



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

Associations and DotCom Fever

The business world—and certainly the stock market—has been gripped by .com fever, and trade associations are not immune. Associations are being barraged almost daily by e-commerce offers. Moving activities as diverse as signing up for trade shows or meetings to participating in statistical programs from the traditional offline mechanisms to web-based programs requires significant changes in traditional contracts and poses new legal issues. The unwary association who fails to ask the right question—and both understand and be comfortable with the answers—may find that they get burned. Here are ten tips.

1. What are your web site objectives? Associations are faced with various e-proposals—to host their websites, to update and jazz up their websites, to enter into co-branded arrangements, to post advertising, to provide web development services to members, and/or to conduct an array of e-commerce activities. It's important to both understand the association's objectives, and to do your homework. Make sure you understand what your members want, what they're willing to support financially, and what's already available in the marketplace. Do you want to simply communicate with the public? With your members? Do you want to allow members (and others) to buy and sell association materials? Raw materials and/or office supplies? Insurance and other products? Will you offer opportunities to sign up for conferences and trade shows online? Will you permit advertising to help defray the costs? Will you offer online testing and certification opportunities? Will you offer special, members-only areas? Will purchasers be permitted to actually buy online, or must they adopt print and send or call methods? Establishing your objectives, often through establishing a phased-in approach to the addition of new features, may make sense, but it's the first step to determining the kind of outside consultants and service providers you'll need to implement your objectives.

2. Who's got the IP? Intellectual property is king on the Internet. Firms are seeking business relationships with associations because associations have recognized "brand" identities with their members, and typically offer valuable content (like updates on technological trends, government activities, standards, etc.). Associations have to understand and take steps to protect their trademarks, tradenames, copyrights and the like in negotiating e-commerce arrangements. No, you don't lose copyright protection by posting things online, but as a practical matter, you may want to use special care about allowing access to valuable information by those who might not respect its value. All sorts of mechanisms exist, like registration features, member-only areas, and even special fees for "Internet members," to protect valuable intellectual property. And, you want to make sure that you protect yourself contractually so that you own or have perpetual rights to digitized forms of your content, and that you do not cede copyright or other rights to other parties. Further, make sure you protect what you consider to be your trade secret information. Thus, associations must take special care to register and protect domain names and trademarks, to establish their copyright ownership in their content, and to appropriately protect their trade secret information, by implementing intellectual property protection programs and incorporating IP clauses into e-commerce agreements. In the information age, it's your most valuable asset.

3. Who "owns" the eyeballs? The Internet is all about "stickiness": attracting eyeballs to your website. In short, the web operates in much the same way as television stations do. On TV, stations use programs to attract viewers; it's access to the viewers that TV and cable companies sell to advertisers. Visitors to your web site are your members and prospective members. The number of "hits" on your site and areas of your site, data about your visitors, etc. are all valuable information that you should address contractually. If you consider that list to be your property, then make sure the contract specifies your ownership rights, what the service company can and can't do with the information, and what happens upon termination. And, pay attention to the structure of the site. If many of the featurestake visitors out of your site, does the site really meet your objectives?

4. What's the impact of moving association activities to the web? Your online activities should be integrated into your traditional business planning. You will often find that moving a traditional offline activity to a web-based program engenders new legal consequences, or may have a negative financial impact on the organization. Association statistical programs are good examples of the first. A typical statistical program operated through a third party fiduciary is straightforward enough. Move it to the web and you raise new legal issues. Will proprietary software be used? Will the program be hosted on the association's server or the fiduciary's server? If it's the latter, a standard services agreement, coupled with possibly a software licensing arrangement if proprietary software is used for data massaging, may no longer be adequate. If the fiduciary operates the program through its server, you should include a web hosting provision in the agreement. You will also need to include mechanisms to assure confidentiality of individual data reported and the integrity of the server as well as the stored data.

5. What's the "net" result? Associations entering into e-commerce deals must carefully establish the financial parameters to make sure that they don't end up with a net loss when moving activities to the web. Often, e-commerce companies work for a percent of the e-commerce revenues. This makes sense and minimizes cash outlay, but may provide an incentive for your outside consultants to move more and more association "products" to an online sales model. This requires careful consideration about the impact on members, and on the organization. One increasingly popular concept, for example, is the "virtual trade show." While the idea has not fully taken hold yet, associations who rely on convention and trade show revenues to minimize dues and sustain services should certainly investigate now the potential financial impact of the virtual trade show. Another issue is the theory that moving registration for meetings, conventions and trade shows online will reduce costs. That may be true, but for events where there are a

theory that moving registration for meetings, conventions and trade shows online will reduce costs. That may be true, but for events where there are a finite number of participants (committee meetings, for example), to cover your basic costs may actually require a fee increase to appropriately compensate your e-commerce service provider.

