ANYONE WHO’S BEEN IN THE PHOTOGRAPHY BUSINESS FOR ANY LENGTH OF TIME HAS PROBABLY COME ACROSS THE TERM “PAPER TRAIL”—THE WRITTEN RECORD OF A BUSINESS DEAL FROM BEGINNING TO END.

But where does the trail begin? According to PDN’s panel of experts, it should begin with the delivery memo—or, to use Picture Agency Council of America (PACA) counsel Nancy Wolff’s preferred term, the delivery contract. “It is a contract,” she says. “And it should be called one.” The primary purpose of a delivery contract, she says, is “to spell out under what conditions you’re going to let someone borrow your material and use it.”

Of course, the unstated reason for having a paper trail that includes a delivery contract is to protect yourself should you wind up in court. Jane Kinne, who’s been called upon numerous times to serve as an expert witness in copyright and lost slide cases, can attest to that. “A delivery memo is especially important if you end up in court because then you have to be able to prove that the recipient was aware from the get-go of what the deal was going to be,” she says. “A delivery memo helps to establish that.”

There are other benefits as well: “If nothing else, using a delivery memo gives a client an image of you as someone who conducts business in a professional and businesslike manner—and most clients are businesspeople, not artists,” says American Society of Media Photographers (ASMP) counsel Victor Perlman.

L.A. advertising and editorial photographer Michael Grecco, who is a stickler for paperwork, concurs. He says, “I think my clients respect me more because the details have been negotiated and discussed beforehand. It shows that I’m conscious of everything I’m supposed to do, that I know what my needs are, and that I know what the clients’ needs are too.”

According to the experts, it matters only a little whether clients actually sign and return your delivery memo. And as a matter of fact, most clients don’t sign—at least not after the first time you deal with them. “With all my years of experience in this business, I estimate that delivery memos are signed and returned about 20 percent of the time,” says Kinne.

Grecco says, “If I don’t trust the client, I make sure they sign my delivery memo before I send pictures. If I’ve worked with a client a million times, and they’re fastidious, and [the delivery memo] doesn’t come back signed in an instant, you don’t stress out. The object is to get them signed.” For a big assignment, he notes, the job estimate includes the same terms and conditions spelled out on his delivery memo—and the client always signs the estimate, he says.

Meanwhile, some stock agencies get new clients to sign a delivery memo as part of the credit check process. That way, the client understands and agrees to the terms up front and can’t argue ignorance later on. The important thing, says Wolff, is to discuss your terms and conditions with a new client, then include a delivery contract that spells out those terms with each shipment of pictures.

“If [your package of pictures] is delivered with those terms, there’s no objection from the client and they use your images, that’s deemed acceptance” of the delivery memo terms, even if it isn’t signed, Wolff says.

The validity of an unsigned delivery memo, Wolff explains, is rooted in the so-called Uniform Commercial Code (UCC) adopted by nearly every state to govern the transaction of goods between merchants and their customers. (The PACA delivery memo specifies that the transaction is subject to the UCC.)

“You don’t always have signed contracts, so there’s a standard of practice under the UCC: If you don’t agree with the seller’s terms, you send the goods back.” Failure to send the goods back unused constitutes acceptance of the terms—a principle that courts generally recognize when clients try to argue that a delivery memo is invalid because it was unsigned.

Still, it is best to get the client to sign the delivery memo, if only because it will cost you time and money to argue in court that your delivery memo is valid, even though your client didn’t sign.

That brings us around to the meat of the matter: What
exactly are the important elements of a delivery memo?

Lost and/or Damaged Originals

One of the most important items to establish from the start is the value of any original images that you ship to a client. That’s because just about all clients occasionally lose images or damage them beyond repair. The best protection against such loss is to plan for it in advance with a so-called stipulated damages clause in a delivery memo.

Every delivery memo we’ve examined includes a stipulated damages clause, which does nothing more than specify what a client must pay for lost or damaged images. There is some debate about what those damages should be, though. And there’s also disagreement about how well the loss clauses hold up in the courts, which are the final arbiters of legal liability and damage awards.

By 4 p.m., Gibson says, the two sides were still thousands of dollars apart, so his attorney asked for the mediator’s suggestion—which both sides agreed to hear. “She suggested $60,000, and every one walks away with nothing attached,” Gibson says. It was the magic number. After paying his attorney’s fees, Gibson walked away with $49,000.

Although it was an arduous process and Gibson didn’t get anywhere near the damages stipulated in his delivery memo, he feels that he did well—particularly since the delivery memo hadn’t been signed. “Their attorney proved that these were not high-end advertising images, that we sell our images editorially, for about $300 per one-time use,” he says. Had the case gone to trial, he feels he might have been awarded $600 per slide, which would have brought the settlement a lot closer to the $60,000 he received than the $180,000 in stipulated damages in his (unsigned) delivery memo.

