# Drafting Tips for Transactional Attorneys

By Steven T. Lowe

I tried a case in the Los Angeles Superior Court that concerned a lengthy and complex written agreement. As plaintiff's counsel, I firmly believed that the provisions of the agreement supported our position; however, opposing counsel adopted a strategy to "muddy the waters:" paragraphs of the agreement were projected onto the screen that were only tangentially related or basically irrelevant to the issues at hand – presumably for the purpose of confusing the jury. Since the case settled midway through trial, I never learned if this strategy would have been successful. However, it occurred to me at that moment that transactional attorneys should always try to keep in mind how contracts are likely to "play out" in a courtroom. What follows are some tips that might help transactional attorneys maximize their client's chances of success should litigation ensue.

Keep contracts as "user friendly" as possible. Jurors are not always sophisticated. It is my opinion that lawyers write contracts for other lawyers to review, seemingly for the purpose of keeping members of the profession gainfully employed. The agreements are often a concoction of overly-wordy deal points and boilerplate legalese. This method of contract drafting, however, might not be the best for the client in court. It is not terribly difficult to confuse a jury with dense and complicated language – especially if doing so is in one party's best interest.

Whenever possible, the transactional attorney should stick to short sentences with ordinary words that lay people can understand. Good drafting should be about distilling the essentials of an agreement into straightforward language that is understandable to an ordinary person. After all, the only time people start looking closely at an agreement is when there is a dispute, and judges and juries typically resolve disputes. Judges also don't have time to decipher convoluted agreements.

Think outside the box. A transactional attorney should also pay attention to matters external to the contract: Are all parties represented by counsel? Are all parties of majority age? The attorney should likewise ensure that they have no conflicts of interest with any of the parties to the agreement. Obviously, a contract is more likely to be challenged if an attorney representing one party also represented another. If a person is unrepresented altogether, at minimum, a statement in bold letters should be included acknowledging that the party has been advised to seek legal counsel and has intentionally refrained from doing so. Furthermore, if a person is under the age of consent, the contract should be approved by the court in order to avoid it being disaffirmed.

Identify the key players and pick the venue. Typically in litigation matters, one of the primary tasks is to make sure the client is suing a party that has assets. For instance, if there are three defendants and only two are solvent, these two solvent parties will necessarily be the primary targets of the lawsuit. It is somewhat pointless to obtain a large judgment that can't be enforced. While it may be difficult to do, properly identifying the parties with assets (or are likely to end up with the assets) at the time of contracting will make a litigator's job easier down the road.

Also, the place where the litigation ultimately takes place (i.e. the venue) is often key to the economics of litigation. For this reason, a transactional attorney should consult with the client regarding the best venue, and include this in the contract with decisive language. To increase the chances that your client will get the venue of choice, for example, an attorney should add an "exclusive venue" clause into the contract, which may be crucial to the economics of dispute resolution when contracting with foreign parties.

**It is my opinion that lawyers write contracts for other lawyers to review, seemingly for the purpose of keeping members of the profession gainfully employed.**

Be clear/unambiguous about intellectual property issues. Entertainment transactional attorneys must also know virtually all areas of intellectual property law including copyright, trademark, idea submission law, trade secrets, and right of publicity/privacy law, among others. Addressing each of these issues with precision is the goal.

I recently handled a case where a company entered into an agreement to use a model's name and likeness in connection with a particular product. However, the company ended up using the model's trade name to launch an entire line of commercial products, which the model received no compensation for. No trade name licensing was included in the agreement; needless to say, litigation ensued.

Also, in the recent case of *Halicki Films, LLC v. Sanderson Sales and Marketing*, litigation ensued due to ambiguous contract language. The plaintiff asserted that she had reserved the merchandising rights to remake the car known as "Eleanor" from the original "*Gone in 60 Seconds*" movie, which her late husband wrote, directed and produced. The defendant claims they acquired those rights through an agreement granting sequel rights to the original "*Gone in 60 Seconds*." The district court granted summary judgment for defendants, which was vacated and remanded on appeal.

In addition, it is a good idea to be aware of all state and federal statutes that may impact your client, and make sure you don't inadvertently waive these rights. For example, in California, there are statutes that provide artists with the right to audit, even if auditing rights are not expressly contracted for between the artist and record label. See, California Civil Code Sections 2500 and 25002. This is one of many statutes that may impact the pending transaction.

Don't include an arbitration clause (unless your client has lots of money). I don't recommend arbitration clauses for clients who are not wealthy. Although there is a generally accepted myth that arbitration is a cheaper, more efficient way of settling disputes, this is simply not the case: There are *significant* filing fees and *significant* arbitrator fees that can *substantially* increase the cost of litigation. Arbitration agencies typically charge a percentage of the amount in dispute as a filing fee, and an additional amount or percentage as a "case service fee."

At the American Arbitration Association, for example, filing fees are based on the amount of the case. To file a commercial case of $75,000 to $150,000, for example, the initial filing fee is $1,800 with a service fee of $750. Above this are arbitrator's fees, which usually run around $400/hour. Thus, even though arbitration might seem a more cost effective and efficient method of resolving a dispute, it can actually cost much more because it's equivalent to paying the court for its time and paying the judge for all of his time. Many cannot afford these fees, or if they start the process, eventually run out of money.

The above ideas, though hardly exhaustive, offer a set of tips that entertainment transactional attorneys might do well to follow depending upon who they are representing. Just be aware of these issues and you may equip a client with an arsenal of tactical advantages should a legal battle arise – or even prevent the battle altogether.

**STEVEN T. LOWE** is the principal at Lowe Law in Los Angeles. (lowelaw.com) He has been involved in litigation and negotiations with parties such as MTV Networks, NBC, ABC, UMG, Warner/Chappell, the estate of Tupac Shakur, the estate of Christopher Wallace (Biggie Smalls), Melanie Brown f/k/a "Scary Spice", Rob Schneider, and other entertainment professionals and production companies.