AVOIDING LITIGATION

TIPS FOR BUSINESS AND ENTERTAINMENT PROFESSIONALS

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TIPS FOR AVOIDING LITIGATION
FOR BUSINESS AND ENTERTAINMENT PROFESSIONALS
First Edition

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Introduction

The following tips are not meant to offer legal advice or to eliminate the need for consultation with legal professionals as you build business deals. These are merely guidelines to consider when you are building the professional relationships required to own and operate a successful business. Whenever legal rights are at stake, it is important to consult with an attorney.

Please remember that you should always consult with an attorney whenever you are building business relationships, not just when those business relationships have fallen apart. The cheapest, fastest, most advantageous time to resolve a legal problem is before it has been created.

3 Myths People Believe About Litigation

Three myths frequently lead clients into significant legal difficulties. These myths are born from their inexperience in the legal process and the belief that what seems to make logical sense must also make legal sense.

Myth #1: I don't have anything so I can't be sued.

When someone sues you successfully in court, they can take away not just the assets you own now, but the assets you will own in the future. In fact, this is routine. Judgments against you can ensure you will not buy a home, can garnish future wages, and can be levied against the income from businesses you have not yet started. A judgment is valid for ten (10) years and can be renewed for another ten (10) years as many times as is necessary until the judgment is paid. It can result in a garnishment of your wages, a levy of your bank accounts, property liens, and other collection methods.

However, if the defendant does not have any income or property that the judgment creditor can legally go after, then the defendant is referred to as "judgment proof." Many times, sly business people may attempt to hide assets in various business entities. If the purpose in forming the business entity is to avoid creditors or to commit a fraud, then the corporate veil can be pierced and the assets will not be afforded the corporate protection from creditors.

Having said that, most attorneys will be hesitant to recommend a client pursue a lawsuit against an individual defendant if that individual does not seem to have the assets or insurance coverage required to satisfy a judgment. After all, a judgment is just a piece of paper. There must be the ability to collect for the winner to benefit financially from a suit for it to make economic sense to pursue.

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An attorney is far more likely to recommend his client pursue litigation against a defendant that is wealthy or who has coverage for its liability in the form of insurance or a co-defendant that's a corporation with deep pockets.

Moreover, the insurance carrier may be liable for insurance bad faith to its own insured if it does not settle a claim when a policy limit demand has been made. California law implies a covenant of good faith and fair dealing in liability insurance policies. The duty of good faith and fair dealing requires a third party liability insurer to settle a lawsuit against its insured when there is a clear and unequivocal offer to settle within policy limits at a time when liability is reasonably clear and there is a likelihood of a recovery in excess of the policy limits. Otherwise, the carrier will be acting in bad faith. The insurer's duty to accept reasonable settlement offers is implied in order to protect the insured's reasonable expectations in purchasing the insurance.

Sometimes, if a client is particularly wealthy and very angry, they will pursue a judgment against someone despite their attorney's advice that it does not make financial sense for them to do so. This is dangerous and the litigation costs could have a severe economic impact. When people pursue lawsuits solely out of spite or emotion, it is a huge yellow flag.

Myth #2: I didn't do anything wrong so I can't be sued.

Unfortunately, cases can only be decided on what can be proven by the evidence that is presented at the time of trial, and this can sometimes not be what is the truth of what actually occurred. The system is not perfect, but we can agree that our justice system is still the best and most fair system for deciding disputes. This is why it is important to document everything so that you can prove your case later if you happen to be involved in litigation.

It is also important to understand a complete stranger can elect to file suit against you for any reason at all. The case may ultimately be thrown out by the judge for being frivolous, but to get it thrown out you will likely have to mount a defense with the help of a lawyer. If you do not mount a defense you may lose and you may have to pay damages. Depending on the type of case, if you win the case you can instead often recover your attorney fees.

Myth #3: I can't afford to sue anyone even if I have been wronged.

In California, for cases where the amount in controversy is less than $10,000.00, you can file a lawsuit in small claims court where the parties can only represent themselves without an attorney. If you are successful in obtaining a judgment, you can attempt to seize the assets of the defendant. This is important because many people who have been promised payment for services they have rendered and products they have delivered have forgone payment simply because they think mounting a case to recover their money is too expensive.

You can hire an attorney for just a few hours to explain how small claims court works and how to file a case. They can tell you what documents you should bring with you and what questions you should be prepared to answer. The courts do not just exist to support rich people. Our justice system is designed to provide access to the courts for everyone.

