collective wisdom®

SZABO ASSOCIATES, INC. VOLUME 17, ISSUE 2, JUNE 30, 2002

Dear Friends:

A sluggish economy changes some of the ways credit managers approach the credit and collection process. The degree of complacency about the basics of credit management that existed in some organizations in the 1990s is no longer acceptable. Credit staff who are now experiencing their first recession are being reschooled in the logic and arithmetic that underly credit reports and other credit tools. Understanding the basis for the conclusions these tools provide enables them to learn what to look for and to recognize early signs of trouble. Credit managers are also acknowledging the benefits of accelerating the collection process, identifying problem accounts early, and outsourcing to third parties while there still is life in the account and potential of collecting. With indications that the number of commercial bankruptcies will set a new high over the next 12 months, this high level of due diligence is vital.

We hope to see many of our friends at the NAB Radio Show, September 12th through 14th in beautiful Seattle, Washington.

Best wishes for a terrific summer!

Pete Szabo, President
Szabo Associates, Inc.

When You Don't Have a Signed Contract ... Do You Still Have a Chance to Win?

Szabo Associates, Inc. would like to thank Raoul Roth, Esq., of the Law Office of Raoul Y. Roth, Encino, California, for his generous contribution to this article.

The space or spot time was ordered, the ads ran, then something unfortunate happened. Your customer claims that the ads did not run as requested. Your customer claims that the ads were never ordered in the first place. Or perhaps the worst yet ... your customer refuses to accept liability for payment. Additionally, you don't have a signed contract. Is all lost?

While we all know the value of signed contracts, we also know the realities of our business, one of which is that getting a signed contract is often omitted from the sales process. In the absence of a signed contract, however, there are actions you can take to help avoid nonpayment because of disputes, denials of order placement, and liability issues. These actions can be distilled into a single general directive: *Get documentation!*

As any good attorney will tell you, the value of documentation cannot be overestimated. Proper documentation establishes who is primarily responsible for payment and shows that you have met your side of the agreement. There is no such thing as too much documentation! The more that contributes to your paper trail, the better your chances of avoiding the courtroom and the better your chances of winning if you end up there.

Proper documentation can accomplish one of three important goals. The first (most desirable) goal is to convince the party or parties that it/they are liable for payment, the order was placed, you have met your side of the agreement, and the best and cheapest way out is to pay in full or at least agree to a proposed settlement. The second (not-so-bad) goal is to convince a judge of the above so that he or she issues a summary judgment in your favor and you do not have to go through a trial. The last (not-pleasant-at-all-but-better-than-losing) goal is to endure a trial and win.

A simple rule to follow when trying to decide whether a written communication is worth keeping or not, is this: Keep <u>everything</u> ... <u>any</u> written communications between you and your customer. Always keep in mind that every account is a potential prospect for dispute or litigation, at which time you could need all the ammunition you can get.

Who's on First. The issue of liability continues to be thorny for media because there is currently no standard practice in the industry regarding liability. The position of media for the past couple of decades has largely been joint and several liability. Prior to 1990, the position of the AAAA was that the agency was primarily liable for payment for the advertising it placed. This AAAA position created a standard

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practice upon which media could rely. It also stood in contrast to the position in law that an agent or agency is generally not liable for the debt of a disclosed principal.

Media suffered a blow in 1990, when the AAAA changed its position to one of sequential liability, where the agency was liable only if the advertiser paid the agency. With the AAAA's policy change to support them, agencies felt free to choose not to sign and return credit apps, orders, contracts, and confirmations of buys that contained media's joint and several liability clause because they did not want to be bound by media's liability terms.

Clearly, if media is to protect itself, it must obtain some affirmation of acceptance of liability for payment from someone. Credit managers should, of course, always get credit information from the party to whom they are extending credit and whom they deem to be liable for payment. We all know that getting signed credit applications, which include terms and conditions, from both the agency and advertiser is by far the preferred approach.

