ADvice
ISSUE 14

A NEWSLETTER FOR ADVERTISING AND MARKETING PROFESSIONALS

HOW TO MASTER YOUR MASTER SERVICES AGREEMENT

Many agency-client relationships begin with the negotiation of a Master Services Agreement ("MSA"). A MSA is designed to provide broad structure to guide the ongoing relationship between the parties, while individual statements of work ("SOW") contain terms specific to individual projects. **While parties often use a MSA from a prior deal and just change the names on the document; what was good for the prior deal is rarely good for the next one.** There are numerous provisions included in a MSA, for instance: who owns the intellectual property that is developed during the relationship; ensuring confidential information is protected; clarifying the rights of a party when the other party breaches the contract; how a dispute is resolved and where it is resolved; and what law applies in resolving any dispute between the parties. The MSA may also restrict each party from soliciting the employees of the party after the engagement ends; and specify the duration of the MSA and any renewal terms. While this article will not cover all the issues mentioned above, each (and even more, depending on the relationship and specific engagement) should be addressed to meet the specifics of your transaction.

WHO OWNS THE IP?

A key component in any MSA is clarifying ownership of intellectual property that is part of any deliverable. The client expects to own what it paid for, and wants to make sure the agency does not use this IP when the agency serves another client. The client, though, should not own any IP owned by the agency and that is incorporated into the deliverable. The agency will likely want to restrict the client to using the IP only for the specific purpose for which the agency was engaged and paid. And, the agency will not want the client to deliver any IP to any future agency or other vendor.

Depending on its level of involvement in the creative process, the client may want to be protected if the deliverable violates any IP rights owned by another person or business. If the client is not actively involved in the process, it may fairly believe the agency should pay for any claim that the deliverable violates the IP rights of another. However, the agency may want to limit its obligation if the client uses the IP in a manner inconsistent with the SOW. Further, the agency should not be held liable for IP violations if the deliverable is used in conjunction with property not developed by the agency or if the client modifies the deliverable in any way.

In many cases, the agency will deliver proposals that are not ultimately used by the client. Who owns this work product must be spelled out. If the client pays for multiple options, it may rightfully assert ownership. Otherwise, the agency

All too often clients come to me after they have run into problems with their own client, asking me to tell them their rights under their contract. Unfortunatley, many clients often just use an old agreement and put in new names for the new deal, and do not take the time to evaulate the risks of this particular relationship.

In this editon of *ADvice*, I review the elements of a Master Services Agreement and discuss some important issues that should be in the document. Each engagement will dictate the scope and complexity of the MSA, but I hope you will find that this is a good foundation to review your own MSA. Remember, *an ounce of prevention is worth a pound of cure*.

I'm always looking for newsletter ideas, so the next issue that perplexes you might also perplex others, and thus be a great topic for *ADvice*. Please let me know. I look forward to your feedback.

Very truly yours,
Kemp Klein Law Firm

Andrew J. Goldberg

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may claim this material was never paid for and it should retain ownership of the property.

HOW WILL YOUR DISPUTES BE RESOLVED?

While parties go into a transaction assuming the best, they must also prepare for the worst. This is why **dispute resolution provisions can be critical**. Be wary of automatically assuming resolving a dispute by arbitration is necessarily the best method. It is often not the fastest nor even the cheapest method to resolve a dispute. Also, if the parties want the right to appeal an arbitrator's ruling, arbitration has little value because it does not bring finality to the dispute. Lastly, an arbitration clause does not need to be stated in the contract; the parties can always agree to arbitrate when the dispute arises.

The parties should also determine where the dispute will be resolved and what state's laws will apply. These seemingly **minor terms can have a disproportionate impact** on the dispute resolution process. If you have to deal with unfamiliar laws, it may be to your disadvantage. Also, if you have to travel to pursue or defend a claim, it adds to the cost of litigation. One option may be for any dispute to be resolved in a court where the defendant is located. In other words, the defendant has home court advantage. This will be a barrier to filing a claim even where you feel wronged, but it does provide an incentive to resolve a dispute before starting litigation.

If one party breaches the MSA, the other side will want to be fully compensated. Of course, the breaching party will want to limit its liability. Options to limit liability include: setting a dollar limit on the amount that can be recovered; giving rights to remedy any breach; or allowing the agency (if it breaches) to just refund any money already received from the client. The parties should also consider limiting the types of claims the injured party can make, for instance, prohibiting special, incidental, consequential, punitive or exemplary damages. Lastly, the parties might wish to shorten the normal statute of limitations in which a party can bring a claim, so they do not have any lingering unknown liability at the end of the engagement.

MORE ISSUES TO CONSIDER

The agency and the client often develop very close relationships with each other's employees. In some cases, one side may actually want to hire the employees of the other side. The parties might consider a one-year cooling off period after termination of the MSA, during which time neither the agency nor the client can hire any employees of the other.

Because of the close relationship between the agency and client, each party will also learn of confidential information of the other. Keeping this confidential information secret is crucial. The client certainly does not want the agency to use any of its information to serve another client; and the agency does not want the client to use any of its secrets to try to negotiate a better contract with another agency. Therefore, the MSA must include confidentiality terms.

Many businesses hate insurance, considering it a *necessary evil* with no real benefit. However, it can be a great tool to manage the risks of the engagement. The agency and client should consider a contract provision eliminating liability of the breaching party if the harmed party has insurance covering the damage. This is often referred to as a *waiver of subrogation clause*.

YOUR ACTION PLAN

These are only a few of the numerous terms that are part of a MSA. Advertising law and general contract law is an ever-evolving process and even varies from state-to-state. Therefore, the parties must be aware that **merely using a previously drafted MSA may not work with the next engagement**. One engagement may be quite different from the prior and have different risk factors, and therefore requires different MSA terms. Careful negotiation to protect your vital interests and to implement a strategic risk management process is imperative to the long term success of your company.

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