

INSIDEOUT The Industry From The Inside

Samuel J. Erkonen's Seminar On Legal Issues

Reported by Jan Kearney
Cast of Thousands Entertainment Co.

I don't know about you, but my dreams of being in the entertainment business never included ruining my eyesight while squinting at the fine print in a 15 page contract, or trying to translate all sorts of legal mumbo jumbo. Being the "creative" type, I hate having to deal with this stuff!

But years and years ago, during a show we had produced, I watched in horror while a very tall pipe and drape installation start to fall toward the front row of the audience. At that same moment, acrobats were teetering in a precarious pose, while a juggler simultaneously darted forward to catch the falling pipe and drape. On his way to a heroic rescue, the juggler inadvertently stomped on the magician's prize duck. I couldn't help but wonder, "HMMMMMM....does my contract cover any of this?"

Like it or not, legal issues are an important element of our business, and we ignore these issues

at our peril. So I figured Sam Erkonen's seminar on legal matters at the IACEP conference would definitely be worthwhile, but probably somewhat boring.

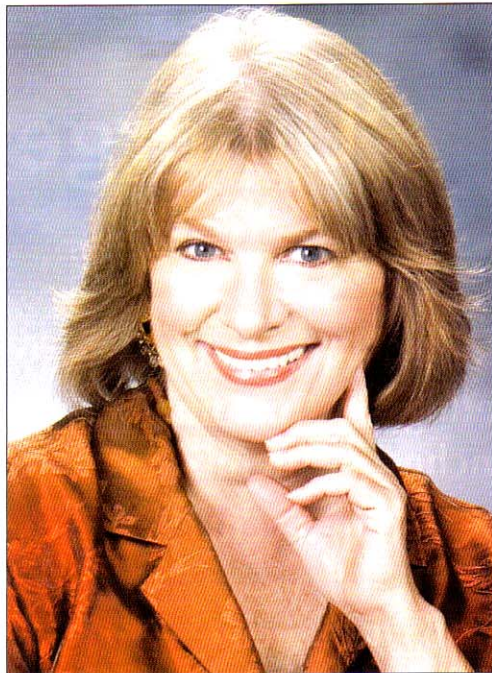
I was in for a big surprise. The session was actually entertaining—imagine that, at an entertainment conference! Samuel J. Erkonen, of the Chicago based law firm, Hutton & Howe, Ltd, kept the audience laughing while he provided excellent detailed information regarding the legal pitfalls in our industry.

Exposure

To start with a familiar example, think: "Wardrobe malfunction!" When things fall apart as it were, who is liable? The

exposed performer? The ripper-offer? The wardrobe designer? The producer? The venue? The TV broadcaster? The sponsor? Predictably, in our business, to quote the Secretary of Defense, "Stuff Happens!" So how do you arm yourself, as you maneuver through the mine field of contracts, addendums, clauses, riders, terms and conditions?

Sam Erkonen wisely advised, "Hope for the best, and plan for the worst!" In contractual agreements, as in most of our relationships, communication is key. We should be guarding against any ambiguity, any circumstances (or body parts) left uncovered, since any vague or missing statements will be construed against the maker of the contract. More words of wisdom from the speaker: "Become a better communicator!"



During the seminar we discussed the various remedies for "breach of contract" and learned the difference between liquidated damages vs. mitigation. Liquidated damages are a fair, but not punitive, specific dollar amount to satisfy a loss resulting from a breach of contract. An example might be a non-refundable deposit. Erkonen advised us to get as much of the payment up front as possible, to minimize our risk. Much of what he relayed had to do with shifting the risk to others, rather than assuming it oneself.

Indemnification

Indemnification applies to the "Bad boy/bad girl entertainer," among other scary situations.

INSIDEOUT The Industry From The Inside

If, for example, you hire a famous performer for a half time show, your contract with said entertainer should transfer the risk away from you and onto the entertainer, or anybody you can, just so it's not you!

Mitigating Circumstances

Mitigation of damages, I believe, involves making up for the loss in some way, rather than a specific dollar amount. "Carrot Top has the flu, can we send Gallagher instead?"

We also discussed "defend and hold harmless" agreements, certificates of insurance, alternate dispute resolution, and "Quantum Meruit," which literally means "as much as he deserves." This term has to do with fair payment for services rendered, even though some element might have been deficient or missing. For instance, you book a group called "Spinal Tap" and their drummer dies of spontaneous combustion onstage. The band bravely plays on anyway, and so they deserve to be paid something, but not necessarily what you had agreed to in their contract.

I was surprised to learn that contracts actually include more than those pieces of paper we all sign. Relevant voice mail messages, emails, even printed instant messages can all be construed as "contracts" in a court of law. So keeping detailed and accurate records of our professional conversations is a necessity in today's litigious climate.

And now, thanks to the Electronic Signatures in Global Commerce Act, or ESIGCA, contracts with electronically transmitted signatures are valid and legal. I just received one from an acrobat

in Canada which has his printed name on the dotted line, along with these words: "Digitally signed by (his name) I agree to the terms defined by the placement of my signature on this document. 10-16-2005"

With non-electronic contracts, I was happy to learn that handwritten changes are highly recommended. Erkonen says, "If one is making little modifications to an event or to a contract, let's have a paper trail. Handwritten changes are just as good as fancy typed changes."

May the Force Majeure not be with you!

We also discussed the term "Force Majeure" or Act of God, literally a "greater force" or an occurrence outside of our control which makes it commercially unfeasible to have the event. At the conference, some participants were still feeling the brunt of Katrina's and Rita's fury -- cancelled events, destroyed casinos, and the pain of lost payments. Not as tragic as many other losses, but a significant financial impact nonetheless.

The term "Force Majeure" seems pretty straight forward, but even here there are gray areas and ambiguities. The airport is shut down, true, but can you get there by car? Are the circumstances truly out of your control? There was a massive power failure. What, no back up generators? The World Bank is having a banquet. Protesters fill the streets, block the entrances, preventing guests from entering the event. Force Majeure? And of course, Force Majeure clauses now include the phrase, "Acts of terrorism."

Intellectual Property

Mr. Erkonen discussed ASCAP rules, and said they absolutely could not be ignored. The wisest policy is to transfer ASCAP compliance on to other parties, not letting the responsibility fall on us. He stressed again and again that if anything we have created has a tangible form, it can be considered "intellectual property." Included herein are speaker materials, videos, and power point slides. (And this article, too-- so watch out!) We touched on the issue of photographs, song lyrics, parodies, and the questionable practice of lifting images off other companies' web sites without permission.

Finally, since I'm running out of space, I would just like to end by saying that I thoroughly enjoyed Mr. Erkonen's presentation. If you weren't there -- you missed a valuable learning experience! Further, I request that you hold me "harmless" for any inaccuracies in this article, and the examples cited herein are my own, not Mr. Erkonen's.

Oh, and by the way, the pipe and drape did not fall on the audience, the acrobats held their pose, and the injured duck, a real trooper, made it through to the end of the show. However, his injuries did prove fatal later that night, so the juggler bought the magician a new duck, a rare and expensive breed. But it was a wake up call, so we got to work right away on putting together a much more comprehensive contract for our company!

Jan is the owner of Cast of Thousands Entertainment Co., based both in Washington DC, and Berkeley, California. In business for 25 years, the company, specializes in customized themed performances, and has won 16 local and international awards, including four ISES "Esprit Awards" for Best Entertainment. jk@castof1000s.com, Phone: 888-277-2278, www.castof1000s.com