

Advertising Contract Clauses I Have Come to Love

By: Jim Astrachan

"Our agency requires a written contract with new clients", insisted the Account Manager. "We generally work on a handshake", contended the new client, "but tell us what you want and why and we'll consider your request".

The best way to avoid contract disputes is to work with the right written contract. After twenty six years of practice, I am still amazed that so much business is done on a hand shake and crossed fingers. Even with the best of faith, the intentions of the parties are quickly forgotten without a written reminder. The best agency-client contracts will contain at least the following clauses:

We agree not to act as advertising agency for any product that directly competes with Fly-Hi Cola during the term of this Agreement, and you agree that we shall serve as your sole advertising agency with respect to this product. This means that during the term of the agreement the client has an agency and the agency has a client. If the agency takes on a

competing product it has breached the agreement, and can be fired, but this is less likely to happen than the client hiring another agency during the term to either replace the agency or perform discreet functions already within the agency's area of responsibility. If the client pushes the agency aside before the term is over, the agency can recoup from its client the profits it would have made on the business improperly given to the new agency. In addition to this clause, a well-drafted contract will outline in detail the services to be performed by the agency, or will read, **Agency shall perform all the services customarily performed by a full-service advertising agency.**

You authorize us to act as your agent in purchasing goods and materials on your behalf. We've seen this clause save agencies hundreds of thousands of dollars of state sales taxes so its inclusion in the agreement is important. This is because if an agency purchases tangible personal property, such as art work, for its client's ultimate ownership, the agency may be liable for the sales tax unless it collects the tax from the client and pays it to the state. Unfortunately, many agencies neglect to do this and on audit years later, it may not be possible to go back to the client and recover the tax that the state can force the agency to pay even though payment of that sales tax was the primary liability of the client. If the agency is designated as an agent for its client in the agency-client contract and on the vendor purchase order, there is a good chance the state will look only to the client for the tax under the theory

that the client was the only buyer to whom title was transferred. Most clients will properly ask for some control over what appears to be this unlimited grant of authority by requiring the agency to obtain advance written consent for purchases and commitments.

We will use reasonable efforts to cause vendors and media to perform their commitments, but we will not be responsible for their failure. The week before the big weekend sale, one television station in Boston fails to run the ad blitz and sales at the client's Boston stores suffer. As long as the ads were delivered to the station and the agency's credit is good, this clause should short-circuit all questions of agency liability.

You have the right to cancel, modify, or stop any plans we have made for media or vendors, and upon written notice, we shall endeavor to carry out your wishes. You shall assume our liability for all commitments we make on your behalf and pay to us any losses we may incur. Once the media is committed to, or the contract for services agreed to, the client still has the right to change its mind. But it is likely the agency has incurred costs or will lose revenue as a result of the client's changed plans. Although some media is non-cancelable most is not, and while the client may get out from under a large monetary obligation the agency has certainly incurred substantial costs to that point for which it likely seeks payment from commissions. A win-win. Also, whenever the agency is purchasing non-

cancelable media, such as network sports programming, it is a wise agency that confirms, in writing to its client that the media is non-cancelable and that a change of plans will require the agency to seek a buyer for this otherwise committed time.

We will never disclose your confidential information, nor use it in any way except as required under this agreement. This language is way too broad, but it is often requested by clients. There is nothing wrong with agreeing to keep secret a clients information, but "never" is a long time, and the agency must be careful to define what information it is obligated to keep secret. Instead of confidential information, we like to use, on behalf of an agency, the term, "trade secret, as defined in the Uniform Trade Secrets Act. That at least creates a definition of what the parties intend to be kept secret. Clients will often want this broadened to include "proprietary information", and their request can usually be accepted by defining this term using some elements of the trade secret definition. The disclosee should always be released from its obligation of confidentiality once the information becomes public through no fault of the disclosee. Agencies must also be careful when they receive confidential information in order to compete for new business. Receipt may be used by the disclosor to prevent the agency from later doing paying work for disclosor's competitor.

