

Duff on Hospitality Law

## **The Meat and Potatoes of Third Party Food and Beverage Operations in Hotels**

By Greg Duff on 5.24.12 | Posted in Food and Beverage

Bringing in an operator, restaurateur or celebrity chef to provide food and beverage service in a hotel can provide immediate and significant benefits for a hotel and its guests. Hotel owners and operators use the experience, vision and creativity of third party food and beverage providers to generate attention, energy and business for hotel properties. Further, while hotels brand their properties and earn their reputations over decades, pockets of a hotel property can be made available to third party food and beverage providers to create a more immediate change in brand direction or environment. Despite the lure, however, chemistry and contract details are important. To avoid being left with a bad taste, owners and executives should consider a number of important contracting details while evaluating or courting a third party food and beverage provider.

**Big Picture Goal.** Although not necessarily a legal consideration, experience indicates that use of third party food and beverage in hotels often works best when the hotel owner and, if applicable the hotel operator or manager, have a clearly defined goal and have analyzed, on a specific level, the manner in which third party food and beverage will be used to achieve the goal.

**Existing Contract Parties.** The existing organizational structure within the hotel is important when considering third party food and beverage. Is the hotel operated by the owner or by an operator? Does the operator currently provide food and beverage service? From both a contractual consent perspective and with regard to the parties' business relationship, will an operator embrace use of a third party food and beverage provider? Along those lines, will the operator try to jettison the less attractive aspects of food and beverage (i.e. room service) while attempting to keep the high margin aspects (i.e. the lobby bar). Existing operators will likely be somewhat concerned about the effect of a third party provider on matters such as brand standards, finances, insurance, shared use and day-to-day operational matters.

**Scope.** Assuming the hotel's existing legal structure allows for inclusion of a third party food and beverage provider, the owner or hotel operator should consider the appropriate scope of the undertaking. By scope, we mean the level of services provided and the physical property that will be made available for that purpose. Is the hotel bringing in a third party to operate just a restaurant? Is there also an expectation that room service and catering will be handled by the third party? Food and beverage providers in hotels often service ancillary facilities within the

hotel but outside the main restaurant, such as: lobby, pool and rooftop bars, breakfast areas, dining terraces and patios. As restaurant operations increasingly blend into other hotel facilities, greater attention should be paid to legal complications such as shared services, staffing, insurance, indemnity, and maintenance and repair.

**Economics.** Hotel owners and operators will consider the economics of the deal. Specifically, how will the third party food and beverage provider make money? Will the third party provider pay lease rent and keep the remaining revenue? Will revenue flow directly to the hotel pursuant to an operating agreement with a percentage paid to the third party provider? In an operating agreement context, will there be performance bonuses for successful outcomes and termination provisions for failure to hit benchmarks?

**Type of Contract.** A hotel can use a number of different types of agreements to facilitate third party food and beverage, including: leases, licenses, celebrity chef agreements, management agreements or operating agreements. If the hotel is merely providing a designated restaurant space for a third party who will operate a restaurant, then a commercial lease is a viable option. Generally speaking, however, a hotel owner or operator will usually prefer to use an operating agreement or a management agreement to document the various rights and obligations of a third party food and beverage provider in a hotel.

**Key Personnel.** Does the contract include celebrity chef services? If so, what will that person's specific duties and requirements entail? Agreements regarding the responsibilities of celebrity chefs are often divided into two or three segments that track development and execution of the food and beverage concept, such as: (i) restaurant concept, branding and menu creation, (ii) physical space development, initial staffing and training, and opening and stabilization, and (iii) chef appearances and on-going quality control. The parties should also consider the other key third party food and beverage personnel that will work regularly in the hotel and should create contract provisions to ensure mutual satisfaction with such personnel as between the hotel owner/operator and the third party food and beverage provider.

**Radius Restrictions.** Radius restrictions prohibit a third party food and beverage provider—especially a celebrity chef—from operating competing restaurants within the same general location or within a similar type of property. Radius restrictions and related restrictions on the total number of undertakings that a celebrity chef can be associated with, are usually contentious, but are also often important.

**Employees.** Who will hire and supervise the employees serving food and beverage? Important legal responsibilities flow from that decision. There are also significant brand standard, service level, appearance and chain of command considerations associated with employee hiring, training and firing.

**Physical Space.** Is the physical space within which the third party food and beverage operator will perform constructed and ready for use? Is a remodel required? How and when will construction and remodeling occur? Who will oversee the project, what company will perform the work, and how will the parties ensure that hotel guests are not adversely affected while work is performed? A significant build-out or remodeling project can have significant tax and accounting consequences.

**Liquor License.** Who will carry the liquor license? Does the allocation take into account all of the places within the hotel property that alcoholic beverages currently are, or may in the future be, served? Is the liquor license allocation consistent with the parties' decisions regarding employee hiring?

**Intellectual Property.** The parties should determine who owns intellectual property such as trade names, recipes, and menus; how secrets will be protected; and how IP will transfer, if applicable.

**Operational Matters.** Restaurants, bars and food service providers, often use other services within a hotel to prepare and deliver their food and beverage to guests and other customers. Examples of shared services include: valet and parking, front desk reservations, concierge referrals, point of sale and IT systems, marketing, janitorial, and building maintenance and repair. The parties to a third party food and beverage contract should think through, and define, how shared services will be utilized and allocated.

In conclusion, while replacing or introducing new service providers within a hotel is not always a major undertaking, utilizing third party food and beverage often is. Thinking through the major considerations before the parties bind themselves, can help a hotel owner or operator ensure that he or she made the best choice possible to achieve specific hotel objectives through the use of third party food and beverage.

If you have questions, or would like more information about this topic, please contact [me](#).

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