

Board Training Kits: Legal Aspects of Associations and Non-Profits

#2



Southern Early Childhood Association

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Association Name

The name of an association should accurately and concisely reflect the nature and purposes of the organization. A name should be chosen that protects the good will and reputation of the association and avoids deception or confusion with the name of some other organization. The initials of the association name – its acronym – also should be considered.

Misuse or infringement of an association name can best be avoided through its registration by virtue of state corporation laws or through federal registration of the name as a “service mark.”

Source: Jacobs, Jerald A. Association Law Handbook. Third Edition. Washington, DC: American Society of Association Executives, 1996, p. 34.

Statement of Purpose

Statement of Purpose: a general statement describing the reasons for which the association was formed and its intentions for the future. Examples of common purpose statements:

- To promote the interest, welfare or common good of an industry, a profession, a field of interest, or group of members.
- To deal by lawful means with common problems or concerns.
- To act as advocate and representative before government bodies.

The purposes for which an association has been formed should be accurately stated in the articles of incorporation, in the bylaws, or both, but the most important statement of purpose is that given in the articles of incorporation, as these articles may be used in determinations of whether the association:

- Can be a non-profit organization under state law
- Is exempt from payment of federal or state taxes
- Has the legal authority to engage in specific activities
- Can attract individuals or firms desiring to support its objectives by becoming members
- Is organized or operated for purposes that restrain competition

Two main guidelines for writing (or revising) your association's Statement of Purpose:

- Because a statement of purpose can restrict an association's operations, the statement is best kept more general than specific.
- An association's statement of purpose should announce the intention of the organization to act consistently with its non-profit tax-exempt status and to observe the letter and spirit of all applicable laws and regulations, including those in antitrust and trade regulation areas.

Source: Jacobs, Jerald A. *Association Law Handbook*. Third Edition. Washington, DC: American Society of Association Executives, 1996, p. 34-36.

Legal Contracts

Contract: a voluntary understanding between two people or firms that creates a binding relationship between them. As a result of a contract, each person or association has obligations and expects something in return. Three essential elements of a legal contract:

- An offer: a promise conditioned upon something being done by the person promised. An offer can be withdrawn before it is accepted and no contract will result. The party making an offer can set a time limit as a condition of acceptance in order for an enforceable contract to ensue.
- An acceptance: an expression of assent to the essential terms of an offer. All sides must agree to the terms of the offer before the offer becomes a contract. Generally, silence is not considered to be an offer of acceptance. One cannot pick and choose among the terms of the offer. Minor items can be changed or added if the other side accepts these modifications. Major items cannot be changed or added after acceptance.
- Consideration: anything of value that is exchanged in performing the contract. Consideration must be mutual, and both parties must provide something in order for a contract to be valid, but there is no requirement that the value of the consideration given by one party be equal to the value of consideration received by that party. When the terms of consideration were never discussed or agreed upon, the contract may be voided by either party.

Source: Jacobs, Jerald A. *Association Law Handbook*. Third Edition. Washington, DC: American Society of Association Executives, 1996, pp. 38-40.

Your association may enter into a legal contract when engaging in any of the following activities:

- Renting or buying office space
- Purchasing office equipment or supplies
- Arranging for meetings or conventions
- Booking speakers or panelists
- Buying insurance
- Hiring accountants, authors, attorneys, researchers or other consultants for the association's use
- Employing association staff and executives

Guidelines for Forming Legal Contracts

- **Authority:** Before entering into any contract, be sure the other side actually has the authority to agree to the arrangement.
- **Legality:** Where a contract requires one party to do something that violates the law, the contract raises no binding rights or responsibilities.
- **Jurisdiction:** The interpretation of all contracts is subject to local courts applying local law, which may vary considerably from one jurisdiction to another.
- **Assignment:** If one of the contracting parties plans to delegate any portion of the expected work to a subcontractor or other firm, this information should be included in the original contract.
- **Modification:** Once an offer is accepted, a contract exists and cannot be modified by one side without the agreement of the other.

Source: Jacobs, Jerald A. *Association Law Handbook*. Third Edition. Washington, DC: American Society of Association Executives, 1996, pp.40-1.

Five common mistakes that are made in contracts (and how to avoid them):

- Failure to negotiate. When faced with the vendor's "standard form contract" read the fine print and attempt to negotiate out of unfavorable clauses. Do not automatically assume that you must sign the agreement as is.
- Failure to understand. If you do not understand a provision, find out what it means before signing.
- Lack of specificity. When contracting for customized services, such as computer software, be sure to carefully draft the specifications for the customized services. If there is a dispute, you only can rely on the specifications as written in the contract; you can't rely on what you thought the customized service would do for you.
- Lack of deadlines and penalties. When contracting for services it is critical that you include specific timelines for completion of the work. It is a good idea to have a payment schedule and to attach penalties if deadlines are not met.
- Failure to require parallel liability clauses. Vendors, hotels and others frequently will attempt to place all legal liability on the association. Instead, liability clauses should be parallel, placing responsibility on the vendor if its employees are negligent, and on the association if the association is negligent.