It is also worth noting that if Gibson had not used delivery memos at all, his story may have played out very differently. The law firm representing Network Communications’ first move was to threaten to file a preemptive lawsuit in Georgia (which would have forced Gibson to take his legal battle there). Their argument: that not one of the terms in Gibson’s delivery memo (including his right to arbitration in California) was binding because it hadn’t been signed. “But we had a track record,” says Gibson. “They had accepted 36 of my delivery memos and signed off on 3 of them.”
Grecco specifies a value of $2,500 per image—a figure that is based on an APA (Advertising Photographers of America) contract. But he says that he sees this clause as simply a starting point. “All you’re trying to do by adding a liquidated damages clause is to set a tangible estimated price” from which to begin negotiations in case of a loss, he says.

In the 24 years he’s been in business, Grecco estimates he’s only had to try to collect from a client on lost or damaged originals about a half-dozen times—most recently when his former agency lost hundreds of his original images. His delivery memos have helped him every time. “It’s been so effective that I’ve been able to settle any case and never go to trial,” he says.

“At PACA we let individual picture libraries select [the amount] they think is appropriate for their company,” states Wolff. She says that the $1,500 stipulated damages clause was originally added to delivery contracts for the client’s benefit. “The $1,500 amount came out of a survey that ASMP did back in the 1970s. They wanted to establish a reasonable value of a lost or damaged original transparency as an agreed amount in contracts for those clients who wanted to obtain insurance.”

Both Perlman and Wolff would prefer to see photographers assigning a specific dollar value to each original image they send out. “Judges don’t like [stipulated damages clauses],” says Wolff. “Particularly in situations where you have a large loss, they can be viewed as penalties and are thrown out of court. By assigning a specific value to each lost or damaged image, a judge and jury are more likely to see those numbers as being fair and reasonable, simply because the photographer had to take time to think about what each photo is worth.”

In general, the stipulated damages clause—whatever value amount you use—is more likely to hold up if the loss is a small one (a client is far more likely to pay $3,000 for two lost originals than $300,000 for 200) or if the client is a small-business person as well. “A deep-pocket, aggressive opponent can just grind you down,” says ASMP’s Perlman. “And that’s true whether you’re talking about a delivery memo for lost or damaged slides, or a personal injury case.” (See sidebar below.)

**Rights And Terms**

There are lots of reasons for having a delivery contract beyond what would happen if a client lost or damaged your photographs,” says Wolff. “When you send out your photography to a client, you’re delivering your property to someone else to borrow and use, and they have to know the terms and conditions under which they can do that. Among other things, you have to tell them that your photography is rights protected and can only be used as agreed in the license. And you have to tell them that they have no right to use the material until terms have been negotiated and the invoice has been paid.”

The PACA Delivery Contract (which, of course, is a stock delivery contract rather than an assignment contract) organizes these terms and conditions under three main subheads. First, “Terms Relative to Submission [of Images]” covers holding fees, stipulated damages and other issues. Second, “Terms as to Use” not only specifies who may use the images, how they can be used and for how long, it also spells out penalties for misuse. Third, “Disputes and Claims Arising out of Submission and/or Use” specifies the manner in which disputes will be handled, and in which jurisdiction, should a dispute end up in court.

ASMP’s, APA’s and Editorial Photographers’ recommended delivery memos don’t use those particular subheads, but they all cover the same basic ground.

Delivery memos for assignments cover other contingencies as well, specifically, the rights and responsibilities of both parties in the event of a reshoot, or if a shoot needs to be canceled or postponed.

Because clients often neglect to sign delivery memos, Perlman also recommends that photographers stipulate that the mere acceptance of the delivery memo constitutes an agreement to the terms. “If I were a photographer formatting these forms, I’d put that in 14-point type, and maybe in red, to make sure it doesn’t get ignored,” he says.

**What A Delivery Memo Can’t Guarantee**

Unfortunately, though, no matter how good a legal document your delivery contract is, there’s no guarantee that it will protect you in the end.

“You can have the most ironclad, legally enforceable language in the world, and if the other side can outlast you and out-finance you in litigation, you’re not going to benefit from it,” Perlman says. “Fortunately, you don’t often run into opponents who will act in bad faith, or use financial strength to maximum advantage, even in a worst-case scenario.”

