

anatomy OF A contract

V^LA^A

Volunteer
Lawyers and
Accountants
for the Arts

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St. Louis Volunteer Lawyers and Accountants for the Arts (VLAA) provides free legal and accounting assistance to financially eligible artists, small arts businesses and nonprofit cultural organizations. VLAA also offers mediation and a wide variety of educational programs.



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Preface

“An honest man’s word is as good as his bond.”

— Miguel de Cervantes, *Don Quixote*

Although many of us prefer to conduct our business on a handshake, vague verbal agreements can result in ugly misunderstandings. Most disputes are not intentional; they are the result of confusion that could have been avoided with a letter of agreement, a contract, or at the very least a focused discussion delineating responsibilities.

Of course, no piece of paper will compensate for lack of integrity or mutual respect. Even when the parties completely trust a “gentleman’s handshake,” without a written contract, each is taking a risk that expectations may not be fully understood. Written agreements are the most reliable way to determine that a deal was actually made and what the terms were.

Consulting an attorney will ensure that the contract really says what you think it says and that no other obligations have been slipped into the fine print. When your written contract includes a mediation clause, you’ve set the tone for a working relationship built on open communication and established a conflict resolution process should problems arise.

At St. Louis Volunteer Lawyers and Accountants for the Arts, we have heard too many stories about artists who sign away their rights because they feel lucky to have received their first break. At the same time, we are aware that income-generating opportunities are scarce and that even the most successful artists must compete for work.

The goal of this publication is to level the playing field by giving you the confidence to negotiate, encouraging you to put your agreements in writing, helping you determine when to seek legal counsel and explaining the benefits of using mediation to resolve art-related disputes.

The Art of Negotiation

Negotiation — the give-and-take process of bargaining to reach a mutually acceptable agreement — is a collection of behaviors combining communication skills, psychology, sociology, and conflict management. The very thought of negotiating may be intimidating. Yet we are all experienced negotiators. You have negotiated all of your life — with your parents, siblings, spouse, children, neighbors, landlord, colleagues, and yes, your car mechanic.

We tend to develop assumptions about how we should negotiate in order to get what we want. Too often those assumptions are based on positional bargaining, which encourages stubbornness and forces the parties to either yield or compete. The result is an agreement that may not really address the needs of both parties.

At VLAA, we believe the interest-based approach is more effective. Based on the best-selling book *Getting to Yes*, this approach focuses on satisfying the underlying needs of both parties. Instead of each side trying to get the best deal through demands and force, the parties listen to each other, clarify the issues, develop options for mutual gain, and select outcomes that satisfy their interests. The result is a sustainable, win-win agreement.

Another mistaken belief about negotiation is that the final outcome is automatically determined by power. Seldom does one side have all the power, and power relationships can change. For example, because the unemployment rate among professional actors is so high, producers usually are considered the more powerful party when it comes to casting. But what happens when the producer is forced to find a last-minute replacement? Suddenly, urgency reverses the dynamic, giving the actor the stronger bargaining position.

Roger Fischer, co-author of *Getting to Yes*, offers the following suggestions for enhancing negotiating power:

- *The power of skill.* A skilled negotiator is better able to exert influence than an unskilled negotiator. Skills, which can be acquired, include the ability to listen, to become aware of emotions, to empathize, and to become fully integrated so your words and nonverbal behavior reinforce each other.
- *The power of knowledge.* The more information negotiators gather about their counterparts and the issues at hand, the more powerful they'll be at the table. Preparation is crucial — a repertoire of examples and precedents enhances a negotiator's persuasive abilities.
- *The power of a good relationship.* Generally, negotiations are not one-time events. Instead, they establish or foster ongoing relationships. If, over time, you have established a well-deserved reputation for candor, honesty, integrity, and commitment to promises made, your ability to exert influence will be greatly enhanced.

Here are some common sense negotiation tips:

Know what you want. Have realistic expectations about money. Prioritize your needs. Identify each area of potential difference. The issues should then be separated into “deal breaking” issues and “negotiable” issues.

Be confident. Remember the other party is really interested in you and your work. Otherwise, you would not be talking.

Know your counterpart. Reputation matters. Do your homework. Are you talking to the decision-maker? Could misunderstandings or a different approach to the negotiation process result from cultural or other differences?

