



## AICE NEW YORK SALES TAX & INSURANCE MEETING

### Experts:

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*AICE and its Board are not in a position to give legal or CPA-level advice of course, simply facilitate the conversation and ask the questions that are likely on everyone's mind, or play devil's advocate to clear up confusion.*

### **INSURANCE:**

#### Overview:

- Specifically, E&O which is Errors and Omissions and Media Liability coverage:  
“Protection for libel, slander, defamation, infringement of copyright or trademark, unauthorized use of titles, formats, ideas, characters, plots and invasion or infringement of or interference with the right of privacy or publicity resulting from a production.”

#### Scott Taylor (ST):

- Reason this came up was because Jennifer was looking at purchase orders & contracts—almost every PO requires E&O insurance & people are signing it without E&O insurance.
- Contracts have always required E&O but agencies do a bad job at policing it. You will have exposure.
  - Post is NOT covered under the production's E&O because post is subcontracted. Lots of projects involve licensing footage from the internet...which can leave you liable to copyright infringement
  - Production insurance policies protect the client and the agency.
- Element coverage: if post is subcontracted, there was a transfer of risk of loss from production to the post company as the transfer of elements. The post house should have its own elements coverage. Coverage sections still cover digital format not just physical film. The exposure is there until there is a copy or back up.
- Agency's and clients buy wrap up insurance which covers live action phase and post phase but they get a waiver of subrogation endorsement.

## Discussion:

1. Q: Situation—example: we do a commercial for Saab & we do the wrong super which sells them \$45.

ST: The problem is there is no proof of approval from the agency. E&O policy with added proof of approval possibly the solution.

2. Q: Do we just keep telling agencies we don't have E&O?

ST: What is really the liability of leaked footage? Agency might lose the client because of your fault. E&O isn't terribly expensive. Price it out. It's off of revenue. You could say to the agency "add me as a named insured on wrap up policies." Maybe make it a best practices thing: have everyone ask.

3. Q: Does it affect their cost if they assume our risks for the policy?

ST: I don't see wrap-up coverage policies very much, but I think they are charged based on the cost of the production of the spot. Especially since losses don't usually happen in post. I do believe something happened with Apple (leaking a spot before it was scheduled for release) because they have very strict rules about policy coverages now.

E&O insurance does not protect against patent infringement. Patent infringement claims are very expensive. Your policy should specify: "Any and all claims excluding patent claims"

4. Q: We've been under hardcore audit for elements insurance and are getting 50% pushback when asking to be covered by production company.

ST: That makes sense, why would they name you when you're just working on the same thing? Gather info on all of their certificates of insurance and that should be good for your audit.

5. Q: [In regards to elements insurance] What's the definition of a flood?

ST: A pipe burst or back up of a sewer or drain are not covered as flood. A clogged roof drain on the roof also does not count as flood.

6. Q: As a group we have to say that the limits of liability have to be reasonable. They're asking for a lot more [than they should, if the E&O is based on revenue].

7. Q: What if you're keeping dailies on your drive & your drive goes down, but the production company deleted their footage. Are we liable?

ST: Yes, you're probably responsible for those elements, but you'd have to look at the contract. Element coverage is supposed to cover it. If it was a hardware failure, then it's covered but operator error is not covered. Maybe it should be.

8. Q: Workers comp v E&O?

ST: Workers comp covers gross negligence & bringing a third policy in. (Rattled off exclusions on employers/commercial liability) Umbrella does not cover E&O.

Q: All in all: we're all under insured!

## **SALES TAX:**

Overview:

- To cover the application of the NYS Sales Tax Code against AICE member companies' services and clear up any confusion.
- See Blane's handout, and ST120 & ST121 forms.

Roger Blane (RB):

- For starters you're in a great position because the state wants you to stay here and wants to keep you happy. So you want to get it right in terms of how to file returns but it should cost you nothing to do business here.
- General rules of sales tax –
  - if someone is delivering tangible personal property to NY you are getting charged sales tax, unless specifically exempt.
  - Sales tax is a destinations tax.
- Intangible properties are not subject to tax if you're delivering property via email or file sharing you don't have to worry about it
- Difference between "electronic" vs "digital": a CD, Hard drive, DVD it is taxable (get an exemption certificate) but a e-transfer is not.
- You're in a good position as a sub-contractor generally. When items are purchased from a subcontractor they're usually for resale. So you get a ST120 for resale, ST121 for other exemptions.
- ST121 - make sure box B is checked by the production company. They just as easily can give you the resale certificate even if you're giving it directly back to agencies.
- These forms are meant to take the burden of proof off of you (the seller). So if state ever audits you, keep the certificate of exemption with the invoice. You may need some kind of proof of intangible delivery (such as emails, to be used like delivery specs) can serve as that proof if you are audited.

Discussion:

1. Q: A final invoice is proof when tangible elements are delivered out of state. Can you put wording on invoice about intangible delivery?

RB: Sure, print out something that is like a tangible shipping doc but for intangible delivery.

2. Q: Hard drives with raw material to give back to agency?

chicago  detroit  los angeles  minneapolis  new york  san francisco  texas  toronto

RB: Counts as tangible delivery. You want to a get certificate. Either blanket or specific.

3. Q: If you shot it and edited it? Both production and post?

RB: Same thing. Get the certificate from the client. From whoever paid you. Or you won't have to charge tax if you deliver it intangibly. Also -- you can never be wrong charging tax if someone wants to be charged tax.

And everyone should file sales tax returns even if everything you do is delivered intangibly. (The statute of limitations is 3 years)

4. Q: What about getting resale certificates? Our post company is dealing directly with agency, even though we're subcontracted by production company. Is getting it from the agency just as good as getting it from the production company?

RB: Getting it from the agency is not the proper approach. Editors need to get that certificate from the production company.

The law says that if you produce anything--the company doesn't have to pay sales tax on anything that helps produce the thing. Computers related to production/electricity going into production. Law specifies that film counts though other intangible stuff does not count. 51% is the threshold of usage, if used for the production of film you don't have to pay sales tax. Utilities is not subject to predominance test—you just pay the portion you're using for production.

5. Q: Can that be applied to utilities included in monthly rent payment?

RB: You can file a claim for refund for all the sales tax you paid on the utilities charge. If you can figure out what percentage is dedicated to production (there are contractors who can figure out just that) some people take a credit on their return but it's better to go back to the state.

6. Q: What is the definition of producing a film for sale?

RB: Anything that can capture moving pictures and sell.

7. Q: Radio spots?

RB: It doesn't qualify if it's just sound.

8. Q: We're getting more work directly for clients, so then it's not for resale.

RB: If they are the end user they should not give you a resale certificate. If they give you a resale certificate even if they are the end user, you're covered. If it involves tangible delivery you might want to deliver out of state.

9. Q: Why do they bother auditing post for sales tax?

RB: You should have virtually no exposure

10. Q: If they say they're exempt but don't give you a certificate for half & half of it is tangible.

RB: You have exposure, get a certificate.

11. Q: We have archives on internal server with tangible components but deliver to the client intangibly. Are we required to charge for archiving and having a tangible copy?

RB: I don't believe that would subject to tax.

12. Q: Is the back-up copy we give them on a physical copy taxable?

RB: Yes, but it doesn't make the entire thing taxable.

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