

SPEECH TO THE AUSTRALIAN GRAPHIC DESIGN ASSOCIATION

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by Shane Simpson

It is traditional to start a seminar with a joke to lighten the atmosphere and get the audience on side. But tonight forgive me if I replace the touch of humour with a good old-fashioned sermon.

There is a considerable diversity of people in the audience this evening.

As design professionals you range across the whole design field - but tonight, for short hand, let me refer to **all** of you as "designers".

Many of you are at very different **stages** in your careers -

- There are some just starting out and not yet aware of many of the pitfalls that have already been experienced by their more experienced colleagues.
- There are a few who are so successful that they don't have many problems with their clients because they are so in demand that clients dare not muck them around because their services are so valuable and needed.
- Then there are those who have been in the business for some time, have experienced a wide range of the survival pitfalls and have helplessly shrugged their shoulders and convinced themselves that hardship and being a loser is just part of being a designer. .
- There are those who are just starting out and are looking for hints as to how they might better survive in this difficult business.
- And then there are those who have successful, organised practices that are backed up by well-planned and resourced administrative and financial systems.

Some years ago I was at an arty cocktail party. One well-known college lecturer got quite heated when I suggested to him that his college should be doing more to introduce his students to the business aspects of living from their design talents. He accused me of trying to hustle more work for lawyers; of not knowing what I'm talking about; and finally, that he only had students in the college for three years and that wasn't enough time in which to teach anyone to be an artist or designer let alone use up valuable time teaching them to be lawyers and accountants!

This conversation has stayed with me. Not only because it's as close as I've come in years to pouring wine over someone's head, but because it reminds me of the poor reputation that lawyers have (perhaps deservedly) earned over the years. It also reminds me of the paucity of much of our art and design education when it comes to providing young professionals with basic business skills. (It also reminds me that some of those that we look to as models, can be truly stupid).

As you can see, I believe that education has an important role to play in helping young designers not only to be **good** designers but fed clothed and housed designers.

I believe that the profession itself should supply opportunities such as these seminars and other, smaller workshops, so that senior professionals can pass on their experience to the less experienced.

But I also believe that designers must realise that they have a responsibility to look after their own interests and operate the business side of their practice in as skilful and simple manner as possible. Administration should be as minimal as effectiveness allows.

You do not learn business skills by hunching over a drawing board.

Unless you have someone to introduce you to them, you probably start learning these skills by lying in bed, tossing and turning, unable to sleep for worry. In the morning you get out of bed knowing that you have chosen the wrong career, that you should have listened to your grandparents and got a job as a farm hand in Cootamundra, your clients are bastards and the fact that the cat has defecated in the bath, just sums up everything that you ever thought about design and indeed, about your role on earth.

All too rarely do we think: "This hassle is not just a part of being a design professional. It does not "just come with the patch"!

All too rarely do we ask: What is behind this problem? How can I lessen the chance of this happening again? How do I go about acquiring the skills so that this can be avoided next time?"

You see, I think that there **are** ways of acquiring the necessary skills:

- You must familiarise yourself with the **business** knowledge that is basic to your area of work;
- You must isolate those areas that have caused you to the most problems in the past;
- You must deeply consider those problem to determine how they might have been avoided or more readily resolved;
- Then you must consider what skills you do not have **yourself** but need to have **available**;
- Then you go out and **find** and **hire** those skills.

Unless you do this in an ordered and fairly determined way you will probably suffer from that grey, formless, funless pressure which exerts itself on nearly every professional who is responsible for setting up and operating his or her own administrative and financial systems.

How many of you were ever actually **taught** simple systems? How much **easier** would things have been had somebody showed you some alternatives and helped you set up the system that best suited you?

I am not a systems analyst but from my clients I have learnt how important a lawyer and an accountant can be in setting up basic systems. How many of you have a lawyer and an accountant that understands what **you** do and how **your** business operates?

