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CTRL+CLICK CAST #119

Standard Agreements for Digital Services with Gabe Levine & Josh Barrett

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Preview:

[Music]

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Gabe Levine: Yeah, and there are legal bits that you want to consider having in there as well, limitations on liability and disclaimers and things like that, and I think I hawked on about the attorney's fee provision that you hopefully don't need, but in my former life as a litigator, and frankly, at least a half dozen times a year in my practice, come up because, as Josh said, most of these things don't head to disputes, but some of them do, and when you have these provisions, they help resolve those disputes quicker and cheaper.



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Lea Alcantara: From [Bright Umbrella](#), this is CTRL+CLICK CAST! We inspect the web for you! Today Gabe Levine and Josh Barrett join the show to demystify agreements for digital agencies. I'm your host, Lea Alcantara, and I'm joined by my fab co-host:

Emily Lewis: Emily Lewis!

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Emily Lewis: In lots of our episodes this year, Lea and I have mentioned Owner Summit as a really great event for digital agency owners and how much we learned and we're inspired by the other attendees and presenters, and one of the presentations was with our guests, Gabe and Josh, who detailed a base level SOW [Statement of Work] and MSA [Master Services Agreement] specifically for digital agencies, which is what we're going to talk about today.

Gabe is principal attorney at [Groundwork Legal, Inc.](#), a Bay Area-based virtual law firm that provides legal services to the creators of digital products. He has been named a Super Lawyers "Rising Star" nine years in a row and works for some of the most well-respected companies and professionals in the web and software design industry.

Josh is founder of [CreateLegal](#), a Portland, Oregon law firm helping freelancers, growing studios and busy agencies find practical solutions to business law problems. Client focused, clear speaking and detail oriented, Josh is always looking for opportunities to help clients up their legal game.



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Welcome to the show, gentlemen!

Josh Barrett: Thank you very much.

Gabe Levine: Thank you.

Lea Alcantara: Thank you! So can you tell our listeners a bit more about yourself? Gabe, let's start with you.

Gabe Levine: Yeah, sure. I am a San Francisco Bay Area native. I left for five years to go to college and play around in Santa Barbara. I found my way back to San Francisco for law school and have lived here since 2000. I operate my little law firm out of San Anselmo, which is just over the Golden Gate Bridge in lovely Marin County, home of mountain biking, invented literally on Mt. Tam by Gary Fisher. I spend a lot of time on that mountain running and not biking because it's less far to fall if you trip. [Laughs]

Emily Lewis: [Laughs]

Lea Alcantara: [Laughs]

Josh Barrett: [Laughs]

Gabe Levine: I live at my house with my wife Holly, my daughter Kate, and my dog Scully.

Lea Alcantara: Fun. So, how about you, Josh?

Josh Barrett: Yeah, sure. Well, I'm originally a Montana guy, and I moved out to Oregon for law school. Gosh, it's been over 20 years now and I met my wife in law school and stayed and we moved



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to Portland where we've been ever since. I'm not a runner, but my latest hobby in the gym is boxing and so three or four nights a week, you'll find me down at the boxing gym throwing the leather around, which is a lot of fun.

Emily Lewis: So I'm curious, as I mentioned in your bios at the top of the show, you both specialize with clients who work in tech digital, and I'm just curious how that ended up happening. Gabe, how did you find that niche for yourself?

Gabe Levine: My very first client was Mule Design with Mike Monteiro and Erika Hall before there was a formal company.

Emily Lewis: [Agrees]

Lea Alcantara: Ah.

Gabe Levine: So at the time, I was about two years out of law school. I've worked for a big firm. My personality was a little harsh for some of the partners.

Emily Lewis: [Laughs]

Lea Alcantara: [Laughs]

Gabe Levine: And some of the partners were a little harsh for me, and so I found my way out the door pretty quickly knowing that I didn't want to be there. I joined a small business firm with three partners, I became their first associate, and shortly thereafter, my father who's also an attorney had a partner named Alisa Baker who had done some time in sort of the 90's dotcom boom and she received a referral to Erika Hall, and so Erika Hall reached out to her, and she said, "Yeah, I really



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don't do that kind of work anymore, but here, call this young upstart," and from there, it's a few years of the Mule and Gabe story.

Emily Lewis: How about you, Josh, how did you start specializing working with creatives and people in the digital space?

Josh Barrett: Yeah. When my kids were at school, when they started going to school as kindergarteners and were standing around the playground with other parents, they found out I was a lawyer and parents started asking me questions, about legal questions, and everybody, it seemed like one parent was a designer and one was a developer and one was in video.

Emily Lewis: [Agrees]

Lea Alcantara: [Agrees]

Josh Barrett: And I was giving out lots of free advice, which is fine, but at the time, I was at a larger law firm downtown and really, it got me focused on, "Oh, hey, maybe there's a specific area I can focus my practice on here," and it was something that I love. I like photography myself and trying to break things on the web, and I really admired what a lot of my clients and friends were able to make, so I decided to form CreateLegal and serve those people directly.

Emily Lewis: You know, I feel like that both of those are perfect examples of how you really figure out who your ideal client is. It's like who's already coming to you and asking you for this stuff.
[Laughs]

Josh Barrett: Yeah.



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Emily Lewis: So today's topic, we're going to be talking about service agreements. We call ours a master services agreement, like an MSA, and I think some people may even call them client services agreements, but can we talk about what these service agreements are in general, what their purpose is?

Josh Barrett: No. [Laughs]

Gabe Levine: [Laughs]

Emily Lewis: [Laughs]

Lea Alcantara: [Laughs]

Josh Barrett: The shortest podcast.

Gabe Levine: Yes, yes, of course. It's sort of think of it as like relationship guidelines, right? If this happens, then this is what it means, and so the MSA is the standard terms that govern the relationship between the parties, oftentimes, leaving out the essential business terms of the particular engagement, so what services are going to be provided and what is going to be paid for those services, and that's left for a later statement of work or work order or whatever you call it to put the meat on the bones of that particular engagement between the parties.

