



## Negotiation Strategies

Ryan Gannon

Seton Hall School of Law

Copyright 2008 Ryan Gannon

Reprinted and distributed by New Jersey Volunteer  
Lawyers for the Arts, Inc.,  
with the permission of the author

### **I. There's No Business Like Show Business<sup>1</sup>**

The Entertainment Industry in general is unlike any other line of work. It is a highly competitive and very personal industry where an artist's life could change due to the strategy used in negotiating a contract. In the entertainment and arts industry the terms of a contract can be confusing and intimidating.

---

<sup>1</sup> Matthew Bender & Company, Inc., *Entertainment Industry Contracts* 120.01 (2007).

Therefore a performer, producer, artist or even somebody who is an investor in a performance should always use an attorney in negotiating a contract or at least have an attorney review the contract prior to finalizing it. However, knowing that hiring an attorney is not always financially feasible, this article will provide some insight on general negotiation skills and advice tailored to those in the entertainment and arts industry.

## II. Negotiation Strategies

The first thing that all parties involved in contracts and negotiations should remember is that a written contract is always better than an oral contract. The practice of relying on oral contracts often leads to contract disputes.<sup>2</sup> Uncertainties and disputes over

---

<sup>2</sup> See, Bogner, Michael S, *The Problem with Handshakes: An Evolution of Oral Agreements in the United States Film Industry* (Although this article details the tradition of oral agreements in the film industry, the

the terms of an oral agreement can lead to extensive litigation at an extremely high cost. In a famous case where Kim Basinger did not honor an oral agreement to star in the movie, *Boxing Helena*, a court in California originally ruled against Basinger for a verdict of more than eight million dollars, although it was reversed on appeal.<sup>3</sup> Although this example is at the extreme end of the entertainment industry and most contracts will not lead to lawsuits for damages this high, it demonstrates the importance of the written contract as opposed to an oral one.

There are several strategies to negotiating a written contract that will lead you to the best result.

This brief overview of negotiation was compiled through the analysis of two leading sources on

---

same general principle that a written contract will create fewer issues in the future than an oral contract applies to the theatre industry as well).

<sup>3</sup> *Main Line Pictures, Inc. v. Basinger*, No. B077509, 1994 WL 814244, at 1 (Cal. Ct. App. Sep. 22, 1994).

negotiation strategy.<sup>4</sup> This article should not be used as an exclusive source for negotiation technique, but rather guidance on several effective ways to negotiate. Each negotiation may require a different strategy, but this will provide a basic strategy that can be effective. This list of steps to follow can be used in any negotiation from negotiating about a raise, to negotiating with a car salesman, for a record deal, or a contract extension for the local theatre group. However, these guidelines have been tailored to contracts in the entertainment and arts industry.

## **1. Separate the People from the Problem<sup>5</sup>**

A major misconception about negotiation is that the two sides bargaining are enemies that cannot work together. However, to be a strong negotiator you

---

<sup>4</sup> Bender, *supra* note 1; Roger Fisher & William Ury, *Getting to Yes. Negotiating Agreement without Giving In* (Bruce Patton ed., Penguin Books 1991) (1981).

<sup>5</sup> *See* Fisher, *supra* note 4, at 17.

need to separate the people from the problem. You should not blame the other side for your problems, but rather the two sides should work together to resolve the issue. A major key to negotiation is communication between the two parties. A misunderstanding could result from a lack of communication or simply from one side simply not listening to the other side's points and objectives.<sup>6</sup>

In negotiation, emotions are often high. In order to avoid emotions taking over, it is important to recognize both your emotions and those of the other party. If you let your emotions consume you, the negotiations are likely to end without a result that satisfies both parties involved.<sup>7</sup> For example a young film creator who has finally developed a work that is

---

<sup>6</sup> *Id.* at 32.