You should retain experts to do expert work. If you do not have an accountant and a lawyer you should get one. Train them up. At first they will probably know nothing about your business and they can only operate effectively if they are made knowledgeable.

I know that they are expensive. (I charge \$200 per hour, which is enough to make most designers gag when they first utter the words. Big firms start at \$250 and go through to more than \$350 an hour). Its up to you to look around and choose for yourself.

About selecting your lawyer I would say just three things:

- First, **do not go to your family lawyer and expect them to know anything about design or copyright.** There is a fallacy that any competent lawyer can handle any legal problem so long as the facts are set out clearly. I don't believe this and moreover, I believe that the client ends up paying for the lawyer to learn. Not all designers are as good at doing all areas of design practice and the least expensive designers are not always the cheapest in the long run. The same goes for lawyers.

(I am presently negotiating a contract that was presented to a designer client by a jewellery manufacturer. The contract, which was drafted by the senior partner in a well-respected general practice, did not even mention the word copyright once!)

- Secondly, you must **budget for your external professional help.** To run your affairs effectively you must allocate a certain sum in your monthly budget for legal and accounting advice. For example, if you are a design consultant and decide to have a standard agreement which all-new clients sign, this is going to be an enormously important document in your business. It must be full enough so that it provides the legal protection that you seek, yet it has to be non-confronting enough so that it does not scare away your clients. It is not worth skimping on: it will be the most important and most commonly used piece of documentation in your drawer. It has to be right.

Find suitable advisors, budget for them - and use them.

- Thirdly, I spend all my time getting people into deals or out of them. I work almost solely in the commercial aspects of the arts, entertainment and intellectual property industries. Let me tell you that **the best money you will ever spend is when you pay for advice when setting up your deals.** A deal that is properly established has a far lesser chance of going wrong than one that is set up on a phone call and a wink. Perhaps 80% of my time is spent getting people into deals: it is fun, optimism charged and fast. The 20% of my time spent on getting people out of deals is negative, long-winded, expensive and altogether rather depressing. It is dealing with human failure rather than the dream. Nobody truly wins. Even the winners lose.

Get the deal right before you commit to it. That is the safe, responsible, professional way of doing it.

Enough preaching. Here endeth the lesson. Now for some hints and ideas.... Let's look at how the sensible use of contracts can ease the pressures.

Enforceability of Contracts

I have already been talking about contracts. **Remember that a contract does not have to be in writing to be enforceable.** An oral agreement is just as legal as a written one. The difficulty with oral agreements is proving what the terms of that agreement actually were. The drawback with oral ones is that if there is any confusion as to what was agreed by us, there is nothing to refer to. Your memory and my memory will be at odds. Most often, I will be telling the truth and so will you. It's just that we never really understood one another in the first place.

It's not a matter of trust.

It's a matter of making sure that you've got it right.

If there is a dispute and the terms of the deal are in writing you have a chance of retaining the business relationship. If it was only oral, because each of you will think that your memory is correct, at least one of you will feel that you've been diddled and it will be the end of the business relationship.

However, I am not suggesting that your office should be awash with contracts and lawyers. Heaven forbid!

Standard contracts

Develop standard documentation to cover your most commonly occurring business transactions.

You will only get into the habit of using written contracts if you have simple standard form documents readily available. Nobody is going to ring up their lawyer to draw up a contract every time a client orders some work. Nor should they. It should merely be a matter of opening the drawer (or the computer) and drawing out the standard documentation for that sort of deal.

What is needed for your business will differ from that needed by the person sitting next to you. Remember that the term "Standard Contract" can be rather misleading. The shoe must fit the foot. Every written contract must exactly reflect the terms of the deal. If it doesn't, change it. (This is the joy of having your standard documentation on computer. You can then change it terms quickly, cheaply and simply so that each agreement will be effective and accurate).

