Faux Attorneys

by Chris Burand

I often see television and internet advertisements for realizing your business dreams through the use of cheap boilerplate legal agreements. I give the advertising agency high marks for making it seem as though their clients' boilerplated legal agreements will save businesses thousands of dollars enabling them achieve their dream even quicker. It is difficult to make a ditto machine legal agreement sound romantic, but they do. Kudos to them.

These advertisements for boilerplate contracts tell the consumer, effectively, that the vendor has prescient knowledge of all the future legal problems of every potential purchaser of their boilerplate contracts and therefore, the consumer can realize their dreams by purchasing these perfect agreements for $99.99.

These firms are of course preying upon consumers that not only do not understand legal issues, or more importantly contracts, but they also are cheap and distrusting of attorneys. As bad as this sounds, it may not be as hypocritical as it first appears because many attorneys only use boilerplates for these clients too. They take a standard legal boilerplate, insert the names, addresses, dates, etc., advise the insurance agency owner this is all they need, and send a bill as if they wrote the agreement from scratch. My experience, having reviewed both types of boilerplates for agency owners having contractual issues is that the $99.99 version was not that much worse in some instances. The attorneys' positions may not necessarily be wrong. For the purposes generally requested, a poorly constructed contract may be all the agency owner needs. The agency owner has not actually asked for a contract that will work if contested, they are just making that assumption and the attorney is taking advantage of it.

This may sound nefarious, but it is not. Both parties are getting what they think they want. Most agency owners do not want to spend the time and money building a contract that will work when contested so they get one that works when it is not needed.

The raison d'etra of contracts is to establish the rules of contest. In other words, if two parties to the contract disagree, a well-written contract will have set the rules by which the disagreement is settled. For example, a poorly written shareholders contract may not contain a buy-sell clause between partners spelling out how a partner may leave the firm in the event of a disagreement, effectively creating bondage. A well-written agreement will spell out all common circumstances under which a partner may leave and it will include the terms, methods, and values for each. Another example, an extremely common example, is that boilerplate agreements purchased over the internet or through many attorneys, will have a valuation method/formula most applicable to a construction firm or a medical practice or even a real estate lease rather than an insurance agency, much less specific to the type of agency (independent, direct, etc.). The result then when a partner leaves is that the valuation clause is wrong and someone is going to get a lousy deal. Moreover, if the catalyst for leaving is a disagreement, the most unreasonable partner is likely to benefit the most.

For example, in one such instance, an agency's buy-sell did not account for the shareholders having $1 million of extra cash. The result was that the selling partner lost his right to $500,000 cash! He did save $1,000 in initial legal bills 20 years ago though.

Another example, quite common with these boilerplate agreements, is the most important shareholder being held hostage by the nonperformers. This happens all the time because the shareholder agreement has been written in a way that nonperformers can make a lot of money not doing anything, yet if the top performer's performance slips, everyone makes less. No mechanism exists so that the best and hardest working shareholders are paid accordingly. Many agencies have broken apart and even blown apart due to this one single over simplification.

An example with greater consequences and more frequent consequences is a shareholder agreement that violates IRS valuation and reasonable compensation rules. For some reason, many attorneys do not know about these crucial issues. They consider these issues to be accounting issues. They don't consult financial experts because these contracts involve accounting issues so it behooves someone to request the input of a financial/tax expert.

An alternative to buying an Internet/1-800 contract or settling for an attorney pretending to write an agreement specific to your situation, is to teach an attorney about the specifics of insurance agencies. Teaching them is necessary because few know this industry and this industry is unique. But teaching them is expensive and they may still not write a proper agreement. I saw one attorney get, and charge for, eight hours of insurance agency education. Yet he still wrote the buy-sell so that the agency was effectively sold twice (give that some thought).

The attorneys' clients are not always much help with educating either, especially if the shareholders are not seeing eye-to-eye. I have seen agency owners truly believe it was okay to steal trust monies, to sell the same agency twice (at the same time), to sell books of business not belonging to them, and many more wild and crazy propositions. You might think these agency owners were malevolent, but none were. They were just mistaken.

The best solution often is to hire someone like me. This best solution sounds self-serving, and it is. This solution is also the best advice. People who know this industry and its contracts extremely well can help establish the contractual framework that includes real world knowledge of how various contracts need to work. For example, almost no producer contracts I have read, written by attorneys with limited insurance agency knowledge (about 95% of attorneys), know the importance or even the wording to make sure producers are paid as paid. This little item has significant legal and financial importance.

Another option is to have an attorney write the contract and then have it reviewed by someone like me. The advantage is that the attorney provides the initial document and then one can ask questions, thereby not challenging them. The negative is that this angle is usually more expensive.

One last contract suggestion: most attorneys who write contracts do not do trial work. Therefore, they often miss weaknesses a trial attorney will identify. When they write a contract, they do not write it

from the perspective of it being challenged in open court. This is a weakness when challenged. When challenged and the weakness is discovered, the timing is never good and never cheap.

So if you are in need of an important contract, you are in a great position of being able to start from scratch and do it right. If you have contracts that need to be reviewed or improved, my advice is to take the time to have them reviewed and possibly strengthened now, before a dispute arises, while the rules can still be set. Once the game begins, once two parties are engaged, rules cannot be changed even if the rules are wrong.

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