<sup>7</sup> *Id.* at 29.

going to be bought by a major company after years of struggling will likely be looking for a nice payout from the company. During the negotiations the company seems to attempt to underpay the film producer, which leads to emotional outbursts causing the negotiation session to come to an end. However if the two sides had communicated better and addressed the emotional issues involved, a resolution may have occurred. In this example the film creator is emotional because he has spent years with creative visions and has finally been discovered and feels he deserves the pay he has always envisioned. On the other side, the company negotiator may be underpaying because the last contract he signed with a young, unknown creator was breached, and therefore he is afraid of this happening again. If the two sides had addressed

these emotions and communicated in order to reach a common goal, the negotiations may have ended more favorably.<sup>8</sup>

## 2. Focus on Interests Instead of Positions<sup>9</sup>

It is important to not be so focused on “winning” the negotiation, but rather focus on promoting your interests. A key strategy is to ask “why” or “why not” when the opposing negotiator makes a request or denies something that you want in the negotiation session.<sup>10</sup> This simple technique will help you understand what the interests of the other side are. Negotiation should not be a battle over positions but rather should be more of a compromise of interests. The authors of *Getting to Yes*<sup>11</sup>, Fisher and Ury,

---

<sup>8</sup> See *Id.* at 29-36 (If negotiators do not control and address emotions, the negotiation session is not likely to be successful).

<sup>9</sup> *Id.* at 40.

<sup>10</sup> *Id.* at 44-45.

<sup>11</sup> Fisher, *supra* note 4.

provide the example where two people are arguing over the window in a room being opened or closed. It turns out that the first person wants the window closed because she does not want a draft in the room and the second person wants the window open to get fresh air. If the two had expressed their interests to each other, they could have come to the solution where the window is opened in the next room to get fresh air, but yet not have a draft.<sup>12</sup> It is not too difficult to imagine this occurring in the entertainment field as well. If the creator of a short film focuses on position rather than the interests of both sides, something with a simple solution such as the window example could be the cause of a stalemate in the negotiations. Some people may feel that it will be a

---

<sup>12</sup> *Id.* at 40.

disadvantage for opposing sides to have access to each other's interests, but withholding this type of information could lead to an unnecessary end to the negotiation process.

### **3. Generate Options**

In negotiation, many people search for a single answer and are not willing to adjust. You may believe that by having several different options available, the negotiation process will just be delayed and never reach a final result.<sup>13</sup> However, this is not necessarily true. For instance, if you are a musician negotiating an agreement with a producer, you may limit the effectiveness and benefits of the contract by only having one set of terms in mind. You may not be willing to sign a contract for less than a certain amount

---

<sup>13</sup> *Id.* at 58-59.

of money. Although you may create different options, such as taking less money on the first recording produced, in exchange for a guaranteed second production deal. Before going to a negotiation session, you should take time to brainstorm about important terms, and perhaps more importantly, what your ultimate goal really is.<sup>14</sup>

#### **4. Use Objective Criteria**

Negotiating based on positions is not likely to lead to a favorable outcome. A good technique in negotiation is to use fair, objective terms and criteria for deciding opposing issues.<sup>15</sup> This technique, if used effectively, will make bargaining and negotiating less adverse and more of a compromise. If you have created a script for a television series and are pitching

---

<sup>14</sup> *Id.* at 60-62.

<sup>15</sup> *Id.* at 81-88.

it to a network, you could begin by saying: “You want to pay a low price for the rights to the script and I want a high price, why not figure out what a fair price would be.”<sup>16</sup> This simple process of determining objective, unbiased terms will make the negotiation session friendlier and more likely to be successful for all who are involved.

## **5. Know with whom you are negotiating<sup>17</sup>**

In order to get the most favorable contract for yourself, you should try to learn the interests and tendencies of the person sitting across from you, and what that person wants from this negotiation. You will want to know how that person reacts to different

---

<sup>16</sup> *See Id.* at 88 (Fisher and Ury are describing how objective criteria can make negotiating less complex yet fair at the same time).

<sup>17</sup> Bender, *supra* note 1, at 2.

situations, likes and dislikes, and strengths and weaknesses.<sup>18</sup>

## 6. Assess your Bargaining Power<sup>19</sup>

A major mistake made by people negotiating contracts, especially people who are not seasoned in negotiation, such as a young performer negotiating a first performance contract, is to make an extravagant demand. On the other side, a producer may not understand how much power he really possesses and may offer to compensate a performer beyond what would be reasonable. An overreaching demand could end the negotiation session without ever coming close to a deal, while the mistake of offering excessive pay to the performer certainly will not end the deal, but

---

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.*

may set a precedent that this particular producer overpays for talent.

