



Negotiating Advertising Agency Agreements

Ad Agency Contracts: Key Negotiating Points, Leverage, and Getting to Win-Win



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Agenda

1. Overview
2. Creative Agreements
3. Media Buying
4. Influencer
5. Promotions

NEGOTIATING ADVERTISING AGENCY AGREEMENTS

Aligned goals. Clear terms. Strong partnerships.



- Understand each other's objectives
- Define scope, deliverables & expectations
- Negotiate fair, transparent compensation
- Align on success metrics & reporting
- Build a partnership for impact
- The right agreement builds the foundation for great work.

Agency-Brand Relationship

- Agency is a strategic partner, working with Brand, not a vendor of widgets
 - Or is it?
- Agency services integrated with Brand functions (marketing, sales, media buying)
- Agency is NOT a fiduciary in most circumstances – agencies are independent, profit-seeking actors
- Negotiating Positions:
 - Brand: tight control, clear deliverables, rigid approval process
 - Agency: flexibility and creative autonomy
- **REMEMBER:** It's the Brand's advertising!
 - An Agency is not (a) an indemnitor or (b) a lender or (c) a bunch of company employees.

Core Contract Issues



Scope of Work



Compensation (fee, commission, percentage of media buy, hybrid)



IP ownership, including AI



Approvals workflow



Term / Termination



Liability / Indemnities

NOTE: These contract terms appear in every contract, but operate differently, depending on agency type.

Unique Risks

- Regulatory (FTC, state AGs)
 - Ad claims, substantiation
- IP chain of title – ownership issues; use of AI
- Talent and third-party rights
- Media placement liability
 - Includes Can Spam (email) and TCPA (text) compliance
- Privacy compliance

UNIQUE RISKS

General Concerns

- Beware of hidden linked extra terms
 - (E.g., this MSA is governed by the T&Cs at www.NoWayReally??.com)
 - *Practice Tip*: Either (a) attach current version of linked terms or (b) refer to version as of date of execution of contract
- Do trade association terms work? Consider IAB terms, others
- License of Brand IP limited to providing services under the contract
- Pay attention to Privacy and Data Security
- Cross-Border / Global concerns
 - What law applies (U.S.? EU? Other?)
 - *Practice Tip*: Designate place of litigation or arbitration in jurisdiction of OTHER side
- Subsidiaries, independent contractors, providing contracted services
- Conflicts issues with large corporations and large agencies – is there really an alternative?

Creative Agreements – Scope

- Be specific – don't assume “Everybody knows!”
- Campaign development and ideas
- Production (photo, video, digital assets)
- Deliverables; approval process; timing
 - Brand wants flexibility, extra time, goes up the chain
 - Agency wants to “make a damn decision and stop holding us up!”
- Subcontractors (production companies, independent contractors, divvy up responsibilities)



SIMPLE SAMPLE: “Agency shall perform the Services described in each Statement of Work (SOW). Any services outside the scope require prior written approval and may result in additional fees.”

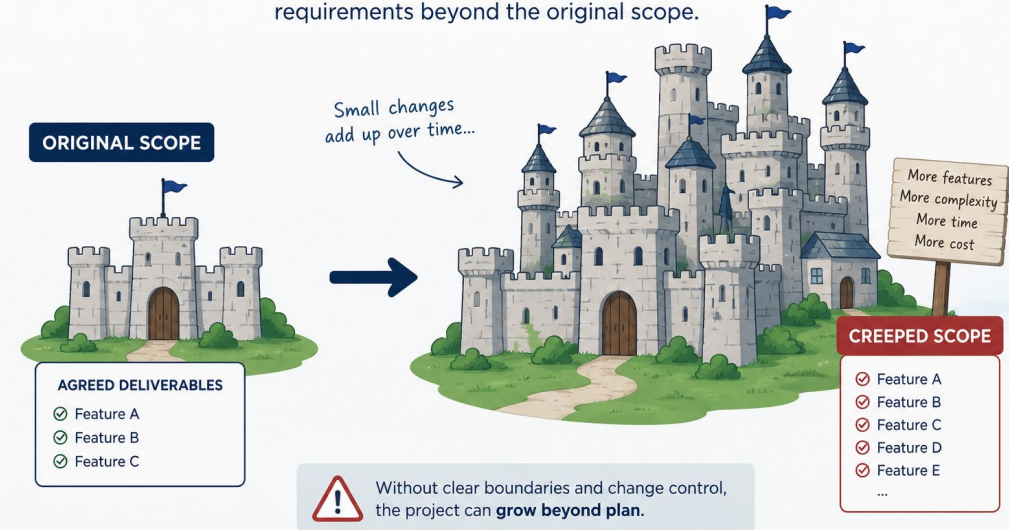
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 - BEWARE OF "SCOPE CREEP" AND ASSUMPTIONS ABOUT WHAT IS INCLUDED IN THE PROJECT ('while you're at it' projects)