Josh Barrett: I'll just add something really quickly. You know, it's important we all think about contracts in the context of disputes and fights and litigation, but really 99-plus percent of the time, it doesn't go to a dispute, it doesn't go to a problem, but the process of putting a contract together helps the parties get on the same page and manage mutual expectations and make sure the project goes smoothly. The process of contacting and putting together an MSA and SOW helps avoid problems from even arising.



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Lea Alcantara: So before we dive deeper into the particular service agreements, I'd like to know if there are any common rights that freelancers and agencies have that they should know even before they sign any contracts or the dotted line.

Josh Barrett: Yeah, well, I think a couple of things are particularly important. I think any creator of intellectual property needs to understand sort of what they own has a default when they create stuff.

Lea Alcantara: [Agrees]

Josh Barrett: And as a general rule, the creator owns it. Until you have a written contract that defines either a license or a transfer, the creator owns those things. I think that is the basis around which the main relationship "I'm going to make some stuff for you and you're going to pay me for it" starts so you need to understand what you've created and what you own.

Emily Lewis: [Agrees]

Lea Alcantara: [Agrees]

Gabe Levine: Yeah, and I'll add you often hear people toss around the phrase, "Work for hire or work made for hire."

Emily Lewis: [Agrees]

Gabe Levine: And I think Josh probably does this, too, but just get that out of your lexicon. Don't use it unless you really fully understand what it means and you intend to use it from a legal perspective because once you agree in writing that something is a work made for hire or work for hire, it changes that copyright default from ownership of the creator to the ownership of the hirer.



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Lea Alcantara: [Agrees]

Emily Lewis: Wow! That seems like a small thing, [laughs] but I guess that's how legal stuff is.

Gabe Levine: Yeah. I often try to describe it like programming, right? You make one little error and it messes up the whole piece of software.

Emily Lewis: So in those situations that maybe the creative isn't selling work for hire per se, but maybe they're doing spec work or something like that, do they still own the rights of the creation or because it's spec, they've given up that right. Is that the same thing?

Gabe Levine: Yeah. So I don't think, whether you call it spec or something else, it really changes the nature of that copyright fundamental proposition. If something is spec work, I'm guessing that chances are that the creator has agreed somewhere in some checkbox that that spec work is work for hire, like if you're doing a contest online or something like that.

Emily Lewis: [Agrees]

Gabe Levine: So it really is what the parties agree to. Does that sound right to you, Josh?

Josh Barrett: Yeah. And I think the situation I see that comes up most often is maybe before a client and an agency have a formal relationship is maybe the agency or the studio is pitching some creative concepts to try and win the work.

Emily Lewis: [Agrees]

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Josh Barrett: And you have a question about who owns that stuff. Maybe there are some comps, maybe there are some sketches of logos that are put together, and this is a great example of where you have some default rules under the law, but even then I've certainly had disputes come out of an agency pitches some treatments for a campaign and the agency doesn't get hired, but the client goes ahead and uses the treatment.

Emily Lewis: [Agrees]

Josh Barrett: And that's where not having spent a little time talking about it or getting something in writing leads to unhappy agency, unhappy studio.

Emily Lewis: So that leads perfectly into our next question, so how does having a proper standard agreement protect you and your client?

Gabe Levine: Well, so Josh and I being lawyers that primarily serve the agency/service provider side, I think our standard agreement is tuned in all honesty to be favorable for the agency, the service provider, the designer, but it's not unfair to the client, and when we crafted it, we talk a lot about what we could do to make it more fair. So the idea again here is that you have clear expectations and you understand what your rights and your remedies and your obligations are, and I will say this that the process of negotiation which Josh and I probably each spend a good 50% of our time on, you start with somebody's form 99% of the time, but the process of negotiating that agreement talking about it but between the parties and their lawyers ends up creating something that makes those expectations more clear and frankly lets the parties know, if their lawyers are good, what they need to do in order to not run afoul with their agreement.

Emily Lewis: If I can ask sort of – this just comes from my lack of understanding about some of this stuff, so in your standard agreement, you really should be looking out for yourself and you just hope



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your client is looking out for themselves as opposed to you need to be looking out for your client as well.

Josh Barrett: Well, I think you actually need to meet in the middle a little bit. So as a professional studio or agency or freelancer, I don't think it does anybody any good to start a relationship for a contract negotiation with the needle pegged completely on the agency side of the spectrum. You are a professional business, there are certain things that you should just promise and stand behind your work and just own those things right out of the gate. There are areas where reasonable minds can differ or where a standard agreement or a template or the default agreement that a client sends over that's written for every possible situation, but it's not custom for the particular work at hand, and so it needs to be adjusted.

I don't think starting an agreement that's completely one sided, and I would tell all the clients, all the brands out there as well, that starting with their completely one-sided agreement doesn't do anybody any good. It increases the time and cost to getting to an agreement in place. It impacts trust and so I think both Gabe and I really counsel our clients to say, "Yeah, we can start in an agency-favorable situation, but let's not be greedy, if there are promises that we can make and stand behind, let's make them and just take those things out of the negotiating equation."

Emily Lewis: [Agrees]

Josh Barrett: And it's quicker to agreement and quicker to posit and quicker to getting started on the work.

Emily Lewis: And probably has some impact on that relationship building, the trust building.

Gabe Levine: Yeah, certainly, I mean, a lot of times, long negotiations, more frequently on larger deals, but they do have that emotional impact in a relationship effect.



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Lea Alcantara: [Agrees]

Emily Lewis: [Agrees]

Lea Alcantara: You know, with all these talks about setting expectations, it's clear that both sides, the agency and the client has certain ideas of what goes into a contract. I think the best way to help tackle that for our listeners is maybe if both of you can share what common misconceptions agencies have about contracts in general.

Josh Barrett: Common misconceptions, okay, I'm going to try this one off my top of my head. They don't mean anything and that we're just going to sign it and whatever.

Emily Lewis: [Laughs]

Lea Alcantara: Ah.

Josh Barrett: Most recent example of this is somebody saying, "Wait, well, what do you mean I can't talk about this work?" Right?

Emily Lewis: [Agrees]

Lea Alcantara: Right.

Josh Barrett: It says right there on the contract, you can't talk about the work. So I guess the most common misconception particularly with fledgling businesses is that the contract really doesn't mean a lot, and everybody, "It must be reasonable, even if I'm signing it. Everybody else is signing it, so it's standard, and standard means okay."