Even if you do not think that your business yet justifies the cost of developing standard documentation, never underestimate the importance of letters of confirmation. If the deal is done over the phone, immediately confirm your understanding of the deal in a letter, ending up with a concluding paragraph which states:

"If the above does not accord with your understanding of our deal, please contact me at once".

Fax it through to them. Not only will you look efficient, but in the event that there is a dispute about what was to be done, you will have the only written evidence as to the terms of the deal. This is a very simple and cheap way of protecting your own interests.

Some Basic Terms

Each specialist area that you deal with demands a contract with particular terms relating to those special needs. Commercial and publishing agreements, releases, royalty agreements for novelty and paper products, book contracts and agency agreements, all demand careful articulation so that each party's needs are covered.

We don't have the time here to discuss specific clauses in any detail. They are probably best done in smaller groups or even in writing.

Just let me say that the quality of drafting that you get from your lawyer will largely depend on the quality of the instructions that you give that lawyer. Make sure that you are providing a clear picture of how you see the deal working.

A contract is just a deal.

A written contract is just the written expression of that deal.

The terms of the contract simply articulate the expectations of the parties.

Credits

Credits are now fairly standard practice for illustrators in all editorial uses. They are far less common for other designers. Fabric designers and book designers, who are paid little and then not given a credit on the selvedge or the fly, are understandably upset.

How many of you have agreements that **specify** that you will be credited for your role on the project? How many of you specify the **wording** of that credit?

Of course such credits have to be appropriate: It would be **difficult** to give credit to my designer on my **letterhead**, even though I am happy to acknowledge his talent if my firm was to produce a **brochure**. Although I have never seen it done, I would be happy to give my designer the right to even put a credit line on the back of my business card, so long as it was discreet).

It is only through your work that you are known and if no one knows who did it, it will never enhance your reputation and thus your business.

Remuneration

You usually get paid a **fee** for your services. Depending on the sort of work you do, never overlook the possibility of working on a **percentage or a fee plus a percentage**.

Percentages can be very remunerative or they can leave you without anything at all. It all depends on your analysis of how the deal stacks up.

If you are working for a little t - shirt manufacturer you may decide to take the fee and run. Your chance of getting any sort of accurate accounting is usually negligible so you are better getting paid up front. Again, if you think that the product is likely to stiff in the market place you are probably better off with a straight fee.

Recently a designer asked me to negotiate her deal with a well-known manufacturer of sheets and the like. The art director for the company was supposedly very enthusiastic about the preliminary designs and had asked the designer to keep working and come up with finished designs. He said they would work it on an hourly rate, although no rate was fixed. He said he'd tell her if it was starting to cost too much. The designer tells me that she spent about 200 hours getting the design up to final stage. The designer thought that \$20 an hour was not unreasonable. That made it about \$4 -5,000. I rang. The company wanted all rights, throughout the world, for all uses, no royalty, and a fee of \$500. Credit appeared to be a problem that he hadn't contemplated. The deal did not proceed.

To me, the use of a designer's talents for \$500 by a company that intends making tens and even hundreds of thousands of metres of fabric and certainly hundreds of thousands of dollars profit using that design, when one of the primary selling points of that product is the appeal of the design, is simply iniquitous.

Don't forget about the possibility of a royalty. This is particularly important if you are working in the area of product development. Some clients will be pleased because they don't have to come up with as much upfront money at those expensive but non-income earning, early stages of the project.

May I suggest another thing? **Make sure that your billing terms are put on your standard documentation:**

State that terms are 30 days and that after that date, say, 1.5% interest is payable each month of part thereof. Of course you may decide not to collect the interest payable, but this will remind your clients that you are not a cheap alternative to Bankcard. Late payers affect the viability of any business.

What does this have to do with contracts, you ask? Well, if you put it in the document, which describes the deal, it becomes a term of the contract and is enforceable if you have to sue them later.

No doubt you already specify the fee payable. Also make sure that you specify **the schedule for payment**. This can be particularly important on a large job where it is common that you receive a third upon commencement, another third upon some nominated **trigger** during the project and the final payment on completion.

