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Article
for
ASSOCIATION TRENDS

Attrition Clauses----No More Mr. Nice Guy

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Recently, an association which represented an industry that had been devastated by the economic recession received a rude awakening. The association had lost half its membership within the last two years and its revenue had declined by an even greater percentage. For the past several years, the association had held a series of major meetings at hotels run by a well known chain. The association had a large meeting scheduled for late spring 2009 but in the fall of 2008, the writing was on the wall. There was no way that the association would be able to have the meeting.

The association did the responsible thing. It contacted the national office of the hotel chain and the account rep at the property where the meeting had been scheduled. It explained that it needed to cancel the meeting. There was no way that a critical mass of members would attend. The representatives of the national hotel chain were sympathetic. They said that they would be willing to permit the association to cancel the contract but the property in question was not company owned and the ultimate decision would be made by the owner of the property. The association's chief staff officer and the chief elected officer met with the hotel management at the property. They offered a mid five figure settlement if the property would let them walk away. The general manager asked for written confirmation of the economic plight of the association. The association provided the information. The next thing that happened was that the hotel filed for binding arbitration under the contract and demand liquidated damages of \$500,000 plus attorney's fees and the costs of the arbitration. No more Mr. Nice Guy.

It is now time for both the association community and the hotel community to get realistic about attrition clauses. In many instances, association exec's sign hotel contracts with attrition clauses without consulting their Board of Directors or counsel. These clauses are designed to protect a hotel from the potential damages of taking a large block of rooms off the market at the request of an association only to find that shortly before the meeting is scheduled, the association changes its mind because the new Chairman of the Board prefers another venue and the hotel does not have enough time to get a replacement meeting. Obviously, the hotel needs some protection in such a situation. At the same time most convention hotels and associations that hold large meetings recognize that regardless of contract language, problems occur and there is a need to work together. Very rarely does a large meeting go by without some problem. Perhaps an airline problem keeps members from attending the first two days of the meeting. Alternatively, the hotel HVAC system malfunctions and it takes 24 hours to get it back in service. Working together, the association and the hotel come up with the best possible solution. Cooperation has always been the key.

Past examples of cooperation have lulled many association execs' to ignore the fact that many hotel contracts have very harsh attrition clauses. Some associations have been willing to sign contracts with such clauses because (1) the association has a long history of always exceeding its room blocks and (2) the association recognizes that most hotels have been reasonable in negotiating away attrition charges in the event that an association did not meet its room block but has acted in good faith.

Today, economic conditions require that both associations and hotels reassess their positions on attrition clauses. Associations must evaluate whether in the current economic crisis, they can take the risk presented by a tough attrition clause. They must recognize that times are difficult for hotels as well as for associations and if an association has to cancel a meeting with only a few months notice, the hotel may try to enforce the liquidated damage provisions in the contract. As an association can you take that risk? As an association executive, are you sure that your Board fully understands this potential liability? Does your

Board know that when you signed that contract you agreed to liquidated damages of \$300,000, \$500,000 or \$1,000,000 and also agreed to binding arbitration?

Hotels must review their attrition clause enforcement policies. If an association has a history of meeting its hotel contract obligations but has to cancel a meeting because of the recession, does the hotel want to force the association to close its doors?

This is the time for you, as an association executive, to review all of your meeting contracts. What are the risks presented by those contracts and can you afford to take those risks? Are you sure that you can meet your room block requirements?

You should ask hotels to renegotiate the attrition clauses. Add an escape clause based on change in economic conditions. If the hotel is unwilling to work with you and the meeting is several years away, you may be able to cancel now without a penalty.

Most hotels that rely on meetings and conventions recognize the need to work with their association partners. However, when times are tight, hotel owners may not be willing to suffer a short term loss caused by a meeting cancellation. They may insist on full payment of liquidated damages under the attrition clause. In many cases, the liquidated damages are based not only on lost revenue from room rents but also lost revenue from food and beverage services plus attorneys fees. Notice, I said lost revenue, not lost profits.

What if you have a hotel contract with a tough attrition clause and the hotel tells you that although it cannot change the language because of corporate policies, if there is a problem you can be sure that they will “work with you.” That is not an acceptable answer. In most contracts, there is a clause which provides that only what is written in the contract matters and any oral representation of either party is completely unenforceable. Further, as we all have had to learn the hard way, you can’t rely on “trust me’s.”

Don’t wait until you have a problem. Start looking at those hotel contracts now. And get input from your counsel.

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