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Emily Lewis: Yeah, that was me at the beginning of my freelance career for sure.

Gabe Levine: I think another common misconception is understanding how contracts can work for you as a tool, and again, not just looking at it as “this is what we would find about in the lawsuit” — that’s a tiny lens to look through — but how can we use this to clarify mutual expectations. I think the really powerful thing an agency can do when defining the scope of a project is really clearly defining what is expected of the client and that the team is available and communicate to you over the course of the project and that they’re going to provide the content in this format on that day, and the creator brief will be approved no later than X. And if it’s development, maybe there’s a functional spec or a technical spec or maybe there’s a testing specification, and all those types of details really help make sure that we’re all working on the same project because whenever there’s ambiguity, the client is assuming, “Well, the agency will take care of that,” and the agency is assuming that’s outside the scope. So that’s where investing a little time to really tailor those things and maybe articulate those unspoken assumptions can be a great deal of value.

Emily Lewis: When it comes to dealing with contracts or not even specifically contracts, but just getting advice, I do think it’s important to hire a lawyer, but it wasn’t until your presentation at Owner Summit that I was like, “Oh, maybe I need a lawyer who specializes in what I do.” Can you expound on why that’s important having a lawyer who knows your space versus just the law?

Gabe Levine: Yeah, I mean, lawyering is not brain surgery, but there are a lot of decent lawyers out there, so what’s the leg up that you can get? What’s the value that you can get for yourself? The value is in having somebody who can really understand the problems that you run into and the issues that you face and the things that are important to you in your business, and so both Josh and I through years, dealing almost exclusively with this business realm, have developed those pieces of knowledge. We know what’s important to the clients. Similarly, if you’re somebody who represents general contractors, you know what’s important to a general contractor.



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I think there's huge advantage in both cost savings and in the crafting of your agreements and the advice you get to have an attorney or even a CPA or an insurance broker who really knows the type of business you have and what's important for them to do for you.

Emily Lewis: [Agrees]

Josh Barrett: And relatedly, from the experience of working with agencies, I mean, Gabe and I know generally the workflow, the actual thing that an agency does to produce a logo or to produce a video segment or to build a website, and we know some stuff about it. While I couldn't build a website, I understand the pieces that go together in the intellectual property issues that are raised and there are plenty of folks that don't, and even if you understand the legal concept behind intellectual property or copyright, understanding how a video is made into something for a campaign is a really important distinction, and having a lawyer, and it's not just Gabe and I, but having a lawyer that understands that industry-specific stuff is tremendously valuable.

Emily Lewis: Yeah. I just wanted to mention for our listeners, like this was something that was a big takeaway for Lea and I from the conference about, because we have a lawyer and we have an insurance person, but they don't specialize in our field, and same with accountant, and so since Owner Summit, we sort of have been on a research path to change this.

Lea Alcantara: Yeah.

Emily Lewis: And it's been really challenging to try and find people who are specialist in their trade, but also understand what we do so that we know we are protected as completely as possible. Lea, you've had a challenge most specifically trying to find like an accountant.

Lea Alcantara: Yeah, absolutely. I think it really is important in that if you choose somebody who is specialized in our particular industry, then they really can tailor your protections and their solutions to



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you, and you, actually yourself, as the business owner do less work and less research and you get back to designing websites as opposed to like, “What, I can get sued on this? Or if my laptop got stolen, that’s not covered by insurance?” Like there’s a lot of like weird little nuances where until like, frankly, Owner Summit. I was kind of taken aback that I had to contact our insurance person who is an specialist in the digital space and being like, “Hey, have you heard about digital liability? Like what happens if my laptop got stolen, my client information, which is all on there, is compromised, what’s the liability? Is there any sort of protections?” He had no idea. Yeah, and that’s extremely concerning, right?

Emily Lewis: Extremely.

Timestamp: 00:20:02

Lea Alcantara: I mean, we...

Emily Lewis: But we didn’t know.

Lea Alcantara: Well, yeah, because I’m not an insurance agent, right?

Emily Lewis: Right. [Laughs]

Lea Alcantara: So in order to protect yourself as a digital agency, Step 1, I would think, is like when you’re setting up your business is finding someone who actually has had experience and multiple experiences with agencies like yourself, not just in general business and general protections. Questions like that where it’s like, “Okay, I’ll do my research,” and he was able to find those particular protections that existed, but it was weird to me that I had to prompt him as opposed to like somebody being proactive and saying like, “Hey, there’s this new protection with the new climate. With our more and more digital climate, here are the ways that you can be legally protected in a scenario where your



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laptop can get stolen.” That isn’t an uncommon situation, what happens to your work, your clients, those kinds of things, right?

Emily Lewis: Yeah. It’s really. Really, I do feel like it’s really important. One of our top priorities for Bright Umbrella is to sort of shore that up and make sure we are being represented and supported by people who have that broader understanding, because like Lea said, we don’t have the time to figure that stuff out on their behalf.

Josh Barrett: Working with somebody that has that working experience with your industry is they will ask you better questions.

Emily Lewis: [Agrees]

Lea Alcantara: [Agrees]

Josh Barrett: “What are you, you know ... not just how you’re building a website. Well, what are you building it on? What CMS are you using? Where is the content coming from?” And because someone that’s experienced, whether it’s insurance or accounting or law, will be able to dig down and get to the next layer of questions that will really help you get things dialed in.

Emily Lewis: So when it comes to these standard agreements, what are some of the nuances that developers and designers typically miss if they’re using like a template they find on the web or I know what I did, I borrowed one that I saw someone else is using.

Josh Barrett: [Laughs]

Gabe Levine: [Laughs]



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Emily Lewis: And I just used it.

Lea Alcantara: And then changed the company name. [Laughs]

Josh Barrett: Right, right. Well, you know the agreement for if you're making logos is different than the agreement for making websites and different from making the front-end of websites versus the back-end of websites, and it's different yet again from making video, because all those things have different intellectual property issues and financial issues and issues surrounding termination, and so while what you did probably was not broken, it probably wasn't serving you the best in terms of managing expectations, making sure that everybody was working on the same project, and in the event of a problem, it probably wasn't doing the best job of protecting you.

