

Ideas



March 2008

Suggestions on How to Protect Your Ideas When Pitching

It is really disheartening when we think a prospect we has used the ideas we discussed during the presentation. It seems we put our best foot forward in an attempt to find the strategic answers to their issues and then when we don't get the business we are naturally disappointed. That goes almost without saying. But, what really gets us riled up is when we see some of our ideas being used by the client and their new agency.

What are the 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 a proposal?

I'd like to offer my take on this, and suggest what you should do to preserve your ownership.

A Little Background

Parts of our industry's dynamics are agency searches. I believe there is a dialog needed between the presenting agency and the marketer. If, as agencies, we promote a best practices they can facilitate efficient and fair new business activities.

Whatever you do, this dialog should be constructed to assist the marketer and the agency in the discussion of business goals, marketing objectives and service expectations. It should help a bilateral examination of capabilities, compatibility and financial expectations.

The search process should now be used to create a storehouse of ideas and materials.

What you need to consider

Going through the process of a comprehensive agency search is time intensive and costly for both the marketer and the agencies involved. Everyone, including the third-party consultants need to attempt to create a search process that is efficient, timely and fair.

The search process should be outlined up front by the marketer.

- Get the process started early. Use your agency's new business questionnaire. This should help in the up-front discussions and initial interviews.
- Some marketer's process asks for speculative work as part of the presentations. I would like to suggest that both parties have a mutually clear understanding of the scope of work and of the deliverables and how the agency will be measured.
- Short list and final phases should adhere to the agreed upon process.

Before you start in a search, you should discuss with the prospect if you will be paid for your participation. You should also include what costs will be reimbursed. Any agreement should spell out that any payment is to compensate for the agency's participation in the process and does not change your ownership of agency-developed concepts and materials.

Where does this lead you? Who owns it? Is it being assigned? What are the usage rights?

Before participating in search meetings and presentations, you should discuss our ownership, license and usage rights of your ideas will be handled.

If you are participating in an RFP, I recommend that you protect your ownership. In the work that the AAAA has

done on this, they make a recommendation that you use a paragraph similar to their retention language:

“Advertiser/Marketer acknowledges that any and all ideas, concepts, strategies, trademarks and materials that Agency presents or provides to Advertiser/Marketer (the “Presentation Concepts and Materials”) are being presented or provided for the sole purpose of allowing Advertiser/Marketer to determine whether Advertiser/Marketer wishes to use the Presentation Concepts and Materials and to engage Agency’s ongoing services. Advertiser/Marketer acknowledges and agrees that the Presentation Concepts and Materials are, and will, remain Agency’s property regardless of any payment made by Advertiser/Marketer 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/Marketer’s Possession in the form of copy, artwork, etc.”

If, however, you encounter a situation where the marketer is concerned about potential confusion or legal dispute resulting from ideas, plans, or work that was in the possession of the marketer before the agency submitted the work, or similar work submitted by other agencies involved in the RFP, then maybe the marketer’s concerns can be assuaged in an agreement between the marketer and the third party review participant.

For example, the following paragraph that may handle the concerns of all parties:

“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.”

As a matter of good practices, you need to have competent legal counsel who is experienced in service marketing and intellectual property dynamics. Counsel should be consulted as part of your new business team where appropriate.

It happens, although rarely, that the marketer wants to purchase the ideas and plans developed in the search/presentation process, but does not want to hire the agency.

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.

Again, an example from AAAA:

“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."

An open, equitable two-way dialog between the marketer and your agency about goals, processes and money matters makes for the best long-term

relationship. I would encourage you to value and protect your ideas and work. Marketers that are looking for a long-term communications partnership with an advertising agency respect agency work and value it fairly.

Upcoming AMR Workshops & Network Meetings

March 7-8	Strategic Marketing Network	Tempe, AZ
April 9-10	Marketing Resources Network	Scottsdale, AZ
April 21-22	AE BootCamp	Chicago, IL
April 23-24	Financial Firepower Management Roundtable	Chicago, IL
May 2-3	Alliance of Marketing Communication Agencies	Carmel, CA
May 15-16	Roundtable of Agency Management Principals	Santa Fe, NM

If you would like a program brochure that includes meeting information, an agenda and a registration form, go to the AMR website and download the PDF brochure for the meeting. You'll find the link on the home page, and on the appropriate workshop page. www.agencyroundtable.com

If you would like to know more about AMR Management Networks, please call Dave Wood at 623-266-8981 or write email dave@agencyroundtable.com