It is important to know how much bargaining power you actually have. For example, if you are the biggest star on Broadway, your bargaining power is obviously high, but if you have never acted before and are negotiating your first theatrical contract for the summer theatre program in your town, your bargaining power is probably low.<sup>20</sup> However, do not be discouraged if you believe your bargaining power to be low. You should assess the person or company in the same manner. If you believe the opposing negotiator to have similar bargaining power to you then you are not in a particularly bad position at all. If your bargaining power is low, a strategy that is often

---

<sup>20</sup> *Id.* at 3.

helpful is to create a “BATNA” (Best Alternative to a Negotiated Agreement).<sup>21</sup> When you are on the weaker side of the bargaining table you should have two objectives. First you want to protect yourself from an agreement that you should reject. Second, you want to make your bargaining power, even though it is less, useful and ultimately satisfy your interests.<sup>22</sup>

Developing a “BATNA” is important before you ever enter a negotiation. If you are negotiating the sale of a particular piece of art to a gallery, your BATNA may be to walk away from the deal and attempt to sell the work to another gallery, or your BATNA may be to take the lower offer that the gallery is offering because your artwork is unlikely to be purchased by another gallery. Whatever the situation is, it is important to

---

<sup>21</sup> Fisher, *supra* note 4, at 97.

<sup>22</sup> *Id.* at 97.

know your BATNA before negotiations occur in order to prepare for an unfavorable situation.

## **7. Define the Terms**

Regardless of which party drafts the contract, it is extremely important to define the terms used.

Although a term or phrase may mean one thing to you, it may mean something else to the person with whom you are contracting. Therefore, avoid confusion and potential litigation in the future by making sure the terms being used are defined.<sup>23</sup> For example, what are your specific obligations, when do they start and end, what are the events triggering payment, when is payment due, how can the contract be terminated or extended?

## **8. Know, But Question, the Tradition**

---

<sup>23</sup> Bender, *supra* note 1, at 3.

As somebody who is involved in the arts and entertainment industry, you should become aware of the traditions of the industry and when you should negotiate away from them. For instance, as a performer you may sit down with the producer of your local theater group to contract for the upcoming performance who may tell you that this contract is the “standard” contract or “the way it’s always done.”<sup>24</sup> However, this type of claim or statement does not mean you have to accept that reasoning. Most importantly you should make sure the terms are clear when you are told “this is how it’s always done,” and if you do not agree with those terms, you should attempt to negotiate more favorable terms.

## 9. Honesty is the Best Policy

---

<sup>24</sup> *Id.*

Many people believe that in order to get the most favorable deal you need to lie and deceive the other side into thinking you are more powerful or more valuable than you really are, but this is not the case. In any business, and especially a close one like the entertainment and arts industry, being honest is not only an important moral or legal issue but also one that may forever affect your reputation.<sup>25</sup> By being deceptive or lying to gain one favorable contract, you could ultimately damage your reputation for all future contract negotiations.

### III. Conclusion

It is difficult to state all of the rules of negotiation. Negotiation in the arts and entertainment industry is a complex process in which many people are afraid to

---

<sup>25</sup> *Id.* at 4.

engage. As stated before, the best advice is to have an attorney involved in the process, but when you are faced with a situation where you have to represent yourself, the art of negotiation does not have to be so complicated. The key is to be yourself and ultimately be comfortable with the terms to which you agree. These tips can be used to get to a fair result, which is what every good negotiator is looking to do.

**###**

**By reviewing this article, the reader acknowledges that (1) the article contains law that is subject to change after the publication of the article; and (2) the article is intended for informational use only and is not to be construed as a legal opinion or legal advice, in general or with respect to any particular legal matter. This article contains a general overview of the topic and is not intended as legal advice or as a substitute for a consultation with an attorney. If you have further questions about this or any arts-related legal issue, please contact New Jersey Volunteer Lawyers for the Arts, Inc., at 856-627-0428 or [info@njvla.org](mailto:info@njvla.org).**