Casino Nights and Raffles

By Joseph C. Boggins, CAE

Periodically, an association executive will ask if it is okay at the annual convention to conduct a raffle or casino night, with the proceeds to be given to charity. As with many legal questions, the quick answer is, "It depends."

The starting point in understanding what is legal and what is not is to be aware that what we are talking about is gambling. And while there are many permitted exceptions, donating the funds to a charity in and of itself will not cause a gambling event to be legal. Something more is required. Also, do not get sidetracked by trying to guess whether local law enforcement authorities might prosecute. No one can give you that kind of comfort level.

The Penal Code, in §47.02, sets forth a functional test for conduct that constitutes the offense of gambling. Generally, it is making a bet with money or other thing of value in a game or contest or with a gambling device. There are various exceptions many of which are not germane to this discussion. Lottery is defined in §47.01 to mean:

> any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or some other name.

First, let's consider raffles. For TSAE members, the most important exception to the laws prohibiting gambling is probably the Charitable Raffle Enabling Act, Chapter 2002 of the Occupations Code. It permits a "qualified nonprofit organization" to conduct not more than two raffles each year. "Raffle" is defined as:

> the award of one or more prizes by chance at a single occasion among a single pool or group of persons who have paid or promised a thing of value for a ticket that represents a chance to win a prize.

To be a qualified organization, an association must meet all of the following conditions:

1. If a corporation, the organization must have been incorporated under the Texas Non-Profit Corporation Act.
2. Other than expense reimbursement, no part of its income may be distributed to members.
3. The organization must be at least three years old and have its board of directors or officers elected by the members.
4. The organization must not devote a substantial part of its activities to influencing legislation and must not make campaign contributions or participate in political races.
5. It is exempt from federal income tax under Section 501(c) of the Internal Revenue Code.
6. The organization does not have local chapters, and affiliate or a subsidiary.

For most associations, No. 4 is a killer, and No. 6 could also be an impediment for some. Assuming, however, that an association believes that it is a qualified nonprofit organization, what restrictions then apply? The primary ones are, raffle tickets many not be advertised statewide, each ticket must state the name and address of the sponsoring organization and details of the raffle, only authorized person or association members may sell raffle tickets and these individuals may not be paid compensation for selling. Further, a prize may not be money or valued at more than $50,000.00 and all proceeds from the sale of raffle tickets must be used for charitable purposes.

Before continuing, keep in mind that door prizes and silent auctions are not a form of gambling.

Now let's turn to casino nights.

Two opinions of the Attorney General of Texas provide guidance. The first is JM-412 issued in 1985. The factual situation described in this opinion involved a function held for graduating students. They were given play money to use to play cards or other games of change. Later the "money" was used to bid at an auction for donated prizes. Of great importance: No charge of any kind was made to a participating student. The Attorney General opined that this was not gambling since "the essential element of consideration...is missing..."

Contrast the above facts with those explained in a 1992 Attorney General opinion, DM-112. Again, prizes were donated. But players were given chips to start off and then had to purchase additional ones. The Attorney General pointed out that there are three elements of gambling: consideration, chance and prize. The distinction between JM-412 and DM-112 is in the former no consideration was involved, as only play money was used. But in the latter the players bought chips.

Thus, an association that is considering a casino night must not permit the participants to use real money. Otherwise, it is a criminal offense.

The charitable justification was raised in the facts explained in another Attorney General opinion, JC-0482, issued in 2002. A nonprofit corporation conducted a sweepstakes program with four percent of the proceeds going to charity. Participants were not required to purchase a ticket, but, if they won they would only receive one percent of the sweepstakes. A participant who "donated" funds and won, however, would win seventy percent. The opinion held that this scheme was a lottery and a violation of the Penal Code.

To sum up, a lottery may be held by a "qualified nonprofit organization," using real money, if all statutory requirements are followed. But a casino night may be conducted only if the participants do not use real money at any time in playing. The failure to fit into either exception from gambling means a criminal violation has occurred. Charitable donations will not give immunity.

Four Meeting Contact Tips

By Joseph C. Boggins, CAE

I. How to Sign a Contract

Make it a habit always to add a title after or below your signature on any business contract. This tells everyone you are signing in what the law calls a representation capacity. Otherwise, association execs could be held personally liable.

Here is what the Texas Supreme Court said in Seale v. Nichols:

> Texas law provides that in order for an agent to avoid liability for his signature on a contract, he must *disclose* his intent to sign as a representative to the other contracting party.

Yes, it may be highly unlikely that the association will not be able to stand behind its agreement. But why take a chance when meeting contracts will not be performed for many years in the future and attrition and cancellation clauses routinely impose tens of thousands of dollars in damages?

II. Force Majeure

Is a force majeure clause really needed in a meeting contract? After all, if performance becomes impossible, shouldn't that fact be sufficient to excuse a party? Unfortunately, no. Texas law leaves little room for relief.

> In contract cases, the rule is that an act of God does not relieve the parties of their obligations unless the parties expressly provide otherwise. GT&MC, Inc. v. Texas City Refining, Inc.

This Houston Court of Appeals had before it an appeal where the damage was caused by a hurricane and heavy rain. The court also observed that force majeure clauses are enforceable in Texas.

A properly drafted force majeure provision should be part of every meeting contract and not be limited to acts of God but include other eventualities that are beyond the control of the parties.

III. Liquidated Damages

Are liquidated damage provisions always enforceable? Sometimes not.

Unless there is a great disparity in the relative bargaining position of parties to a contract, the courts will normally uphold what they have agreed to do. But for a liquidated damage clause to be valid it must meet two conditions:

1. At the time of making the contract the amount of potential damages must be uncertain and difficult to estimate; and
2. The liquidated damages must be reasonable.

The question then arises whether it is really that difficult for a hotel to estimate in advance what its actual damages will be if, for example, an association fails to pick up 50 to 100 sleeping rooms. Just compensation is normally lost profits (not lost revenue.) The percentage of profit on sleeping rooms is, on average, fairly well known in the industry. When the attrition formula states that close to the meeting date the liquidated damages will be 100% of the room revenues, that, in this writer's view, is clearly a penalty, and courts will likely not enforce such a provision. The hotel would then have to prove actual damages and have an obligation to demonstrate what efforts were made to mitigate its losses. The latter may not be an easy thing to do if several years have passed before the parties have their day in court.

IV. Hold Harmless

Let's now look at the very real danger associations could face when they routinely agree to indemnity or hold harmless clauses. Bear in mind that associations are liable for damages caused by the breach of a duty by someone with authority to act on their behalf – staff, officers, agents, etc.

An association would not, barring some highly unusual facts, be liable for damages which occurred during a convention and were caused by members, exhibitors, or guests. Responsibility for damages exists only because the association has agreed to be so held. Where the danger arises is that the comprehensive general liability insurance policy carried by almost all association s excludes coverage for "continually assumed liability."

What to do? Well, it would be nice to negotiate away the indemnity clause. But that usually can't be accomplished. The easy answer that my association clients have found is to pay a small premium for an endorsement restoring insurance coverage for contractually assumed liability.

If anyone doubts that the association could have to pay a large damages and attorney's fees when a hotel is sued, remember the Tailhook Convention. Then, ask yourself if you really know what goes on at your own hospitality suites when the hour is late and booze flows freely. IF you are still unconvinced, don't forget that people do smoke in bed and that fires do happen. Transferring the risk to an insurer makes sense.