So I think obviously, intellectual property is one, the financial termination is probably one that doesn't get as much thought as you would expect in whether if it's the issues surrounding how we this relationship should or can break up is different for a yearlong retainer project and it's different for a 3-week quick logo concepting and it's different yet again for an hourly project versus a fixed fee.

Emily Lewis: [Agrees]

Josh Barrett: So those are all types of things that can be and should be customized depending on the nature of the work in the project.

Gabe Levine: Yeah, and there are legal bits that you want to consider having in there as well, limitations on liability and disclaimers and things like that, and I think I hawked on about the attorney's fee provision that you hopefully don't need, but in my former life as a litigator, and frankly, at least a half dozen times a year in my practice, come up because, as Josh said, most of these things don't head to disputes, but some of them do, and when you have these provisions, they help resolve those



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disputes quicker and cheaper, whether it's you looking to get paid or you're looking to fend off a client who's claiming you did something wrong.

Emily Lewis: [Agrees]

Lea Alcantara: So speaking of those particular disputes, we've been kind of mentioning them in generalizations, what are common reasons clients and prospects push back on with the agreements?

Gabe Levine: It depends on who the clients and prospects are, I would say, but when we're dealing with parties that have attorneys who, at least, understand the basics of intellectual properties and risk allocation, very often I am fighting about the limitations of liability in the indemnity provisions which shift risk or allocate risk between the client and the agency, and it's pretty esoteric stuff, but it boils down to if somebody comes along and claims this infringes, for example, a patent, which doesn't happen often, but has happened a couple of times recently, who's responsible for that? Nobody knew about it, but who's responsible for that? So I think that risk allocation piece is something that I fight about a lot, and then there's also frequently a discussion around payment and levers for payment. For example, does an invoice have to be "undisputed" in order for it to be due?

Emily Lewis: [Agrees]

Lea Alcantara: [Agrees]

Gabe Levine: And that can be a problem because if the client disputes it, there's no obligation to pay it. There is some measure of good faith required, but that's an easy obligation to satisfy. Does there have to be approval or acceptance of a deliverable before a payment or is it merely the delivery of the deliverable that triggers the payment obligation? So that's another category of things that frequently I'm negotiating.



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Emily Lewis: [Agrees]

Josh Barrett: I think one of the things related to what Gabe mentioned as one of the things that I negotiate often, I have a lot of people in the design and logo spaces fighting about the representations about trademarks and whether if I make a logo for you, whether or not I'm making any promise that you can register that as a trademark or whether it would be infringing, and a designer, while a designer does some research, they're not doing clearance services, and so anybody that's doing logo and naming work should be very careful about warranties about whether something infringes trademarks and the level of diligence that's being done and what promises are being made about whether it might be infringing, and a lot of the standard agreements that come across from procurement departments at big brands, they are all cranked super favorable for the brand and they would make the designer responsible if a logo that the designer put together was determined by someone out in the world to be infringing, and a designer is not a trademark lawyer. A designer is not doing those types of clearances in most cases, so he shouldn't be making those promises.

Emily Lewis: Yeah, and something like that could probably just be devastating for someone who is maybe a smaller shop or an independent freelancer.

Gabe Levine: Yeah. And this is where insurance is so important too. You want to talk to a broker who understands what you're doing and it's possible to get coverage for that sort of stuff. Side note: Excluding patent infringement 99.9% of the time, but if you have a broker who knows your business and understands the ask, you describe the situation we just described, your job you just describe to your broker and say, "Can we get coverage for that? A client sues us because some third-party claims infringement and they want indemnity, are we covered?" And you want your broker to be able to say, "Yes, here's the policy."

Lea Alcantara: [Agrees]



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Emily Lewis: So there have been situations I've been in before, and Lea, I'm not sure if you have before we started working together, but when the client is insistent that we use their agreement as our contract or MSA, what should you do when that happens?

Josh Barrett: Well, the first thing I encourage folks, I mean, first, you'd take a look at it. Maybe it's a fine place to start, but likely it is a generic form designed for all creative services or maybe even worse, any sort of independent contractor relationship, from providing widgets to providing websites, and so the first response is, "Thanks for showing me your agreement. However, I have something that is tailored exactly for the types of services that we're providing. I'm happy to have a conversation with you and negotiate the terms so they work well for both of us, but I think we would start much closer to the end result if we started with something that was designed expressly for the type of work being provided as opposed to something that is generic and is trying to be one size fits all. Let's get an agreement in place that is tailored for this work."

The other response that can sometimes be helpful is to say, "Well, the pricing that we put together, the estimated or the ballpark number that we gave you is based on our default terms, and if we're going to have to negotiate those significantly, that may affect our pricing." They sort of require the brand to put their money where their mouth is, or they are really insistent on their form of agreement if they're going to have to pay more for it, and that's a delicate negotiation to play, but it can be valuable to ensuring there's a substantive conversation happening over what form we should use instead of just, "Well, this is the default. This is what the legal department gave me."

Emily Lewis: [Agrees]

Gabe Levine: Yeah, exactly, get to the meat of the matter, why did they really want to use their form? Are they a large corporation that has to? Okay, well, maybe you've got to start there. Are they as startup that's been told by their lawyer who they never talked to since incorporation, "That you must use this for all your jobs." What's the rationale?



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Lea Alcantara: [Agrees]

Gabe Levine: And then maybe you can get to some common ground by figuring out what their hold up is, too.

Lea Alcantara: I just wanted to bring up a question that I actually asked Gabe in person that's exactly related to this, when clients insist on using their agreement standard. Sometimes, these clients are like, "We'll sign yours and you sign ours," and then you're like, "Whoa, whoa, whoa, not a good idea." And I'm sure... [Laughs]

Josh Barrett: Okay. [Laughs]

Gabe Levine: There can be only one.

Lea Alcantara: Exactly.

Josh Barrett: [Laughs]

Emily Lewis: [Laughs]

Lea Alcantara: So for our listeners who I'm sure also might have had that type of conversation where they're like, "We'll just both sign two MSAs," tell our listeners why that's not a good idea.