In most instances, then, a legally sound delivery memo used consistently is a good way to protect your rights and images.
Decoding Ad Agency Contracts

DECEMBER 01, 2003

Have you ever read the fine print on the back of a purchase order? Really read it? Before you sign on the dotted line, read our explanations of nine of the most troublesome clauses. (The contract language is here shown in red.)

The rights and control clause. This clause is the bane of your existence, Dear Readers, and you’ll find some version of it in most ad agency purchase orders (POs). In layman’s terms, it says the agency owns and controls the pictures you produce, once you sign on the dotted line. Moreover, the agency can do anything it wants with the pictures—not just use them in ads, but alter them, sell them, license them, give them away, chop them up in little pieces and sell the parts, incinerate them, whatever. Meanwhile, you give up your right to do anything at all with the pictures since they’re not yours anymore. You can’t even put them in your portfolio without the agency’s permission.

Why do agencies put this clause in purchase orders? Because they’ve got nothing to lose by trying to mug you for everything you’ve got. The reason for all this legalese, by the way, is because federal law says that freelance photographers own and control all rights to their work, including copyright, unless they transfer those rights in writing. This particular clause satisfies the transfer-in-writing requirement of the law.

The antidote, of course, is to negotiate limited usage rights for your work, get those terms in writing from the agency, and cross this heinous clause out before you sign the purchase order.

Supplier hereby conveys all rights, title and interest, including the copyright in and to the materials to (Ad Agency), as agent for client. Such rights include, but are not limited to: (a) the right to use, publish, display or reproduce the Material in advertising or for the purposes of trade or for any other purpose whatsoever; (b) the right to alter, retouch, or crop or simulate the Material in any way; (c) the right to secure copyright in the Material anywhere throughout the world; (d) the right to license, exploit, sell, assign or otherwise dispose of the Material or any of the said rights included therein for any purpose which (Ad Agency), client and their assigns and licensees may see fit; and (e) any and all subsidiary rights in the Material including characters or parts which are contained in the Material.
**The indemnity clause.** It's bad enough when agencies hog all the rights, but even worse when they saddle you with all the liability. In a nutshell, this clause makes a human shield out of you. All claims stemming from the production of your pictures or their use become your problem rather than the agency's, even if you haven't done anything wrong. Just imagine the possibilities. Agency art director runs over a model with an SUV on the set of your shoot? Technically, the liability is all yours. Someone alleges that you've infringed his copyright with the pictures you've shot to the agency's specifications? You have to fight the claim, and don't expect much help from the agency. A model sues over an ad that damages her reputation? That's your problem, too, not the agency's or the client's.

Of course, it is only fair that you take on certain responsibilities. Those include making sure models sign valid releases and making sure you obtain property releases where necessary for the trademarked objects that appear in your pictures. But agencies want to make sure no legal problems bestir them before your carcass is picked clean in court, so they write sweeping clauses such as this one holding you responsible for every conceivable problem.

Your best protection is to run the PO past a good lawyer. The agency may or may not allow changes, but at least you'll get the legal advice you need to make an informed decision about whether signing is worth the risk. Also, regarding all that liability for death, illness and injury: just make sure you carry liability insurance on every job (and pass the expense to the agency when you bill for the job).

Seller indemnifies, holds harmless and will defend Purchaser and the client named on the face of this Purchase Order and each of their respective affiliates, officers, directors, agents, representatives, employees, successors, assigns and users of Seller's products or services against any suit, damage, claim, demand, loss or expense (including reasonable attorneys' fees) for (a) bodily injuries, illnesses, death or other personal injury and property damage sustained or incurred resulting from or in any way, directly or indirectly, connected with the manufacture, distribution and use of the goods purchased pursuant to this Purchase Order, or for breach of any express or implied warranty by Seller; (b) bodily injury, death or other personal injury or property damage arising out of any act or omission of Seller or its agents, employees or contractors; (c) damage resulting from any actual or alleged infringements of any patent, trademark, trade dress, trade name, copyright, right of publicity or privacy or other similar or literary or artistic right (including moral rights); (d) breach of any of the terms and conditions of this Purchase Order; and (e) upon any other considerations whatsoever, by reason of the purchase, use (including commercial advertising purposes), distribution or sale of the goods ordered.

**The Ooops-sorry-pal clause.** Nobody likes to be bound by a contract, so the agency grants itself neat little escape hatches in the form of clauses such as this one. At any time and for any reason, the agency can call the whole deal off and owe you nothing except for out-of-pocket expenses you are able to document. Forget about collecting any money for your wasted time, lost job opportunities or overhead. And if they cancel the deal because you haven't lived up to your obligations (and they'll be the judge of that), then they don't even have to reimburse your out-of-pocket expenses. So why don't you get a no-questions-asked escape hatch like this? Because the agency writes the purchase order and holds the lion's share of the bargaining power. That's why.

