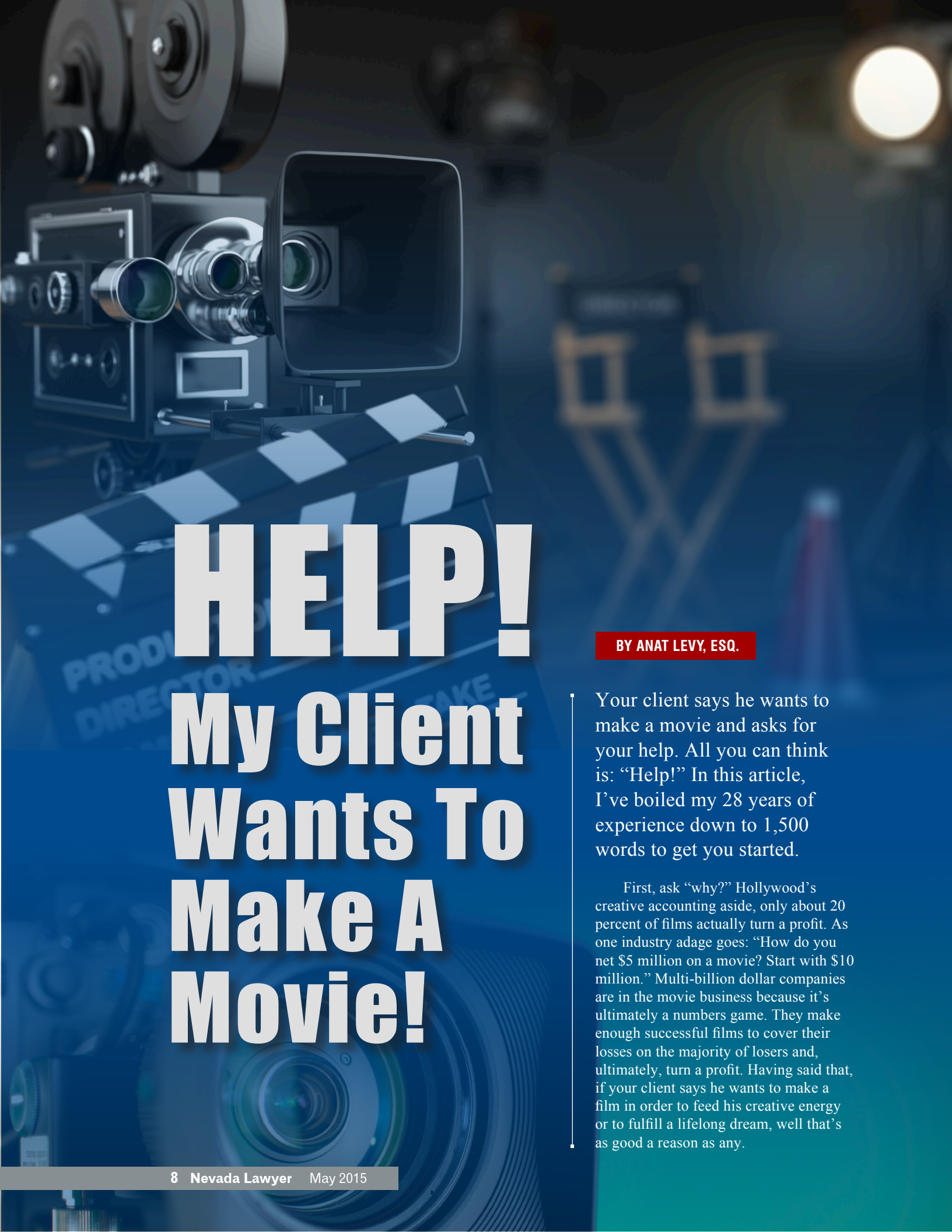


HELP! My Client Wants To Make A Movie!

BY ANAT LEVY, ESQ.

Your client says he wants to make a movie and asks for your help. All you can think is: "Help!" In this article, I've boiled my 28 years of experience down to 1,500 words to get you started.

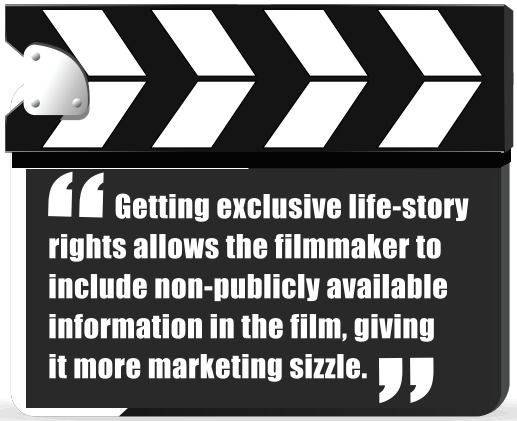
First, ask "why?" Hollywood's creative accounting aside, only about 20 percent of films actually turn a profit. As one industry adage goes: "How do you net $5 million on a movie? Start with $10 million." Multi-billion dollar companies are in the movie business because it's ultimately a numbers game. They make enough successful films to cover their losses on the majority of losers and, ultimately, turn a profit. Having said that, if your client says he wants to make a film in order to feed his creative energy or to fulfill a lifelong dream, well that's as good a reason as any.

