



4A'S BEST PRACTICE GUIDANCE: Agency Search Agreements (AKA New Business NDA's)

A Position Paper from the 4A's.

***Fourteenth in a series of Position Papers Addressing Key Industry Issues
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I. Objective:

The purpose of this position paper is to provide agencies with best practice guidance relating to obtaining formal agreements between an agency and a prospective client during the marketer's search for agency resources or a marketer's request for proposal. The position paper discusses confidentiality, ownership of agency ideas and work, reimbursement for agency activity and expenses and post-review feedback.

The 4A's recommends that agencies execute new business agreements with client prospects at the outset of every agency search.

A sample Agency Search Agreement that illustrates some key terms that should be addressed at the beginning of a search is incorporated as an appendix to this position paper.

II. Background:

Marketer searches for agency resources are an integral part of the industry's dynamics. The 4A's believes that it is prudent to promote a dialogue on best practices in order to facilitate effective, efficient and equitable agency new business activities.

The 4A's has previously issued best practice guidance recommending that agency new business activities entail a detailed discussion of the prospective client's business goals, marketing objectives and service expectations. We recommend that the agency search process fosters a two-way assessment of capabilities, compatibility and economic expectations. The 4A's also recommends that agencies preserve ownership of new business-search ideas, plans and work product.

The client search for agency resources can require a significant level of resource investment and information sharing by both the agency and the advertiser. The 4A's believes that it is prudent to have formal agreement between the parties at the outset of an agency search.

III. Considerations:

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 and terms of the marketer’s search process should be outlined up-front.
- The exchange of confidential agency and client information should be protected.
- Early dialogue and use of tools such as the “4A’s Standardized Marketer New Business Questionnaire,” the “4A’s Standardized Agency New Business Questionnaire” and the “4A’s Agency Prospect Assessment Guidance” should facilitate up-front discussion.
- If speculative plans or work is a component of the search process, the agency participants and the marketer should have a clear understanding of the purpose, scope of the activity, deliverables and measurement standards that will be involved.
- Agencies and the marketer should discuss the subject of remuneration and out-of-pocket cost reimbursement payable to the agency for participating in the review.
- Effort should be made to adhere to an agreed-upon process for all phases of a search.

Best Practice Guidance: Agency Search Agreements

In advance of participating in a client request for proposal or agency search, the agency and client should execute a formal agreement covering topics such as mutual confidentiality, ownership of agency ideas and work, reimbursement for agency activity and expenses and client commitment to provide the agency with frank feedback following a significant review.

Key provisions that agencies should consider incorporating in new business agreements are outlined below:

Mutual Confidentiality

If it is likely that proprietary information about an agency’s process, plans, pricing, research, data, analytics, business, technology or any other form of confidential information will be disclosed to an advertiser (or an intermediary working on behalf on the advertiser), access to and use of the agency’s confidential information should be restricted and protected by written agreement between the parties.

In the event that the advertiser is likely to disclose proprietary information to the agency during the course of the search, the advertiser’s confidential information should also be protected by written agreement.

When a consultant is involved in a review, agencies should ensure that the consultant contractually commits to the mutual confidentiality terms agreed upon by the advertiser and agency. The agency should ensure that the consultant confidentiality commitment not only incorporates protections such as the confidentiality provision of the [Agency Search Consultants Code of Conduct](#) but also restricts access to and use of agency confidential information, without agency consent, by any third party.

Ownership of Agency Ideas and Work

If the agency is likely to develop speculative strategies, plans, ideas or other work product in the course of participating in an advertiser search process, the agency should preserve ownership of its ideas, plans and work product via executing a written agreement between the parties.

It is appropriate to note that the ANA/4A 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 rights ([ANA/4A's Guidelines for Agency Search](#)).

Reimbursement Covering Agency Participation and Expenses

In advance of participating in a marketer search, agencies and the marketer should discuss what level of remuneration, if any, 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.

Post-Review Client Feedback

Given the significant investment that an agency will make during the agency search process, it is appropriate for the agency to ask the marketer and for the marketer to agree to a contractual commitment to provide the agency with frank feedback as a condition of the agency agreeing to participate in the review.

The 4A's encourages agencies to value and protect their information, ideas, work and economic interests. Best practice dictates that agencies involve competent legal counsel and develop formal written agreements with prospects at the outset of the marketer's search for an agency.

For additional information on agency search best practices we suggest that agencies and advertisers adopt the recommendations included in the [ANA/4A's Guidelines for Agency Search](#).