Moreover, attorneys may be hired on a contingency basis. In a contingent fee arrangement, the attorney agrees to accept a fixed percentage of the client's recovery rather than upfront costs. If the case is successful, the attorney's fee comes out of the money awarded. However, few lawyers are willing to take business disputes or intellectual property infringement matters on a contingency fee basis. The most common area of law that involves cases on a contingency fee basis are personal injury matters. Be that as it may, many attorneys may be willing to negotiate a workable fee structure and may allow a hybrid arrangement consisting of a blend between an upfront fee and a contingency.

5 Mistakes People Make that Often Lead to Litigation

People make mistakes when doing business that routinely lead to legal problems. A quick overview of those mistakes, and why they are mistakes, goes a long way in resolving legal problems before they begin.

Mistake #1: Doing Business with Strangers

When your washer is broken and you call a repairman you have never met to fix it, your risks are fairly low. The washer is already broken. He is taking on the obligation of trying to fix it and he is representing that he is capable of doing that kind of thing. So your most likely risks are generally that he might break the washer more or that he might hurt himself in some way while working on your machine. Those are pretty low cost risks and he is already assumed a lot of them for you. Also, if he is employed by a company, the company will have insurance that covers him and his work at your house.

But if you are involved in a major production and you elect to hire someone to hang lights over a set that will soon have working actors on it, or choose to create a "partnership" with a co-producer who will have full access to your company's bank accounts and the social security information for every employee who works for you, your risks are much higher and you are responsible for many of those risks.

It is your company. You hired them. Your responsibility is to keep people safe. You let them modify the work environment. You gave them access to your company data, including data you were responsible for keeping confidential. If the lights fall and hit actors, or you and your employees get cleaned out, you will have to sue the person you hired and others may well sue you.

Carefully vet people who work for and with you. Check references, see if they have had judgments against them, and work with them in a limited capacity for some period of time before you hand them a great deal of responsibility. In California, you can investigate the Secretary of State's website to determine if the business entity is active or whether the business is suspended for not paying its annual franchise taxes. If the latter is the case, this is a yellow flag as it shows the business is not financially responsible. Also investigate the federal courts' records for bankruptcies filed by an individual or business. You can also search to determine if the individual or business has been named as a defendant or plaintiff in federal lawsuits. This can be done via the federal Public Access to Court Electronic Records (PACER) portal. Be on the alert if the party was named as a defendant and incurred liability. Also be on the alert if the party has brought numerous lawsuits as the plaintiff. You do not want to invite a lawsuit by doing business with a vexatious litigant and you do not want to do business with someone who has wronged others in the past. History is the best indicator of how someone will act in the future. Fortunately, court filings provide a public record.

For those who wish to be more thorough, a private investigator can always be retained to provide a more full history. The information that a private investigator may be able to discover for you may include the subject's current location, source of income, officer and director search, fictitious business name search, bank accounts, statewide real property search, UCC-1 financing statements (i.e. does the subject appear to be named as debtor in any outstanding filings), public records search, civil litigation in county of residence, aircraft/watercraft ownership, motor vehicle ownership, date of birth, verified social security number, and public records of tax liens and bankruptcies.

When conductIng business in the entertainment industries, investigate the other party's intellectual property. The more registered works, the more likely the prospective business will be legitimate. Many people in Hollywood pretend to be a writer or production company. You can research the Copyright Office's database to determine if the subject has any registered copyrights. The Copyright Office is required by law to maintain records of copyright registrations and to make them available for public inspection. Likewise, the United States Patent and Trademark Office (USPTO) also keeps a database of patents and trademarks.

Mistake #2: Giving Away Ownership Without Accountability

Frequently people who want to undertake a project together, whether it is a film or the launch of a new tech company, will decide to become equal "partners". They do this because it seems "fair" and, at that particular moment, they feel they share common goals, strategies, and commitment for the work they are going to do.

First, you should never use the word partner to describe someone you are working with, because the law considers "General Partners" to be fully liable for one another's mistakes. If

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your “partner” runs someone over with a car while drunk, your personal assets, such as your own house, can be at risk. So, generally speaking, never loosely use the word “partner”.

Second, when you and someone else have an idea that involves undertaking a project, it’s just an idea. The courts have made it clear that “ideas are as free as the air.” It is the mental labor that leads to the expression and embodiment of that idea in a tangible medium that can be protected by copyright law. If you have developed an invention or design, protection by patent law may apply.

