

HOSPITALITYLAWYER.COM PRESENTS

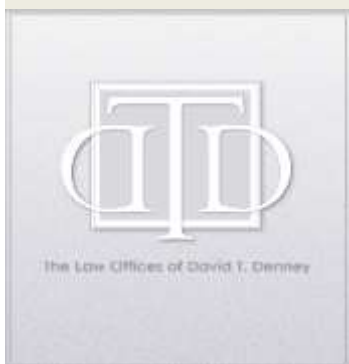
2013 THE **HOSPITALITY LAW**
CONFERENCE
FOCUSING ON LEGAL, SAFETY & SECURITY SOLUTIONS

FEBRUARY 11-13, 2013 • HOUSTON, TEXAS

DIRT, FOOD & BOOZE

NEGOTIATING LEASES, CATERING AND BANQUET
AGREEMENTS AND OTHER FOODSERVICE CONTRACTS

Presenter



- **David T. Denney**
- **The Law Offices of David T. Denney, PC**
 - Dallas, Texas
- **The firm's Food, Beverage & Hospitality practice focuses on representing clients in:**
 - The formation, purchase and sale of entities;
 - Private Placements of Securities;
 - Franchising;
 - Corporate transactions;
 - Civil litigation;
 - Commercial leasing;
 - Beverage alcohol licensing;
 - Developing Comprehensive Policies and Procedures;
 - Employment matters; and
 - Other random, weird stuff.

OVERVIEW

- **1. The Restaurant Lease**
- **2. Banquet and Catering Contracts**
- **3. Hotel Food and Beverage
Management/Licensing Contracts**

RESTAURANT LEASES

- **Standard Provisions that get all the attention:**
 - **Events of Default**
 - **Remedies**
 - **Relocation**
 - **Radius Restriction**
 - **Termination**
 - **Tenant Improvement Allowance**
 - **Personal Guarantees**

RESTAURANT LEASES, cont'd

- **Less-standard but equally-important provisions getting all the attention in this session:**
 - **Permit Contingency and Rent Commencement Date**
 - **Permitted Use and Exclusivity**
 - **“Gross Sales”**
 - **Cap on Common Area Maintenance (“CAM”) Expenses**
 - **Assignment and Subletting**
 - **Subordination, Non-disturbance and Attornment**
 - **Operating Covenant**

RESTAURANT LEASES, cont'd

Permit Contingency and Rent Commencement Date

- Evil Landlord Language:

*“Rent Commencement Date”: the earlier to occur of (i) the **date upon which Tenant opens for business** at the Demised Premises or (ii) **ninety (90) days after** the Demised Premises are deemed “ready for occupancy” (as that term is defined in [Landlord’s Work Letter], attached to and made a part of this Lease for all purposes). It is Landlord’s **estimate** that the Demised Premises will be “ready for occupancy” on or before [date].*

RESTAURANT LEASES, cont'd

Permit Contingency and Rent Commencement Date

■ Possible Tenant Revision:

*The rent commencement date shall be **one hundred fifty (150) days from the date Tenant receives all permits, variances and governmental approvals** necessary to construct and operate Tenant's restaurant in the Demised Premises.*

*Tenant shall have the **right to terminate** the Lease upon written notice to Landlord if it is unable to obtain all permits, variances and governmental approvals needed for the lawful construction and operation of its store (including signage, alcohol sales and outdoor seating) within 150 days of the Effective Date.*

RESTAURANT LEASES, cont'd

Permitted Use

- Permitted Use Examples:
 - Seafood restaurant
 - An upscale, “New-American” restaurant featuring fine dining including the service of alcoholic beverages
 - Operation of a typical "Twisted Root Burger Company" restaurant selling burgers and other related food and drink items including hot dogs, French fries, chips, salads, milkshakes, beer and wine for on-premises consumption only and for no other purpose

RESTAURANT LEASES, cont'd

Exclusivity

- What is an Exclusive?
- How might a Landlord get around your newly-acquired exclusive?

RESTAURANT LEASES, cont'd

“Gross Sales”

- What it should include...

