

Final Draft — Structuring A Literary Agent Agreement

Law360, New York (October 11, 2011, 6:04 PM ET) -- Not all stories have happy endings. See, for example, what happened to the writers who chose the Deering Literary Agency of Nicholasville, Ky., to represent them. Over a period of 13 years, the founder of the agency, Dorothy Deering, persuaded these writers to give her thousands of dollars to edit, publish and promote their books — only six of which, out of the 200 books that Deering contracted to publish, ever made it to print. In the end, Deering was sentenced to 46 months in prison, and her agency was ordered to repay more than \$2 million in restitution to the hundreds of authors that were deceived.

While this horror story is not the norm, it has been estimated that every year more than 10,000 desperate-to-succeed writers pay around \$50 million to swindling literary agents. The Washington Post calls it “one of the dark, ugly secrets of the American publishing industry.” To avoid being taken advantage of when entering into a literary agent agreement, it is imperative for authors to understand the purpose of such an agreement and what information it should contain. This article highlights some of the issues that arise when evaluating a literary agent agreement.

Function of a Literary Agent

These days, it is commonplace for an author, particularly one seeking to have his work published by a large publisher, to retain a literary agent. Generally, an agent performs three functions. First, the agent will search, or “shop,” for publishers who may have an interest in the author’s work. Second, the agent will negotiate the terms of a publishing agreement. And third, the agent will review/revise royalty statements and collect royalties for the author.

Evaluation of a Literary Agent Agreement

Agent agreements can range anywhere from informal engagement letters to formal written contracts. Nevertheless, though each agent may differ on what they present as the “standard” agreement, every author who retains an agent should always insist on a written contract. This contract should address, at minimum, the following issues: scope, term, commission, disbursements, expenses, accounting and termination.

1) Scope

Though typical agency agreements give agents the exclusive right to represent the author's work worldwide in all media, such authors should consider limiting the scope of the agreement by geography and/or types of markets, including coverage of electronic rights. The agreement should also require that the agent keep confidential all matters handled for the author, as well as permit the author to accept or reject any offer obtained by the agent.

2) Term

It is best, at least for authors, to provide for a short term, such as one year. If the contract has a relatively long term and cannot be terminated on notice at any time, it should allow the author to terminate if the agent fails to generate a certain level of sales, or if the agent dies or leaves the agency.

3) Commission

The standard commission rate is 15 percent, although some agent's rates may be slightly higher or lower. For sales that involve subagents (such as for film or foreign rights), agents will usually charge a higher commission, ranging from 20 percent to 25 percent. Commission rates may often vary with the agreement dependent on the type of media involved. Despite the exact rate charged by the agent, it is important to state that commissions are not payable on billings which have not yet been collected.

4) Disbursements

It is customary for agency agreements to provide that the agent will collect all publishing royalties and remit to the author the remainder, less commissions. Furthermore, the agreement should provide that all funds received by the agent should be deposited in a trust account, separate from the agent's (or agency's) general account, so that such funds cannot be attached by creditors. It should be clear that all payments due to the author must be made quickly by the agent after billings are collected (i.e., within 10 business days).

5) Expenses

Traditionally, agents would absorb client expenses, such as copying and postage, from their commission. If that is the case, then such expenses should be disregarded for purposes of computing the commission. Yet recently, agents have begun charging authors for substantial expenses. Then, the agreement should provide that the income will be reduced by the expenses before the computation of the agent's commission.

6) Accounting

Authors should be entitled to receive a copy of any statements of account received by the agent at the time the author is paid. Additionally, the agreement should provide for full accountings by the agent on a regular basis (such as every six months), if requested, and the author's right to audit/inspect the agent's records given reasonable notice.

7) Termination

In most cases, literary agency agreements allow for termination on 30 days' notice to the other party. The author typically may also terminate the agreement immediately in the event that the agent files for bankruptcy, or upon the agent's death or disability. If the author terminates the agency agreement prior to the end of the specified term, the author usually will remain liable for commissions on all works placed during the remaining term of the agreement, despite the fact that those works are placed by another agent. Furthermore, the agent customarily will be entitled to commissions on all amounts received from deals negotiated by the agent during the term of the agreement, even if such amounts are received post-termination.

People often compare an agent-author relationship to a marriage. Using this analogy, the agency agreement would serve as a prenuptial contract. A well-drafted agency agreement therefore will cover most potential issues before the breakup occurs. For this reason, it is imperative that literary agent agreements be specific and thorough. This article has highlighted some of the main sticking points for structuring and negotiating a literary agent agreement.

--By Anthony V. Curto and Joseph V. Cuomo, Forchelli Curto Deegan Schwartz Mineo Cohn & Terrana LLP

Anthony Curto and Joseph Cuomo are partners in the Uniondale, N.Y., office of Forchelli.

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