Work is required to turn an idea into a reality. If you spend six years working on that idea, and your “partner” drops out six months in without having achieved anything, he should not receive the same benefits or have the same level of control you do.

So you should create agreements with people you want to work with. Set up from the onset with the assistance of legal counsel the proper legal business structure and relationships. Document what you are going to do, who is going to do what, when things are going to happen, and what will happen when goals are achieved or not achieved. It may be preferable for ownership and control in a business or intellectual property created by two or more people to vest over a period of time based on performance, rather than be granted outright.

If you cannot come to that agreement, then perhaps each “partner” should create their own version of the business or property. Then paying customers can decide who to compensate.

Third, when two people own and control something equally they run into trouble when they disagree. There is no tie breaker. Sooner or later you and anyone you work with will end up diametrically opposed on some issue that seems critical to both of you. Decide, before you work together, how you will break that tie and put that agreement in writing so it can be legally enforced.

And fourth, every business deal needs an exit strategy that both parties are happy with. Key provisions are the termination and withdrawal terms. If you cannot figure that exit strategy out at the beginning of a relationship when you are both most motivated to work together, you will not be able to figure it out when you are bitterly at odds.

Partnership agreements, operating agreements, and corporate bylaws are key documents in defining the relationships between people who wish to do business together. Although not legally required in order to create the respective formal entities, these documents are critical to outlining the rights and obligations of the parties to the respective business relationships. It is important to consult with an attorney when drafting and entering these agreements.

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Mistake #3: Believing in Oral Agreements or Failing to Believe in Them

The truth is that agreements people make verbally, or in informal emails, may be enforced. If two people have a meeting of the minds, develop a plan of action, determine who will be paid and/or how revenues will be split, and one or both parties take action on that agreement… it is probably a contract. It is just a badly defined contract which will lead to trouble for both parties if it is about something important.

On the other hand, an oral agreement is just like any other agreement. Certain requirements must be met. The key terms in the agreement must be certain, definite, and clear. An essential element in any contract is consideration. There must be a reciprocal bargained-for exchange for which each party incurs a legal detriment and a legal benefit. To enforce an agreement or seek monetary damages in the case of a breach, one party has to be able to prove that the other did not make good on its commitments or failed to substantially perform its end of the deal. When the agreement is not written down, proving there is in fact an agreement is not easy. It is even more difficult to clearly prove what that agreement was.

In both New York and California, the law recognizes legal claims for *implied in fact* contracts, particularly when it comes to idea submission and idea theft. This body of law was developed because major studios historically took advantage of those pitching creative ideas. In certain cases it may be difficult to succeed on copyright infringement due to the requirement of proving substantial similarity between the works, especially when going up against a major studio. Nonetheless, a cause of action for breach of an implied contract may be a more feasible claim. Contract law was developed in order to hold people to their promises. An implied contract is an agreement that arises without any party specifically, in writing or verbally, expressing the terms to be enforced. Rather, the parties indicate by their conduct that they have reached an agreement. The parties behave in a way that indicates they have entered into a contract. This cause of action requires a bilateral expectation, as proven by the factual circumstances, that the party receiving confidential information will compensate the other party for its reasonable value. Key factors include: whether or not the idea was solicited or unsolicited, was there an opportunity to reject the idea, were there general business circumstances surrounding the disclosure, and was the idea in fact used.

Simply put though, get all agreements in writing! If this is not possible, document the best you can.

A good written contract is everyone's friend in a business deal. It is negotiated and written when the parties have a clear meeting of the minds and know why they want to work together and what their expectations and assumptions are. It documents what happens when the parties find themselves in disagreement (exit clauses, arbitration agreements, etc.). It allows good business to happen because it helps everyone to be clear about what they want, what they owe, and how their interest is calculated.

Pursuant to California law, the time frame for when a lawsuit for breach of contract must be filed, which is known as the statute of limitations, for a written contract is four (4) years from the date the contract was broken and for an oral contract is two (2) years from the date the contract was broken.

Mistake #4: Believing the Corporate Shield is All Powerful

Everyone who owns and operates a business should avail themselves of the protection provided by a Limited Liability Company (LLC), S Corporation, or C Corporation. These tools turn your business into a separate legal entity and can ensure that when your business gets sued, your personal assets (house, future income from other businesses, etc.) are protected.

But the corporate veil is not all powerful. In order to be in force, you have to follow legal formalities. Each form of an entity (LLC, S Corp, C Corp) has its own set of legal requirements. Annual meetings, even for C Corporations owned by a single person, the requirement to provide employees with workers compensation insurance, failure to file and pay state taxes, and participating in criminal activities like fraud, are just a few of the things that can pierce the corporate veil.

