collective szabo MEDIA COLLECTION PROFESSIONALS wisdom®

SZABO ASSOCIATES, INC. VOLUME 26, ISSUE 4, December 31, 2011

Make Your Contracts "Bullet-Proof"!

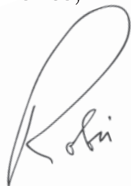
Dear Friends:

Even as technological advancements propel us into new ways to exchange information, the information itself pretty much stays the same. What you need to know before engaging in a business relationship—about an individual or company, and about the expectations and obligations of everyone involved—remains at the center of every deal. This issue's feature discusses the contract essentials that can help protect your organization in all aspects of the business agreement, from negotiation to collection.

Our winter agenda includes the Media Financial Management (MFM) CFO Summit on February 23-24 in warm and sunny Ft. Lauderdale, Florida, where we're pleased to sponsor the opening breakfast.

Szabo Associates has had much to celebrate in 2011. At the close of our 40th year in business, I would like to say "thank you" to all who have supported us so much through the years. All of us at Szabo Associates hope that 2012 will bring new levels of prosperity and personal enrichment to all of you.

Best wishes,



Robin Szabo, President
Szabo Associates, Inc.

Every business deal involves a contract of some sort. Virtually any time you or your company agrees to either do something or pay an amount in exchange for something of value, a contract exists. Verbal or written, simple or complex, contracts compel its parties to behave in an agreed upon manner. Most people who enter contracts have every intention of honoring their part in the agreement. The majority of problems arise when parties fail to understand or disagree on the exact nature of their contractual obligations.

In order to meet the legal definition of a contract, an agreement must include several factual elements: an offer; acceptance of the offer, a promise to perform; consideration (something of value that each party gains from the agreement); a time when performance must occur; terms and conditions for performance; and the performance itself. Media contracts are by nature complex, often involving a series of performance requirements and numerous terms and conditions. The "What," "Who," "When," "Where," and "How" aspects of the agreement should be clear and indisputable in any well-drafted contract.

What.
The "what" in the written contract should essentially be negotiated, understood, and agreed upon by the principals before the document is presented for signature. Once the deal is negotiated and agreed upon, all parties benefit by having it in writing and signed. If any item needs further clarification, the contract should be rewritten prior to requesting signature.

"Fuzzy" contracts, which fail to properly detail every expectation of the parties involved with regard to business terms, consideration, execution, and delivery, have no place in today's media environment and most often are the source of disputes and litigation. While our focus is principally on credit and collections, it is important to note that a well-drafted contract must include <u>all</u> aspects of the deal—terms, dates, amounts, warranties, performance, cancellation, and default—any and all issues pertinent to the buy. Credit and sales personnel should be familiar with all inclusions and able to explain them to customers, thereby reducing the chance of misunderstandings later. If any significant term is omitted from the written contract, the parties may be forced to argue or litigate, and a court may refuse to enforce the contract at all.

An effective contract must be clear and concise. Sentences should be short. Pages should be numbered. Arcane terminology whose meaning is known only to legal professionals should be avoided where possible. Legal or other terms that must be included but are not commonly understood should be defined. Tone, grammar, and word usage should be consistent. Business terms should be presented with reasonable specificity, allowing no misinterpretations of wording about price, terms of payment, party responsible for payment, timing of the advertisement, etc.

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Who.
Parties to the contract, as well as individual representatives, must be clearly identified. The correct legal name of the entity must be listed, as well as any other names under which the entity may operate. Individuals signing the contract on behalf of a legal entity (corporation, partnership, limited liability company, etc.) must be authorized to act on its behalf and should clearly indicate the legal capacity in which they are signing. The signatories should both print and sign their names.

If the contract is with an advertising agency, the contract should state that the agency is unconditionally and primarily liable for all payments due to the media property, regardless of whether the agency is paid or reimbursed by the advertiser. (Agencies that have a parent company usually operate contractually as individual entities, with contract requirements that address their particular business model and services.) For additional protection, Szabo recommends that the contract (and for that matter, credit applications and all subsequent invoices and correspondence) include a "joint and several" liability clause, which states that both the agency and advertiser remain liable for payment until the media property is paid. Because the joint and several liability position holds the advertiser responsible in the event of nonpayment by the agency, the advertiser should receive a copy of the contract.

Where.
The "where" in the contract agreement is often underestimated in its importance until the contract is breached. When enforcement of the contract or recovery of loss becomes an issue, however, the "jurisdiction and venue" clause in the contract can greatly affect the decision about how to move forward as well as the final outcome.

Jurisdiction is the power or authority to decide, interpret, or apply the law. As explained in Nolo's Plain-English Law Dictionary, a court must have both "subject matter jurisdiction" (power to hear the type of case in question, which is granted by the state legislatures and Congress) and "personal jurisdiction" (power to make a decision affecting the parties involved in the lawsuit, which a court gets as a result of the parties' actions). The court may be a municipal, general, county, state, district, or federal court.

Venue is simply the locale in which a suit may be filed. The choice must be appropriate under the law. Where the contract was entered into, where the contract is to be performed, or where one of the principals resides or conducts business would be deemed an appropriate choice.