Keep in mind that, as with most other business ventures, clients should ultimately work though a corporate shield for protection from personal liability. The form and timing of establishing this shield (typically an LLC) depends on your client's particular circumstances. So make sure that all of the contracts into which he enters for the film are expressly stated to be freely assignable by your client. Contracts entered into before his company is formed will need to be assigned to his company; contracts entered into by his company will ultimately need to be assigned to the film's financiers and distributors.

Next, ask what the movie will be about, as this will determine what rights, if any, to which your client is entitled. For example, I had a client who wanted to make a film based on a real-life murder. While he could have based the film solely on publicly available information, such as newspaper articles and trial transcripts, it was hugely more advantageous for him to also get exclusive life-story rights from key people involved in the murder (e.g., the murderer's wife and the victim's family). Getting exclusive life-story rights allows the filmmaker to include non-publicly available information in the film, giving it more marketing "sizzle." This makes it more attractive to financiers and distributors who want to maximize the draw for potential viewers.

Further, the rights agreement can protect your client from claims of defamation, invasion of privacy and right of publicity claims, as well as expressly giving your client the right to fictionalize the story as needed. The contract can also require the releasor to help your client get information from other sources, such as other family members, thereby increasing the scope of your client's exclusive information. The contract should not, however, give any life-rights grantor the right to approve the script, the film, its marketing or its distribution. Granting that kind of approval can easily kill the project for a studio, writers or directors, and severely hamper your client's ability to make the film he wants to make.

Life-rights agreements should be structured as an exclusive option, meaning that your client would pay a small fee for the exclusive "right to purchase the rights," within a year or 18 months, with an option to renew that right for another year or 18 months. The contract would provide that your client can develop and shop the film for financing during the option period, so that he does not have to pay the full purchase price, which should also be pre-negotiated in the contract, before figuring out if he can even get the film financed. A client once came to me after spending $100,000 to buy the film rights to a popular video game, only to learn that she couldn't get a financier interested in her project before the rights contractually reverted to the rights holder. Had she instead simply purchased an option for this period, she would have saved considerable sums.



Next, your client should get the story written in some form. He should write, or hire a professional writer to write, a film treatment, which is a five- to 15-page summary of the storyline, key events and point of view of the film. If your client or the writer is a Writer's Guild of America (WGA) member, then with few exceptions, the terms of the WGA's collective bargaining agreement will apply. Regardless, however, the final treatment should be registered on the WGA website and, ideally, be registered with the U.S. Copyright Office as well, so that your client will have some level of protection in the event the treatment is later misappropriated.

Once the treatment is finished, a full script can be commissioned, or the project can be presented to financiers based on the treatment alone. On the up side, having a full script helps financiers and talent better evaluate the project and is a huge asset when creating a budget. On the down side, it costs more to have a scriptwriter pen the script — unless the writer agrees to defer compensation (check WGA rules for your client's type of project); it will also make your writer harder to replace if a financier likes the project but prefers to work with a different scriptwriter. This happened to one of my clients who had hired a scriptwriter for a television pilot, only to learn that the studio liked the project but wanted to replace the writer.

Next, a budget should be developed to estimate how much money the client needs to raise for the project. While budgeting software is available, your client should hire a professional, as the task can get complicated. Script breakdowns need to be made; guild minimums accounted for; shooting days estimated; costs of stage rentals, music, pre- and post-production costs estimated; and a myriad of other elements must to be considered.

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Now comes "the chicken and the egg" conundrum of filmmaking: getting the film financed. It is hard to get a film financed without at least one key talent (a high-level actor, director or producer for example) verifiably committed to the project. Conversely, it's difficult to get key talent committed to, or even made aware of, the project without showing proof of funds to the talent's agent or manager. Agents and managers work on contingency, so they try not to waste time on Hollywood wannabes, offering their clients great roles that don't ultimately materialize. A potential client recently called me, ecstatic, believing that her film was getting made because a CAA agent, "liked the script and will give it to [his A-list client], once I give him proof of funds… what does that mean?" Bottom line, any direct access that your client has to talent will facilitate getting talent attachment and financing.

