

A Legal Perspective on Planning Meetings in a Changing World

John S. Foster, Esq., CHME

**A Legal Perspective on Planning Meetings
in a Changing World**

Special presentation for

prevue
meetings + incentives

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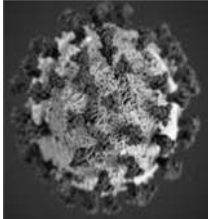
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What We Will Discuss

- **OVERVIEW:** What's going on in our industry and in our country?
- Professional Liability Explained
- The Four Legal Duties Event Sponsors Have
- Establishing Health and Safety Rules for Events Waivers - Assumption of the Risk
- Key Issues and Contract Clauses
- What about Insurance?



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What's Going On in our Country & Industry?

- CDC has issued guidelines concerning gatherings (Guidelines vs. Regulations)
- Vaccine boosters are being pushed
- Individual cities and states have removed restrictions on gatherings
- Airlines are carrying full travel loads and have removed mask requirements
- The public is being told that the Pandemic is over but the COVID Omicron variant is still with us and we may have a resurgence in Winter.




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Professional Liability – Managing the Risk
Negligence = Liability

- We are not required by law to be *perfect* at what we do
- The law requires that we conduct our affairs without *Negligence* by exercising *Reasonable Care*




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Planner's Legal Duties / Avoiding Liability and Financial Loss

- INVESTIGATE all aspects of the Event and take Appropriate action to reduce RISK OF HARM
- INFORM and WARN attendees of known HAZARDS
- PLAN for the SAFETY and WELL-BEING of every attendee
- Take precautions to not subject attendees to UNREASONABLE RISKS OF HARM



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Best Practices for Establishing Health and Safety Rules Contractually

- Give your attendees an ample HEADS-UP of your health policy (Emails, Registration Website, etc.) to which they must agree
- If your policies may result in attendees being PROHIBITED FROM ATTENDING the event or may otherwise result in EXCLUDING them from event activities, have a clear REFUND or REGISTRATION TRANSFER Policy
- Be very clear in describing what is ALLOWED, what is PROHIBITED, and what is ADVISED



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Establish Health & Safety Rules for Your Event

SAMPLE POLICY*

VACCINATION REQUIREMENT

- By registering for and attending the ABC Organization Meeting, you are confirming that you are up to date and fully vaccinated.
- The CDC considers people up to date with COVID vaccines when they have received all primary doses and recommended boosters. This should occur prior to the start of the meeting.
- A list of acceptable COVID vaccines can be found on the CDC website

*Source: A large medical association



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Establish Health & Safety Rules for Your Event

SAMPLE POLICY*

MASKS

- Meeting registrants, meeting staff, and vendors will be required to abide by CDC and local guidelines regarding masks at the time of the meeting. ABC Organization recommends that all Meeting participants and staff wear a KN95 mask in the event spaces and on public transportation.
- A limited number of KN95 masks will be available onsite

*Source: A large medical association



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Establish Health & Safety Rules for Your Event

SAMPLE POLICY*

COVID-19 Symptoms and Testing

- Potential attendees should not attend the conference if they are experiencing or exhibiting and COVID-19 related symptoms. All attendees are encouraged to take a COVID-19 test within 48 hours prior to arriving at the ABC Organization Meeting. Attendees who test positive should not attend and will be refunded their registration fee.
- A limited number of COVID rapid tests will be available onsite as needed for attendees who develop symptoms during the Meeting.

*Source: A large medical association



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Establish Health & Safety Rules for Your Event

SAMPLE POLICY*

Testing Positive for COVID-19

- If you test positive for COVID-19 during the Meeting, you will need to self-isolate. ABC Organization staff can assist you with your hotel room, transportation, and returning home. By attending this Meeting, please be aware that you agree to assume any related financial obligations associated with complying with CDC guidelines
- Your registration fee will be refunded if you are unable to attend the Meeting in its entirety and are required to isolate.

*Source: A large medical association



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Establish Health & Safety Rules for Your Event

Sample

Sanitize Your hands

- ABC Organization recommends that you sanitize your hands periodically after greeting people with a handshake. Hand sanitizer stations will be made available at the XYZ facility and you are encouraged to use them as needed.

• As a participant in the ABC Organization Meeting, I represent that I have read the Meeting guidelines and agree to abide by these policies.



