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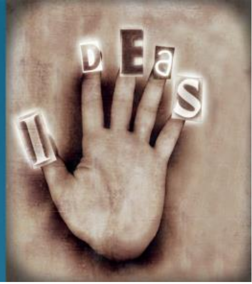


**2018 ANA ADVERTISING LAW & PUBLIC POLICY CONFERENCE**

# BRANDS IN CRISIS: EFFECTIVELY MANAGEING LEGAL REPUTATION AND RISK WHEN SOMETHING GOES WRONG

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MICHAEL LASKY

# Battling the real 'fake news'

Unfortunately, the unauthorized use of a celebrity's name and image has become a deceptive marketing practice frequently used by dishonest online marketers. This type of promotion typically claims (falsely) that a public figure has used or endorsed what is billed as the latest miracle weight-loss supplement or wrinkle-reducing cosmetic.

Going after these bad actors to protect one's right of publicity and intellectual property rights can be a challenge. It also tends to be difficult to identify the responsible parties, and even if they can be found, they may be either a small operation that appears not worth pursuing or an enterprise outside of the reach of U.S. laws. A recent action by the Federal Trade Commission, however, serves as a reminder that those who peddle in false online endorsements may be part of a larger network that can be identified and stopped.

In December, the FTC announced that it had reached an agreement to settle charges against a network of internet marketers who for years had sold its alleged weight loss, muscle-building and wrinkle-reducing products to consumers using false and deceptive marketing and billing practices. These practices included the use of fake magazine and news articles and phony celebrity endorsements. The settlement is notable not only for the substantial financial award achieved by the FTC, but also for the breadth of the marketing network involved.

Celebrities and public figures seeking to combat the unauthorized use of their names or images in internet marketing campaigns should take comfort from the FTC's settlement. Through skilled investigatory work, it is possible to identify the parties responsible for such misconduct and put a stop to their deceptive schemes.

**The network**

According to the FTC's complaint, three individuals used a complex network of 19 corporate entities to market and sell purported weight-loss, muscle-building, and wrinkle-reducing products. The defendants allegedly marketed and sold their products "through an interrelated network of companies" that were under common control and ownership, and shared officers, managers, employees, call centers, recordkeeping systems, commingled funds, and sales practices. The FTC alleged that the three individual defendants controlled each of the corporate defendants, some of which they owned themselves, and others which were owned by family, friends, employees, and unpaid interns.

The defendants marketed and sold their products on their own websites and on those operated by "affiliate marketers," which are independent marketers hired through third parties known as "affiliate networks." The defendants paid a fee to the affiliate network every time a consumer bought one of the defendants' products after visiting a site hosted by an affiliate marketer in the network. The FTC alleged that in 2015 alone, those fees amounted to more than $19 million.

**The 'fake news'**

The FTC's complaint describes a variety of deceptive marketing and billing practices that were used by the defendants. Most notably, the FTC alleged that the defendants — and the affiliate marketers working on their behalf — hosted "websites designed to look like legitimate and independent news reports or magazine articles about one of defendants' products." The fake media sites used domain names and mastheads that falsely appeared to be from legitimate news, magazine, or health websites and engaged in numerous deceptive practices. These practices included falsely claiming that celebrities such as Kim Kardashian, Jennifer Aniston, Will Ferrell, and others had used or endorsed the products.

The FTC also alleged that the defendants failed to properly disclose the terms of sale, including that their "risk-free" trial offers would in fact lead to negative option renewal programs unless cancelled within a short amount of time. In addition, the FTC alleged that the defendants attempted to conceal their misconduct from regulators, banks and payment processors by creating "alternate 'cleaner' versions" of websites that had more prominent disclosures than the "landing page" websites that consumers would typically see.

**The settlement**

The defendants agreed to settle the FTC's charges in a stipulated order entered in federal court in California. That court order includes a staggering monetary component of $179 million, which is how much the FTC alleged consumers had paid to the defendants over a period of more than five years. The court, however, suspended that judgment upon the defendants' payment of approximately $6.4 million to the FTC, paid directly and by relinquishing title to assets held by dozens of payment processors and other financial services companies.

The court order also imposes extensive injunctive relief, including prohibitions on certain negative option sales and other sales practices. Of particular note, the order prohibits further deceptive marketing through the use of fake media sites, false endorsements and other phony testimonials and claims, and requires the defendants to more strictly monitor the marketing materials of affiliate marketers to ensure their compliance with the order.

**Bottom line**

The FTC's settlement with the defendants allegedly engaged in these deceptive marketing practices serves as a reminder that the parties responsible for online marketing using public figures' names and images without authorization can be identified and stopped. Those parties may include the operators of large marketing networks. In other words, the FTC did not just find the parties responsible for the unlawful marketing practices; it also found parties within the U.S. with assets significant enough to disgorge millions of dollars in deceptively-acquired profits.

PR firms should also be mindful about who they accept as clients. There is unlikely to be any indemnification in a client agreement that will extend to this type of serious and substantial economic and reputational loss. ●

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## MICHAEL LASKY

# Pitfalls and solutions when negotiating the client's form of master services agreement

Many public relations firms have a preferred form of client contract. Clients hiring a public relations firm, especially for larger engagements, often insist using its own form of contract. In these instances, public relations firms still need to be mindful of the common pitfalls (and solutions) when using the clients form of agreement.

This article will address the four most common pitfalls and the pragmatic solutions.

### THE ONE-SIDED LOL – IT'S NOT THAT FUNNY

**Problem:** The agency-client agreement should include two types of a limitation of liability ("LOL"). The first is a waiver of all indirect, incidental, and similar damages, including lost profits or revenues. This is intended to prevent either party from claiming damages such as lost sales for most circumstances. The second limitation of liability should be a maximum amount of damages that either party can recover. This can be a fixed dollar amount, or an amount that's equivalent to the agency's fees over a certain period of time.

