Campus Law
by Adam S. Lambert

Contracts And Riders, Continued. Dealing with "Additional Terms".
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Last month, we began a discussion about contracts and, more specifically, contract riders. Contract riders are very useful tools in our business. A rider, which is nothing more than an addendum or addition to a contract, is meant to be a way for a school and an agent or artist to come to a basic agreement on major issues such as price and date, while leaving certain "nuts and bolts" technicalities for later determination.

When a school contracts with an agent representing an artist, the contract rider is often an absolute necessity, because the agent may not be fully aware of certain technical or personal requirements the artist may have. Similarly, the school representative may not be totally aware of the exact requirements or limitations of the school. For example, it is not uncommon that neither party in the negotiations will know what the artist's lighting requirements are, or what the electrical limitations of the performance area are.

The problem, we have seen, is that the addition of terms to the contract can sometimes change the landscape of the deal to the extent that there is no longer a "meeting of the minds". In other words, when a contract rider contains provisions so out of whack with the original deal the parties thought they were striking, the entire deal may be, at least in the eyes of one of the parties, defunct. What you usually end up with at that point is one party who is mad about the other party's failure to honor the rider, as agreed to, and the other party mad about the first party's devious use of a good-faith tool. See you two in court!

Riders are a useful tool. Of course, fire is a useful tool, too. And, believe me, a bad contract rider can burn you just as badly as any fire!

How can we avoid this "rider abuse"? Should we simply stop using riders altogether?

Let's review some helpful law.

First, is it even possible to have a valid contract when the "acceptance" contains terms different from the "offer"? Well, mostly, the answer is Yes. Looking at the Uniform Commercial Code, the "UCC", which has been adopted nation-wide as the authority for contracts and sales, we find the following statement:

UCC § 2-207: Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional upon assent to the additional or different terms.

Now that half of my reading audience just went to sleep, I will attempt to make some sense of that statement for you.

As we learned last month, an acceptance with additional terms not contemplated in the original offer is not a true acceptance, but actually a counteroffer. As we learned, it is that "not contemplated in the original offer" part that makes things sticky. The addition of terms that are so far afield of the original offer that they were not contemplated in the original offer vitiates the offeror's consent.

Let's go back to our example of Aaron and Bobby. Remember, Aaron wanted to sell a baseball to Bobby for $5.00. If Bobby accepts the $5.00 offer, but also adds terms that are so outrageous that no reasonable person could have believed they were included in the deal,

Aaron's consent no longer exists. Aaron is offering to sell the ball for $5.00 and has consent for that. If Bobby accepts the $5.00 price, but adds that Aaron must also teach him to play baseball, Aaron's consent no longer exists.

However, if Bobby simply adds that delivery of the ball must be made by tomorrow, Aaron cannot really say that he lacks consent, as immediate delivery was reasonably contemplated as being part of the offer. Thus, the rule of UCC § 2-207, stating that additional terms (such as riders) are acceptable.

So, how do we protect ourselves from these "additional terms"?

Well, first, we should note that most agents, artists, and school representatives are dealing in good faith. We all share a common goal, which is, as APCA puts it, "quality programming at affordable prices". While you should always be concerned about protecting your interests in any negotiation, you should never go in believing that the other party is out to get you or is attempting to put one over on you.

Avoid the "battle of the forms", where your "iron-clad" contract contradicts every possible clause in their "iron-clad" clad contract. While it will sound good at first blush to have your attorney write an "iron-clad" contract, contracts with Draconian clauses in them usually end up doing neither party any good. And remember, whenever you write a contract, any ambiguity in that contract will be construed against you! Having the "perfect contract" is not always the answer.

Exercise some patience when negotiating. Take the time to read the contracts before you sign them. Anytime you sign anything, the law assumes you read it and understood it before signing. If you don't understand it, ask! Don't just sign on the dotted line without reading the contract, so that you can get back to the wax hands exhibit before it closes for the day.

Put everything possible into the contract. If you know the technical

requirements of the artist, or the travel policies of the school, put them into the contract right then and there. Don't be afraid to write things in the contract, or to scratch out things you don't want (make sure both parties initial any changes you make before signing).

If you have any additions that absolutely must be placed in a rider (you often do), then try to define those things as best as possible in the contract. In other words, place a clause in the contract stating something along the lines of, "State U to provide artist with round-trip coach-class plane ticket priced $200.00 or less," or, "Amplification requirements for room of 50'x75' to be determined later and set forth in rider," or "Reasonable electricity demands not to exceed university plant services regulations to be supplied by State U."

By taking your time and placing everything on the table up front, you will avoid problems down the road—even if you aren't sure of the exact technicalities to come. This way, even if you don't know what the exact numbers will be, you can at least spell out what general requirements will be forthcoming. This way, the two-way street that is your contract will have bright lines and large signs, so that both parties will easily know how to get where they want to be.

I always welcome your input on this, or any other topic. Keep your emails coming!

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