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Waiver of Liability / Assumption of the Risk Contract

By clicking REGISTER below, you are acknowledging that an inherent risk of exposure to viruses, and other hazards that may cause injury or sickness, exists in any public space where people are present. By attending the ABC Event, you knowingly and voluntarily assume all risks to exposure to viruses and agree not to sue the Event Sponsors nor the XYZ Facility, nor any of their affiliates, directors, officers, employees, agents, contractors, or volunteers not attempt to hold any of them liable for any illness or injury”




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Key Issues and Contract Clauses

- Hotel Protocols and Policies based on COVID-19 Prevention and Hotel's Warranty / Hold Harmless and Indemnification
- Insurance Requirements
- Attrition and Cancellation (Rooms & F&B)
- Force Majeure / Excuse of Performance/ Termination
- Purpose of the Meeting (Expectations and Assumptions)
- Guaranteed Meeting and Function Space
- Protecting Deposits / Escrow Accounts
- Demand for Adequate Assurance of Performance
- Date Change vs. Cancellation and Rebooking
- Guarantee of Quality of Hotel services and Adequate Staffing Levels




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Key Issues and Contract Clauses

- Hotel Protocols and Policies based on COVID-19 Prevention / Hotel's Warranty / Hold Harmless & Indemnification
 - ❑ **PURPOSE:** Specify what protocols and best practices Hotel will implement to protect attendees and staff in accordance with CDC guidelines, Hotel policies, industry practices, Certifications, and Group requirements
 - Specify what protocols Hotel is required to follow. If they are published either attach to contract or incorporate them by reference (e.g., CDC Guidelines, Hotel guidelines on website, Certifications, etc.)



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Key Issues and Contract Clauses

- List of Hotel Protocols and Policies based on COVID-19 Prevention / Hotel's Warranty / Hold Harmless & Indemnification
 - ❑ PURPOSE: Specify what protocols and best practices Hotel will implement to protect attendees and staff in accordance with CDC guidelines, Hotel policies, industry practices, Certifications, and Group requirements
 - State that all Hotel warrants that protocols and practices shall meet or exceed standard of care for the hospitality industry
 - Hotel should agree Hold Harmless, Indemnify and agree to Defend Group from asserted claims, judgments and Liability from failure to comply with agreed upon protocols and standards as well as other risks



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Key Issues and Contract Clauses

- List of Hotel Protocols and Policies based on COVID-19 Prevention...

GBAC STAR™ Facility Accreditation





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Key Issues and Contract Clauses

- Insurance Requirements
 - ❑ PURPOSE: Specify the Type and Amount of Insurance both parties are required to have.
 - Every Hotel contract with an Indemnification provision should require both parties to have Insurance that pays for third-party claims.
 - Third-party claims are usually brought by attendees or guests at the meeting claiming that either the Hotel or the Group or both were negligent and caused them to be injured
 - Claims by the Hotel or Group against the other for property damage should be limited to the amount of property insurance required in the contract

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Key Issues and Contract Clauses

➤ Insurance Requirements *Continued*

- ❑ PURPOSE: Specify the Type and Amount of Insurance both parties are required to have.
 - Typically, Group and Hotel agree to list each other as "additional insured" on each other's policy
 - Both parties are usually required to furnish a Certificate of Insurance to the other party




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Key Issues and Contract Clauses

➤ Attrition and Cancellation

- ❑ PURPOSE: Specify terms for calculating damages, if applicable.
 - GUEST ROOM ATTRITION
 - Attrition in guest rooms should be based on Room Nights, not Revenue. Specify amount of allowable attrition and when it applies
 - Current allowable attrition is between 20% and 40%
 - Use Best Efforts clause with no room night guarantees if COVID is still a threat to attendance.
 - If meeting is more than 1 year away, specify review dates when Group can revise room block without liability and specify the date when the room block is final and cannot be revised further without liability.
 - The percent of allowable attrition should apply to the final adjustment date and go through the entire meeting dates...



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Key Issues and Contract Clauses

➤ Attrition and Cancellation....*Continued*

- ❑ PURPOSE: Specify terms for calculating damages, if applicable
 - GUEST ROOM ATTRITION
 - Make sure the clause includes formulas for calculating damages:
 - Include resold rooms in formula in order for clause to be a reasonable approximation of actual damages
 - Attrition should be calculated Per Night and added Cumulatively with credit for Overage nights
 - Damages should be based on estimated Lost Profit, i.e. 70% - 80%.



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Key Issues and Contract Clauses

➤ Attrition and Cancellation....Continued

- ❑ PURPOSE: Specify terms for calculating damages, if applicable

CATERING ATTRITION

- Make sure the clause includes formulas for calculating damages:
 - State *minimum guarantee* for Catering in Revenue
 - Better to *underestimate* amount Group will spend
 - If Group spends less than minimum guarantee damages should be based on incremental difference between minimum guarantee and actual amount spent multiplied by estimated lost profit (i.e. 30%-40%).
 - Example: \$10,000 minimum with \$7,000 actual. Damages are \$3,000 multiplied by X%.



