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CAN MR. BLANDINGS RE-BUILD HIS DREAM HOUSE?

By Jim Astrachan

It won't come as much of a surprise to anyone long involved in the advertising industry – client or agency – that the game has really changed. Once, ad agencies were their clients' marketing partners, and the clients cared enough to assure that the agencies were fiscally healthy by paying decent fees to support the agencies' efforts on their behalf.

Today, some clients treat agencies as commodities. Often, agencies are selected on the basis of low cost responses to RFPs, or by 4 agency search consultants, hired by clients only for this purpose. True, there are agencies, valued by their clients who are treated well, but sadly, shabby treatment may be more common than agencies care to admit, and there is very little prospect for change.

If impersonal search consultants and cost-dependant agency selections do not paint an ugly enough picture, consider that agencies who work with written contracts can usually be fired on 30, 60 or 90 days' notice. And those hapless agencies who eschew a written contract can be fired immediately.

It's not hard to imagine the adverse financial affect on an agency, discharged in the first 6 months, who has spent considerable upfront time to learn its client's business while working for a flat fee with the expectation of a long-term relationship. That agency will never recover its initial investment in learning its new client's business.

Under this assault, can agencies leverage their talent and creative products to assure that they will be able to earn decent fees from the clients? The short answer is "Yes."

First, an agency should always contract to prevent its termination during the first year of engagement. And if it is prematurely terminated, it should be paid for the remainder of the year. That's fair because clients or search consultants usually review

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a number of agencies and have an opportunity to get to know the anointed agency. Clients can review ads created by the agency for its other clients and it can contact those clients for references. Upon selection the client should be willing to commit to the agency for at least a year. Doing so allows the parties a chance to iron out wrinkles in the relationship and provides a financial incentive to work together. After the first year, the contract should require 90 days' notice to terminate.

Second, agencies should consider the novel concept of not giving away their creative. This bucks custom and usage as the traditional agency-client contract provides that once the client pays for the creative, it owns it. Fire the agency the day after payment for creative is made, and the client is free to use the creative forever, subject to SAG-AFTRA rules regarding some talent usage.

Instead of transferring ownership to its creative product, the agency should license its creative products. For example, the client pays a fee to the agency during the term of the contract and during that term is allowed to use any creative prepared for it by the agency. But the agency retains ownership, including copyright of the creative, and when the term of the contract is over so is the right to use the agency's creative, absent a negotiated license fee for use. This theme can be varied to account for those situations where the agency terminates the contract for reasons other than the client's breach, or where the client terminates the agency for real cause. In those situations, the agency might allow a one year paid-up license for use of its creative.

For clients who do not want to risk the inability to come to terms on the use of creative following termination of the contract, a fall back license fee might be provided in the contract if the parties can't reach agreement. And, imaginative negotiators can phase-in client ownership of agency creative if the agency-client relationship lasts for a number of years.

The restrictions on use following termination should be broadened to include not only the *expression* of the agency's concepts but those concepts themselves. For example, the longest running ad campaign, as recognized by TRIVAL PURSUIT, was Choice Hotel's Man in a Suitcase campaign. Choice abandoned this campaign after it changed agencies, but if it did not and still wanted to employ the concept of a celebrity popping out of a suitcase in a hotel room, it would have been free to so do absent a contract restriction. Expression and concept are different so to restrict use of the concept, or theme, the contract restrictions must be sufficiently broad.

Third, agencies can partner with their clients by being paid based on the results of their efforts to sell their clients' products. This takes nerve because success means payment; failure does not. The success of new product campaigns can be measured against client projections – hit the projections, earn a fee and a bonus. Exceed projections and earn a larger bonus. The success of advertising an existing product can be measured against base-line sales. Think direct response. When the ad runs,

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either the phone lines light up or they are dark. Payment or no payment. The same can occur with traditional campaigns although measurement of results will take longer. Contingent compensation should sober an agency's desire to work for a company whose product or staff is questionable. But for good products and clients, a demonstrable record of really pushing sales should lead to new agency business.

Two things are clear. An agency needs to create stand out ads that sell products. And when it develops that reputation, it can demand imaginative compensation packages and the client will go along. Until an agency can do both it does not really control its own future – its clients do.

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