Here are the most common ways to fund a film before production:

Studio financing

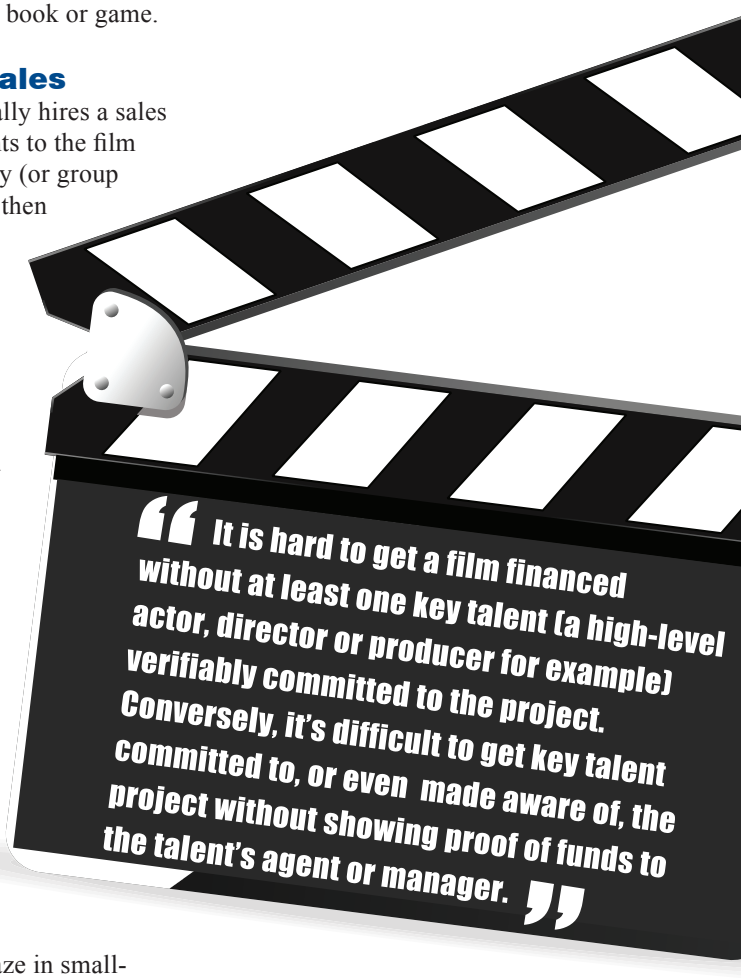
A studio agrees to pay for the costs of the film in exchange for the right to distribute the film in all or some territories, and to all or some media outlets (e.g., theaters, television, Internet). It is difficult to get this type of backing without some proven money-making element attached to the film, for example, a proven director, writer, actor or story rights to a bestselling novel, comic book or game.

Territorial pre-sales

The producer typically hires a sales agent to pre-sell the rights to the film on a territory-by-territory (or group of territories) basis, and then uses those distribution contracts to secure a bank loan sufficient to fund the film.

Investor financing

The film is financed by one or more persons who buy shares of the company through which the film will be produced and/or distributed. Beware of state and federal securities laws that may kick in, depending on the form of the new entity and/or the number of investors involved.



Crowdfunding

This is the latest craze in small-film financing. I had a client raise $50,000 using Kickstarter to fund the distribution of her documentary. Spike Lee recently raised $1.4 million on Kickstarter to fund a $1.2 million film. Other sites include Indiegogo and Gofundme. Obviously, review individual website rules carefully to ensure compliance.

Self-funding

Unless your client has significant disposable income that he doesn't mind losing, avoid this at all cost.

Your client should also try to capitalize on film tax credits. Numerous states offer tax credits for productions made, at least in part, in their state. The earned tax credit can then be sold to a third party, typically at a discount, to raise cash for the production or marketing of the film. In 2014, Nevada's new film tax credit law took effect, allocating $80 million in credits to be issued to qualifying productions over a four-year period. This past September, the Legislature mostly gutted that program by transferring $70 million of that credit to Tesla. The program still exists, however, and to the extent that funds are available, productions can get a 15 to 19 percent tax credit in Nevada. Other states offering tax incentives include California (20 percent to 30 percent), New York (30 percent to 40 percent), Louisiana (30 percent to 35 percent), Georgia (20 percent to 30 percent) and New Mexico (25 percent to 35 percent).

After these first steps are taken, your client can start thinking about the actual production, post-production and distribution of the film, all subjects for future articles. **NL**

ANAT LEVY is a 28-year entertainment lawyer and chair of the Entertainment Law Section of the Nevada bar. She is licensed in California and Nevada, and specializes in production, licensing and distribution of films, television programs, documentaries and other works. Levy started her own firm in 2000, representing studios, distributors, post-production houses, producers and talent. She also worked at Paramount Pictures and MGM, and is an arbitrator with the Independent Film & Television Alliance. Levy is a 1986 UCLA Law School graduate, having earned her bachelor's degree from UC Berkeley in 1983.