Timestamp: *00:30:05*

Gabe Levine: Well, back in law school on your contracts class you learn of something called the battle of the forms, and it means, "Here's our form of agreement. Here's your form of agreement," and they're most certainly going to have contradictory terms, so you don't have a meeting of the



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minds on what those terms are. To put a little bit of legalese on this, and I probably mentioned this to you when we chatted, it is possible if the wording is correct that the later signed agreement ends up overwriting the prior signed agreement. For example, if one has an effective date of January 1st and the other has an effective date of January 2nd, it is possible that that January 2nd agreement controls, and the January 1st agreement doesn't mean anything, but you really don't want to just sort of punt and take those risks. Otherwise, the whole point of having an agreement, to understand what your obligations are, is kind of out the window.

Emily Lewis: [Agrees]

Josh Barrett: Right. That's exactly right. That "Well, let's just sign it," it's treating this contracting process as sort of a box to be checked, and certainly it is, at one level, a box to be checked, but the substance of the discussion of what are we doing here and why are we doing it, that all gets missed if it's just like, "Okay, we'll just both sign and we can file them in and go," you've missed the benefit of getting to that understanding that will make the project go smoothly.

Emily Lewis: And when you were discussing the issue of negotiating to come to an agreement on terms, is that something that the agency owner or representative should be doing on their own, or is that something that you should bring your lawyer into the discussions?

Josh Barrett: I think, again, it really depends. Sometimes there are terms that an agency owner with little experience and a little guidance is perfectly capable and sometimes there are questions. I think the agency owner should consult with their advisers, whether it's accounting, legal, insurance, as they need to get it done. Sometimes you can bring a lawyer in just on a couple of points, and that can really help bring things to resolution quickly where the business people maybe it's something like limitation of liability, which is pretty wonky, lawyers might be able to cut to the chase more quickly and actually get it done more quickly so you can get off to the project and get a deposit and get moving.



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Emily Lewis: [Agrees]

Gabe Levine: And I'll add, like I know both Josh and I pride ourselves on education of clients, because our clients, at least nine out of ten of our respective clients, do not have the money to be bringing us in on every negotiation nor would we really want them spending it that way.

Emily Lewis: [Agrees]

Gabe Levine: So I think the longer you work with a lawyer, and particularly a lawyer who understands your space and if you have a good grasp on what your insurance covers and what it doesn't, you're able to knock out those preliminaries more quickly. I will say when it gets down to fine tuning the language of the actual contract, there is risk involved in somebody, who doesn't understand how the provisions play with one another, actually making those changes. So I've seen some pretty Frankenstein up stuff from some of my forms. I know Josh has too. So the negotiation and then the redrafting is kind of two separate things there.

Emily Lewis: Yeah. I've been in this situation where there were just a couple of terms in the contact that a client wanted me to sign versus them sign mine, and I just kind of extracted those things out and sent them to my lawyer and got advice on that, so it didn't have to be, you know. It wasn't cost prohibitive. It allowed us to move forward, but that was only after a couple of years of not really knowing what I was doing and signing stuff without thinking about it that I realized I needed like a relationship with a lawyer that I could contact when those things came up. Not just, "Oh, I had a guy do some contracts for me once," but like a lawyer you know and you can contact whenever you do have those questions.

Gabe Levine: Right. And that's ideally how your professional services should work.

Josh Barrett: Yeah.



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Emily Lewis: So I think what we've been leading up to essentially with this conversation is to getting into the standard digital agreement that you and Josh created with Bureau of Digital, which you launched or released at Owner Summit. So what I think is great about what this product is, it's kind of gives you a baseline that covers a lot of the things you've already discussed on our show today. Can you talk about what this agreement is and why you decided to put something like this together in the first place?

Gabe Levine: I'll take the second part and then maybe hand the first one to Josh, so why? One of the owners of one of the shops who I knew from a past Owner Camp made an ask in the Bureau Slack, and frankly this was something I've been thinking about and talk with some people about since the very first Owner Camp, which was then Shop Talk back in 2012 because I know Josh here is with me in this also. It's kind of this pie in the sky notion that we can actually change the fundamental assumptions around what you guys are asked to sign, which is shit.

Emily Lewis: [Laughs]

Josh Barrett: [Laughs]

Gabe Levine: There are these contracts that come out of Silicon Valley, and as Josh said, they're entirely cranked in favor of the buyer. And look, I'm not faulting the big firm lawyers in Silicon Valley for protecting their clients. That's what they're supposed to do, but it's not really a practical approach. So I had this pie-in-the-sky idea about shifting this sort of playing field. So when Barbeau in the Slack made this ask, I said, "You know what, okay, it's time. I'm excited, but I am definitely not doing this alone, and there's only one guy I know and trust to do it with me," and Josh had already been introduced to I knew a fair number of people in the Bureau community as well, so we decided to do it together, and Josh, I don't know if you want to talk about kind of – I mean, I guess we've talked a little bit about it, but the first part of the question was really what is this thing, I think. Is that right?



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Emily Lewis: [Agrees]

Josh Barrett: Yeah. And I think we have a shared purpose in wanting to come up with an agreement that was a fair balance of what an agency or studio should undertake and what is fair for a brand to ask of an agency. Again, part of the goal was to maybe make some changes in the industry, but also on a smaller level is to get an agency from proposal to signed contract to deposit more quickly. It's no more complicated than it needs to be. We worked really hard on making sure we used plain English or not complicated or not legalese where we could as an effort to increase trust and help with communication, and all of those things help on a micro level on an individual studio or agency transaction, but we also want to, if we can get lots and lots of agencies using this and more brands seeing it, hopefully, we can accomplish those larger goals of getting the understanding for what common terms should be closer to where they should start, and I think that will help everyone. Certainly, it helps agencies on not having to agree to something that's ridiculous, but I think it helps clients, too, in terms of – it helps brands in terms of getting to an agreement more quickly, understanding what they're getting and what they're paying for so the work can get started and get done.

Gabe Levine: And pushing back on their in-house corporate lawyers.

Emily Lewis: So we downloaded the agreement, and for us, we've been going through it and kind of looking for areas that stood to us that we hadn't seen in our own agreements prior. So if we're using this, how would you recommend someone review it and then implement it?

