

## Best Practice Guidance: Ownership of Agency Ideas, Plans and Work Developed During the New Business Process



A Position Paper from the American Association of Advertising Agencies

*Thirteenth in a Series of Position Papers Addressing Key Industry Issues  
Amended October 2011*

### **I. Objective**

The purpose of this Position Paper is to provide agencies with guidance on best practices relating to the ownership of agency developed ideas, plans and work created in the course of a marketer search for agency resources or a marketer request for proposal.

*The American Association of Advertising Agencies recommends that agencies preserve ownership of new business-search ideas, plans and work product.*

### **II. Background**

Agency new business searches are an integral part of the industry's dynamics. 4A's believes that it is prudent to promote a dialogue on best practices that can facilitate effective, efficient and equitable new business activities.

The agency search/new business process should be geared to help the advertiser and all agency participants discuss business goals, marketing objectives and service expectations. The process should also foster a two way assessment of capabilities, compatibility and economic expectations.

The agency search/new business process should not be used by marketers as a mechanism to generate a bank of ideas and materials.

### **III. Considerations**

The effort and activity involved with participating in a comprehensive agency search is significant for both the advertiser and for participating agencies. All parties involved in an agency search, including third-party intermediaries, should strive to structure the search process to be efficient, timely and equitable.

- The key elements of the marketer's search process should be outlined up front.
- Early dialogue and use of tools such as the 4A's Marketer and Agency new business questionnaires should facilitate up-front discussion and initial screening.
- If speculative plans or work is a component of the search process, the 4A's urges that agency participants and the marketer have a clear understanding of the purpose and scope of the work and of the deliverables and measurement standards that will be involved.
- When a search consultant is involved in a review, agencies should ensure at the outset of the review that the consultant supports the intellectual property provision of the [Agency Search Consultants Code of Conduct](#) which specifies "We (Agency Search Consultant) undertake to respect the intellectual property vested in the work of competing agencies."
- Effort should be made to adhere to an agreed upon process in the short list and final phases of a search.

ANA/4A's Guidelines for Agency Search strongly reinforces the best practice that agencies should retain ownership of their new business ideas and work and that clients should not request or require ownership unless the client is prepared to pay the agency fairly for the IP rights ([ANA/4A's Guidelines for Agency Search](#)).

## **ANA/4A's Guidelines for Agency Search notes:**

Guidelines for Clients: "The client should have no ownership rights over creative work or intellectual property developed by the agency unless that has been agreed to in advance, and the client pays a fair and reasonable fee for ownership. Note: This is much more than a stipend."

Guidelines for Agencies: "If a client offers a stipend to help defray costs, ensure that this does not imply ownership of the work even if you don't win the business. If compensation is offered that will grant the client the rights to the work, negotiate what you consider fair remuneration. If a client insists on ownership of work to invite your agency into the pitch, which is not a best practice for clients, you have a decision to make. It is inadvisable to surrender the rights to your work as a condition of pursuing the business."

Thoughts on Spec Assignments: "Agree on Usage Rights. If the marketer is interested in obtaining an assignment or license of agency developed work product, then the agency and marketer should agree on supplemental, fair-value compensation for usage rights. Payment for usage rights should not be confused with token stipends that are paid merely to partially offset an agency's cost of participating in a review."

The ANA and 4A's urge the marketer and agency communities to adhere to the ownership and use guidance that is recommended by industry leading marketers and agencies.

In advance of participating in a marketer search, agencies and the marketer should discuss what level of remuneration will be paid to the agency for participating in the review, as well as what costs of participation in the search will be reimbursed. Advertiser payment to agencies for participation should specify that payment is solely intended to offset agency cost of participation in the review and does not alter the agency's ownership of agency-developed presentation concepts and materials.

### **Best Practice Guidance: Ownership, Assignment and/or Usage Rights**

In advance of conducting search meetings or presentations, the marketer and participating agencies should discuss how ownership, license or usage rights of agency developed ideas, plans and work will be handled.

*The American Association of Advertising Agencies recommends that agencies preserve ownership of new business-search ideas, plans and work product.*

Illustrative ownership retention language that agencies might wish to consider incorporating in new business agreements is provided below.

"Advertiser acknowledges that any and all ideas, concepts, strategies, trademarks and materials that Agency presents or provides to Advertiser (the "Presentation Concepts and Materials") are being presented or provided for the sole purpose of allowing Advertiser to determine whether Advertiser wishes to use the Presentation Concepts and Materials and to engage Agency's ongoing services. Advertiser acknowledges and agrees that the Presentation Concepts and Materials are, and will, remain Agency's property regardless of any payment made by Advertiser to Agency in connection with Agency's participation in the review. Agency shall retain all right, title and interest in connection with the Presentation Concepts and Materials regardless of whether the physical embodiment of the creative work is in Advertiser's possession in the form of copy, artwork, etc."

If your agency encounters a marketer that is concerned about potential confusion or legal dispute resulting from ideas, plans or work that was in the possession of the advertiser prior to submission by the agency or similar work submitted from other participants in a review, then the client's concerns can be carved out in an agreement between the marketer and review participant.

The following is an illustrative carve-out provision:

“Advertiser and Agency agree, however, that Advertiser’s acknowledgement of Agency’s ownership of, and Advertiser’s ability to utilize, the Presentation Concepts and Materials shall not apply to any Presentation Concepts and Materials that (i) Advertiser independently develops (or has already independently developed) without any use of any of the Presentation Concepts and Materials presented by Agency, or (ii) are provided to Advertiser by an independent third party (including another agency) that is not affiliated with Agency or under a confidentiality obligation to Agency.”

Best practice dictates that agencies involve competent legal counsel, who is experienced in marketing services and intellectual property dynamics as part of the agency’s new business team.

### **Postscript**

If an agency has an interest in selling its ideas, plans or work developed in the course of an agency search and if the marketer is interested in buying the agency’s ideas, plans or work, then the parties should discuss when and how fair compensation can be established.

Ultimately fair compensation must be determined by mutual agreement between the two parties. There is a broad range of possible approaches that can be used to arrive at fair compensation for agency ideas, plans and work.

For example:

- The parties can agree to a one-shot buyout. (Think of buying out talent or buying out photography rights.)
- There can be a phased approach with some minimum initial payment and provision for subsequent payments depending on the level and/or duration of subsequent usage by the client. (Think of a talent-session fee and then ongoing reuse fees.)
- Alternatively, the parties can agree to negotiate a specific compensation formula at a future date. Rather than trying to determine a specific payment approach during the search process, the parties can agree to negotiate fair payment in the future in the event the advertiser wants to use the agency’s ideas, plans or work.

To illustrate:

“If Advertiser ultimately decides, in its discretion, that Advertiser would like to use or exploit the Presentation Concepts and Materials in any manner, or if Advertiser would like to engage Agency’s ongoing services as Advertiser’s advertising agency, Advertiser and Agency will negotiate in good faith and enter into a separate agreement setting forth the terms of Agency’s services, or of such use or exploitation, including the amount of Agency’s compensation.”

The best long-term, marketer-agency relationships involve an open, equitable two-way dialogue on goals, processes and economics. 4A’s encourages agencies to value and protect their ideas and work. Marketers that are seeking a long-term communications partnership with an advertising agency respect agency work and value it fairly.

***Adopted by AAAA Board of Directors, January, 2007  
Amended October 2011***