

LEGAL LENS: PRODUCER'S KNOW-HOW – WHEN TO USE A LAWYER

By Vinca Liane Jarrett

So you want to produce a movie. Or you're even more ambitious than that; you want to start a production company and over time produce several movies. Whether you're a first time filmmaker or experienced veteran, you need to know when to include an attorney in your plans and how to avoid legal pitfalls that many inexperienced and old-timers alike fall into, sometimes with disastrous effects. This article will explore when you should be bringing in an attorney to make sure your project doesn't fail before it ever gets off the ground. The Entertainment Counsel should be considered one of your team right from the beginning. The good attorney will help you identify legal issues in the script; draft releases, deal memos, agreements, contracts and financial documents for you; negotiate with agents, investors, location owners; and even help you with distribution once the film is finished. Here are some guidelines you can follow early in the process. While this article is not comprehensive, it will give you a start in determining what steps needs to be taken as you move into the world of producers and making movies.

STEP ONE –Forming a Legal Entity– Ultimately, you're going to form a legal entity that will have the primary goal of making movies and protects you (and your assets) from being sued. ***Just One Movie*** -- If you're only going to be a one-movie producer, then generally only one legal entity needs to be formed, and it is industry practice to simply name the production company the name of the film. For example, *Red Rock West, LLC*. All your agreements with talent, crew, investors, product placement, distributors, banks etc. will be with the corporation. You should never, ever, ever enter into any agreements under your own name; only in the company's name. ***Just my FIRST Movie*** – If you are thinking that you're going to be the next Zoetrope, then you need first to name your production company, and protect that name. Your first order of business is to register the name in the state in which you plan to primarily operate (and ultimately incorporate) with the Secretary of State's office. You will also have to file a Doing Business As (DBA) if you're not quite ready to file your corporate papers. Second, a trademark search will be necessary to ensure there are no other production companies with that name, and you should probably avoid other well-known names of companies to avoid confusion with what you are trying to do. You should ultimately reserve and trademark the name. This primary company is only be set up for "development" of pictures. Your option and sales agreements can be with this company. However, for each and every film you set up and move into pre-production with, you will need to set up an additional legal entity. This is not cheap, and many novices avoid doing this, but herein lies the problem. Let's say your first film manages to get an A or B list star to agree to be in one of the roles. You now have to sign onto the Screen Actors Guild (SAG) contract. If you sign onto that contract under the primary production company's name, all future film projects will be subject to the terms of the SAG contract. This will apply to any other union members such as costume designers, decorators, makeup artists et. al. that you use forever. If, however, those contracts are just with Your First Film, LLC, rather than Your Production Company, Inc., then your next project (or the one 10 years down the road) can still be a non-union picture. The unions are very strict. Try to cross them, and you'll never work with their members again. You will also benefit immensely in that each film will likely have a different source of financing, and the corporate entity will likely reflect where you're getting your money.

There are several options in forming a legal entity: Sole Proprietorship, Partnership, Corporation, Limited Liability Corporation (LLC) or Limited Liability Partnership (LLP). The first two are only for the foolhardy. Sole Proprietorships are generally used by individuals in business for themselves with no employees. Partnerships are subject to each state's guidelines for partnership, most which follow the Uniform Partnership Act, and subjects each partner to joint and several liability for any business conducted by the partnership. If you're working with one or two others and haven't entered into a written agreement that outlines your roles and rights as partners, you are already considered a partnership in most states, including all the New England states, California and New York. You have no corporate protection, and each of you may be sued individually. If you're the one partner with money, trust me, they'll come after you first. The main purpose to forming a production company is to protect your own individual assets from liability (i.e., threat of law suit) and so that profits (god willing there are any) can be distributed fairly (and legally) to investors. Many states, including all the New England states, California and New York, have laws allowing for LLCs and LLPs. This is currently the recommended legal entity for forming a production company. The rules governing these entities are fairly flexible. You do not have to issue "shares" as in the traditional corporation. Voting powers (so that you don't give away your creative

decision making) can be restricted. While filing for status as a LLC or LLP is fairly simple and inexpensive (each state is different), the by-laws that govern the entity are very complex, and herein lies the beginning of your financial investment in making a movie and having a production company. Expect your legal expenses in forming one or two companies to be between two and ten thousand dollars, including investor agreements, disclosures, and sophisticated (and necessary) by-laws.

STEP TWO -- Finding a Project – Most producers begin with a project they love. If you're a director/producer or a writer/producer, you found this before you even dreamed of having your own production company. If you're acting only as a producer, then you may be accepting scripts from writers or writer/directors to consider producer. In any event, once you have found the project you want to produce, there are several legal steps you must take to protect the project. **Get a release** -- If you're accepting submissions from writers in the form of treatments or screenplays, make sure you get a release signed by that writer that states clearly that there are lots of scripts out there, and many stories are similar, and you can't guarantee that you haven't had other similar scripts submitted to you etc. This is generally why writers need agents or lawyers in order to submit to experienced production companies. But even in so far as you're a new producer and are accepting (you probably have to) "unsolicited" scripts, you should have the writer sign a release that protects you from a copyright infringement suit.