(Ad Agency) may cancel this order at any time prior to its acceptance of the Material or work covered by this order, upon written notice to Supplier. In such event, unless such termination is based on Supplier's breach, (Ad Agency) shall be liable to pay Supplier in lieu of the price specified on the reverse side of this
order, any verified direct costs incurred by Supplier in the
performance of its obligations hereunder prior to such cancellation,
provided, however, that the total amount of such costs shall not
exceed the price specified on the reverse side of this order.

The audit clause. One interpretation of this clause is that it protects agencies
from photographers who pad expenses and otherwise rip off agencies. Another
interpretation of this clause is that it gives the agency the tools it needs to
micromanage your production or nickel-and-dime you about your expenses
before, during or after the shoot. You be the judge.

Supplier hereby agrees to provide to (Ad Agency) and Client
access to all records and information of Supplier relevant to the
transaction covered by this Order for purposes of an audit of
Supplier's performance and charges hereunder.

The timeliness clause. File this clause under Clumsy Lawyer Tricks. Here, the
agency attempts to impose the terms of the PO no matter when they send it and
regardless of whether or not you sign it. But any PO that arrives after you've shot
the job and submitted the images is irrelevant. Instead, the prevailing terms are
whatever you agreed to prior to the job, either orally or in writing. On the other
hand, if you get the PO before you make delivery, you should confirm what the
deal is and cross out any terms on the PO that contradict the agreed-upon terms.
And rest assured that your copyright is yours under federal law until you transfer it
in writing (i.e., by signing it away), no matter when the PO is sent or what it says
to the contrary.

Insist upon a deadline in writing, if only to deprive them of yet another way to
weasel out of the contract. But don't miss the deadline, or you'll give the agency
an out.

It is agreed that time is of the essence and that (Ad Agency) may,
at its election, cancel this order or any part thereof if this order is
not fulfilled within the time specified or, if no time is specified,
within a reasonable time.

The If-we-don't-like-it clause. Art directors and clients sometimes change their
minds about using your work at the last minute for good reason or for no reason.
Either way, the agency could be out a lot of money for a wasted shoot. But these
two clauses put all of that risk onto your head. Even if you've finished the job and
submitted it, the agency can still back out of the deal and owe you nothing—or get
its money back if it has already paid you—simply by announcing that your work
has been rejected. The agency doesn't have to give you a reason, and you don't
have any recourse.

The material supplied hereunder must comply with (Ad Agency's)
specifications and is subject to its approval. (Ad Agency's)
payment for the Material shall not constitute acceptance thereof
and the material shall be received subject to inspection, approval
and privilege of return at Supplier's expense if not in compliance
with the specifications hereof. Defects are not waived by (Ad
Agency's) failure to notify supplier of such defect upon receipt of
the material.

The If-you-break-it clause. Shooting big-ticket items on loan from the ad agency
or its client? Make sure you have insurance to cover it while it's in your possession.

Any and all property of (Ad Agency) or Client, in the possession or control of Supplier, shall be and remain the property of (Ad Agency) or Client, and Supplier shall be responsible for any loss or damage occurring to such property while such is in the Supplier's possession or control.

The confidentiality clause. This clause says zipper your lips. Don't repeat or use any information you learn about the business of the ad agency or clients, except when you have to in order to get the assignment done.

Supplier covenants and agrees that it will not, at any time, disseminate, reveal or otherwise make available to any person; or use for its own purposes, any information of a proprietary or confidential nature concerning (Ad Agency) or Client obtained by it regarding, but not limited to, trade secrets and confidential information, advertising matters, ideas, plans, techniques and accounts, products, business, customers or methods of operating, except as otherwise required in the performance of its obligations hereunder.

The Ignore-everything-else, this-is-the-contract clause. In plain English, the agency is telling you, "This purchase order spells out the deal, you can't change it unless we agree to the change, and by the way, the terms and conditions on your delivery memo or any other paperwork floating around don't mean squat to us."

The terms and conditions set forth herein constitute the entire agreement between the parties with respect to the Materials or work to be performed pursuant to this Order, and said terms and conditions may not be modified or amended, except by an agreement in writing, signed by (Ad Agency). Notwithstanding (Ad Agency's) payment hereunder, any other documents originating with Supplier shall not satisfy the requirements of the preceding sentence.

Special thanks to attorney Joel Hecker of Russo & Burke in New York for assisting with this article. This article is for informational purposes only. Advice or recommendations given here are in no way intended to replace the advice of qualified legal counsel.