SZABO
COLLECTIVE WISDOM
szabo MEDIA COLLECTION SPECIALISTS
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Dear Friends:

We've enjoyed a wonderful and busy summer in Atlanta. One of the things that I have been doing (other than continually battling debtors) is increasing value-added services for our clients. Later this Fall, you'll be hearing more about these services, which are part of our continuing commitment to the industry and to the further development of partnerships with our clients in the '90s.

Our calendar for the rest of the year includes the Advertising Media Credit Executives Association conference on October 10th through 14th and the annual Szabo Christmas party on December 19th in Atlanta.

Hope to see many of our friends there! In the meantime, have a happy, hopeful, and prosperous Fall season.

Best wishes,

Pete Szabo, President
Szabo Associates, Inc.

If The Agency Is An Agent, Whose Agent Is It Anyway?

The following article is based on a presentation on advertising agency liability by Barry L. Miller of the Law Office of Barry L. Miller, P.A., 230 E. Marks Street, P.O. Box 1966, Orlando, FL 32802, phone (407) 422-1966. We would like to express our appreciation for his contribution to this newsletter.

Advertising agencies are important. Today's ad agencies are involved in virtually every aspect of advertising, from its creation to the placement and tracking of its results. They are an integral link between the advertiser and the media. And consequently, they often find themselves at the center of controversy on issues regarding advertiser/media relationships.

When conflicts arise regarding the issue of liability for payment to the media, the role of the advertising agency is often brought into question. More specifically, just whose agent is the agency anyway?

Advertisers contract advertising agencies to perform certain functions, and the agencies receive remuneration in a number of ways. The advertiser may pay the agency for its time and efforts on an hourly or project basis. The more common method of payment, however, is for the agency to receive a commission of 15 percent of the cost of advertising placement.

Ordinarily, the agency places the advertisement with the media, and the media then bills the agency. The agency, in turn, bills its client. The client (advertiser) pays the agency, and the agency retains 15 percent of the amount billed as the agency commission.

In view of this relationship between advertiser and agency, it would seem apparent that the agency is the agent of the advertiser. In a number of recent lawsuits brought against advertisers by the media, however, advertisers have alleged in their defense that agencies are the agents of the media rather than of the advertiser. Their arguments are based on the issue of who pays whom. Specifically, they argue that the agency is the agent of the entity that pays it for its services. The advertisers contend that, since the agency receives the 15 percent agency commission off the amount due the media, the implication is that the remuneration comes from the media.

In cases where the advertiser pays the agency and the agency simply disappears or refuses to pay the media, media outlets sometimes sue the advertiser directly. The media usually seek to recover on the basis of breach of contract by the advertiser's agent and also on

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the basis of quantum merit. The advertiser, in such cases, feels that it is unfair that it be expected to pay twice when it paid the agency in good faith.

So is the agency an agent of the media because the commission is deducted from the media's fee to the agency? And if the advertiser paid the advertising agency, is the advertiser automatically free of liability to the media?

The answer to the first question is an unequivocal "no," and the answer to the second is "not necessarily." Although courts have in some instances ruled to the contrary, traditionally the agency is an agent of the advertiser. And there have been instances in which advertisers have had to suffer the consequences of entrusting agencies with funds to conduct business on their behalf.

The relationship between agency and advertiser exists because the two parties have agreed that it exists. Similar to other contractual arrangements, the advertiser must intend that the agency act on its behalf. (Often, the advertiser will assert in its defense that the agency no longer had the authority to place the ad, and therefore, the advertiser should not be liable. If this is so, the advertiser must take some affirmative steps to notify the media outlet that such authority no longer exists.) In collection litigation, the media might assert that the advertiser/agency relationship exists because of a contract between the advertiser and agency, an executed contract between the media outlet and the agency (on behalf of the advertiser), or because of the course of conduct between all of the parties.

Another theory that binds the agency upon the advertiser involves the benefits to the advertiser of the agency's dealings with the media. Let's assume that the advertiser voluntarily places an agent in the position of being perceived by the media as having the authority to conduct business in the advertiser's behalf. The advertiser subsequently receives the services of the media and benefits from the advertising, thereby ratifying the agency's actions.

In these cases, the advertiser cannot attempt to reject the costs associated with the benefits it received. And since the advertiser is the entity that receives the full benefit of the advertising, the media outlet should not be deprived payment for its services simply because it gave credit to the agent instead of to the principal. The chances of recovery are greater in cases where neither the agency nor the advertiser has paid, although there have been court cases in which the advertiser has been required to pay the media even though it had already paid the agency.

Media outlets can save themselves much time and money wasted in litigation by utilizing contracts that most effectively protect them on issues of liability. In view of these tough economic times and of the Four A's position of sequential liability (see "Szabo's Forecast," "Collective Wisdom," March 31, 1991), we have often recommended that media establish Dual or Joint and Several Liability, in which both the agency and the advertiser are liable until the media outlet is paid. Assuming there are proper credit checks and notification, this clause protects the station if either party fails to pay by providing recourse against both parties.