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Key Issues and Contract Clauses

➤ Attrition and Cancellation....Continued

- ❑ PURPOSE: Specify terms for calculating damages, if applicable

CATERING ATTRITION

- State that Hotel is required to reduce any damages by *replacement business* from F&B functions it books after notification that Group will have reduced attendance that it could not have booked otherwise.



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Key Issues and Contract Clauses

➤ Attrition and Cancellation....Continued

- ❑ PURPOSE: Specify terms for calculating damages, if applicable

CANCELLATION BY GROUP

- Damages for Cancellation by Group should be mutual – *but NOT Reciprocal*
- Cancellation by Group needs to be differentiated from *Termination*
- Establish Sliding Scale to determine cancellation damages. Sliding scale needs to incorporate percentage of allowable attrition and credit for resold rooms.
- Establish how "lost revenue" is calculated including what rate will be used to calculate. Sales tax should be excluded unless required by state or local law.
- If meeting is cancelled and not be rebooked, Group should get credit for X% of damages paid on any future meeting it books at same hotel within five (5) years



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Key Issues and Contract Clauses

➤ Attrition and Cancellation....*Continued*

- ❑ PURPOSE: Specify terms for calculating damages, if applicable

CANCELLATION BY HOTEL

- Damages for Cancellation by Hotel are not equal to potential damages when Group cancels
- Cancellation by Hotel needs to be differentiated from Termination
- Difficult to state a specific amount owed to Group if Hotel cancels the Group. Group is required to mitigate its damages by rebooking in a replacement hotel
- Clause should specify that Hotel will compensate Group for its lost revenue if attendance is less due to replacement location and any additional or increased expenses it incurs to rebook the meeting in a second hotel.
- Specify that Hotel will return deposits to Group and to Individuals immediately



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Key Issues and Contract Clauses

➤ The Force Majeure Clause

- ❑ Allows the parties to allocate risk and decide in advance what will or will not excuse performance
- ❑ When applicable, Force Majeure is a complete defense to performing the contract
- ❑ The act or occurrence must be outside the control of the party claiming the defense
- ❑ The occurrence must fit one of the standards of excuse

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Force Majeure: The Legal Standards

Parties to a contract should list what *triggers* must be met before performance is *terminated*


- Performance is impossible or illegal (objectively), or
- The fundamental purpose of one of the parties has been frustrated because of new events, or
- Performance is not impossible but has been made impracticable (substantially more burdensome) than originally expected due to an extreme or unreasonable event occurring that the parties could not have reasonably anticipated (i.e. unforeseen)

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Tips for Preparing the Force Majeure/Excuse of Performance/Termination of Contract clause



- Clause should be broader than “Acts of God”
- Clause can include other contingencies that must occur or not occur that are significant to either party’s performance of the contract

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Tips for Preparing the Force Majeure/Excuse of Performance/Termination of Contract clause

Parties must specify the “Impossibility” standard needed to invoke the Force Majeure clause.

The choices are:

- ✓ Total Impossibility
- ✓ Temporary or Partial Possibility (as well as inability)

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Include Potential FM Events in Contracts

Including, but not limited to...

- Acts of God
- Hazardous weather (actual or forecasted)
- War (declared or undeclared, or specific threat of war)
- Construction/renovation of the facility



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Include Potential FM Events in Contracts

Including but not limited to...

- Government regulations, advisories, guidelines, or a quarantine restricting travel or similar stay-at-home orders
- **(Overseas Meeting)** Government regulations by the United States or (foreign country) restricting travel including advisories, quarantines, or curfews or travel ban to a specific country or region(s) of a country
- Strikes, labor disputes, picketing or work stoppages (actual or threatened) materially affecting the meeting




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Include Potential FM Events in Contracts

- Change in hotel ownership or management company
- Deterioration of facility where meeting is to be held
- An epidemic or disease in the city or region where the meeting is to be held or from where potential attendees would be traveling
- Any act or occurrence creating a significant risk to the health or safety of potential attendees
- Loss of health permits at facility



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Include Potential FM Events in Contracts

Including, but not limited to...

- Cancellation or restriction of commercial travel to or from the meeting location
- **(Use of Convention Center)** Inability of the parties to negotiate a mutually agreeable License Agreement, or the inability or unwillingness of the Convention Center to provide actual use of its facility over the meeting dates



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Include Potential FM Events in Contracts

Including, but not limited to...