So you have neither a signed contract nor a signed credit application? There are other ways, though not as compelling, that a customer might give you credit information and, in doing so, affirm acceptance of liability. Even if they are unsigned, documents faxed or mailed to or from the customer that imply liability are useful, as are letters to customers reiterating phone conversations. Even a simple note from your customer about an issue other than the subject of contention may contain a one-line comment that can contribute to your case.

Advertising orders, contracts, or confirmations of buys can play an integral role in supporting your liability position. Identify all parties involved in the buy and send <u>all</u> of them—advertiser, agency, and buyers—orders/contract confirmations that include your terms and conditions on the reverse side. If you are to rely on terms and conditions on the back side of a credit application or contract, many, if not all, states require you to include on the face of the document, in 10 point or larger type, a statement that the terms are on the reverse side of the document.

If you've conducted business through an agency or buying service, you have no signed documents, but you <u>do</u> have documents that imply that your customer is liable for payment and that you have met your side of the agreement, you (or a skilled third-party collector or attorney, if your efforts fail) can often convince the customer to accept liability and pay what is owed. When all you have are unsigned documents on agency or buying service deals, you definitely want to make every possible effort to collect without having to take the matter before a judge! With the state of the industry as it is, with no industry custom and practice regarding liability positions, you face considerable odds in a court of law if you do not have proper <u>signed</u> documentation to support your case. In a recent California trial regarding liability, the agency's counsel referred to the statement in the ad agency's insertion order that the agent was acting on behalf of a disclosed principal. There was no signed credit application, no signed contract, no signed confirmation order, and no signed authorization from the agency binding the agency or advertiser to liability for payment. Even though media sent a contract/confirmation of the buy, including terms and conditions, to the agency, the agency did not sign it because it did not want to be bound by its liability conditions. The judge ruled in favor of the agency and delivered, in addition to her decision, the admonition that "this industry better clean up its act."

You <u>Did</u> <u>So</u> Order It. The most valuable document to support your case when the customer claims that the ad was not ordered is the confirmation of the buy/order/contract, which you mailed at the time of the sale. Again, <u>all</u> parties involved in the buy need to be notified by you that the buy was made, this is what was bought, and these are the terms and conditions.

We are surprised by the recent number of media properties that fail to send out such confirmations following a buy or change order. And while you may expect the national sales reps to send confirmations to the parties involved in the buy, these documents usually will not include your own terms and conditions! Additionally, there are numerous parties involved in the deal, all of whom have their own agreements with one or more of the others. There is the advertiser, which hires the agency, which contracts the buying service, which may sub-contract another buyer, who places the buy with your national sales rep.

There are additional "informal" documents that can prove that someone ordered an ad. Was copy, tape, or digital file sent? Was art sent? An insertion order? Somebody had to send something to publish or air. Such documentation might prove to the liable party that the ad was indeed placed and that a judge might reach the same conclusion if the party wants to push the issue that far.

It <u>Did</u> Run As Ordered. The customer claims the ad did not run as originally ordered. Or it was supposed to be changed. Or canceled. Here again are even <u>more</u> reasons to send confirmations buys/orders/contracts, including terms and conditions, to <u>all</u> parties involved in the buy. These documents will confirm the schedule and state your terms regarding issues such as inability to run and early termination. When no written notification regarding cancellation

clauses is sent, an agency or advertiser can simply place a phone call canceling the schedule without notice. Additionally, if all parties always receive confirmations of changes and cancellations, an agency or advertiser would have difficulty legitimizing a complaint that ads have been running for several weeks after they thought they had been canceled.

You must also, of course, provide evidence that the advertising was published or broadcast as ordered. Many publications require customers to approve final copy prior to printing, and tear sheets provide tangible proof that the ad was indeed published. Affidavit invoices provide evidence for broadcast media that the spots ran as ordered.

Give Your Third-Party Collector, Attorney, and Yourself a Break. If you need to engage a third-party collector and/or an attorney to help resolve any of these problems, give every piece of documentation you have on the customer to them at the start of the process, even if you question its relevance. This is very important in all cases and particularly critical in cases where you have little or no signed documentation.