Josh Barrett: Yeah, great question. Well, like anything else, there are lots of templates on the internet, and so this is designed for a hypothetically used case, but when you downloaded it, it doesn't know if your primary deliverable is design or development or if it's video or events, and so the first thing you should be doing when you talk to your personal lawyer is how to customize these things for the specific type of work and deliverables that you provide. I think the other thing is to think about



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is every business is different. One person's idea of risk tolerance is different than another person's. They might be okay in accepting more risks.

Emily Lewis: [Agrees]

Josh Barrett: And so that often can show itself in payment terms. I have some clients that won't do any work without payment on net 15 days, and some are okay with net 45 and 60, and they're different business propositions for an agency or a freelancer or a studio, and there are different risks and they're a different risk profiles, and so ultimately, you have to customize and think about how do we need to adjust that agreement so it works for your business, because out of the box, it's a good default set of terms, but it's not custom to you. You can't just put your name in it and go. You'll be missing lots of details that makes it more effective for you.

Emily Lewis: [Agrees]

Gabe Levine: Yeah, and I would add, this kind of goes back to one of your earlier questions with what mistakes do people in your field make with agreements. It's kind of not thinking enough, I would say, perhaps about the statement of work and its implications on the legal relationship. So the master is the master, and then the statement of work has assumptions and obligations built in and this is where that I think Josh and I were able to add a lot of value in particular on our knowledge of this space in the work, but you really have to tailor that SOW to your process, your payment terms.

Emily Lewis: [Agrees]

Gabe Levine: And we try to give variables there, but they're not going to fit for probably more than 50% of the projects, so you've got to look at it and understand it, work with your lawyer on it, and get the SOW dialed into your process, your services, your assumptions, your obligations, your client's obligations, that sort of thing.



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Josh Barrett: And I think just extending on that a little bit more, there's something when a document comes from your lawyer or from lawyers that you know and a download like this, sometimes in the SOW, these terms are treated as sacrosanct, but they're not. I mean, they're guides, but you still have to do or an agency still has to do the work of customizing them, and not only for its own workflows and process, but for the client so that business terms you might insist on when you're working with Apple or Facebook or Twitter might be different than the business terms that you insist on when working on a barely-funded startup.

Emily Lewis: [Agrees]

Josh Barrett: You need to think that they have different risk profiles and you need to make different choices in how you complete that SOW, whether on your own and with your other business team or with your lawyer.

Lea Alcantara: You know, what I liked about this standard digital agreement, this Bureau digital agreement after I downloaded, it wasn't just the template, because there are default templates that you can download anywhere, like creative templates or all that stuff, but I think one of the biggest difference makers is there was an actual guidebook. [Laughs]

Emily Lewis: [Agrees]

Lea Alcantara: And not just the "Here's the template, now fill in the blanks and customize on your own." Both Gabe and Josh kind of like annotated specific parts saying like, "Hey, here's a specific part where you definitely a 100% should customize and this isn't relevant to every single particular project, and here's why, and here's this particular thing and this is what this means in lay terms." I mean, obviously, your own lawyer should be doing that for yourself, but for self-education in trying to



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wrap your mind around the value of contracts, the Bureau digital agreement actually does a really good job in actually breaking down why these particular terms even exist in the first place.

Emily Lewis: Yeah, and I feel like, Lea, aside from just educating yourself about why that is relevant or not relevant, I think it also gives you even more context in those situations when someone pushes back and they're like, "What's this for?"

Lea Alcantara: Yeah.

Emily Lewis: Well, then you actually have some knowledge about what something is for in terms that aren't just legalese, but contextual to what we do for a living.

Josh Barrett: Yeah. One of the best ways of cutting through those types of discussions is if you understand the business reason for the provision, then you can have a substantive business conversation when there's a negotiation, and it's not just lawyers pushing markups back and forth to each other, but you can have a conversation on why do you want to make that change and get at the underlying issue, and that's something that we've talked about a couple of times in this conversation, and so that's what we wanted that user guide to do is to better enable agencies to answer questions on their own or go into those conversations focused on the underlying business issue so they could answer questions and solve the problem.

Emily Lewis: I feel like the resources really make this particular part of doing business a little more easy. I know that's not the most elegant way to put it. [Laughs] But I've always been very intimidated by this aspect of the business, which kind of makes me probably not as diligent at making sure it's protecting us as much as I should because I'm just more intimidated by it, whereas this agreement, especially with the supplemental user guide that comes with it, just sort of makes it a lot more palatable for me. I can process it better. I'm less intimidated by it. I feel less stupid when I ask



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my lawyer a question because that always holds me back, too, just this sense that I do not know what this is so even whatever answer I get, I'm still not going to know what that is.

So I feel like this kind of begins to break down the mystery that has always surrounded contracts and MSAs and SOWs specifically for me, and so I really recommend our listeners, even if you feel what you have and are using with your clients is tiptop, there's no reason not to at least see what's here and get even more familiar with something that's very, very specific to the digital industry.

Lea Alcantara: And it's free, FYI.

Emily Lewis: Yeah, it's free.

Lea Alcantara: Yeah. I mean, your email isn't free. [Laughs]

Emily Lewis: [Laughs]

Lea Alcantara: But otherwise, the information is free, and I think the biggest takeaway really out of all of this entire discussion is that this contract is really another discussion point about your business and about the project and a way to set expectations and get everybody on the same page.

Emily Lewis: [Agrees]

Lea Alcantara: Because when you see blocks and blocks of texts, it feels, as Emily mentioned, like intimidating, but certain discussions like warranties or time to pay or those types of things, those are discussions you might have over the phone, but then you actually should put it on in writing so that they don't hound you over a bug that they discovered six months later after handover and expect you to fix it for free. With stuff like that, you have to have a discussion internally to decide like what are the limits. Do they need to sign a retainer contract in order for you to just jump in and fix it six months



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later? It's those kind of things or is there like a 30-day leeway period after handover, but also defining what is handover, right?