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SCOPE CREEP

The gradual, uncontrolled expansion of project requirements beyond the original scope.



Creative Agreements – IP

- Work-for-hire vs. License
- Concepts vs. Deliverables
 - Idea #1 accepted; Ideas #2-5 rejected; Ownership result?
 - Ideas versus Executions – distinguish!
- Portfolio rights
- 3P Clearances / obligations

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Negotiation positions:

- Brand: full O'ship of all Deliverables and concepts
- Agency: retain rejected ideas, preexisting IP, portfolio rights

SIMPLE SAMPLE: “To the extent permitted by law, all Deliverables shall be deemed ‘work made for hire.’ To the extent not so deemed, Agency hereby assigns all right, title, and interest in such Deliverables to Client.”

Creative Agreements – AI

Risks of use of generative artificial intelligence

- Brand view:
 - Agency should assume risk because it's in a better position to manage and mitigate
 - Agency can avoid use of AI altogether (technically true, but in reality?)
 - Agency hired for expertise in creative services, paid to assume the risks
- Agency view:
 - Client receives benefits from use of AI, client should assume risks
 - Agencies are not insurance companies
 - AI providers often have “take it or leave it” terms

Creative Agreements – IP

Considerations with use of generative artificial intelligence

- Indemnity: Agency should at least pass through to Brand the AI vendor’s indemnity
- Use of AI: Limit agency’s use of AI to an AI provider that provides a reasonable indemnity
- Approval of Use of AI: Prohibiting “any use of AI” is overly broad, as AI is embedded in most software tools
- Misuse: Agency should remain responsible for intentional infringements, including via AI prompts

Creative Agreements – Talent

- Union issues (SAG/AFTRA)
 - Define whether union talent is permitted
 - Practice Tip: Agency must use non-union talent unless Brand provides express consent
- Usage rights
 - Including music, which can be really difficult
- AI and Digital Replica laws (CA, NY)
- Territory/time limits
- Residuals and Renewals
- Be aware of hidden costs of re-using talent

Agency is union signatory – Brand remains non-signatory.

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DEALING WITH TALENT & SAG ISSUES
IN ADVERTISING AGENCY CONTRACTS

Protect the campaign. Respect talent. Mitigate risk.

SAG COMPLIANCE
Ensure all talent engagements comply with SAG-AFTRA rules and requirements.

CLEAR TALENT TERMS
Define talent, roles, deliverables, usage (media, territory, term) and exclusivity.

COMPENSATION & FEES
Address SAG scale, residuals, overtime, buyouts and all applicable fees.

APPROVAL & MORAL RIGHTS
Include approval rights, privacy, publicity and use of name, image and likeness.

CONTINGENCIES & KILL FEES
Plan for changes, recasts, scheduling conflicts and early termination.

KEY NEGOTIATION FOCUS

- ✓ Confirm SAG applicability early
- ✓ Allocate responsibilities between agency, client and production
- ✓ Get certificate of compliance and proper releases
- ✓ Limit liability and indemnify for talent claims
- ✓ Document changes in scope, usage and fees

Clear agreements. Happy talent. Successful campaigns.
Address talent and SAG issues up front to avoid delays, cost overruns and legal risk.