Multiple Hotels / Citywide: Use of two or more hotels. Unavailability of a sufficient number of hotel rooms suitable to meeting sponsor for use within (X) mile radius of the Convention Center, or the inability of the meeting sponsor to negotiate mutually agreeable contracts with a sufficient number of hotels over the meeting dates

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Key Issues and Contract Clauses

➤ Purpose of the Meeting clause

- ❑ PURPOSE: Advises all parties of the "purpose of the meeting"
- ❑ Supports "*Frustration of Purpose*" doctrine: States that all performance assumptions in the contract are based on Group's ability to fully accomplish the purpose(s) stated in the contract without acts or occurrences outside its control materially frustrating its performance and ability to accomplish its purpose(s)...



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Key Issues and Contract Clauses

➤ Purpose of the Meeting

- ❑ PURPOSE: Specifies Group's expectations and assumptions in booking its event at the Hotel, i.e.:
 - That no material changes will occur to the reputation of the Hotel or to the surrounding area that would materially frustrate the Group's ability to accomplish the purpose(s) and performance requirements specified in the contract
 - Written surveys from anticipated attendees will be accepted substantiate

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Key Issues and Contract Clauses

➤ **Guaranteed Meeting and Function Space**

❑ **PURPOSE:** (a) Guarantees that once meeting space is agreed to by the parties meeting rooms will not be changed without Group's written approval; (b) also guarantees that Hotel will use its best efforts to set up meeting space using social-distancing per CDC guidelines.

- Hotel may change function space with Group's approval based on square footage to accommodate number of attendees but not the number of meeting rooms
- The parties must agree that this is a material term of the contract and that changing meeting space without Group's written approval would cause Group's Event to suffer irreparable harm and money damages are not an adequate remedy.



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Key Issues and Contract Clauses

➤ **Guaranteed Meeting and Function Space - Continued**

❑ **PURPOSE:** (a) Guarantees that once meeting space is agreed to by the parties meeting rooms will not be changed without Group's written approval; (b) also guarantees that Hotel will use its best efforts to set up meeting space using social-distancing per CDC guidelines, if applicable.

- If Hotel does not comply with these terms, Group is entitled to either of two remedies:
 - ❖ Specific performance without objection from Hotel, or
 - ❖ The right to Terminate the contract and hold Hotel liable for Cancellation



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Key Issues and Contract Clauses

➤ **Protecting Deposits / Escrow Accounts**

❑ **PURPOSE:** Protect Group's deposits from creditors in the event of bankruptcy or foreclosure or if there is a dispute over Cancellation vs. Force Majeure occurrence

- There is no such thing as a non-refundable deposit. Specify circumstances
- Specify Amount of Deposit and When Due (Use 1/3 - 1/3 - 1/3)
- Specify that all deposits shall be held in an Escrow Account (based on size of deposits) Account held by a third-party and will be released at conclusion of Event or upon breach of contract by either Party



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Key Issues and Contract Clauses

➤ Demand for Adequate Assurance of Performance

❑ PURPOSE: This clause gives both parties the right to demand adequate assurances of performance in the event the other party's performance becomes uncertain

Adequate Assurance

- The doctrine of adequate assurance protects expectations and allows either party to a contract with reasonable grounds to believe that the other party is either unable or unwilling to perform its obligations to demand that the other party provide adequate assurances that it can and will perform its contractual obligations
- Failure to provide adequate assurances is an anticipatory breach of the contract

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Key Issues and Contract Clauses

➤ Date Change vs. Cancellation and Rebooking

❑ PURPOSE: Allows Group to change dates (Rebooking) of meeting without Hotel considering it a Cancellation. Certain terms have to be met:

- The meeting is booked at same Hotel or different hotel with same owner
- The projected revenue is the same or greater
- Date change is made within X months of first date
- New dates are within X months or X Years of first meeting
- If Hotel cannot or will not offer dates within specified time frame, another year will be added to time to move meeting until suitable dates are found.



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Key Issues and Contract Clauses

➤ Guarantee of Quality of Hotel Services and Adequate Staffing Levels

❑ Purpose: Protect future meetings against low Hotel staffing levels

- Hotel should guarantee that staffing levels will be the same during the meeting as before COVID restrictions
- Consider requiring Hotel to list their ratios of employees per guest and/or per guest room by departments (e.g. 1 front desk personnel per 50 arrivals; 1 food server per 20 people, etc.)
- Specify remedies for poor service (i.e. percentage discount for late catering service)



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Thank you for Attending!



Questions?
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