Make sure you work with your attorney to keep your company in legal compliance.

Mistake #5: Deciding the Labor Laws Do Not Apply to Your Company

Depending on the facts, “interns” may be considered to be employees. You have to pay them reasonable compensation and provide workers compensation insurance. “Volunteers” may also be considered employees. If there is an assent between the parties for the benefit of the hiring party and that party has control over the means of production, then there most likely is an employer-employee relationship. It is a fact-based inquiry. For example: Are they free to come and go as they please? Who is providing the tools and equipment? At whose location? Almost everyone who works with and/or for you on a project may be considered an employee. Therefore, it is important to obtain independent contractor agreements that are clear.

Be cautious, the IRS will strictly scrutinize those who decide not to pay taxes on workers who have been incorrectly characterized as interns, volunteers, or 1099 contract employees.

Labor laws do apply, and when you work in the entertainment industry and have unions involved, it becomes even more important to understand your obligations under the law. It is important to work with an attorney so that all appropriate independent contractor and work for hire agreements are in place.

What to Do When Business Deals Start to Fall Apart

Business deals do run into trouble. The longer you are operating your business, the larger your projects get, the more people you work with, the greater the probability that you will run into a problem that causes a business agreement to fall apart. When that happens, you need to know what to do.

- Remain calm. Antagonizing the other party or parties in a business deal makes things worse.
- When it is clear you have a fundamental disagreement about what happens next with someone you are working with or for, or someone you have hired, politely step back and stop talking.
    - If you are going to fire someone or quit, do it when you are calm.
    - California is an at-will employment state, but If you wish to terminate someone's employment, it must not be for an unlawful or discriminatory reason. Under federal law, it is illegal for employers to fire an employee because of the employee's race, gender, national origin, disability, religion or age. Generally, a claim process for claims of discrimination, retaliation, and wrongful termination. must be pursued with the appropriate government agencies. An experienced employment law attorney should be consulted.
    - As a practical note, providing a sufficient severance package may show that the parties acted in good faith. Release and waiver of claims may also afford peace of mind against any lawsuit. An attorney should be consulted.
- Protect your assets. In some cases this may mean simply changing passwords and locks on doors. Register copyrights with the United States Copyright Office. Register trademarks and patents with the United States Patent and Trademark Office. Consult an attorney to protect your intellectual property rights.
- Do not seize anyone else's assets. Do not seize property or stop others from working. You could be liable for interfering with another party's existing or prospective business relations.
- Do not involve third parties who are not your attorney. False statements of fact made to other parties that cause damage to the reputation of an individual or business could give rise to liability for defamation or trade libel.
- If you are experiencing criminal behavior like assault, harassment, or intimidation, inform your attorney so you can decide when, if, and how to go to the police.
- Remember that it is illegal to record phone calls or capture video with audio without telling someone they are being recorded. There are exceptions to this rule, but suffice to say an attempt to force someone into confessing in front of a hidden camera or microphone may not be admissible evidence in court.

To be clear, this information is not presented as legal advice. Once things start getting dicey, particularly on a high dollar deal, or on a deal where you think criminal activity is involved, you need to get a lawyer to learn the facts of your particular case and to actively advise and represent you.

Things to Say (and Avoid Saying) When Someone Threatens to Sue You

You certainly should not be the person loosely threatening lawsuits against others. You could in fact be committing extortion, which is a criminal offense, when you threaten to sue people. Whenever legal rights are at stake, it is best to consult with an attorney.

When someone seriously threatens to sue you, in certain situations the best course of action is simply to stop dealing with that party and contact an attorney. You may need to leave the area as swiftly and quietly as you can. Do not threaten to sue them back. Do not try to resolve the problem with them. Do not admit guilt. Do not accuse them of anything. Simply stop talking and leave. Let your legal counsel advise you and represent your best interests.

Avoid arguing about issues with someone who is already furious and thinking about litigation. If you have to say anything, it should be something like “I need to step back from this so I can think clearly” or “Please speak to my attorney.” Many times, people incur more liability when they try to handle the situation without adequate legal counsel.

This advice is particularly important if someone is being physically violent. If you are being physically threatened contact the police immediately! It is worth noting that if you are forced to agree to things, or sign contracts because someone is threatening to harm you physically, you are under duress and those agreements are not enforceable. You should consult with an attorney as soon as possible in these situations.