6. What are the antitrust issues? For some time, the focus of antitrust concern about association web activities involved chat areas. Typically unmonitored, they may give participants an opportunity to post comments that could be construed to violate antitrust laws. Chat room rules which include reminders that adherence to existing association antitrust guidelines is a must are one answer. As interest in e-commerce opportunities continues, however, the potential for these activities to raise antitrust concerns has come into sharper focus. In a recent speech, the newest Federal Trade Commission (FTC) Commissioner, Thomas B. Leary, acknowledged that the line between Adam Smith's "perfect marketplace" and improper collusion in restraint of trade has not yet been made clear. As all sorts of ambitious joint e-commerce undertakings are announced by associations or groups of competitors, federal antitrust authorities are increasingly interested in them. E-commerce activities involving auctions, bid offers, posted prices, and the like, hosted by a joint venture of competitors, are drawing regulatory scrutiny. A related aspect to this relates to the terms and conditions of e-commerce sales. The unfortunate reality may be that the jurisprudence has not caught up with the technical realities of the World Wide Web.

7. How do we protect our organization from legal liability? Just as you would post disclaimers on your materials and structure activities to minimize liability, these same precautions should be integrated into your web services and products. Once you engage in e-commerce as an association, or offer chat rooms, this becomes even more important. It is customary for e-commerce operators to post a user agreement or special terms and conditions that limit the organization's legal exposure. It is rare to see that in an association site. The issues associated with association user agreements, however, may actually be much more complex than with a traditional for-profit company site, starting with the question of what is the association's role. Will you offer opportunities to buy from preferred providers who have agreed to offer specific discounts on their products or services? This is one of the simplest models. Is the association actually a seller or buyer? That may suggest establishing a for-profit subsidiary, buying coop or other structure to accommodate the activity and limit liability exposure. Is the association merely a facilitator or host of e-commerce activities, with commercial arrangements made exclusively between buyers and sellers at the site? If so, you may want to specify that the terms and conditions governing the business relationship between buyers and sellers on your site have to be established independently by the parties. Depending on those activities, issues such as delivery schedules and methods, risk of loss and insurance, acceptance criteria, quality control testing, warranties and limitations of warranties, should be addressed by the parties. Do you offer chat rooms? Make sure that you post chat room rules disclaiming responsibility for libel, defamation, product disparagement, intellectual property infringement, and the like. Establishing your terms as a "click-wrap" agreement and/or using a "click to acknowledge" feature should offer additional protection.

8. What's the deal on privacy? One of the hottest legal issues today is the issue of online privacy. The bottom line is this. Even if you're primarily involved in offering goods and services online to business people, pay attention to personal privacy. Companies don't visit your site: people do. You should post—and follow—a privacy policy which specifies in a general way the information you collect, why you collect it, and how it's used. Most importantly, it should spell out the circumstances under which third parties can use, sell or share their personal data. That directly relates to point number 1 above. Remember—when you engage in e-commerce, even as a not-for-profit, you may be treated for some legal purposes (like privacy) as operating a "commercial website." And, the confusion becomes even greater when you consider how many associations, foreclosed from registering their acronyms as ".org's" because another non-profit got there first, actually operate as ".com's." New laws and regulations on privacy are possible in this area, and an important law which goes into effect in April will affect any organization which operates a "commercial website" and which knowingly collects personal information from children under 13.

9. What should we look for in a web consultant? Selecting the right company to host your web site, develop it, maintain it, and or supervise e-commerce activities may prove to be one of the most important decisions you make. Since much of this is so new, your normal due diligence review may not provide the in-depth analysis you might typically require. Thus, protecting your members may involve a matter of "chemistry"—the sense that the company or companies involved are knowledgeable, and will be easy to work with and responsive to the needs of your association. Depending on your objectives, it might make sense to adopt a "one-stop-shopping" approach, or it might make sense to contract separately with various service providers. You must have a firm understanding of what proprietary and off-the-shelf hardware and software your service companies will provide.

10. What sort of contracts do we need? With so many uncertainties, even if you have selected a consultant that you think has the right chemistry for your organization, ultimately, of course, protecting the association comes down to the contractual details. Make sure your agreement addresses approval mechanisms for content posted on the site, intellectual property ownership, revenue-sharing, liability protection, and the like. You should make sure you understand the software and hardware that will be used, and response times to respond to visitor requests. Rights to data about visitors, whether visitors will be personally identified, and whether information can be shared with advertisers or others is another key issue. You should include provisions that require consultants to assist you in transitioning the site to other service providers if needed. Other traditional provisions like choice of law, mechanisms to deal with disputes, etc. should be included consistent with any standard contractual guidelines that the association follows.

Association e-commerce arrangements offer exciting possibilities to serve members and adapt to changing times. A little attention to some of the legal and business aspects initially should make the process easier when you get to the implementation phase.

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Last updated 04/20/00

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