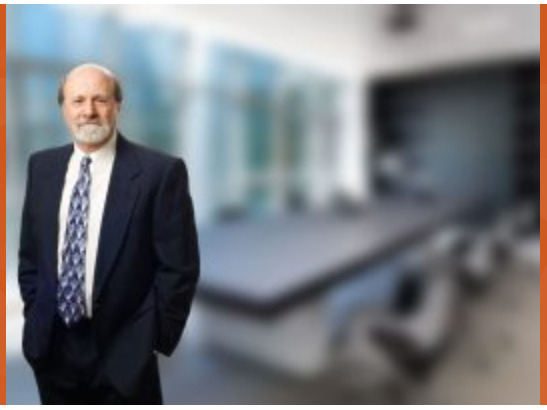
Agency Contracts Declassified

How to negotiate terms that will benefit your writing and make your agent work for you



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September 07, 2009

This article originally appeared in Writer's Digest.

Do you need an agent? Do you even want one? And what should you do if you get one?

When I was a fledgling publishing lawyer, I answered the first question by telling most of my writer clients, "probably not." That is, until I saw a good agent in action.

An editor at *Writer's Digest* had referred to me two psychologists-turned-authors who had self-published a health guide, and who were now being courted by an agent claiming she could place the book with an established publisher to round out its new line. Despite some skepticism on my part, I helped these authors negotiate their contract with the agent—who promptly netted them a six figure advance for their already self-published tome.

No surprise: I became a quick convert to the importance of a good agent. On top of the point that many publishers won't look at unagented work, add the argument that knowledgeable agents can truly—and often dramatically—increase their clients' sales, revenues and overall success.

Of course, that's not to say every agent does this for every client. As with any personal or professional relationship—from spouse to doctor to lawyer—the key is to find someone who is the right fit for you. The process starts with due diligence: learning more about this person to be sure she not only has the basic qualifications required for that role, but also seems to be the partner or resource you need.

So let's say you've found that agent and have been offered a contract. Now What?

There are three key points to keep in mind: Agents represent the work; agents must earn their keep; and writers need an exit strategy.

1. Agents Should Represent the Work, Not the Worker.

As a writer, you want an agent who's committed to you and the success of your work. But you don't want to shackle yourself to an agent, certainly not until he has proven he has the drive and talent to make you a success.

This is significant because agents often offer writers, especially novices, a contract that states the agent will represent the writer and all of his literary creations, from the start of the contract until it ends (see points No. 2 and No. 3). A savvy writer should reject this approach and, if offered such a deal, require that the contract be revised to state that the agent represents the author for only the specific identified project(s) under discussion. Writers should avoid granting their agents an automatic right to represent them on sequels, "option works" for the same

publisher, or anything else.

Obviously, if the agent (and the book) does well, both writer and agent will want to partner on other projects. But even if the writer doesn't seek additional representation from the agent, the agent typically will have been reasonably well compensated for this efforts (assuming they were successful), so he'll have little cause to complain.

Subsidiary rights are a related issue. Most agents stipulate they handle not only the sale of the book and all the literary rights associated with it, but also movie, TV, dramatic, multimedia and other subsidiary rights. Because the sale of book rights is often the lynchpin to these others, it isn't unfair for the agent to manage these. But before you sign, just make sure your agent can demonstrate success—with experience and established contacts—in managing sub rights.

The key is to remember this: Your agent is there to promote your work, negotiate contracts and monitor your royalties, but you don't want to give him unrestricted authority over your career. So be sure the agent agreement requires your written approval of—and preserves your right to reject—all contracts.

2. Agents Must Earn Their Keep.

Many agents want to be compensated for any contract that arises after they've taken charge. Although an agent is generally appointed on an exclusive basis (for the particular work, during a period of representation), if that period ends without success, the question arises: Should the agent still be entitled to a commission if the work is sold later, perhaps by the author's new agent?

If the agent had no role in the sale, no. But possibly yes, if the sale—despite occurring after (but not too long after) the contract expired—resulted from the agent's efforts during the term of the agreement. Some publishing lawyers insist the only such post-termination contracts that should earn an agent a commission are those that were under negotiation at termination. Most agents believe that's too high a bar.

A reasonable compromise is to agree the agent will collect a commission not only on contracts she negotiates and closes during the term, but also on contracts that close within one to three (but no more than six) months after the agreement terminates, provided they are with publishers with whom the agent had material dealings or discussions about the work during the contract period. The emphasis on "material" (or "substantive") is meant to prevent the agent from claiming a commission on any sale to a publisher to whom the agent had merely sent an email or made a brief phone call mentioning the project. To earn a commission on a contract she didn't negotiate, the agent's involvement must not have more than remote or casual. (If you reach such a compromise, consider inserting language into the agreement that also requires the agent to negotiate the publishing contract even if her representation has ended. That way, she earns her keep regardless of the timing!)

The contract clause addressing this issue should also describe what happens if another agent is involved in the post-term sale. Then, to make a sharing approach work, the contract with the second agent must specifically agree to this treatment. You do not want to be in a situation where, by contract, both agents can claim a full commission on a particular sale (or one can claim a full commission and the other a half commission—or any situation where their combined claims exceed 100 percent of a fair commission.

3. Writers Need an Exit Strategy.

Even if you've done your due diligence and found an agent who seems right for you, things don't always work out as hoped. The agent may have less experience with your genre than you realized; or have too many projects at one time; or begin acting inappropriately (not returning your calls, etc); or be dealing with personal issues; or…

The “or” doesn’t matter. What matters is that you need a way to exit the relationship if things are not working out.

On the other hand, it may be unfair to fire an agent – particularly one who contributed to the work or proposal or otherwise invested time and energy in you–before the agent has had a reasonable chance to sell the work.

The most judicious approach is generally to allow an agent a fair amount of time—say, four or six months—to market your work, as long as he’s doing what he promised (at a minimum, he should be providing periodic reports about his progress and/or offering responses to your questions). But after the minimum period ends, either party should be free to cancel the arrangement by simply notifying the other that the contract is finished (perhaps subject to the agent’s right to complete any negotiations in progress).

As I said before, if agents receive commissions on all contracts they negotiated and get a reasonable opportunity (e.g., 30 days) to conclude any contracts underway (or to get credit for post-termination contracts that resulted from their efforts), they have no cause to gripe.

Finally, don’t forget that your agent’s job is to handle the business terms and negotiations—in other words, to put deals together. Unless your agent is also a lawyer, and agrees to represent you on legal terms as well, it’s often prudent to consult with folks like me.

For more information on publishing law and contracts, please contact **Howard G. Zaharoff**.