

Dear Friends:

We at Szabo hope you had a wonderful holiday season. Our annual holiday party was a lot of fun, and we thank all our friends who dropped by and helped to make it a success.

This issue's feature is about contracts—not standard media contracts, but those non-standard agreements that seem to be popping up more often these days. Many of these contracts that have come across our desks lately are vague or incomplete, making them virtually unenforceable in a court of law. Our friend, attorney Mac Cushing, offers valuable advice on how to create solid, enforceable business agreements.

And be sure to check the Calendar of Events for important February conventions—hope to see many of our friends there!

Best wishes for a happy and prosperous New Year,



Pete Szabo, President
Szabo Associates, Inc.

How To Cut A Deal Without Cutting Your Throat

Of course, there are places for ambiguity. Like a who-dunnit mystery novel, or a French movie, or perhaps a first date. But one place it doesn't ever belong is in a business agreement.

We've lately noticed here at Szabo an increase in what we might call "fuzzy" contracts—badly structured agreements that are difficult if not impossible to enforce from a credit and collections standpoint. It is understandable that in a highly competitive media environment, there are lots of "deals" being cut out there. But many of these non-standard agreements are thrown together with too little regard for what recourse the credit and collections department is left with in the event of nonpayment.

Szabo Associates recently conducted an interview with Mac Cushing, Senior Partner of Cushing & Morris, a general practice law firm located in Atlanta, Georgia, specializing in corporate work for closely held companies. The discussion centered around how to insure that a business agreement is clear and enforceable.

S.A.: Mac, where do most problems with contracts come from?

M.C.: Contract problems arise most often because of vague or indefinite language or because the

agreement is incomplete, making it difficult to enforce in a court of law.

S.A.: Some might argue that if you draft a contract with the primary goal being its enforceability in the event of litigation, you're likely to kill the deal.

M.C.: That should happen only when the parties cannot come to agreement on the terms. There is benefit to all parties involved for a contract to set forth the deal clearly, in words that can be understood by all participants. But before a word is written, all principals should have agreed upon all the essential terms of the deal. Then you put it in writing. If something is not understood, it needs to be clarified. If it turns out that something in the written contract has not been agreed upon and is unacceptable, the contract shouldn't be signed, and it's back to the negotiating table.

S.A.: Should the media provider involve an attorney in the negotiation process?

M.C.: The media provider should decide independently which business ("economic") terms are acceptable and which are not. When it has reached a decision on these terms, it would

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be wise then to ask its attorney about the consequences of its conclusions and whether there are other legal terms that should be included.

S.A.: Before involving an attorney, is there a way for the media provider to determine if it has covered all the bases fairly well, at least in a categorical sense?

M.C.: It's helpful to consider each basic element of a contract and what it should include, particularly the business terms of the contract and identification of the parties to the agreement. Other elements are consideration, execution, and delivery.

S.A.: How would you insure enforceability of the contract with regard to the business terms of the contract?

M.C.: The business terms must be set forth with reasonable specificity. This means that each aspect of the arrangement should be clearly specified, including price, terms of payment, nature of advertisement to be run, party responsible for costs, timing of airing or publication of advertisement, etc.). If any significant term is not included in the written agreement, the parties may be forced to argue or litigate over verbal statements in order to "fill in" the missing components. In such situations, if the terms are sufficiently lacking or ambiguous, a court may refuse to enforce the contract at all.

S.A.: Is there a particular format that is preferable?

M.C.: The format is very much a matter of personal choice.

S.A.: Let's talk about the parties to the agreement.

M.C.: It is surprising that one of the issues surrounding many advertising contracts is the question, "Who are the parties to the agreement?" Generally, there are three parties that have an interest in the contract: the advertiser, the advertising agency, and the media provider (the television station, radio station, publisher, etc.). Because the law in the various states is unclear and inconsistent regarding the ability of an advertising agency to bind the advertiser with respect to advertising commitments, it is critical for the media provider to determine with whom it has a contract.

S.A.: With the advertising agency, the advertiser, or both.

M.C.: Exactly. If the contract is simply between the media provider and the advertising agency, without any reference to the advertiser, the media provider may be limited in its recourse to the financial viability of the advertising agency, even though the advertisement was for the benefit of the advertiser. If the advertiser-advertising agency relationship is disclosed in the contract, the media provider will have a much better argument to obtain recourse against the advertiser. Of course, the advertiser can (and probably will) argue that the advertising agency did not have authority to enter into such a contract.

S.A.: What would you suggest to avoid this situation?

collector's corner

"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.

Question: I'm getting orders lately from agencies that say, "This order is to be governed by the 1991 copyrighted version of the 4A's contract." What does this really mean? And is it enforceable?

S.B., New York City, N.Y.

