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Pitfalls and solutions when negotiating the client's form of master services agreement

Many public relations firms have a preferred form of client contract. Clients hiring a public relations firm, especially for larger engagements, often insist using its own form of contract. In these instances, public relations firms still need to be mindful of the common pitfalls (and solutions) when using the clients form of agreement.

This article will address the four most common pitfalls and the pragmatic solutions.

THE ONE-SIDED LOL – IT'S NOT THAT FUNNY

Problem: The agency-client agreement should include two types of a limitation of liability ("LOL"). The first is a waiver of all indirect, incidental, and similar damages, including lost profits or revenues. This is intended to prevent either party from claiming damages such as lost sales for most circumstances. The second limitation of liability should be a maximum amount of damages that either party can recover. This can be a fixed dollar amount, or an amount that's equivalent to the agency's fees over a certain period of time.

The form client agreement may be missing one or both of these types of LOL. Even if included, one or both may be one-sided in favor of the client. Even if both LOLs are included and are mutual, there may be a laundry list of exceptions that effectively undermine the intent of the provision.

Solution: At a minimum, PR firms should try to ensure its client agreement includes a mutual exclusion of indirect and similar damages. The agreement should also include a mutual "cap" on damages that will not exceed the fees paid under the engagement. PR firms should also avoid overbroad exceptions that could swallow the rule.

THE OVERBOARD AND IMBALANCED INDEMNITY – IT'S JUST TOO MUCH

Problem: The client agreement may require the agency to indemnify the client for a long list of circumstances, some of which are very broad, and some of which address areas that the agency may not provide as part of its services, such as trademark searches. Reciprocally, the agreement may not include any indemnification obligations on the part of the client, or only very limited ones.

Solution: The point of the indemnity is to identify specific potential risks in advance and allocate the risks to one side or the other. It shouldn't be drafted as an insurance policy. PR firms should try to eliminate overarching and broad concepts and concentrate on narrowly focused areas within the agency's control.

THESE ACCEPTANCE TERMS ARE UNACCEPTABLE

Problem: The client agreement may allow the client to withhold payment if the client does not "accept" the services or deliverables the agency has provided, or if the client is otherwise not "reasonably satisfied." Although this may seem reasonable at first glance, the reality is that it may not be fair for the client to have the contractual right to withhold payment based on subjective reasons. Whether or not in practice the agency will do everything it can to make the client happy is a different matter.

Solution: Make sure if payment is tied to acceptance, the acceptance process is based on objective criteria such as the delivery specifications set forth in the mutually agreed statement of work or other written document that the agency has signed off on.

COMPETE – I JUST CAN'T!

Problem: The client agreement may include an exclusivity provision prohibiting the agency working for competitors of the client. Oftentimes this provision is very broadly drafted. Where the client has many different product lines, or is part of a parent company with many subsidiaries operating in different areas, this could mean the agency is prohibited from working on a very long list of products and companies having nothing to do with the products agency is servicing for the client.

Solution: It may be appropriate to try to remove this provision altogether if at all possible depending upon the size of the engagement. The agency can try to comfort the client by pointing out that the agency is bound by the confidentiality provisions in the contract.

In situations in which an exclusivity provision is appropriate, the agency can try to restrict it to the key personnel working on the account, rather than having the exclusivity agreement apply to the agency as a whole. Those key personnel should be mutually designated in writing by the parties. A list of direct competitors could be attached as an exhibit for maximum clarity.

Where that is not possible, it is important to make sure the provision only applies to products or services competitive to the products or services being serviced by the agency and not the entire parent company network of companies or all other divisions of the client.

Understanding these four pitfalls and possible solutions will allow a savvy agency to achieve a fair form of contract even when the client insists on working off its form. Next month's column will address the remaining issues for agencies to include in their client contract negotiations. ●

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