Source: "Contracts, Contracts, Contracts: Five Common Mistakes to Avoid." Pfau Englund Nonprofit Law, P.C. Alexandria, VA Copyright © 2003 Sandra Pfau Englund. www.nonprofitlaw.com

Contract Disputes

If an association becomes involved in a dispute over the terms of a contract, some guidelines that courts use to interpret and enforce contracts should be considered:

- If the contract is in writing, the court will always enforce the clear intentions of the parties set forth in the written words of the contract.
- If a written contract does not address a particular point, or if the words of a contract are confusing, a court may admit evidence from other sources to determine what the parties meant.
- If a contract is in verbal form only, courts will admit evidence from the parties and other sources to determine the terms of the contract.
- For associations, there are two types of agreements that must be in writing to be enforceable: contracts for the sale of goods valued at more than \$500 and contracts that will not be completed within one year from the date of the contract.
- Once a breach of contract is established by the courts, courts will attempt to remedy the breach by ordering that money be paid to the injured party, called "damages." Courts rarely order the breaching party to perform the specified obligations under the contract, but rather look for a monetary settlement.

Source: Jacobs, Jerald A. *Association Law Handbook. Third Edition.* Washington, DC: American Society of Association Executives, 1996, pp. 42-3.

Legal Counsel

Associations may hire legal counsel to provide guidance on antitrust and trade regulation compliance, procure and maintain tax-exempt status, monitor and affect the direction of legislative and administrative decisions important to the association and its membership, and give advice on association positions and programs. Characteristics to look for when choosing legal counsel:

- Legal competence
- Ability to relate personally and work productively with association staff and officers
- Fees within the price range of the association – be aware that fees may be charged on a straight retainer basis or an hourly fee basis
- Knowledge to protect the association against potential liability

Source: Jacobs, Jerald A. Association Law Handbook. Third Edition. Washington, DC: American Society of Association Executives, 1996, pp. 115-119.

Record Retention

Associations must balance the practical costs of maintaining records (computer equipment, file cabinets, time spent maintaining these records by staff) with the need to keep a clear record of all association activities. There are substantial legal and practical reasons for associations to establish and follow a clear record-retention program that details what is to be kept as well as time periods for retaining and purging each kind of association record. Some guidelines to consider:

- State nonprofit incorporation laws sometimes dictate that particular records be made and kept by organizations. In addition, all associations must heed federal and state taxation and employment law requirements for maintaining documentation. Any record retention plan must begin with an identification of the items the organization is required by law to retain.
- In the absence of a specific legal stipulation regarding how long a specific type of record must be kept, associations must assume that the specified documents are to be retained indefinitely.
- The IRS requires that nonprofit organizations maintain records regarding receipts and disbursements, gross income, unrelated business income, exempt association activities, and anything else that might prove pertinent in an audit.
- Associations should permanently keep the articles of incorporation, other organizing and governing documents, the IRS tax-exemption determination letter, minute books, and bank statements.
- Retain for at least 7 years all canceled checks and other supporting documentation for expenses.

- Association contracts, insurance policies, deeds, leases, trademark or patent registration certificates and similar documents should be maintained while they are in effect and for a period of time after they expire.
- Access by members to association records is frequently guaranteed by the requirements of state corporation laws and decisions interpreting those laws.

Source: Jacobs, Jerald A. *Association Law Handbook*. Third Edition. Washington, DC: American Society of Association Executives, 1996, pp. 67-70, 72.

Copyright

A copyright is the property right granted to authors of original works. To prevent unauthorized use of your association's publications, a copyright notice, including the © symbol, should be included beginning with the first publication of the work in question.

Risk Management Plans

It is possible for associations to foresee and preempt potential risks. The following steps will lead you to develop a risk-management plan for your association by allowing you to identify potential areas of risk and determine how they should be addressed to prevent their occurrence.

- Identify the risks
- Review the types and experience levels of your volunteers
- Review the standard of care and legal duties likely to be imposed on your organization
- Review your premises, your location, your staff and supervision, and the typical activities in which your staff and volunteers engage
- Assess the risks
- What risks can your organization tolerate?
- What risks can you control?
- Which risks are too great to bear?
- Control the risks
- Avoid risks that are too great to bear
- Modify policies, plans and procedures to reduce risks
- Transfer risks to others through insurance or legal agreements
- Implement a volunteer management program that allows you to adequately screen, train and supervise volunteers

Adapted from "NONPROFIT 101: Legal or Liable, Like It Or Not." Pfau Englund Nonprofit Law, P.C. Alexandria, VA Copyright © 2003 Sandra Pfau Englund. www.nonprofitlaw.com

Questions for Discussion

1. Are your association's legal name and Statement of Purpose written in a manner which best protects your organization? Which aspects of the association name and Statement of Purpose are especially helpful to your organization, and which could you improve upon? How does your organization require that such significant changes be made, and who makes them?

2. In what types of legal contracts does your association participate?

3. How much attention does your association pay to the terms of a contract? Be specific, and answer for the following types of contracts:

- Employment contracts
- Hotel and facility contracts
- Office management contracts

4. What is your association's policy for managing its records? Be sure to discuss record creation, retention, and destruction, as well as the determination of who has access to those records.

5. Based on the three steps of the risk-management plan that are outlined in this presentation, what should your association's risk-management plan look like?

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