SAMPLE AGENCY SEARCH AGREEMENT

[date]

Attention: _____

Dear _____:

Thank you for the opportunity to allow _____ (“we” or “us”) to make a presentation to [Company name] _____ (“you”) in connection with your review of advertising agencies to handle your account. In connection with our services, you and we agree to terms and conditions as follows:

1. [Sample Confidentiality Provision]

You and we recognize that, in connection with our participation in your agency search, you and we each will likely disclose to the other confidential and proprietary information regarding our businesses, including without limitation, confidential and proprietary information relating to advertising, promotions, plans, competitive strategies, product characteristics, market research, customer information, budgets, estimates, pricing, costs, data, analytics and any other information relating to our respective businesses that are designated in writing as confidential (“Confidential Information”). You and we agree not to disclose any Confidential Information to any third party without the consent of the other and to require that any third party so authorized to receive Confidential Information agree to be bound by the terms of this provision. You and we also agree not to use any Confidential Information for any purpose other than as is necessary for us to participate in your agency search. Further, you and we agree to return any Confidential Information to the providing entity upon request. Confidential Information, however, does not include information which is or becomes public knowledge through no fault of yours or ours; information that is known to either you or us prior to disclosure of such information to the other; information that is learned from a third party that is not known to be under a confidentiality obligation to either you or us; and information that is independently developed without use of any of your or our Confidential Information. In addition, you and we shall be entitled to disclose any Confidential Information that is required to be disclosed by law or legal process; however, you and we agree to provide the other with prompt written notice of the required disclosure.

2. [Sample Payment Provision]

We agree to prepare and provide to you our recommended ideas, strategies, creative concepts, and creative materials in connection with the advertising and marketing of your _____ product.

In consideration for our participation in your agency search you agree to pay us a participation amount of \$_____ as follows_____, and to reimburse our actual direct out-of-pocket [travel, research, production, etc.] costs associated with these activities, up to \$_____, payable as follows:_____.

3. [Sample Ownership of Ideas Provision]

You acknowledge that any and all ideas, concepts, strategies, trademarks and materials that we present or provide to you (the "Presentation Concepts and Materials") are being presented or provided for the sole purpose of allowing you to determine whether you wish to exploit the Presentation Concepts and Materials and to engage our ongoing services. You acknowledge and agree that the Presentation Concepts and Materials are and will remain our property (regardless of whether the physical embodiment of the creative work is in your possession in the form of copy, artwork, etc.), and we shall retain all right, title, and interest therein. If you decide that you would like to use or exploit the Presentation Concepts and Materials in any manner and engage our ongoing services as your advertising agency, you and we will negotiate in good faith and enter into a separate agreement setting forth the terms of our services, or of such use or exploitation, including the amount of our compensation. You and we agree, however, that your acknowledgement of our ownership of, and your ability to utilize, the Presentation Concepts and Materials shall not apply to any Presentation Concepts and Materials that (i) you independently develop (or have already independently developed) without any use of any of the Presentation Concepts and Materials presented by us, or (ii) are provided to you by a third party (including any other agency) that is not affiliated with us or under a confidentiality obligation to us.

You acknowledge and agree that the Presentation Concepts and Materials are, and will, remain our property regardless of your payment of the participation amounts specified in paragraph 2 of this agreement.

4. [Sample Feedback Provision]

Advertiser has requested the agency to participate in the review of advertising services and advertiser acknowledges that agency will make a resource investment associated with its participation in the review process. As a condition of the agency agreeing to participate in the Advertiser's review the Advertiser agrees that within 10 days of the earlier of either the conclusion of the review or the awarding of an assignment the advertiser's management will provide the Agency with feedback related to the agency's performance during the review process.

The feedback shall involve feedback from the Advertiser management executives that were the key agency selection decision makers [name] either via (i) participating in a [one hour] meeting or phone call with agency management or (ii) completing a questionnaire that is comparable to the 4A's industry standard post-review feedback questionnaire [[Agency Review Feedback Questionnaire](#)]

5. This agreement contains the entire understanding between you and us with respect to the subject matter of this agreement and may not be altered or waived except by a writing signed by both parties. This agreement will be governed by the laws of the State of _____ applicable to contracts executed and to be performed entirely in the State of_____.

If the terms contained in this letter accurately reflect your understanding of our agreement, please so indicate by signing in the space provided below.

Sincerely,

[Agency] _____

By: _____

Authorized Officer

ACCEPTED AND AGREED TO:

[Company] _____

By: _____

This form is not a substitute for legal advice and may not be suitable in all situations. Consult your attorney for legal advice.