In addition, many times cease and desist letters may be sent when it is believed that another person is interfering with intellectual property rights, confidential information, or trade secrets. However, it is important to be cautious when sending these letters to third parties because you may find yourself being sued for defamation or interfering with the business relations of your alleged infringer. It is important to consult with an attorney before recklessly sending out cease and desist letters. When there is a serious good faith belief that you have been wronged, the litigation privilege may protect you against any liability in sending out cease and desist letters. The “litigation privilege” is a legal protection traditionally afforded to attorney communications made during the course of representation. The litigation privilege shields an attorney from civil liability to non-clients for communications made in the course of good faith litigation.

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Preparing to Win the Court Battles You Hope You Never Have

Lawsuits are expensive, time consuming, and risky. Many people, even those with great legal representation, have lost cases they should have won. No system is perfect.

To give yourself the best chance of success in a court case:

- Do business with people you know.
- Make sure you are fulfilling your legal obligations as a business and as an employer.
- Ensure you have set up a formal business entity (LLC, S Corp., C Corp., or Limited Partnership) and that your corporate veil is intact.
- Make sure you have the correct insurance (workers comp, production insurance, general liability, errors and omissions insurance, an umbrella policy associated with your homeowners policy, etc.) with sufficient policy limits to cover you, your personal assets, your business assets, your employees, etc. It is important to fully read and understand your insurance contract. You should review the declarations page, the policy period, the policy limits, all endorsements, all exclusions and exceptions, all defined terms, and you should understand who in fact qualifies as the insured, and you should know what is actually being covered.
- Never engage in illegal activity, and do not turn a blind eye to illegal activities by those working alongside you or your employees.
- Have written contracts with those you work with that were created by an attorney. If it is worth working with someone, it is worth documenting your deal with them.
- Seek legal advice early. A quick consultation early before things go wrong often prevents any issues and may help resolve problems swiftly.
- Remain calm. Going to court is a marathon, not a sprint, so set your expectations accordingly.

Independent legal counsel should always be consulted as you build your business, create deals, hire employees, and sell your products and services.

Be Careful When Seeking Equity Investments

Many businesses raise capital by seeking equity investments. Equity is a share in the ownership of the business. When seeking investment money for a business or project, it is important to protect yourself by disclosing as much information about the business as possible. If investors do not get their money back or see a return, they may threaten to sue for securities fraud. Having the appropriate disclosure documents in place and presented to the investor may provide a defense. Security laws are very nuanced and fraud is a serious allegation.

Both the Securities Act of 1933 and the Securities Exchange Act of 1934 define what is a security.

Section 2(a)(1) of the Securities Act of 1933 defines a security as:

The term “security” means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 3(a)(10) of Exchange Act of 1934 defines a security as:

The term “security” means any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a “security”; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker’s acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

The definitions of security are very broad and include all forms of investment instruments and contracts.

The landmark United States Supreme Court case interpreting the definition of an “investment contract” as a security is *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946). The Howey Test defines an investment contract as follows:

“… an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party…. Such a definition…permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance

of the many types of instruments that in our commercial world fall within the ordinary concept of a security…. It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."

The Howey Test includes a four-part analysis to determine if an investment contract exists subject to security laws: (i) An investment of money; (ii) In a common enterprise; (iii) With an expectation of profits; (iv) Which are derived solely from the efforts of the promoters or third parties.

Where a transaction involves a security, the anti-fraud provisions and accompanying rights and remedies found in the state and federal securities laws will apply. Section 5 of the Securities Act of 1933 makes it unlawful to offer or sell any security unless a registration statement is in effect as to that security or there is an available exemption from registration. To note, Regulation D of Securities and Exchange Commission allows usually smaller companies to raise capital through the sale of equity or debt securities without having to register their securities with the Securities and Exchange Commission.

The private placement offering memorandum (PPM) is the securities disclosure document associated with an exempt private offering, which is the most common method used by low-budget independent filmmakers to raise money. The PPM includes relevant disclosures about your company that allow investors to weigh the risks. Most importantly, the PPM satisfies Regulation D of the Securities and Exchange Commission.

The PPM should contain information on the business, financial information, legal structure and ownership information, and information related to the offering itself. It should also make clear that Regulation D controls the investment and therefore state securities regulations do not apply, although generally the state must still be provided notification of the investment. PPMs do not include as many disclosures as required for public offerings. Investing in private equity requires buying private securities that are not registered with the Securities and Exchange Commission and are not traded in public markets.