Emily Lewis: [Agrees]

Lea Alcantara: Because that's another thing that a lot of people in our industry kind of make an assumption as in like this handover is the moment that the final check has been signed or a specific deliverable or is it a specific date regardless of where the project is at that point in time, and these are not just legal discussions, but these are business discussions that you should be having with your clients.

Emily Lewis: [Agrees]

Lea Alcantara: And if you have that kind of mindset over like all we're doing is trying to clarify business decisions on both ends and then putting it in writing so everybody understands what these terms are so that the project moves more smoothly, then that helps remove anxiety in both parties, right?

Emily Lewis: [Agrees]

Lea Alcantara: And Emily and I are definitely not perfect. For example, getting pings months after something hasn't been done and then trying to figure out, like how awkward is it to have the discussion over like, "Is this part of the thing that we need to do and swallow it?"

Emily Lewis: And this forces us.

Lea Alcantara: I don't know.



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Emily Lewis: This forces us to have those conversations also internally, what are our standards and how are we going to run this business.

Lea Alcantara: Yeah.

Emily Lewis: So you're right, Lea, I feel very much like this product, the standard digital agreement, really made it seem less like this is a legal thing and more like this is about the business, and that makes it seem more manageable to me.

Gabe Levine: And so we upped your game, is what you're saying.

Emily Lewis: Totally, exactly. [Laughs]

Lea Alcantara: Yes, yes. [Laughs]

Gabe Levine: Sweet.

Josh Barrett: And that's super nice feedback. Yeah, it's really nice to hear, and we're continuing to work on the agreement if we find some areas that need clarification or additional issues to explore and the industry changes, and we also want that agreement to have applicability to more types of agencies, and so we're hard at work on some upgrades and updates and so hopefully you'll be able to see those soon.

Emily Lewis: Yeah, and Josh, you had mentioned that, like about a month or so ago, it was updated to Version 1.2 to include some GDPR information.

Josh Barrett: Right, right. Gabe and I worked on that together. Obviously, GDPR is a big impact and it has a massive scope. We took a fairly strategic approach with the Bureau update to basically



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use it as a canary in a coalmine and adding some language to have the agency work under the assumption that it is not a processor or controller of information, which are key terms under GDPR, and if the client strikes those out and says, “Oh no, you’re a processor, you’re going to be managing lots of this data from the EU,” then it’s time to call in specific help and think about what you need to sign or what other steps you need to take to be in that role and understanding what the scope of that law is.

Emily Lewis: So just to reiterate to our listeners, this is in a way a living document that’s going to be updated as they find new things, so it’s definitely worth handing over your email address to get it because then you also get notifications when updates are available.

Gabe Levine: Yeah. And who doesn’t Carl Smith emailing them anyway? [Laughs]

Emily Lewis: [Laughs]

Lea Alcantara: [Laughs]

Josh Barrett: Right. [Laughs]

Emily Lewis: He’s always so positive. [Laughs]

Gabe Levine: Yeah.

Lea Alcantara: [Laughs]

Gabe Levine: For sure. [Laughs]



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Lea Alcantara: So are there any other resources you'd like to recommend for designers and developers to be more informed about protecting themselves and their clients?

Gabe Levine: There's this book out there that some guy named Josh Barrett wrote, *Negotiating or something*.

Emily Lewis: [Laughs]

Lea Alcantara: [Laughs]

Josh Barrett: That's nice of you to mention. Yeah, a year or so ago, I sort of set about writing down everything I knew about negotiating services agreements in one place, and I give it free to my clients that hire me to draft their agreement, and the book is really designed for those situations where you have to sign the other person's agreement. You can't insist on your own terms that you worked on with your own lawyer. You have to sign the big agreement that comes over from the procurement department, and you really need to dig in and understand what these different terms mean and how to approach them and how to negotiate them, and so I wrote this book to give to my clients, and then I decided to stick it up on my website and make it available for sale to people that aren't my clients, and we announced some sort of discount codes so your listeners can download that at a discount, if you can push that out.

Emily Lewis: Yeah. Yeah, absolutely. What we'll do is we'll get the promo code from Josh. We'll add it to our transcripts and we'll promote it on Twitter as well.

Josh Barrett: Awesome.

Emily Lewis: And this is your *Service Agreement Field Manual*, right?



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Josh Barrett: Yeah, field manual. That's right. And it's when you may have to go, you know, I thought about field manual, and maybe when you don't have the time or resources or maybe you don't have a lawyer or maybe you want to have a go at doing it yourself or you just want to educate yourself on these things, and a field manual is what you use in the field and you may not have all the resources you need, but certainly, it's not a substitute for a lawyer, but between having a good lawyer and having the field manual, you can educate yourself to do better in these situations going forward. So I appreciate you asking about that.

Emily Lewis: Any other resources or books, events, workshops that you think would be useful for digital agencies as they think about MSAs, SOWs or even just how to envision the legal aspects of their business as more of a business issue rather than just legal issue to be intimidated by?

Gabe Levine: Another shameless plug, but you know I have clients that struggle with internal business issues all the time because that's particularly, ones are partnerships and with up and down economy issues and things like that and just really growing pains, and for those clients, I wholeheartedly recommend and endorse an Owner Camp.

Emily Lewis: [Agrees]

Gabe Levine: And the Bureau puts on other events too, obviously, and Josh and I will be at the Digital PM Summit coming up in September in Tennessee to talk to project managers about how to use particularly the statement of work, and not just ours, but how to use the statement of work in general to keep the project on track, to set expectations, to really continue that education that we want with the industry.

Lea Alcantara: [Agrees]



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Gabe Levine: And I think the Bureau is fabulous at that, and Carl is a close friend. I know how hard he works to make those events useful for people and I know that the Slack channel is something that immensely useful for the people in the community on an ongoing basis.

Emily Lewis: I think Lea and I would echo your sentiment. Owner Summit was hugely impactful for us, and frankly, in my 20-plus-year career of working in this field, it's the very first time I've attended an event that wasn't trying to teach me how to do my trade better, but teaching me how to be a better business owner and think about my business in a different way, and I think that that is kind of critical for a sustainable business.

Gabe Levine: Yes.

Josh Barrett: Yeah.

