

PRWeek

DECEMBER 4, 2009

WWW.PRWEEKUS.COM



MICHAEL LASKY

Successfully negotiate your agency-client agreement

The working relationship between a PR firm and a client is typically solidified by an agency-client agreement. It can be a challenge for a PR firm to secure all the necessary safeguards during the contract process, while still maintaining the goodwill necessary for a successful venture with its new client. The most important legal concepts in an agency-client agreement are ownership of intellectual property, indemnification, and exclusivity. PR firms should prioritize these provisions.

The ownership in the intellectual property is the first key issue, because intellectual property is a PR firm's bread and butter. Clients often attempt to secure intellectual property rights immediately upon the creation of that property, but it is paramount that agency-client agreements reflect that PR firms maintain ownership and title to all materials they create until clients have accepted and paid all charges associated with owning such materials.

The agreement must make clear that transfer of ownership is subject to rights of other parties that may own elements in creative materials, such as materials secured under limited licenses. It should also ensure that the PR firm does not unwittingly transfer ownership to its client of generic or proprietary software, programming, or other materials owned by the PR firm that pre-exist the agency-client agreement or are developed outside the scope of the agreement.

The second key issue is the indemnification provision. This provision allocates responsibility for any potential legal claims by others that may arise due to various aspects of the PR firm-client relationship. Agencies typically indemnify clients against claims arising out of creative materials prepared by the PR firm. These include claims relating to releases, copyright, and rights of privacy and publicity, provided the client uses these

materials as authorized and without modification.

The client typically takes responsibility for claims arising out of materials or information provided to the PR firm by the client. A well-drafted indemnification provision should also ensure that clients are responsible for claims based on the nature, use, or efficacy of the client's products and services. A PR firm should not assume the risk of a claim based on product defects or product liability issues. ??Also necessary is a risk-shifting provision that imposes indemnification obligations on the client in the event that it chooses to accept risks that the PR firm brings to its attention. The indemnification obligation should cover damages or expenses arising out of the lawsuit and legal fees.

The third key issue is the scope of the exclusivity provision. PR firms might have the opportunity to work with multiple clients in an industry, some of which are competitors. Clients increasingly attempt to impose extensive exclusivity obligations on firms. If possible, agencies should try to narrow the scope of these to specific names of competitors, or specific competitive products, particularly due to corporate mergers and consolidations.

Exclusivity provisions should be limited to the period of time of the agreement and apply to members of the account team only, or office, rather than the whole firm. The PR agency should be prepared to demonstrate its commitment to protecting the client's confidential information by usage of firewalls, computer password protections, and separation of files. ■

Michael Lasky is a senior partner at the law firm of Davis & Gilbert LLP, where he heads the PR practice group and co-chairs the litigation department. He can be reached at mlasky@dglaw.com.