

Mastering the Agency MSA

Presented by:

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Let's Make the MSA Process Easier....

- Today We'll Cover
 - The Process
 - Typical Agreement Terms
 - Conducting MSA Negotiations – Some Pointers

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The Process

Details and Documents

- Whose MSA form will you use?
- When in the process will MSA negotiations happen?
- Who participates in the process?

The MSA Contract Form

- Whose MSA form will we use?
- Why have an Agency MSA template at all?

It's Not Always Predetermined.....

- Even Clients who routinely use their own MSA will use the Agency's version in some cases
 - To expedite the process
 - To document project deals

More Reasons to Have an Agency MSA

- It can get you to the negotiation table quicker
- It sets a more level playing field with your Client for the negotiations
- It's a benchmarking tool to evaluate the Client's MSA form

When Do the Negotiations Actually Start?

- For some deals, a required part of the RFI/RFP process to review/redline in advance
- The Agency's pitch and proposal documents can set the table on some business terms
- It's usually a dual process with larger clients – MSA and SOW are developed in tandem

Who are the Parties to the Process?

- Agency Leadership – Account/Finance/Business Affairs
- Agency Legal Counsel
- Client Procurement Rep
- Client Legal Representative
- Client Marketing Representative –

KEEP THEM INVOLVED AT ALL TIMES

The Agreement Terms

Billing and Collection Terms

- Look beyond the simple payment terms
- When does payment clock start running – on billing or on receipt of “undisputed” invoice
- How do billing disagreements escalate?
- Do services have to be billed by Agency in a certain amount of time?
- Prevailing party language for billing disputes

Insurance Coverage and Limits

- What specific coverage is the Client requiring?
 - Expect general liability, errors and omissions, employer practices, cyber
- What policy limits are required?
 - Expect \$2-5M in policy limit requirements
- **Are the coverage types and requested policy limits appropriate?**

Intellectual Property Ownership

- Everyone expects Client to own rights in the end – it's a question of when rights transfer
 - Not until Agency gets paid
- Carve out any pre-existing or Agency proprietary IP (a license might be appropriate)
- Settle the responsibility for obtaining rights to third party IP (stock photography, software)

Portfolio/Publicity Display Rights

- Client's default is likely no publicity or portfolio rights
- Some MSA's allow publicity use with advance permission of Client
 - Your Agency MSA should allow publicity use by default
- RELATED: Some Clients will also restrict disclosure of names, logos, brands

Exclusivity

- Clients increasingly expect/demand that your Agency not work with others in their category
- Your Agency default should be to decline
- Alternately –
 - Narrow exclusivity as much as possible
 - Don't consider unless the Client's spend warrants it
 - “Grandparent” in current client or prospective client relationships in the same industry/category

Regulatory Compliance

- Clients increasingly demand Agencies assume responsibility for compliance
 - Data protection and privacy
 - Influencer marketing regulations
- Seek to limit the Agency's responsibility as much as possible
 - Shift compliance responsibility to Client as much as possible
 - Limit liability/damages to amounts paid under the contract or the Agency's insurance limits

Need More Help with MSA Terms?

Here to help you with our “Done With You” Agency Legal Checkup

- An abbreviated version of our full Done for You Agency Legal Audit
- Includes a self-assessment of your MSA and other areas of the Agency’s legal affairs and a one-on-one consultative review with an attorney
- Discounted pricing for webinar attendees for the month of March

Learn More Here:

<https://mailchi.mp/legalandcreative/donewithyoulegalcheckup>

The Negotiations

Your Strategy Might Depend on Who Is At the Negotiating Table....

- Procurement Reps – are looking at the numbers. They'll use negotiations as an exercise to get the lowest possible costs, even when pushback is on risk terms.
- Legal Reps – are looking at risk avoidance. They're most concerned about points like IP ownership, regulatory compliance, liability and insurance.

ALWAYS Have Your Marketing Counterparts Participate in Negotiations

AT A MINIMUM, KEEP THEM IN THE LOOP

Timing is Everything....

- The earlier you're asked to redline a Client MSA, the more general you should be in your approach to redlining
 - Leave yourself room to maneuver

Nail the Work Scope Down First

- Try to have the SOW completed before you redline and negotiate the MSA Terms

Know Your Benchmarks

- Make sure everyone on the Agency team who negotiates contracts is familiar with your Agency MSA template

Questions?

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Agency Legal Checkup:

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