The form client agreement may be missing one or both of these types of LOL. Even if included, one or both may be one-sided in favor of the client. Even if both LOLs are included and are mutual, there may be a laundry list of exceptions that effectively undermine the intent of the provision.

**Solution:** At a minimum, PR firms should try to ensure its client agreement includes a mutual exclusion of indirect and similar damages. The agreement should also include a mutual "cap" on damages that will not exceed the fees paid under the engagement. PR firms should also avoid overbroad exceptions that could swallow the rule.

### THE OVERBOARD AND IMBALANCED INDEMNITY – IT'S JUST TOO MUCH

**Problem:** The client agreement may require the agency to indemnify the client for a long list of circumstances, some of which are very broad, and some of which address areas that the agency may not provide as part of its services, such as trademark searches. Reciprocally, the agreement may not include any indemnification obligations on the part of the client, or only very limited ones.

**Solution:** The point of the indemnity is to identify specific potential risks in advance and allocate the risks to one side or the other. It shouldn't be drafted as an insurance policy. PR firms should try to eliminate overarching and broad concepts and concentrate on narrowly focused areas within the agency's control.

### THESE ACCEPTANCE TERMS ARE UNACCEPTABLE

**Problem:** The client agreement may allow the client to withhold payment if the client does not "accept" the services or deliverables the agency has provided, or if the client is otherwise not "reasonably satisfied." Although this may seem reasonable at first glance, the reality is that it may not be fair for the client to have the contractual right to withhold payment based on subjective reasons. Whether or not in practice the agency will do everything it can to make the client happy is a different matter.

**Solution:** Make sure if payment is tied to acceptance, the acceptance process is based on objective criteria such as the delivery specifications set forth in the mutually agreed statement of work or other written document that the agency has signed off on.

### COMPETE – I JUST CAN'T!

**Problem:** The client agreement may include an exclusivity provision prohibiting the agency working for competitors of the client. Oftentimes this provision is very broadly drafted. Where the client has many different product lines, or is part of a parent company with many subsidiaries operating in different areas, this could mean the agency is prohibited from working on a very long list of products and companies having nothing to do with the products agency is servicing for the client.

**Solution:** It may be appropriate to try to remove this provision altogether if at all possible depending upon the size of the engagement. The agency can try to comfort the client by pointing out that the agency is bound by the confidentiality provisions in the contract.

In situations in which an exclusivity provision is appropriate, the agency can try to restrict it to the key personnel working on the account, rather than having the exclusivity agreement apply to the agency as a whole. Those key personnel should be mutually designated in writing by the parties. A list of direct competitors could be attached as an exhibit for maximum clarity.

Where that is not possible, it is important to make sure the provision only applies to products or services competitive to the products or services being serviced by the agency and not the entire parent company network of companies or all other divisions of the client.

Understanding these four pitfalls and possible solutions will allow a savvy agency to achieve a fair form of contract even when the client insists on working off its form. Next month's column will address the remaining issues for agencies to include in their client contract negotiations. ●

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COMMERCIAL LITIGATION: PROCEDURAL ISSUES

# Protecting the Attorney-Client Privilege While Using Third-Party Consultants

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There can be no question that business and legal transactions have become increasingly multi-disciplinary and complex. Business executives and their legal counsel frequently seek guidance from a variety of external consultants, including outside accountants, financial advisors, executive benefits consultants, human resources specialists, insurance brokers, executive recruiters, and public relations advisors (especially in crisis communication situations). Can a company rely on the attorney-client privilege to protect the confidential nature of communications with these external consultants, or will the use of an external consultant constitute a waiver of privilege?

The attorney-client privilege protects communications between a client and counsel that were intended to be confidential and were kept confidential, where the communications were made to obtain or provide legal advice. In some circumstances, the attorney-client privilege may extend to non-lawyers consulted by internal corporate counsel and external counsel at law firms if the communications were made in confidence for the purpose of facilitating the attorney providing legal advice.

There are several steps a company can take to maximize the possible extension of the attorney-client privilege to consultants who assist counsel in providing legal advice. First, companies should have their attorneys, rather than a businessperson, seek the assistance of the consultants. Second, the attorney should indicate that the assistance of the consultants is being sought to help provide legal advice and be the one hiring the consultants if the consultants are being retained for a particular project.

Third, a consultant's engagement agreement should indicate that the consultant is working at the direction of legal counsel and also should describe the manner in which the engagement relates to a legal issue. Fourth, a consultant should render a separate invoice for the work being provided to the client at the direction of legal counsel, separate and apart from its invoicing for other services the consultant may be providing to the client.

It is also advisable for attorneys to be copied on written communications with the consultants, and all written communications with the consultant should be marked "confidential and privileged." The same degree of care should be followed in verbal communications. Preferably, the client's attorney would be present during discussions between the client and the consultant. In at least one instance, however, a federal district court in New York ruled that communications between a client and consultant were privileged without the presence of an attorney because the communications were directed at giving or obtaining legal advice.

Finally, attorney-client privileged communications should not be shared with anyone, including spouses, family members, and friends; doing so risks waiving or destroying the privileged nature of the communications.

## Takeaways

- The complexity of modern legal issues often requires in-house and outside counsel to discuss legal issues with third-party consultants for the lawyers to be able to provide complete, accurate, and useful advice.
- To help to ensure that communications with third-party consultants are not discoverable, attorneys, clients, and consultants must take steps to show that the communications are necessary for the provision of legal advice.