If documents are given to your attorney at the start of litigation, they greatly assist him or her in planning strategy, attempting settlement, and preparing pleadings. They disclose all rights and remedies available to you, such as short-rate cancellation charges, service charges on past-due accounts, the right to collection and/or attorney's fees, and other perhaps obscure remedies that might be specific to the claim.

Do not hesitate to include documents that are not originals. While most, if not all, states' laws require that the original signed contracts, credit applications, or other signed documents be presented at trial as the best evidence of their existence, appropriate facts may be presented to the court to circumvent the need for original documents. Additionally, facsimile documents can arm your collector and/or attorney with enough compelling evidence to convince the customer to settle out of court.

Scour all relevant departments in your company for information. Sales files usually contain the initial purchase order that states who the buyer is and what it is buying. It probably also contains some form of copy to be aired or published, along with a transmittal letter from the creator or an approval signed off by the advertiser or agency. All notes of conversations with the customer made to the file by the salesperson will prove valuable. Documents filed in the sales and accounting departments many times disclose the existence of a "deep pocket," which could turn out to be the only source of recovery by your collector or attorney. There might be a second entity that was not party to the contract but could be liable because it received the benefit of services rendered. If an additional entity should be included as a defendant, your attorney needs to find this out at the beginning of litigation. Accounting files usually contain a credit document signed by the buyer or its agent when the account was first created. This document might also include background information helpful in locating the debtor.

In Summary. Nothing takes the place of signed credit applications, contracts, and confirmations, particularly when the disagreement concerns who is liable for payment. Without these signed documents, we will continue to wage an uphill battle in the courtroom over liability issues until an industry standard is established. The additional documentation described here is nonetheless valuable for dealing with problems regarding liability, disputes, and denials of order placement. It can provide a basis for a successful motion for summary judgment, or even better, help you avoid the courtroom altogether by convincing debtors reluctant to pay—for whatever reason—that they want to end up in front of a judge even less than you do. ♦

"SO FAR I'VE SENT YOU THE INITIAL CONTRACT, A LETTER CONFIRMING I'VE SENT YOU THE CONTRACT, A CONFIRMATION OF THE CHANGE ORDER YOU CALLED IN, A CONFIRMATION THAT THE CHANGE WAS MADE, AND YOU'RE ABOUT TO GET A CONFIRMATION OF THIS PHONE CALL. SO WOULD YOU LIKE TO TALK WITH OUR LEGAL DEPARTMENT ABOUT WHO DIDN'T ORDER WHAT?"

The Szabo Difference:
Value-Added Risk-Management Tools

You can see from this issue's feature article that Risk Management extends a lot further than many companies believe. It is not merely a matter of sound credit policies. It covers all the potential steps between your earliest marketing efforts and final payment—even, if necessary, through collections. The goal of Risk Management is not to make every sale absolutely safe—a cash policy would do that—but to give your company its maximum potential customer base consistent with safety.

Because good Risk Management can both expand your sales possibilities and make our collection job more effective, we make it a part of our business. We provide our clients with several Risk Management tools as value-added benefits of doing business with us.

- Industry standards. Our deep, long-term involvement in the media industry puts us in a position to know current trends. Our representatives can turn to our Library Resource Center for industry surveys on such issues as DSO, aging, and bad debt. We can help you determine how your company's risks compare to the industry's.

- Legal and regulatory trends. Our Library Resource Center includes up-to-date legal information that can help you determine risk factors. This includes debtor and creditor rights, ad agency and advertiser liability, media/advertiser law and the latest legal opinions on most areas of conflict. If it isn't in our resource center, it's probably in the minds of our on-staff paralegals, who are available to all Szabo representatives.

- Effective paper substantiation. We can help you meet industry standards in your critical forms, from the first credit application to sales contracts to billing to your own early collection efforts.

- The Szabo database. Szabo Associates is famous for the industry's most comprehensive database of agency and advertiser credit and collection activities. It covers well over a quarter-million companies.

Many firms pay good money for information like this. At Szabo, this and much more are available to our clients as value-added benefits. We believe that the more our clients know about Risk Management and collections, the longer they'll stay with us. To find out how to make the most of these "freebies," talk to your Szabo representative about your own company's needs. ♦

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