Standard credit applications and contracts for placement should contain language stating that the advertising agency possesses the authority to enter into and bind the advertiser, and that if the agency does not possess the specific authority, then it will be liable.

The media might also obtain an Agency Recognition Form from the

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"Collector's Corner" is our readers' forum for suggestions, comments, and idea swapping. If you have information to share or input on how our newsletter can better serve you, please write or call. We want to hear from you!

Question: Why should a lawsuit be filed in the debtor's locale?

C.P., Tacoma, WA

Answer: The venue will generally be in the county and state of the debtor's place of business or residence, unless otherwise specifically agreed upon between the parties (as indicated in the credit application, personal guarantee or contract).

Assets will normally be found where the debtor is, so the local attorney can apply more pressure on the debtor with regard to the collection process. Additionally, in order to execute, levy, or garnish, the judgment must be entered in the state where the debtor's assets are located.

True Collections

The following story is true. The names, places, and dates have been changed to protect the persons involved.

Get A New Plan, Stan (or: 900 Ways to Leave your Lover)

Stanley Collins didn't own a change of underwear when I met him, but he never seemed desperate, you know? I mean when I saw him for the first time . . . it was in the Bayside Lounge down on Third Street . . . I said to myself, "Now Rita Mae, that over there is a man with ambition." So I just kind of sallied over to the end of the bar where Stanley was having himself a beer and writing little notes on a cocktail napkin.

"You look like a man with a lot on his mind," I said, and he said, "Young lady, what I have on my mind in one minute is as much as most people have on theirs in an entire lifetime." Well, I thought then, rightly as it turned out, that while modesty was not even a bit player in the cast of Stanley Collins' personality, imagination had a starring role.

I like a man with imagination. Seemed like every guy I met before Stanley was just a spectator of life, you know what I'm talking about? They'd say things like, "You don't really want to go out tonight, Rita Mae, Honey. The Lakers game is coming on the TV in an hour."

Stanley and me, we never watched TV. Except now and then to check out his commercials on the cable stations. Went something like, "Do you have a credit problem? Are bill collectors going after you like fleas on a hound dog?" (Stanley wrote that one. "Makes people squirm and want to take action," he explained to me.) Anyway, after that, this great big 900 number flashed on the TV screen and the man says, "If you call this number, we guarantee your credit problems will end today!"

Well I guess there must have been a lot of people squirming all over the country because Stanley's phony corporation got a flood of calls on that 900 line. You'd think more folks would've complained right off because Stanley didn't know anything about fixing anybody's money problems but his own.

Heck, he didn't spend a plug nickel on those ads. How he got all those stations to give him credit I'll never know. And when he couldn't get credit direct, he'd just find some ad agency to get it for him. Meanwhile, Stanley was sending most of his money out of the country and the stations weren't getting one red cent.

Finally, the phone company pulled Stanley's 900 lines and that was that. But not before he dreamed up another scheme: to advertise a service to find ex-husbands who were behind in child support payments. Only problem was how he was going to get credit from the same stations he duped the first time.

As it happened, the phone company, unbeknownst to itself, helped Stanley do just that. It released 175 grand that was sitting in an escrow account and old Stanley went to work with it. Talked his creditors into giving him more credit if he paid 10 percent of his old debt, which was all he could do because after all, he told them, the mean old phone company had frozen millions that belonged to him. Can you beat that?

Stanley had some imagination all right. When the lawsuits finally started, and government agencies were putting together a file of com-

"REMEMBER THAT 'TEAM SPIRIT' SPEECH YOU GAVE TO THE SALES AND CREDIT DEPARTMENTS? YOU'LL BE HAPPY TO KNOW IT FINALLY PAID OFF IN A BIG WAY!"

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advertiser. This document is executed by the advertiser and specifically acknowledges the agency's authority to bind the advertiser. The Agency Recognition Form should also state that, in the event the advertiser entrusts the agent with funds with which to pay the media, the advertiser will remain liable in the event of non-payment by the agency.

The contract might also include a statement that, if the agency fails to remit after it has been paid by the advertiser, the principals of the agency would become personally liable for the debt.

In today's economic environment, where the incidence of bankruptcies among agencies and advertisers has been on the increase, the language of media contracts has become a critical line of defense against costly litigation and loss of money due for services rendered. ♦

True Collections

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plaints big enough to fill a small pickup, and charges were filed that used nasty words like "racketeering," Stanley decided he'd best get himself out of town. And when an agent for the FTC delivered a subpoena for the records of his old company, and a week later the Attorney General delivered a subpoena for the records of his new company, he decided he'd best get out of the country.

Last I heard, Stanley was living somewhere in North Africa. If you want my opinion, he's probably figured out a way to sell one-acre pieces of the Sahara as beachfront "ranchettes."

Well excuse me. Mel's waiting for me over by the TV. He may not be much on imagination, but no one can zap through 50 cable stations faster than Mel. ♦

—story contributed by Andy Carros of Szabo

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