Jurisdiction and venue can be decided in two ways: (1) by review of the events and documents from which the dispute or debt arose, or (2) by consent of both parties in the terms and conditions of the agreement that is the basis of the dispute or debt. Particularly when contracts involve parties in different states or countries, agreement on a jurisdiction and venue clause in the contract can save considerable time, trouble, and money if contract enforcement becomes an issue.

On the face of it, a jurisdiction and venue clause stating that both parties will submit to the jurisdiction of courts in your county and state seems the most advantageous. With this option, the debtor would have to retain counsel in your location, your witnesses most likely would not have to travel as far, you would be familiar with local courts, and the debtor may be discouraged to retain counsel out of state when relatively small amounts of money are in dispute.

There are, however, some disadvantages to this choice. The debtor's assets are more likely to be where the debtor is located rather than where the judgment is entered. If your judgment is awarded against an out-of-state or out-of-country debtor, you then must pursue recognition and enforcement of the "foreign" judgment in the debtor's locale.

Recognition occurs when the court of one jurisdiction or country accepts a judicial decision of a foreign jurisdiction or country and issues a judgment with virtually the same terms without rehearing the substance of the lawsuit. It can refer to either a "foreign-country judgment" (from another country) or "foreign sister-state judgment" (from a different state within the U.S.). Once the judgment is recognized, the prevailing party can then seek "enforcement" by accessing all the enforcement remedies of the jurisdiction that recognized the judgment.

The "Uniform Foreign Money Judgments Recognition Act," which requires states to give effect to the judgments of other states with the proper filings, applies in all states with the exception of Indiana, Massachusetts, and Vermont. In these three states, a "domestication" action must be filed, which is generally a mere formality since the full faith and credit clause of the U.S. Constitution requires states to honor judgments of other states. Additionally, a small minority of jurisdictions, including New York state, require bringing a new action on the judgment in certain types of cases.

The key to using jurisdiction and venue to best advantage is to create a clause in the contract that prevents the defendant debtor from effectively arguing improper jurisdiction while offering media flexibility. Language that requires suit in only one jurisdiction and/or venue should be avoided. Rather, a clause in the media contract whereby both parties consent that proper jurisdiction may be a particular state and court allows the option of suing in the media organization's location if deemed most advantageous. The wording of the clause should be developed with in-house or corporate counsel.

How.
When contract disputes cannot be solved by the parties themselves, the "how" becomes a critical step in the path toward the most satisfying resolution. Contract clauses that state the course of action can save the parties considerable resources.

Default. The consequences of default should be addressed in the payment terms and payment schedule section of the contract. If terms are net 30 upon receipt of a proper invoice, wording might be, "In the case of nonpayment, vendor will be entitled to recover 1.5% (or whatever is the maximum allowable by governing law), compounded monthly on the overdue amount in addition to the original amount outstanding, and in addition to any costs associated with debt collection. In the case of default, the creditor may change credit terms and/or cancel the remaining term of the contract." Again, wording of the clause should be developed with in-house or corporate counsel.

Arbitration. Because of the potential cost of lawsuits, contracts often include clauses requiring parties in dispute to submit to arbitration, a technique that employs an independent and neutral third party to settle disputes outside of the court system. Arbitration is one type of ADR, or alternative debt resolution.

There are a several advantages to arbitration. The process may be faster than traditional court proceedings, depending on the schedule of the parties and the arbitrators. The media organization can insert language into its contracts that stipulate the arbitration organization of choice as well as the number of arbitrators that will hear the dispute. Also, because there are limited avenues for appeal, the duration of the dispute may be further shortened, reducing costs even more.

The disadvantages of arbitration are also considerable. While cost containment is the primary goal of arbitration, the cost of arbitration can actually be higher than the cost of a lawsuit. For example, Szabo attorneys typically work on a contingency basis with costs advanced by clients, while costs for arbitration may be based on the balance of the claim and may be several hundred or even thousands of dollars. Depending on the chosen arbitrator or arbitration organization, discovery may be limited or nonexistent, and there may be a limited number of locations for face-to-face arbitrations to take place. Although usually thought to be a faster process than lawsuits, juggling the schedules of several arbitrators for hearings can cause delays. Awards must be confirmed as judgments in order to execute or collect if the losing party fails to voluntarily pay. Additionally, the limited avenues for appeal can make it difficult to overturn an ill-founded decision.

Because of the many advantages and disadvantages of arbitration, each organization, with its legal counsel, should determine whether inclusion of an arbitration clause is to its best advantage.

Attorney Fees and Collection Costs. The contract should include a clause allowing the attorney to ask the court to award "reasonable attorney fees" in the judgment. Typically, in collection cases, the amount that is "reasonable" is determined by the judge in the absence of local, state, or federal statutes. Collection costs or fees should also be specified, allowing suit for the costs of placing the matter with a collection agency. It should be noted that not all states allow the request for collection fees in a complaint, and some states may interpret attorney fees and collection costs as the same item with regard to handing down an award.