Lea Alcantara: [Laughs]

Josh Barrett: I cannot agree more. You need both sets of skills, and I agree with everything Gabe said about the Bureau event is not a paid endorsement, but it's really a fantastic resource. I refer lot of clients there from the blog on up to the summit events to a camp event. They've just been uniformly terrific in my experience.

Lea Alcantara: So that is all the time we have we have for today, but before we finish up, we've got our rapid fire ten questions so our listeners can get to know you a bit better. We'll ask you both the same question starting with Gabe. Are you ready?

Gabe Levine: I guess.

Lea Alcantara: [Laughs]



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Emily Lewis: [Laughs]

Lea Alcantara: First question, what's your go-to karaoke song?

Gabe Levine: I am so bad at karaoke.

Emily Lewis: [Laughs]

Gabe Levine: Oh, *Livin' on a Prayer*.

Lea Alcantara: [Laughs]

Emily Lewis: [Laughs]

Lea Alcantara: Josh?

Josh Barrett: My goodness, Bon Jovi. I have to admit, in law school, I sang a lot of *Obladi Oblada*.

Emily Lewis: [Laughs]

Lea Alcantara: [Laughs]

Emily Lewis: All right, Gabe, what advice would you give your younger self?

Gabe Levine: Don't be afraid.

Emily Lewis: How about you, Josh?



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Josh Barrett: Listen. Shut your mouth and listen.

Lea Alcantara: All right, Gabe, what's your favorite PG-rated curse word?

Gabe Levine: I'm trying to think of PG right now. [Laughs]

Emily Lewis: [Laughs]

Lea Alcantara: [Laughs]

Josh Barrett: [Laughs]

Gabe Levine: But my vocabulary is not good at this moment. Something clown or clown something.

Emily Lewis: [Laughs]

Lea Alcantara: [Laughs]

Josh Barrett: [Laughs]

Lea Alcantara: Josh, how about you, PG-rated cuss word?

Josh Barrett: It's cripes.

Emily Lewis: Cripes.

Lea Alcantara: [Agrees]



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Josh Barrett: Cripes, yeah.

Emily Lewis: Gabe, who's your favorite superhero?

Gabe Levine: The Flash.

Emily Lewis: How about you, Josh?

Josh Barrett: Oh, goodness, favorite. I'm probably an Iron Man guy.

Emily Lewis: [Agrees]

Josh Barrett: Oh, no, Wonder Woman movie, that was really great.

Lea Alcantara: Gabe, what's your favorite time of the year?

Gabe Levine: Fall.

Lea Alcantara: What's your fave time of the year, Josh?

Josh Barrett: Soccer season.

Emily Lewis: [Laughs]

Josh Barrett: Which goes from March until December.

Emily Lewis: All right, Gabe, if you could change one thing about the web, what would it be?



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Gabe Levine: All those ads.

Lea Alcantara: [Agrees]

Emily Lewis: Josh?

Josh Barrett: Yeah, that JavaScript in websites that auto runs all that garbage and tracks me.

Lea Alcantara: [Agrees]

Emily Lewis: [Agrees]

Josh Barrett: Yeah, gross.

Lea Alcantara: Gabe, what are three words that describe you?

Gabe Levine: Intense, hungry, like literally hungry. [Laughs]

Emily Lewis: [Laughs]

Lea Alcantara: [Laughs]

Josh Barrett: [Laughs]

Gabe Levine: Concerned.

Lea Alcantara: Josh, same question.



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Josh Barrett: Yeah, serious, persnickety.

Lea Alcantara: [Laughs]

Josh Barrett: Caring, I hope, I think.

Emily Lewis: All right, Gabe, how about three words that describe your work?

Gabe Levine: Intense, challenging, rewarding.

Emily Lewis: Josh, same question.

Josh Barrett: Rewarding, persnickety. [Laughs]

Emily Lewis: [Laughs]

Lea Alcantara: [Laughs]

Josh Barrett: I love it.

Emily Lewis: Oh, I love that.

Lea Alcantara: What's your favorite meal of the day, Gabe?

Gabe Levine: Breakfast.

Josh Barrett: Breakfast, yeah, for sure.



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Lea Alcantara: [Agrees]

Emily Lewis: [Agrees]

Lea Alcantara: Definitive.

Emily Lewis: Yeah, last question, coffee or tea? Gabe?

Gabe Levine: Lots of coffee.

Emily Lewis: [Laughs] Josh?

Josh Barrett: A handcrafted pour-over Portland-y [laughs] coffee.

Emily Lewis: [Laughs]

Lea Alcantara: That is very Portland-y answer.

Josh Barrett: Yes.

Lea Alcantara: [Laughs]

Emily Lewis: [Laughs]

Lea Alcantara: All right, so that's all the time we have for today. Thanks for joining the show, gentlemen.

Josh Barrett: Thank you.



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Gabe Levine: Thank you, guys.

Emily Lewis: In case our listeners want to follow up with you, where can they find you online, Gabe?

Gabe Levine: It's groundworklegal.com and my email is gabe@groundworklegal.com.

Emily Lewis: And how about you, Josh?

Josh Barrett: It's createlegal.com, josh@createlegal.com, and occasionally on Twitter at [@pdxbarrett](https://twitter.com/pdxbarrett).

Emily Lewis: Thanks again. I really think what you've created and are sharing with everyone is so, so important. I know our listeners are going to appreciate it, especially those like me and Lea who are still figuring out the business and of running our agencies. So thank you, thank you so much.

[Music starts]

Gabe Levine: Our pleasure. Thanks for having me.

Josh Barrett: Yeah, of course.

Lea Alcantara: CTRL+CLICK is produced by Bright Umbrella, a web services agency invested in education and social good. Today's podcast would not be possible without the support of this episode's sponsor! Many thanks to Foster Made!

Emily Lewis: We'd also like to thank our hosting partner: Arcustech.



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Emily Lewis: Don't forget to tune in to our next episode when Chantal Forster shares what it means to pursue philanthropy in tech. Be sure to check out ctrlclickcast.com/schedule for more upcoming topics.

Lea Alcantara: This is Lea Alcantara ...

Emily Lewis: And Emily Lewis ...

Lea Alcantara: Signing off for CTRL+CLICK CAST. See you next time!

Emily Lewis: Cheers!

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