- What it shouldn't...
 - Gift card sales (until redeemed)
 - Taxes
 - Service Charges / Tips
 - ATM fees / vending machines (when owned by restaurant)
 - Complimentary sales
 - Off-site catering (surprisingly difficult to get)

RESTAURANT LEASES, cont'd

Cap on Common Area Maintenance (“CAM”) Expenses

- Does not apply to “non-controllable expenses,” such as taxes or insurance expenses

- Possible Tenant Revision:

*For purposes of calculating Tenant’s Proportionate Share of Common Area Costs, the maximum increase ... that may be included in calculating Tenant’s Proportionate Share for each calendar year after calendar year 2013 shall be limited to 5% per calendar year, applied on a **non-cumulative, non-compounded basis**.*

RESTAURANT LEASES, cont'd

Assignment and Subletting

- What typically triggers an assignment without consent clause?
 - Transfer of Lease
 - Transfer of equity controlling equity interest in tenant
 - Transfer of all/substantially all assets of tenant

- Negotiate Exclusions from assignment without consent:
 - Equity transfers to affiliate entities and family members
 - Transfers to a “Permitted Transferee”
 - Transfers on the sale of the brand

RESTAURANT LEASES, cont'd

Subordination, Non-Disturbance and Attornment

- Automatic subordination is evil.
- Obtain SNDA agreement from Landlord's lender PRIOR to executing lease.
- Negotiate Landlord duties regarding future lenders.
- Subordination should be contingent on non-disturbance.

RESTAURANT LEASES, cont'd

Operating Covenant

■ Evil Landlord Language:

*Tenant must...keep the Demised Premises open to the public for business with adequate personnel in attendance on all days and **during all hours** (including, if designated by Landlord, evenings) **established by Landlord** from time to time as business days and store hours for the Project... and Landlord shall further have the right to restrict the hours of operation for the Project and any tenant therein and Landlord shall have the right to reasonably expand the hours of operation of the Project for all tenants to more closely coincide with the hours of operation of tenants who have in the aggregate more than 50% of the square footage in the Project...*

BANQUET & CATERING CONTRACTS

- **Standard Provisions that get all the attention:**
 - **Headcount**
 - **Date/Time**
 - **Deposit amount**

BANQUET & CATERING CONTRACTS

- **Deposits**
 - Non-refundable, and staggered as event approaches
- **Cancellation**
 - Sliding scale as event approaches, with no refunds after expenses have been incurred (e.g. food purchased)
- **Food Safety/Allergies**
 - Place responsibility for obtaining information about allergic diners on host
- **Rules Relating to the Service of Alcoholic Beverages**
 - Will be enforced
- **Arbitration**

HOTEL F&B MANAGEMENT/LICENSE

- **Three Basic Choices:**
 - **Traditional Lease**
 - **License Agreement**
 - **F&B Management Agreement**

HOTEL F&B MANAGEMENT/LICENSE

Traditional Lease on Hotel Premises

- Typically favored by restaurateurs/bars, disfavored by hotels
 - Provides tenant with property rights governed by Property Code;
 - Often results in F&B workers employed by tenant; and
 - Higher monetary risk for restaurant tenant often translates into lower operational oversight for hotel.

HOTEL F&B MANAGEMENT/LICENSE

License Agreement with established F&B Brand (or chef)

- Chef or concept licenses its intellectual property to hotel
 - Hotel maintains control over operations and employees;
 - Chef maintains quality control rights over brand integrity; and
 - Hotel pays upfront licensing fee, then royalties.

HOTEL F&B MANAGEMENT/LICENSE

Restaurant/Bar Management Agreement

- F&B company directly operates the concept (occasionally licensed)
 - Experienced F&B operator responsible for management;
 - Management company subject to hotel oversight, including financial reporting;
 - F&B workers are hotel employees; and
 - Management company paid management fee, incentive (profit) fees, and (if applicable) intellectual property licensing fees.

HOTEL F&B MANAGEMENT/LICENSE

Other Considerations When Drafting F&B Agreements

- **Payment of Fees**
 - Who/what is the bigger “celebrity”?
- **Scope of Services**
 - Room service, lobby, pool, banquet/catering, etc.
- **Intellectual Property**
 - Each party needs a limited license to use the other’s IP
- **Employee Issues**
 - Be clear about which party is responsible for hiring/firing, employee access, etc.
- **Termination**
 - How to break up and still be friends.

QUESTIONS?



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