Media Buying Overview

- Traditional vs. programmatic
- Platform relationships (Google, Meta, etc.)
- Transparency expectations:
 - Media buying is increasingly opaque because of programmatic systems
 - 2016 ANA Media Buying Report and Media Buying Contract Template
 - Template is drafted in favor of the brands
 - Template has been updated
 - Template is a HUGE document, rejected variously in part and entirely by agencies

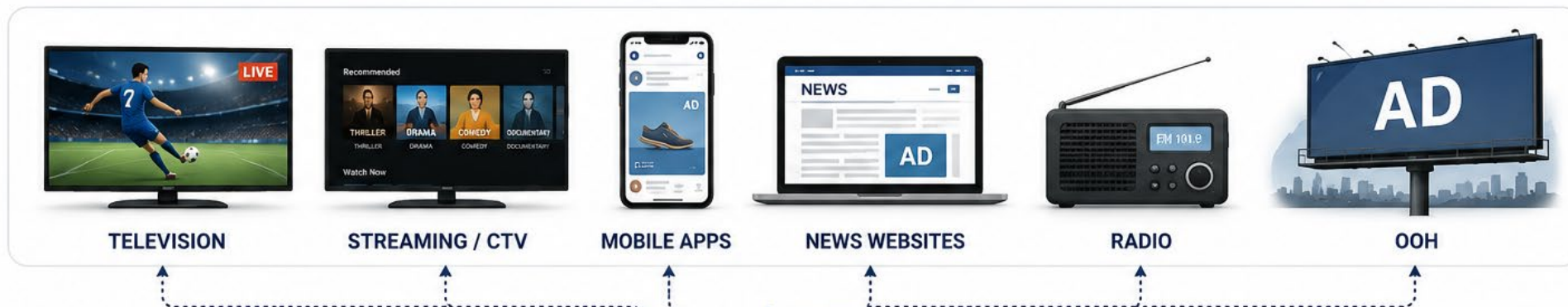
Media Financial Terms

- Commission vs. fee-based compensation
- Rebates, discounts, and incentives
- Audit rights and transparency clauses
- Media spend controls and authorization
 - “Principal Media Buying” means the agency acts as the principal when buying media inventory.

Principal Media vs. Traditional Buying

- Traditional (Agent Model):
 - Agency buys on behalf of brand
 - Full transparency in pricing
 - Agency earns fee/commission
- Principal Model (Agent buys inventory, resells to client/brand):
 - Agency owns inventory
 - Resells at marked-up rates
 - Less transparency, higher margin potential for Agency
 - Think DVR – show recorded for viewing later, as ad space purchased by agency for selling/providing to clients later

PREMIUM MEDIA INVENTORY



PRINCIPAL MEDIA BUYING

- ✓ Buys inventory as a principal
- ✓ Controls negotiation
- ✓ Takes on financial risk
- ✓ Delivers better value



- ✓ Better Rates
- ✓ Premium Inventory
- ✓ Priority Access
- ✓ Transparent Deals
- ✓ Stronger Performance

ONE RELATIONSHIP. MAXIMUM VALUE.



Principal Media vs. Traditional Buying

Real-World Examples

- Programmatic: Agencies buy bulk impressions, resell via private marketplaces
- TV Upfronts: Agencies secure inventory early and allocate to clients
- Digital Platforms: Pre-negotiated deals with publishers
- Data Bundling: Media + audience data packaged together at a premium

Principal Media vs. Traditional Buying

Benefits and Trade-offs

- Benefits:
 - Premium access & scale
 - Potential savings – headline savings
- Trade-offs:
 - Brand has no visibility into actual media costs, unknown markup
 - Agency could prioritize placement in places it owns space, not in Client's best interests
 - Planning by agency could be biased in favor of clearing agency-held inventory
 - No audit rights
 - Performance of ads clouded, unknown if outcomes are driven by optimization or agency inventory priorities

Principal Media vs. Traditional Buying Negotiation Positions

- Brand
 - Push for full disclosure of rebates and pass-through savings accruing to agency
 - Audit rights for all media spend
- Agency
 - Offer savings (s/t a lot!) on media spend for principal-based media inventory
 - No audit rights for brand client for principal-media sales
 - Retain incentives and rebates as profit to Agency

SIMPLE SAMPLE: “Client shall have the right, upon reasonable notice, to audit Agency’s books and records relating to media purchases and compensation.”

