

9/19/21 Notes by Richelle Brooks, [Schroder PR](#)

The 5 Legal Mistakes your agency is making in new business...and how to fix them (Sharon Toerek, Principle Toerek Law)

Agency New Business Process

Problem: You don't protect the agency's IP in the pitch or proposal

Solution: By contract – get an NDA first

- NDA Do's – take positive approach when talking to prospect about signing NDA, present NDA as mutual benefit and protects prospect and agency both
- NDA Don't's – don't sign client's NDA if it isn't mutual, or attempts to create ownership in the agency's IP automatically, don't have a "don't ask" default position on NDA's – sometimes they don't work and sometimes they DO
- Include an IP Ownership Clause in the Proposal or Pitch Deck (documents)
- Use Copyright Law to your advantage – copyright notices on sample campaign pieces and marketing documents, or anything in tangible form is subject to copyright notice

Problem: You accept the client's contract without adequate challenge

Solution: Review every single contract thoroughly for proper review of MSA's

- Watch out for "bad" terms – client owns all work you do for them only after you get paid for that work, long payment terms (can pre-bill expenses) or terms start after client "approves" the invoice plus exclusivity demands, unreasonable agency liability provisions that don't account for the clients behavior or failure to act, no language about approvals process for work, costs, legal reviews

Solution: Benchmark against agency's contract – What is your agency contract?

Problem: You create a new legal paper trail with each new deal or client

Solution: Process (the standard) of bringing on a new client contractually. Change is overrated here for changing contracts for each client.

Docs needed: Standard NDA, standard agency master service agreement, standard short-form legal terms and conditions

- Consider standardizing: proposals, SOWs, "change orders," client approval forms

CENTRALIZE

- One person or dept. should be coordinating and reviewing contracts for clients

What does the agency keep?

- Unexecuted ideas/concepts
- Rejected ideas/concepts
- Pre-existing agency IP (Process/Strategy, Proprietary software, Content incorporated into final deliverable)
- Portfolio Rights in completed assets for agency promotional use

Address payment options and penalty for non-payment or late payment NOW rather than when the problem occurs – this put in initial contract

Liability – clear approval and clearance language for completed work, don't accept liability for work or info. The client does, supplies, or changes, require client legal review of: ad claims, trademarks, regulatory issues, limit insurance coverage (cyber insurance) policy limits to what's reasonable for the size of the project/relationship, limit agency's liability to only the amount of compensation paid

[Get checklist for agency MSA's]

Campaign Strategy that lawyers love

Industry dynamic – today's marketing work product is collaborative, and so is the responsibility

The Disclaimer – nobody expects you to be a lawyer

Trademark Infringement – know that an available domain name is not a clear trademark, go beyond “knockout searching” as a standard practice, remember trademarks are product and service category specific

Copyright Violations or Misuse – art, copy, music, video on clients brand need to be asking about licensing and stock use and make sure proper licenses were obtained

Risk Reduction for Copyright Issues – Read your licenses! Stock photography, music, fonts, graphics – No written license or permission, No Using The Asset! – Get freelancer/signoff of IP rights on all creations and contributions (IP release even if you've paid them – rights don't transfer with money)

Be aware of False or Misleading ad campaigns – ask your client about their product claims (performance and limitations), know what proof or documentation backs the claim, be clear and straightforward in your copy, imagery

FTC Compliance – transparency is number one thing that is looked for – everything has to be disclosed with influencer marketing especially – work with influencers who understand FTC rules

Data Privacy in direct response work – know that it's the consumer's location, not the brand's, that matters – if nobody can prove opt-in, assume there is no opt-in, set up a process and workflow for responding to privacy inquiries (How are you going to help your client respond to data privacy inquiries?)