Still, obtaining the protection of a PPM is expensive in terms of fees for legal, accounting, and financial counsel. It is common for PPMs to cost up to $20,000.00. However, when seeking investments, the PPM is the best type of insurance. The PPM can be used to defend against claims from investors and government regulators.

Technically speaking, if the investors are considered "accredited", a PPM may not be required. Nonetheless, it is still the best practice to do so. Even if investors are "accredited", they can still pursue claims for securities fraud and an adequate defense is needed.

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Moreover, to best protect yourself it is always good to deal with accredited investors. Such a person is considered to be informed and knowingly makes the investment.

In regards to industries such as independent film production, most films are not financial successes. Investing in a fon production is risky. Investors usually only do it because of their personal interest to be part of the “industry”. Therefore, when seeking investments in this type of industry, it is best to obtain certification that the investor is accredited. Investors become accredited by meeting certain criteria such as being worth $1 million beyond the value of the investor's primary home or having made $200,000.00 in salary individually, or $300,000.00 as a couple, in each of the past two consecutive years. Being accredited shows that an investor is sophisticated and has sufficient funds so as not to need the same protections as an unsophisticated investor.

It is important to have the counsel of an attorney, especially because securities fraud can be a criminal offense which can lead to a prison sentence!

Have Clear Contracts for Personal Services

Many times when there is a dispute involving a personal services agreement, it may be difficult to calculate the damages. Particularly in the entertainment industries, the breach of a key actor may have significant impact. However, it is well-settled that the courts will not order someone to specifically perform a contract for personal services. This would violate the Thirteenth Amendment’s prohibition on involuntary servitude. However, courts have been willing to use injunctive relief to prevent a person breaching the agreement from performing such services for someone else for a period of time. The breaching party should not be rewarded its bad behavior. The courts may therefore issue a negative injunction when the personal services were supposed to be exclusive and the services are unique and not readily replaceable. The law considers such harm to be irreparable.

Another worthwhile provision in service contracts may be a liquidated damages clause. A liquidated damages clause specifies a predetermined amount of money that must be paid as damages for failure to perform under a contract. The amount of the liquidated damages is supposed to be the parties' best estimate at the time they sign the contract of the damages that would be caused by a breach. However, a liquidated damages clause must not be a penalty, but rather the amount must be a reasonable estimation of the damages that would occur. Simply, there must be a reasonable explanation for how the stipulated sum was chosen.

Courts have enforced liquidated damages clauses in entertainment personal service contracts. However, such a clause may show that the artist's breach can be compensated with a monetary award. This can be used by the breaching performer in arguing that plaintiff has an adequate remedy at law, and thus, bar a negative injunction.

Legal counsel can help ensure that the client clearly defines the relationship between the parties so that it is clear, practical, and enforceable.

The Reasonable Prudent Person Legal Standard

Needless to say, the law is super critical. For example, the law expects all people to at least satisfy the hypothetical standard of the “Reasonable Prudent Person” when conducting activities. This is a fictional creation by the law that is intended to represent the average safe person. However, the “Reasonable Prudent Person” is one who never breaks the law, never consumes alcohol or substances, never makes a mistake, and always takes all possible safety precautions. Obviously, this is far from the average person! Moreover, even a higher standard may apply and must be satisfied depending on the type of activity, profession, or status of the actor.

Conclusion

From the onset, legal counsel can carefully advise you so that your actions will pass the court’s critical scrutiny and you can avoid finding yourself tied up in unnecessary, time-consuming, costly litigation.

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About Justin Sterling, Esq.

Justin Sterling, Esq. is the Founder and Principal Attorney of The Sterling Firm, A Professional Law Corporation, located in the entertainment capital of the world, Los Angeles, California. Mr. Sterling is a transactional, litigation, and trial attorney. He is licensed by the California State Bar and the United States District Court for the Central and Northern Districts of California. He is committed to representing clients and serving the legal community with the utmost professionalism and compassion.

Mr. Sterling attended law school at the University of West Los Angeles School of Law, where he graduated Summa Cum Laude. Mr. Sterling also obtained his undergraduate degree from West Chester University, where he graduated Magna Cum Laude.

Mr. Sterling has been involved with the entertainment industries for over a decade and is dedicated to serving entertainment and business professionals. Visit The Sterling Firm website at www.TheSterlingFirm.com. Mr. Sterling can be contacted at telephone number (310) 498-2750 or email Justin@thesterlingfirm.com.