Be specific as to what service you are going to provide for the basic fee. How many preliminary sketches or dummies are included in the basic fee? How many meetings?

Specify also the various miscellaneous fees and expenses that you charge - for example:

- **cancellation fees** (say 50% after preliminary sketch stage and 75% after final sketches have been ordered).
- **travel expenses** - including travelling time and
- **production expenses**

Usage

You must specify the usage that can be made of your work. You should limit the usage as much as your market muscle will allow. For example - illustrators should specify the general **category of the usage**, and **the media of usage**. If it is for use in a particular publication, **name the publication**. If it is for a particular product, **name the product**.

Describe the category media and title.

Then add the word "**only**" or "**all other rights reserved**". Then if the client wants to extend the usage later, they can pay for it.

For example, in the United States it is becoming increasingly common for book designers to specify that the fee is for the first edition and that a further payment (say 50%) will be payable for each subsequent edition using the design.

Perhaps the majority of designers still sell all rights to their clients. In theory there is nothing wrong with this - so long as they are properly remunerated for it. The granting of all rights is worth more than the grant of specific usage rights.

Return of Original Artwork

If it is important to you that you get your original artwork back you must make it clear to your client. It is increasingly common practice. It is commonplace with illustrators and the practice is growing with designers generally.

If the client demands to keep the original, find out why. It may be for a reasonable and agreeable purpose (e.g. Parliament House Commission project). Most commonly they will be concerned that you will use them for some purpose contrary to their interests. Often they will relent if you assure them that you will not use them in this way.

Set a date by which originals are to be returned and the manner of transport. Remember that for a designer the simplest way of controlling reuse of your work by the client is to have physical control of the artwork. In this way you can be assured of getting at least an administration fee for supervising reuses or reprintings.

Copyright and the use of designs

All too few designers understand the basics of copyright - yet the ability to reproduce the designer's work is absolutely basic to the business.

If you don't know the basic principles of copyright how can you expect to negotiate a favourable deal for yourself as to the use that may be made of your work?

When a client comes into your studio and commissions you to design a book cover, provide the artwork for a corporate presentation, the layout of a shop, or a corporate logo, who owns the copyright in your work? If you employ a designer, who owns the copyright in the employee's work? Is it any different if the person is a freelance? Do you have a simple standard agreement that you use for all your staff so that these issues are ironed out?

What happens to the rights in your work if the client eventually rejects the work that was commissioned? Can you use it on another client's job? Is there a difference between owning the drawings themselves and owning the copyright in those drawings? After the project is completed, do you have a right to keep the original drawings and perhaps sell them at an exhibition? What rights do you have in the ideas that you supply to your client? What can you do if you come up with an idea that the client rejects but then hires another designer to execute? Does your standard client - studio contract cover these sorts of questions?

CONCLUSION

As design professionals you owe it to your business to

- (a) have a basic understanding of the law of contract, copyright and design protection.
- (b) Get experienced advisors that you are comfortable to work with. Use them to help establish your business system. Budget for their cost so that you amortise their fees into your general client billings.
- (c) I know that some of you feel that you do not have the bargaining power to suggest, let alone insist, that your clients enter written agreements. Often this is true.

For this reason, I would suggest that as an association you develop standard AGDA contracts that are developed by the members of AGDA. It can be very effective:

Some years ago I was approached by the top dozen or so stills photographers who work on movies. Although they were leaders in their profession they found that the producers were playing one off against the other. In a series of small working meetings the basic minimum terms were nussed out, they were put into a draft, that draft was circulated among the photographers for comment, it was then shown to a couple of prominent producers for comment and then became the standard deal. Producers came to accept it because they knew that all of the top talent used it. It became familiar and therefore non-threatening.

Like photographers, designers, even the top designers, have little bargaining power. By banding together in this way however you have a real opportunity of influencing the way in which **your** business is conducted.