Entertainment Contracts - Get It In Writing

November 6, 2010 by Bob Tarantino

If there's a single maxim by which entertainment lawyers live, it's surely "get it in writing". And if anyone needed a cautionary tale about the matter, then the recently-reported tale of the ongoing legal dispute between Lisa Kudrow (best known as Phoebe from *Friends*) and her former manager (hat tip: Eriq Gardner) should serve the purpose:

Three years ago, Kudrow terminated Scott Howard, a business manager who had been representing her since 1991. **The two operated under an oral deal where Howard provided management services for Kudrow in return for 10 percent commission on her income.**

It was a lucrative arrangement for Howard, even after the commission was trimmed to just 5 percent in 2004. At the height of Kudrow's fame, she was getting nearly $1 million an episode for *Friends*, plus a chunk of the "backend" earnings of the show in syndication.

After Kudrow terminated Howard in 2007, he sued for breach of contract, alleging that she had failed to make ongoing commission payments for work that he had handled. Howard sought a declaration that he was entitled to receive his commissions on all of Kudrow's continuing earnings for work done between 1991 and 1997, even after Kudrow terminated him.

I admit to being surprised when I first read that story - one of the world's highest-paid television actresses had an *oral agreement* with her manager? And over the course of a relationship which lasted more than fifteen years, neither of them saw fit to reduce it to writing? The entertainment industry abounds with stories about deals done "on a handshake", but the notion is enough to give a lawyer a serious case of the heebie-jeebies.

The most recent milestone in the dispute between Kudrow and her former manager is this unreported decision by the Court of Appeals of California, which is well-worth reading in detail. The dispute involves a classic example of the sort of contract term which would almost certainly not be part of an "oral agreement" - because oral agreements are by their nature simple, and the type of clause in question is by its nature complicated. The clause in question is of a type often referred to by entertainment lawyers as a "sunset clause", and is found in contracts which involve some sort of commissionable activity - generally management or agency agreements. (It is not to be confused with a "sunset clause" of the kind found in legislation which provides for a pre-determined expiration date of the legislation.) While a manager might be entitled to a 15% commission on an artist's earnings, a sunset clause would provide that once the agreement had been terminated, the manager's commission entitlement doesn't simply disappear, but rather "leverages down" over a specified period of time (the metaphor recalls the sun sinking below the horizon) - so, even if terminated, a manager might be entitled to receive 15% for the first six months after termination, 10% for the next six months, and 5% for the following six months, with 0% commission thereafter.

Often a sunset clause will be worded to provide that the now-terminated agent is entitled to commission only revenues derived from work performed by the agent (so, for example, fees paid under an endorsement contract which the manager/agent was responsible for advising on or securing). Such a clause protects the interests of a manager or agent who successfully guides a career or secures employment for a client, and who could be short-changed if the client terminates the agreement and, in the absence of a sunset clause, enjoys the full fruits of the manager or agent's work without having to pay any commission (it also serves to prevent a subsequent agent from reaping the rewards of work done by a previous agent).

Alas, Kudrow and her former manager, having no written contract, lack any concrete evidence of whether they had ever agreed to a sunset clause - the former manager, obviously, argues that he was entitled to the benefit of a sunset clause. The argument presented by the manager seems to be that it is customary in the industry for management agreements to contain a sunset clause, and so, even though the agreement in this case was a verbal one, the sunset clause was implicitly understood by the parties to be part of the agreement. The trial judge in the case, agreeing with Kudrow's argument, excluded the manager's evidence about industry custom and practice regarding sunset clauses - the Court of Appeals of California reversed that exclusion, concluding that Kudrow's former manager should have been allowed to introduce such evidence.

While the decision is of course focused on California law, it provides some interesting factual background about how artists and managers conduct their business affairs, and some useful consideration of how artist/manager agreements are structured.