Answer: It refers to the 4A's position of sequential liability. Sequential liability means that the agency will be solely liable for payment of media invoices if the agency has been paid for those invoices by the advertiser. Prior to payment to the agency, the advertiser will be solely liable.

You should treat the statement as a disclaimer with respect to liability. The statement is as meaningful as if the actual language of sequential liability had been used.

If you choose to accept the order, and your terms and conditions are not sequential, you should promptly notify the agency, in writing, of your position regarding liability. Be aware, however, that such notification does not in itself protect you in the courts unless the agency agrees to your notification in writing.

M.C.: I would recommend that the media provider do one of two things when the advertiser does not actually sign the contract. The first alternative is to specifically state in the contract that the advertising agency is unconditionally and primarily liable for all payments due to the media provider, regardless of whether the advertising agency is paid or reimbursed by the advertiser. Also, in these cases, the media provider should make sure that the advertising agency is financially viable and can satisfy the obligation without reimbursement from the advertiser. The other alternative is that the media provider require that each advertising agency present written confirmation from the advertiser that the advertising agency is authorized to negotiate and enter into a binding contract on behalf of the advertiser.

S.A.: What about the issue of who has the authority to bind a company?

M.C.: It is essential that the parties to the contract and their individual representatives be clearly identified. This falls into the element of "execution." The individuals signing a contract on behalf of a legal entity (corporation, partnership, limited liability company, etc.) should clearly indicate the legal capacity in which they are signing. A signature on behalf of a legal entity which does not indicate the legal capacity of the individual could cause serious problems if the individual does not have a position that authorizes him or her to act on behalf of the entity.

S.A.: An example?

M.C.: If the contract is signed by the receptionist or delivery person on behalf of the advertising agency or advertiser, the advertising agency or advertiser may not be legally bound because the individual did not have proper legal authority to enter into contracts on behalf of the entity. Generally, if the designation of the individual's position is "lower" than vice president, the

media provider should obtain specific written confirmation with respect to the person's authority to bind the legal entity.

S.A.: We've discussed identification of the parties, terms, and execution. That leaves consideration and delivery.

M.C.: "Consideration" means simply that each party must gain something from the agreement. The legal concept of "consideration" is not often an item of dispute. Generally speaking, the respective promises of each party, (that is, the media provider's promise to air or publish the advertisement in exchange for the advertiser/advertising agency's promise to pay) is sufficient to support a legally binding contract.

It is important for the media provider to air or publish the advertisement in a manner which complies with the contract specifications, both in terms of quality, time, repetition, etc. If the media provider does not make delivery of the advertisement in accordance with the exact specifications of the contract, the advertising agency or advertiser will have grounds to claim damages for breach of contract. If the delivery is sufficiently contradictory to the terms of the contract, the advertising agency or advertiser may have grounds to void the entire contract.

Szabo Associates, Inc. would like to thank Mac Cusbing, Senior Partner of Cusbing & Morris, in Atlanta, Georgia, for his contribution to this article. ♦



"BOSS, THOSE 'CONTRACT EXPERTS' YOU ASKED ME TO FIND ARE HERE FOR YOU TO INTERVIEW."

Why We Work the Way We Do Industry Involvement

If you belong to any media industry organization, chances are you've seen a Szabo representative participating in it.

No other credit firm is as deeply involved in industry trade shows, conventions, seminars, and other activities.

This kind of involvement creates a lively interchange of ideas that helps us do a better job for you. We hear first-hand about the problems and opportunities you and others in your industry are facing. And we use industry groups as forums to pass along valuable news on credit collections and management.

We're involved in giving lectures, participating in group discussions, and writing papers on new developments.

We work with industry associations to promote better credit

management. We bring your industry the latest information you can use to manage credit more effectively—information from Washington, from state and local regulating bodies, from other industry groups, and from the field.

Some of the articles and books we've contributed to include "Understanding Broadcast and Cable Finance," the "Broadcast Credit Administration Manual," and such National Association of Broadcasters books as "Radio Credit Manual," "Off the Books and Into the Bank," "Out of the Red and Into the Black," and "The Small Market Television Manager's Guide—II."

Industry leadership sometimes provides advantages we hadn't anticipated. Many times, your customers already know of our reputation and respond more quickly. They know that when you call in

Szabo to collect a debt, you mean business.

But the main benefit of industry involvement is what we learn from you. It's another way Szabo people keep better informed about the business of media. ♦

Calendar of Events

February 14-16

Georgia Association of Broadcasters
Radio-TV Institute

Georgia Center for Continuing
Education
Athens, Georgia

February 15-17

Broadcast Cable Credit Association
Scottsdale Hilton Resort & Spa
Scottsdale, Arizona

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