We will obtain releases of all third party rights for materials we create or acquire. You shall be responsible for releases for any such materials you provide to us and for the accuracy and completeness of any information you provide to us. This simple clause creates balance and places responsibility on the party who creates the material. If the agency hires a photographer the agency must make sure releases are obtained; if the client provides the agency with product claims to be included in the ads created by the agency, the client is responsible for suits brought for false advertising. A wise agency, however, will protect itself and its client by requiring substantiation of claims before they run as this is fertile ground for expensive litigation. The agreement should contain an indemnification that accords responsibility for breach of this representation. Finally, this should not take the place of an advertising errors and omissions policy.

You will indemnify and hold us harmless against losses arising from your use of commercials or materials created by us which use is contrary to applicable union talent codes. SAG/AFTRA union talent codes govern use of union talent, and many agencies are bound by these codes through membership in the 4As, the national agency trade association. Most uses of talent are for a defined time period, such as flights of thirteen or twenty-six weeks. Any use beyond that term must be compensated. Delivery to the client of broadcast advertising materials containing talent after the

contract ends may result in the agency being liable to the union because the client or its new agency used the ads, violating the contract between the old agency and the union. The union contract allows for a written transfer of liability from the agency to the client if filed with and accepted by the union. Doing this is very highly recommended.

You shall execute and deliver to us the SAG/AFTRA Transfer Agreement attached to this agreement. This creates the client's obligation to absolve the agency, accept liability, for unauthorized use of union talent after termination of the relationship. This form is delivered to the agency on the day the contract is signed, and all the agency has to do is not lose the Transfer and file it with the Union when the agency-client agreement terminates.

If you do not pay our bills when due, or if in our opinion your credit becomes impaired, we can change the terms of, or cancel, this Agreement. Even during a thirty day cancellation period an agency can run up a substantial media bill for which it may be liable. Refusal to place a client's ads during these thirty days could cripple the client and expose the agency to huge damages. This provision allows the agency to terminate the Agreement if payment is not made when due.

This Agreement shall be for a term of one year, cancelable thereafter upon sixty days written notice. Agency agreements have historically been cancelable upon 30, 60 or sometimes 90 days' notice by either side. If the agency thinks a better in-category client has come along, the agency can walk from its first obligation on short notice. But an agency's ramp-up for a new client can be quite costly, and the relationship may only begin to generate profits many months down the road. It is for this reason that an agency may want to hold the client to the contract for at least a year. And a client that expends a great deal of effort and money learning to work with its new agency may want to demand the same.

Our rights and duties, and yours, shall continue during the notice of termination period and shall include the ordering and billing of advertising in media whose closing or broadcast dates fall within such period, and we shall be paid commissions therefor. The agency wants to be sure it will be paid for media placed during the notice period, and the client wants to be sure the agency has an interest in doing so. Often, however, a new agency enters the picture before the end of the notice period and the parties agree to release the old agency and pay it what it would have earned if this clause was strictly followed.

All rejected plans and ideas belong to us. This is merely a simple way of retaining title to ideas pitched and rejected. On the other hand, many clients feel that they are entitled to own anything created by the agency for their benefit as long as the bill is paid.

Upon payment therefor, title to property we create or acquire for you shall pass to you. Historically, what is acquired or created by the agency for the client is owned by the client. This clause give the agency a leg-up on an infringement claim and allows the agency to retain materials until they are fully paid for.

We will secure your advance approval of expenditures. This provides comfort to both parties, but in practice it often occurs by telephone. When that happens, agency personnel must make an effort to confirm this approval by tele-conference report or other written means. Some agency clients are glad to take advantage of the benefit of the expenditure but later refuse to pay on the grounds it was not authorized.

If you instruct us to bill your dealer or distributor and it does not pay us, you will pay us on the normal due date. Too often a client raises as a defense that the agency billed the dealer so the agency should expect payment only from the dealer. This conduct is also problematic where there is

a long history of dealer payment of agency invoices. This language eliminates that defense.

Non-prevailing party shall pay all costs, including attorney's fees, arising out of enforcement of this agreement. "You mean I have to pay your attorney's fees? Deal is dead. I hate attorneys," said both parties simultaneously.

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