Never on a handshake – Regardless of how you found the project, you must decide if you are going to option or buy the rights to make the film of the treatment or screenplay. Most options last a year with extensions. Options usually cost for independent films between \$1,000 (you're probably buddies with the writer) and \$50,000 (you're optioning a bestseller), depending on the clout of the writer and whether that writer is in the Writers Guild of America (WGA). If the writer from whom you are optioning is a WGA member, then there are strict guidelines for how to option that must be followed. If you fail to follow them, you will likely lose the project down the road, regardless of whether you've set it up properly or not. Whether you option or purchase a project, you must enter an agreement for option or sale (of the applicable copyrights) of the project. Depending on the project, these can be simple deal memos or complicated contracts, but only a novice producer moves forward with a project without a written agreement, and face losing the project to another's caprice (Writer: "I don't think I like you after all") or another producer with more experience. If it's your own project (you wrote it), then be smart and register the script with both WGA (you can do this, even if you're not a member) and the Library of Congress (i.e., get a copyright) *before* you start shopping the project. This will prevent for the most part people from stealing your script. Once you are (a) copyrighted/WGA's, (b) have the option or (c) have purchased the project outright (this last is very expensive unless you're sleeping with the writer), you are ready to begin setting up the picture.

STEP THREE – Financing Your Project – Once you've set up your company and found a great project (note most producers have several projects going at any one time. Whichever they find financing for first is the one they'll move up the chain of production fastest), it's time to find financing. Most first and second time producers are making low budget films for under a million dollars. If this is you, then you are likely looking for private investors. Under securities laws (in most states), you are limited to 25 private investors without having to make SEC filings and declarations (which are very complicated and very expensive). You must make a full disclosure to each investor as to how risky the business is before you accept their money. Additionally, each investor must qualify to invest in your film, and this is based on their age (no minors) and their income (the investment must not exceed a certain percentage of their yearly income). These are complicated documents and should not be taken lightly. Your paramount duty in being a producer is in being responsible to your investors. Regular meetings should be held and regular mailings updating them on the status of the film should be made. If you don't keep careful financial records (yes, you should hire an accountant) and don't properly manage the spending of the money, your investors will sue you. There are many instances of this occurring, and the independent filmmaking world is the most liable in the industry (albeit some would argue that big studios "creative accounting" methods would make them more liable; but they get away with it!!!! You won't!). If you've managed to get an A list (or two) and a few B list actors onto your project, you may be able to shop your project to a distributor prior to moving forward with the project, and get a first look or even a pre-distribution deal (less likely), and you may even be able to get financing from foreign distributors and bank financing. This is what you'll do every time once you've struggled raising money for your first few films. Unfortunately you must go through the struggle to create a track record worthy of getting the A list talent and distributors and banks interested in your project. Regardless, careful attention to legal issues

throughout the financing process is necessary, and often helps you weed out the bad from the good investors at the onset.

STEP FOUR – Pre-Production -- So now you've raised your minimum budget (you may be still fundraising during this period, but your corporate structure thankfully allows you to start making your film once you've raised a certain minimum level), and you're ready to sign talent, crew and others to your film project. Often Step Four is simultaneous to Step 3. To keep it simple, you'll need to hire a writer (preferably a WGA member, since they're overall more experienced) to do a rewrite of what is probably otherwise a brilliant, but not perfect first draft of a novice writer's screenplay. This will likely cost you between \$10,000 and \$100,000 depending on the writer. Some writers will work for less, but if they're WGA, they must get their full amount at some point, although they may be willing to defer it. Again, a contract that conforms to WGA guidelines is necessary. Second, you'll need to find actors ("talent") who merit getting the good parts. If you're lucky and smart enough to work with an agency that can help you get talent, then again, a deal memo must be struck with that agency establishing what they'll get from the deal. Otherwise, you must go through each actor's agent, which is fine, but exhausting. Each time an actor you want likes the project and wants to do it, if they're agent isn't ready to let them sign a contract, then ask for a letter stating their desire and intent to do the project if you can get them the money they want and start shooting the picture per their schedule. With crew (that is not A list), you need contracts as well, with each and every crewmember that states clearly what their job is, how much they're getting paid, and stating that they are work-for-hire (i.e., not entitled to any part of the picture with no creative say in the picture). A list crew such as Cinematographers and Line Producers should be treated as such, and contracts must be signed. If your nubile young talent is to appear naked, you **MUST** get a nudity clause or they'll sue you. You will also need to address product placement (any where in the script where a product appears, you will need releases from that company) and location shots (you must get releases for this as well). If you are going to allow a product to appear in your film for money, then again contracts addressing how the product will appear has to be negotiated. The bigger the company, the more complex the format and less negotiating can be done. Finally, every time someone offers to help you that's not talent or crew, they probably want a producer credit. You must carefully negotiate and put in writing what each producer is to contribute. If they're largely financing the project, you probably have this in this finance agreement already. Otherwise, get it in writing.

FINAL REMARKS – Legal issues on films are complex and sophisticated. If you use forms off the web or out of a book, you may easily overlook something pertinent to your particular situation. While many first-time filmmakers are looking for ways to save money on legal expenses, using their Uncle Harry, a real estate attorney, to draft the corporate papers, in the end the legal work ends up costing much more because of Uncle Harry's lack of know-how in the very knowledge-specific area of film. Find a lawyer who has done soup to nuts film production work. Expect to pay for films under \$5,000,000 between three (3) and seven (7) percent of your budget towards legal, half of that during pre-production, and roughly five thousand dollars in development. Some attorneys will discount their fees for a piece of the back end, but you will always need some money for legal work. Plan for your legal work in your budget wisely, and don't guess. When you plan your film's budget, meet with your entertainment counsel and let him review and advise on what to expect. This is not the place to cut corners. And above all, make a movie that can be distributed, because in the end that is the only way to stay happy in the film business.

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[Join ImagineNews, Tuesday, November 13 at 3:00 at Emerson College for a panel discussion on more tips on legal and financial issues in producing films. Call Jim Grace at Volunteer Lawyers for the Arts for more information 617 523-1764]