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More pitfalls and solutions when negotiating the client's form of master services agreement

My [June 16 article](#) addressed a few common pitfalls faced by public relations firms when they are required to negotiate using their client's form of contract. This article continues the discussion and addresses the other problems that arise when the PR firm's client or its procurement group insists that the agency use the client's own supplier or vendor agreement.

Here are five pitfalls to avoid and the best solutions to deal with them.

(DON'T BE A) SECRET AGENT

Problem: The client agreement may include a provision stating that the PR firm is an independent contractor and not an employee of the client. This is generally fine. What is not fine, however, is when the agreement goes on to state that nothing will be deemed to create an "agency relationship." Where the agency is engaged to perform services on behalf of the client, this language is problematic.

Solution: The PR firm should seek to add language specifically allowing it to act as the client's agent when making purchases and otherwise acting on behalf of the client. The language should also make clear that "sequential liability" "applies to any such purchases, i.e., the agency is not responsible for paying any third-party suppliers unless the agency has been paid in full by the client for such purchases.

MFN (MFWHAT?)

Problem: The client agreement may include a "most favored nations" provision (or "MFN"). This requires the agency to agree that the terms it is providing to the client - especially financial terms - are no less favorable than the terms provided by the agency to any other client. This ignores the reality that every client and client engagement is different; some clients may be smaller or require fewer resources. Agreeing to this provision would mean that the PR firm would have to manage and track every client, present and future, to ensure that it is compliant. Further, the PR firm would be prohibited from sharing details of other client engagements with this client, so auditing or enforcement is impractical if not impossible.

Solution: Ideally, the PR firm should seek to remove this provision altogether and explain the difficulties inherent in this provision to the client. If the client insists, the firm should try and restrict the MFN provision as much as possible to clients that provide the same annual fees to the PR firm, or to clients who are provided the same type of services, or to clients whose revenues are similar, as determined in the reasonable discretion of the PR firm.

DATA SECURITY (DON'T BE INSECURE)

Problem: The client agreement may include an extensive section dealing with data security issues. These are often tailored to suppliers that may be providing services with a much more robust data element than the PR firm's services and which include onerous technical, organizational, and policy requirements. From a practical standpoint, the PR firm may not be compliant with these requirements because the firm is not doing the same type of work.

Solution: The PR firm should work with its own internal information technology personnel to identify troublesome areas that are inapplicable.

If possible, have the client bring in its own IT or data security personnel to discuss directly with the agency IT team. The IT and data teams frequently agree that many provisions are unnecessary and can be removed. Where the client insists on keeping certain provisions in, make sure with the agency's IT team that the agency can actually comply with these provisions. Where possible, you may be able to shift the expense for undertaking certain compliance efforts to the client, such as independent audits of security controls.

IT'S OUR POLICY! OURS TOO!

Problem: The client agreement may require the agency to comply with all of the client's policies, as such policies are updated by the client from time to time. These policies may touch many different areas and include payment terms, data security, anti-corruption, and so on.

Solution: If possible, the PR firm should advise the client that the firm complies with its own set of policies and cannot practically be required to comply with multiple client policies. The PR firm may wish to furnish the clients with some of its "client-friendly" and non-confidential agency policies to the client to give the client some comfort. The PR firm can also seek to include language requiring the client to send formal written notice of any policies it wants the agency to comply with and provide a reasonable period of time for the firm to provide its objections to such policies.

TERMINATION

Problem: The client agreement may include a provision that allows only the client, and not the PR firm, to terminate the agreement for convenience. Or, if the PR firm does have a right to terminate for convenience, the agreement may require the PR firm to complete any outstanding SOWs or work orders without regard to whether the SOW may be scheduled to last for six months, 12 months, or even longer.

Solution: After all is said and done, despite a PR firm's best attempts at negotiating a fair agreement and in making its client happy, it may find itself wanting, on the rare occasion, to end the relationship. For this reason, it is important for the PR firm to have the right to terminate the agreement. The PR firm may want to explain to the client that while it is extremely rare for it to terminate its client relationships, it is a fair provision to include, especially if the client does not have a pre-determined commitment to the PR firm, either in length of time or fee levels. At worst, the PR firm can consider agreeing to provide a longer notice period than the client is required to provide.

These practical tips should go a long way in putting the PR firm on solid footing in its new client engagements even in situations in which the client insists on using its form of contract. Here's to finding "win-win" solution and operating from strength. ●

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