

✦ COMMISSIONS: DISCLOSURE AND CHANGING THE PARTY TO BE PAID.

There are many “third party” meeting planners that assist corporations, associations and groups in planning and executing their meetings. Some are large, well known companies like Conference Direct, Experient, Helms Briscoe and others; some are one person independent operators. The types of services that meeting planners provide also vary widely, and services may include some or all of the following: site selection; negotiating contracts; handling housing; destination management; and on site event management.

Just as the services may vary, the way that meeting planners are compensated for the services that they provide also can vary. The most typical methods are a fee negotiated and paid to the meeting planner by the organization having the event, or a commission paid to the meeting planner out of guest room rates paid to the hotel where the event is held, though there are other possibilities, as well.

When a meeting planner is to be paid a commission out of hotel room rates, the fact that commission is being paid must be included in the contract between the hotel and the group and the group needs to determine whether it needs to disclose the commission to its event attendees. Failure to properly disclose commissions can expose the hotel and group to civil or criminal liability.

Occasionally a group organizing an event will decide to change it's the third party meeting planner. When that occurs, it may ask the hotel to pay the commissions provided for in the contract to its new meeting planner. The hotel must carefully review the terms of its contract with the group to determine whether it can agree to the change without exposing itself to multiple claims for commission.

✦ WHY MUST COMMISSIONS BE DISCLOSED?

The first and most obvious reason to disclose the commission payment in your contract is because there should never be a reason to “hide” how a third party is compensated for its services. Any time someone does not want an obligation included in a contract, it is a sign that something inappropriate may be occurring. Neither the hotel nor the customer should agree to anything that has even the appearance of impropriety to maintain ethical business practices.

In addition, failure to disclose a commission payment *may* be illegal under applicable law. The law varies from state to state, but if a party attempting to secure business agrees to pay a third party for assisting it to obtain that business, and the

payment is made out of the contract price paid by the customer without disclosing it to the customer, it may be considered bribery.

For example, the in New York, the law provides:

§180.03 Commercial bribing in the first degree.

A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars. Commercial bribing in the first degree is a class E felony.

When a hotel pays a commission to a meeting planner, it is conferring a benefit on that planner. The planner is the agent of the group, or principal. If the group, or principal does not know about the payment because it is not disclosed, it is not consenting to it. Clearly, the hotel's willingness to pay the commission influences the planner, as the planner would not select a hotel that refused to pay commission. Thus, it is possible that failing to disclose a commission payment could be considered commercial bribery under New York law.

The group may also be responsible for disclosure. If the group is acting as the agent for the attendees in arranging the guest rooms for the event, and the group arranges for a portion of the room rate paid by the attendees to go to the meeting planner instead of the group having to pay the meeting planner a fee, then the group is receiving a benefit without the knowledge of the attendee if the commission is not disclosed.

There are of course many legal issues and factors which would impact whether failure to disclose a commission in any particular contract would amount to a criminal act and it should not be assumed that the examples above would be found illegal. However, since there should be no reason why a meeting planner should want to hide that it is receiving commission, it is always better to avoid any possibility of a legal violation by disclosing the fact that a commission is being paid in the event contract. The group should make its own determination whether further disclosure is necessary.

### ✦ WHEN CAN A HOTEL AGREE TO CHANGE THE MEETING PLANNER TO BE PAID COMMISSION?

From time to time a group may decide to change the meeting planner that it will use for an event. While that is certainly the group's decision to make, the hotel should not assume that it can change the meeting planner who is to receive commission under the group's contract with the hotel at the group's direction.

The hotel's ability to change the commission recipient depends on the language of the commission provision in the contract with the group. If the contract designates a specific third party, like "Ajax Meeting Planning" as the entity that is to be paid commission, there is a good chance that if the group and hotel agree to change the contract to designate "Bob's Meeting Planning" as the commission recipient that the hotel may still be obligated to pay Ajax.

That is because Ajax is what is known as a "third party beneficiary" of the hotel/group contract. By specifically agreeing to pay Ajax, the hotel and group have created an enforceable legal obligation to Ajax that they cannot change without Ajax's agreement. If the hotel pays Bob's instead of Ajax, Ajax may still have the right to sue the hotel to be paid the commission promised to it. The group cannot unilaterally decide to eliminate Ajax's contractual rights.

Ideally, the group and Ajax have a written agreement for meeting planning services that will determine when Ajax can be terminated and how commissions will be handled in that event, but that is not always the case. If not, unless Ajax agrees in writing that it no longer is entitled to commission, the hotel may be required to pay it even if Ajax was replaced as meeting planner.

The hotel's obligation to the third party can vary based upon the way that the commission clause is written. If, for example, the clause states that commission will be paid to "the third party designated by group in its discretion," then Ajax may not have a claim as it is no longer the "designated" party and the contract language did not create a specific benefit for Ajax.

Sometimes a group will suggest that the hotel agree to cancel the contract naming Ajax and rewrite it without a commission provision or with a commission provision naming Bob's instead. Cancelling and rewriting the agreement is the same as changing the original agreement and cannot eliminate Ajax's rights.

Whenever a group asks a hotel to change the commission recipient in an event contract, the easiest way to handle the situation is to agree to do so only if the original third party provides a letter to the hotel verifying that it waives any right to commission. If the group indicates that is not possible, the hotel should not agree to change the commission recipient without having its commission provision reviewed by its legal counsel to determine if the language of the provision allows for a change in commission payment without consent of the original meeting planner.