Influencer Deals: Structure

- Direct brand-influencer vs. agency-managed
- Role of talent agencies and platforms
- Scope of deliverables and content requirements

Note: Contracts are often tri-partite in practice; not with bigger, more well-known influencers, who usually have direct contracts.

INFLUENCER CONTRACTS

Clear terms. Mutual trust. Stronger partnerships.



INFLUENCER AGREEMENT

- ✓ Scope of Work
- ✓ Deliverables & Content Requirements
- ✓ Usage Rights
- ✓ Compensation & Payment Terms
- ✓ Disclosure & Compliance
- ✓ Term & Termination
- ✓ Exclusivity
- ✓ Confidentiality
- ✓ Indemnification

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- Well-defined contracts** protect both brand and influencer—and set the stage for great work.
- SCOPE OF WORK** Define deliverables, platforms, content type, posting dates and revisions.
- COMPENSATION** Outline fees, payment schedule, bonuses, expenses and taxes.
- USAGE RIGHTS** Specify how brand can use content, for how long, and in which channels.
- DISCLOSURE & COMPLIANCE** Ensure FTC disclosure, legal compliance and brand guidelines are followed.
- TERM & TERMINATION** Set contract term, cancellation terms and post-term obligations.

✓ A strong contract builds trust and delivers results.

- Protect Your Brand**
- Align Expectations**
- Reduce Risk**
- Drive Better Campaigns**

Influencer Deals: Compliance

- FTC endorsement guidelines
- Disclosure requirements (#ad, #sponsored)
 - *Practice Tip:* Disclosure of material connection not limited to only influencer’s “statements” but also to tags, depictions, demonstrations, or other identifying characteristics of the influencer that can be construed as an endorsement
- Monitoring and takedown rights/obligations
 - Ok to leave up but Brand may not repost or refresh
- Platform-specific rules
- Cross-posting (technology) concerns

SIMPLE SAMPLE: “Influencer agrees to comply with all applicable laws and guidelines, including FTC endorsement guidelines, and shall clearly and conspicuously disclose any material connection to Client.”



Influencer Deals: IP and Other Terms

- Ownership of influencer-created content
- Paid media usage – OK?
- Define Exclusivity and category restrictions!!
 - Definition of “competitors” is not always obvious
- Music – Platforms have commercial music libraries, but:
 - The available music isn’t great
 - Platforms do not rep/warrant non-infringement
- Morals clauses
- Brand should negotiate loose Termination clause, with detailed post-Termination rights/actions
 - If it’s not working, you’ll know pretty quickly
 - And you’ll want to get out smoothly.

Negotiation positions:

- Brand wants broad reuse/repost rights across all channels and platforms
- Influencer wants to limit duration and get paid for all usage, esp’y paid media by Brand (often wants to limit paid media)

Promotions Agency Contracts: Overview

Contract should be VERY specific as to agency obligations.

- Role of promotions agencies
 - Detail exactly what the agency will do.
- Types: sweepstakes, contests, games
- Legal complexity across jurisdictions

Promotions Compliance

- Official rules drafting
- Registration and bonding (e.g., NY/FL/RI)
- No purchase necessary requirements
- Eligibility restrictions

SIMPLE SAMPLE: “Agency shall administer the Promotion in compliance with all applicable federal, state, and local laws, including registration and bonding requirements.”

Promotions Risk

- Prize fulfillment obligations
- Fraud prevention
- Data collection and privacy compliance
- Indemnities and insurance

Note: Prize fulfillment fails create PR / reputational risks.

Data and Privacy

- Use of consumer data in campaigns
- Platform APIs and tracking tools
- GDPR/CCPA and other laws
- Data ownership and usage rights

Negotiation Positions:

- Brand: Ownership of all campaign data
- Agency: Rights to aggregated/anonymized data

General Negotiation Strategies and Key Takeaways

- Align contract with business model – know exactly what the agency is providing
- Prioritize high-risk provisions
- Use MSA's with clear SOW structures
- Detail ongoing governance, approval process, and dispute resolution
- Agency agreements are highly specialized
- Regulatory and IP risks are central
- Transparency and compliance are critical



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