Strategies to protect agency from risks

- Freelancers/contractors NEED A WRITTEN AGREEMENT
- Contractors may need the same training that an employed team member needs on the legal and compliance side, especially with social media and online marketing campaigns
- Think about campaign risks in advance when planning the campaign – all legal questions that need to be addressed
- Project Mgmt is your friend – track license deadlines, product claim evidence, document brand uses, permission
- Invest in regular team training for best practices
- E&O, General, Cyber insurance coverage where policy matches insurance limits

9/20/21 Breakout notes

[Marketing “Under the Influence” Creating Campaigns Lawyers Love! [Sharon Toerek – IP & Marketing Law attorney] sharon@legalandcreative.com, 800-572-1155]

Influencer Trends

Trend 1: More micro and nano influencers, fewer Macro Deals

Trend 2: Less focus on “Celebrity” and more focus on Influencers who are Content Creators with high quality Content

Trend 3: Using Paid Boosting or Amplification of Content to Expand Reach (vs. relying on the size of a celebrity audience)

Trend 4: More brand partnerships with influencers – including content co-creation

Trend 5: Increased willingness to address Social Issues in Content

Trend 6: Increased Focus on “Authenticity” in Content – Less Filtering (ex: TikTok)

Trend 7: More Social Commerce – Shoppable Posts

Key Legal and Regulatory Risks

- Compliance with FTC Influencer Requirements – Disclosure, Transparency (Were they paid? Did they receive free product or services? #Hashtags)
- Product claims and compliance in Advertising Rules – no claims that you or client can’t verify
- Misappropriation or Misuse of IP (Copyright or Trademark)

Overall: The Agency is assuming LEGAL RISK here, because in most cases the influencer is contacting directly with Agency

Key Business Legal Issues

- Ownership of content and/or limits of content use
 - o Does influencer own their content and license it to Agency?
 - o Does Agency retain the content?
 - o What does the Client Agreement say about ownership?
- Exclusivity of the Relationship
 - o Can the Influencer represent competing or adjacent brands?
- Scope of Activities
 - o Frequency of activity, specific platforms engaged, platform features used or required
 - o Comes down to what is in the SOW between Agency and Influencer
 - o Ability to see backend of influencer so you can let client know how influencer campaign is going
- Reputational Risk to Brand due to Influencer Conduct
 - o The “Morals” clause

Key Influencer Contract Terms (AGR)

- Term – the duration of Agreement
- Quality of Service/Content Approval – Agency’s basis for approval of all influencer content and right to terminate if standards not met
- Termination/Morals Clause – Agency’s basis for terminating the Influencer or the Agreement, including for Influencer behavior
- Confidentiality – NDA required?
- Exclusivity – can define by time (year as benchmark) OR specific companies excluded, certain brands excluded
- Equitable Relief – ability to stop damaging behavior (in addition to simply getting money damages for it after the fact)
- Indemnification
- Ownership vs. License of IP in Content – distinction btw Influencer’s work being treated like a work for hire vs. them “licensing” the content to Agency and the brand for certain uses or certain time frames
- Force Majeure – event that makes it impossible for one or both parties to perform the contract
- Legal Terms – where the actual legal terms and conditions are stated (what looks like the actual “contract”) – Have separate SOW, not the same as the contract
- Statement of Work (SOW) – description of the specific work and services, including timelines, compensation, specific platforms, frequency, etc.
- Compliance Guidelines – guide to appropriate disclaimers, disclosures, and conduct of required FTC (and brand) of influencer
- Brand Guidelines – client guidelines on brand, prohibited behaviors of influencer, and sometimes Exclusivity information

Create system/process to use for Agency - Due Diligence checklist for choosing an influencer

- Have you ever?
- What are all of your channels?

Key Negotiation Points in the Influencer Relationship

- Duration/Term of the relationship
- Compensation to the influencer
- Exclusivity of relationship
- Approval Rights and Process for content creation
- Ownership vs. License of content

Negotiation Tips/Strategies – Handling the Communication

- FIRST: What are the key campaign goals and what are the available resources? Know this before negotiating!
 - o How much money is available?
 - o What is the ROI expected from the Client? What metrics are used to measure ROI?
 - o What competition concerns does the Client have?
 - o What is the client culture and expectations about Influencer behavior?
- NEXT: Determine whether the negotiating is about money OR some other legitimate business or creative concern of the influencer...

- THEN: Work out the details in THIS SUGGESTED ORDER:
 - 1. Relationship Goals
 - 2. Campaign Details
 - 3. Campaign Duration
 - 4. Influencer Compensation
 - 5. Legal Terms & Conditions

MSA OVER LETTER OR ENGAGEMENT FROM AGENCY TO CLIENT

SHORT FORM FOR QUICK PROJECTS WITH LEGAL TERMS & CONDITIONS

GUIDELINE FOR SOCIAL MEDIA PRESENCE IN EMPLOYMENT CONTRACT

SUBSCRIPTION FOR CONTRACTS/AGREEMENTS