

The Legal Corner

Coordinating the Roles and Responsibilities for Companies and Their Advertising, Marketing, Promotional and Interactive Media Agencies

When a company turns to outside agencies to assist with outreach efforts to consumers, the roles and obligations of the parties should be outlined in a request for proposal and then refined in an agreement. It is essential for both the client and the agency to thoughtfully address their respective rights and responsibilities with an eye to the issues, problems and liabilities may arise out of the applicable services and deliverables.

Beyond describing the scope of work, schedule, deliverables and compensation, the parties need to specify who owns what, who is responsible for clearing intellectual property and third party rights and substantiating claims, how risk and third party liability should be allocated, what indemnity and insurance obligations are required, and to what degree the agency is exclusive and shall not assist competitors. The client and the agency will have differing views as to each of these issues.

Historically, agencies develop multiple concepts and assign the rights to only the concepts the client accepts, and for which it has paid, and the unaccepted work is available to be recycled for other clients. There are two problems with this from a client perspective, firstly the intellectual property rights will be assigned rather than created as a work for hire, and thus subject to copyright termination after 35 years. Further, the client risks the embarrassment of seeing a proposal on which it passed become a successful brand identifier or campaign for another party, potentially a competitor. If third party rights are involved, such as when third party materials are licensed or union actors are used in commercials, the agreement should set forth what uses have been paid for as part of the deliverables and what additional uses are to be the client's responsibility.

Clients frequently do not want their agencies doing work for their competitors. However, an agency may seek substantially more compensation if it is required to forgo work within an entire category of commerce. The parties may address this conflict by providing for confidentiality obligations, designating a team, exclusive to the client, that will not work on competitor projects, and implementing physical and information security procedures. Both parties may seek to limit the other from hiring its employees, a restriction that must be narrowly tailored to comply with California and other state laws. Similarly, agencies are frequently concerned that a client will become familiar with its vendors and contractors and subsequently engage them directly. While California and other state laws, except in certain circumstances, prohibit a prohibition on doing business with third parties as anti-competitive behavior, agencies can seek to keep vendor information confidential or to obtain a reasonable fee tail from both the client and the vendor in the event of subsequent direct dealing where no prior relationship existed.



The agency may be compensated in a variety of ways. A traditional fee model is the retainer, typically paid monthly, for a specified scope of work. Retainers are frequently guaranteed (i.e., a monthly fee regardless of what work is done) and in this case both sides bear equally the risk of the time required in any given period being over or under the estimate. Retainers can also be a draw-down advance on fees to be later reconciled. Commission-based fees are a percentage fee multiplied by the cost of the media buy or product integration fee, or in some cases production costs. A project fee is a flat fee paid for a specific set of deliverables with partial payments frequently paid upon completion of certain milestones, subject to increases for change orders. Other models include the hourly rate, "cost plus", fees for additional usage, and incentive-based compensation tied to performance standards (such as bonuses and revenue sharing, but which also might take the form of penalties and liquidated damages in the event the agency fails to fully and timely perform). The issue of what costs will be paid by the client should also be addressed in detail.

The agreement should also address the agency's remedies in the event of late or non-payment, including interest and collection costs and the ability to halt work and hold materials, and the client's remedies in case the agency fails to perform to expectation. The agreement should also address use of subcontractors, project staffing, the deliverables approval process, breach, effect of termination and how disputes will be resolved.

If the company and its agency work through all of these issues in advance, neither will be surprised when the issues subsequently arise. A well written agreement benefits both the agency and its client in this regard.

The agreement should provide who is responsible for claims substantiation and regulatory compliance. Clients may take the position that the agency is the advertising expert and should be responsible for advising as to what is permitted. An agency, on the other hand, will likely be of the opinion that the client is the expert regarding its products, and its competitor's products, and with respect to industry specific regulations relating thereto, and may resist being responsible for the claims being made beyond an obligation to obtain the client's approval.

The agency and the client must determine who is responsible for trademark matters, development of names, words, logos, symbols and anything else used to identify products or services (including sounds and colors) can potentially result in third party trademark liability. Further, to the extent the client wants trademark protection for any agency deliverables, such availability must be determined. Frequently, the agency will be required to undertake an initial web-based search to identify issues and eliminate clear conflicts and then to cooperate with the client's lawyers, with the client ultimately responsible.

It is typical that an agency will make representations and warranties, including that its work product will be original and will not violate third party rights. In addition, it should be clear who is responsible for complying with law, especially regarding use of email for commercial purposes, consumer privacy and data security, contests and sweepstakes, coupons and give-aways, sales and "free" offers, mandatory disclosures, etc. The agreement should also set forth the scope of each party's obligation to defend, indemnify and hold the other harmless from and against third party claims, and from damages arising out of breaches and defaults, and whether there is any liability cap or limitations on remedies.

One way to mitigate third party risk is with insurance coverage. Larger agencies typically have errors and omissions insurance coverage and expect to have to add their clients as additional insureds. Smaller agencies may resist this obligation due to the expense of premiums. A client should be aware of the scope of coverage and exclusions of the agency's policy, and of its own advertising liability coverage, which is a relatively inexpensive addition to a company's general commercial policy.

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