Cost reimbursement to the prevailing party should also be included in the contract to cover out-of-pocket costs such as filing fees, service costs, etc. Additionally, interest payments on overdue amounts should be specified; otherwise, the applicable prejudgment interest will default to the amount allowed in the state. A commonly used statement with regard to fees and costs is, "Advertiser (or other party) agrees to pay all attorney and/or collection fees incurred in the collection of any unpaid balance, along with all costs." As with all contract clauses, the statement regarding fees and costs should be reviewed by counsel.

Non-Originals, Electronic Documents, and Electronic Signatures. There will be times, as we all know, when a signed original hard-copy contract cannot be offered to the courts for consideration. Szabo Associates posed the question about the validity of non-original documents in the courts to a number of attorneys across the country, who agreed that while originals are always best, copies can be acceptable in the majority

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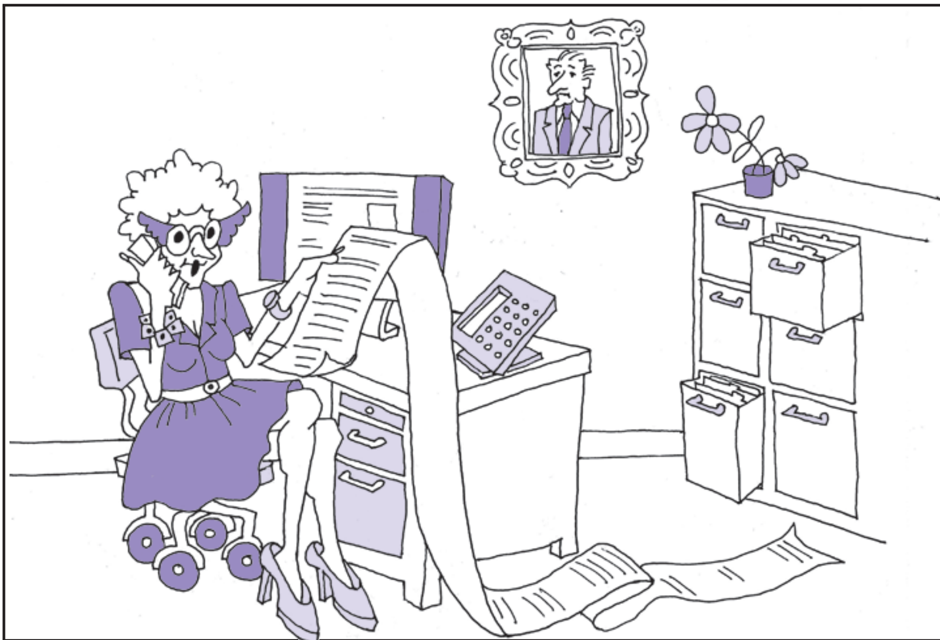

"You know I think it's important to put things in writing, Loretta. But if some guy handed me a prenuptial agreement like this, I'd be thinking twice!"

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of cases. Generally, the court asks for an original when entering the judgment. The court will almost always accept a copy in lieu of the original if the original is lost or destroyed. An affidavit or testimony by a sworn witness that the copy is true and correct and/or that the company has a "scan and destroy" policy will usually suffice as evidence.

But what if an "original," by our traditional definition, never existed? In a time when electronic generation and transfer of documents are common practices, with more and more organizations adopting a policy of scanning old documents, destroying the originals, and generating new documents electronically, are such documents enforceable? Two questions arise from the issue of enforceability: Does the contract exist as a valid document? Are the signatures on the contract authentic?

In 2000, Federal legislation removed the uncertainty that plagued e-contracts by enacting the Electronic Signatures in Global and National Commerce Act (ESIGN Act). The law made electronic contracts and signatures as legally valid as paper contracts. Additionally, the Uniform Electronic Transactions Act (UETA), which was approved by the National Conference of Commissioners on Uniform State Laws in 1999, has been adopted in all but three states. (Washington, New York, and Illinois have adopted their own electronic signatures statute.) Both ESIGN and UETA were enacted to help ensure the validity of electronic contracts and the defensibility of electronic signatures; however, neither adequately addresses the question of authenticity.

One significant difference between ESIGN and UETA is that the latter requires notices to which the parties must agree prior to the electronic transaction. The type of agreement required for the e-signature to be valid varies according to the context and circumstances. Additionally, electronic documents must be available to all parties to view, print, and store electronically in order to be legally binding.

In what seems to be an increasingly depersonalized business environment, a good practice for dealing with e-signature validation has the added benefit of enhancing the business relationship between parties. Fostering an ongoing relationship, talking to the signatory prior to the electronic signing, and having additional evidence of the signatory's intent to do business (such as payment) can reduce the risk that the signature is invalid. (Note: Technology continues to evolve in the area of "digital signatures," otherwise know as "cryptographic signatures." Often confused with the more general category of electronic signatures, current systems for digital signatures employ several algorithms to validate authenticity.)

Contracts lie at the heart of most business transactions. A good contract does not foster an adversarial relationship between parties; rather, it validates the understanding between parties of their relative obligations and expectations. A contract that explains and supports a media organization's business model will offer ample return on the resource and time investment required for its creation. ♦

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