuant to a unique federal law.

E. Meeting Contracts -

1. Review by Counsel - Counsel should prepare contracts with hotels, convention centers, and other such meeting vendors, or review contracts prepared by third parties. The same is true of contracts between associations and other independent contractors (such as transportation companies, tour operators, etc.) retained in connection with meetings. Detailed contracts are fast becoming the norm.
2. Lawsuits Against Groups - Hotels and convention centers are becoming increasingly likely to threaten to sue or suing associations that break meeting contracts, or do not meet their room block commitments.
3. Indemnification, Attrition and Cancellation Provisions - Associations should carefully review hold-harmless, attrition and cancellation clauses inserted in contracts by hotels and convention centers (as well as other parties). Delete or negotiate provisions requiring the association to indemnify or hold harmless another party for the actions of the other party.
4. Other Provisions to Consider - Associations may wish to include in contracts provisions that:
  - a. limit association liability in case of *cancellation or attrition* by the association;
  - b. require hotels and convention centers to comply with applicable safety and health laws and with the *Americans with Disabilities Act*;
  - c. require hotels and conference centers to provide the association with information about *change of ownership or control, construction or remodeling, labor contract renewals*, or other events that might adversely affect meetings;
  - d. protect the association from damages that might be suffered *if a hotel or convention center cancels* or fails to provide promised facilities or services, or changes ownership or management.
  - e. require hotels and conference centers to provide the association with the *lowest available rates* for facilities and services.
  - f. *force majeure* or “acts of god” clauses which permit cancellation of an event without liability upon the occurrence of certain identified circumstances, e.g., natural disasters, acts of terrorism, other events or circumstances which make holding the event either impossible or so unduly burdensome as to warrant discharge from contractual obligations.
5. Contract Formation - Since contracts may be created by an exchange of letters, it is important for associations to phrase their letters carefully. If what you want is an option to use dates at a hotel or convention center, make sure what you ask for is an "option." Contracts may be written or oral.
6. Changes, Modifications - Note that if significant changes are made in a printed or typed contract by inserting language or deleting language, any such changes should

be initialed by both parties. Otherwise, a court may hold that no enforceable agreement was ever reached, or the court may enforce the agreement without the changes.

F. Executive Employment Contracts -

1. Written Contracts - Many associations and their chief executives prefer to have written employment contracts spelling out the employment relationship between the executive and the association.
2. Compensation Alternatives - Many types of compensation for association executives are available, including:
  - a. incentive compensation;
  - b. fringe benefits, including health and welfare benefits;
  - c. deferred compensation arrangements, pension, profit-sharing and other retirement plans;
  - d. life insurance and death benefits.
3. Covenants Not to Compete - One of the clauses frequently included in executive employment contracts is a covenant against competition following employment termination. Such covenants must be restricted to a specific period of time following termination of the employment contract, and the restraint on the executive must be no more than is necessary to protect a legitimate business interest of the association. In some states, *all* such covenants are illegal.
4. Reimbursement of Spousal Expenses - If it is advisable to reimburse the expenses of the executive's spouse for attending meetings, the spouse's travel should be made a condition of employment under the executive's contract, the association's Board of Directors should designate those meetings which the spouse must attend, and the executive should report and substantiate expenses to the association. But such reimbursement may be taxable income to the executive.
5. Conflicts of Interest - Conflicts of interest for association executives should be carefully monitored. The employment contract may state that the executive shall not work for or with or accept or otherwise receive any compensation or other consideration from any other organization while serving as executive for the association. Alternatively, the employment agreement may specify other activities in which an executive may engage.

G. Music Licensing -

1. License Agreements - ASCAP, BMI and SESAC, the major performing rights societies, are currently requesting groups such as associations to enter into licensing agreements for the performance of music at their events. Whether the music is live or recorded, these agreements require payment of royalties to the societies for the

benefit of copyright holders, and licenses are required in order to avoid stiff penalties (up to \$100,000 *per song*) for copyright infringement. Some of the largest organizations in the association and meeting-planning fields have negotiated industry-wide model agreements with both ASCAP and BMI. Ongoing litigation may provide guidance as to the extent of an event sponsor's liability for use of music by exhibitors. Federal legislation was recently passed providing minor changes to music licensing.

#### H. Americans with Disabilities Act -- Public Accommodations -

1. Overview - Prohibits discrimination on the basis of disability by public accommodations, requires new places of public accommodation and commercial facilities to be designed, constructed and altered in compliance with certain accessibility standards, and requires that examinations and courses relating to licensing or certification for professional or trade purposes be accessible to persons with disabilities. The ADA effectively requires associations to assure persons with disabilities reasonable and equal access to association programs and facilities open to the public. Reasonable efforts to accommodate persons with disabilities are required.
2. Allocation of Responsibility in Contract - Allocation of responsibility for complying with the obligations of the regulations may be determined by lease or other contract. Meeting planners should discuss accessibility issues with potential sites, and include in contracts with facilities a clause allocating responsibility for various aspects of ADA compliance. Consider including a clause indemnifying each party from any claims and losses it may sustain as a result of the other's failure to comply with its obligations under the ADA.
3. Facility Responsibilities - The facility is likely to be responsible for providing physical access to the premises by making readily achievable changes in common areas and guest rooms, for providing auxiliary aids and services in common areas and guest rooms, and for modifying policies, practices, or procedures applicable to all guests.
4. Association Responsibilities - The association is likely to be responsible for providing "programmatic access" to ensure that disabled individuals have the opportunity to participate fully in its program. This will mean making conference-specific, readily achievable changes (*e.g.*, ensuring that displays are accessible to individuals with disabilities) within the function space being used, providing conference-specific auxiliary aids and services (*e.g.*, which could include interpreters, Braille materials, etc.), and modifying its own policies, practices and procedures relative to the event.

#### I. Fair Debt Collection Practices Act -

In General - Associations that assist members in collecting debts or other accounts should be aware of the federal Fair Debt Collection Practices Act. The Act applies

to collection activities for any debt incurred primarily for personal, family or household purposes. Collection activities for such debts are required to follow certain prescribed rules, and may not include certain defined unfair or abusive tactics. Because even a small number of collections can lead to an entity being classified as a "debt collector" subject to the Act, and because the Act provides for sanctions of up to \$1,000 plus attorneys' fees in suits for violations, associations involved in such activities should become familiar with and observe the statutory requirements.

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