Consider the alternatives if no agreement is reached. Knowing what alternatives you have if no agreement is reached will keep you from accepting terms that are too unfavorable or rejecting terms that are in your best interest. The other party’s alternatives should also be evaluated.

Show respect. Aggression, intimidation, accusations, threats, sarcasm and ridicule should be avoided. Their use will provoke retaliation and bad feelings.

Communicate your position. Make certain the other side understands your position. Try to build to a logical and compelling conclusion by stating your reasoning first and your position last. The other side will then have to listen to your reasoning before knowing your final position. If you state your position first and then try to justify it, your counterpart is likely to reject it without listening to your reasons.

Ask questions. Asking the other side to explain their reasoning and requirements may expose weaknesses in their position or suggest alternative solutions. Ask questions to gain information, check their understanding, foster commitment, bring attention back to the subject and reduce tension. Once you’ve asked a question, stop talking and listen to the answer!

Empathize. Show concern and understanding for the other side’s needs and problems. Emphasize common goals and shared experience. If something is funny, laugh.

Consider precedents. Know your “industry” customs and practices. Be prepared to educate your counterpart. If the precedents are in your favor, use them as arguments. If the precedents go against you, be prepared to argue why they don’t apply.

Look for other options. Consider other acceptable means of meeting the concerns of both sides. Finding acceptable alternatives is one of the most valuable skills of a negotiator.

Be sensitive to timing. Most negotiations conclude in the final 20 percent of the time allowed for the process. Having patience can pay off. Remembering that deadlines often can be changed may decrease your stress level. If both sides will benefit when negotiations are resolved quickly, then be sure to remind your counterpart of the merits of a speedy resolution.

Take notes. They will refresh your memory later, help avoid “he said/she said” disagreements and assist in preparation of the written contract.

Avoid on the spot decisions. A good negotiator seldom makes an important decision on the spot. Take time to review information, consult with others and think about a decision without pressure.

Consider using an intermediary. Having a lawyer, agent, or other representative handle negotiations can aid in maintaining objectivity and insulate you from pressure and arguments. Also, it is easier to back away from a position taken by your intermediary.

Trust your instincts. During negotiations, you should be able to determine if you'll be doing business with someone with integrity. If the other party refuses to budge, makes personal attacks, abuses power, or uses unethical tricks, be willing to walk away. If the "dating" is not going well, you can be certain that the "marriage" won't work either.

Contracts in a Nutshell

Many business transactions involve commitments to furnish goods, services, or real property. These commitments are usually in the form of a contract — a statement of the agreement creating legally enforceable obligations between two or more competent, consenting parties.

To be valid, a contract must be based on each party bargaining to give something of value (not necessarily money) to the other party. In legal terminology, this bargain is called “consideration” and is what distinguishes a contract from a gift.

Law students learn that every contract must contain an offer, acceptance of that offer, consideration and an intention to create a legal relationship. Here is an example: A dance company approaches a composer about writing music for a new piece (the offer). The composer says she likes the concept for the piece and wants to collaborate (acceptance). They agree on the scope of work, deadlines and a fee (consideration).

Although business in the arts community is often conducted on a handshake and oral contracts may be binding, movie mogul Sam Goldwyn was right: “A verbal contract is not worth the paper it is written on.” There are many reasons why written contracts are better than oral contracts. Putting the agreement in writing:

- *Demonstrates that you are operating with the highest standards of professionalism;*
- *Reinforces the commitment.* The process of writing down the contract’s terms and signing the contract forces both parties to think about and be precise about the obligations they are undertaking;
- *Clarifies the agreement.* When the terms of a contract are written down, the parties are likely to create a more complete and thorough agreement that anticipates and then addresses potential problems;
- *Encourages the parties to take their promises seriously.* It is harder to backtrack on a written contract than on an oral one;
- *Keeps the parties from making up the rules as they go along;*
- *Guards against forgetfulness.* With an oral contact, the parties may have different recollections of the agreement. A written agreement can eliminate disputes over who promised what and when;
- *Indicates that the negotiation stage is over and that the final terms have been reached;*
- *Serves as a record of the agreement for others who were not the original negotiators or signatories; and*
- *Provides reasonable assurance that the contract will be enforceable in court.*

Under state or federal law, some contracts must be written. Examples include:

- contracts for the sale of goods valued over \$500;
- contracts that cannot be performed in one year or less;
- agreements to transfer copyright ownership;
- leases for longer than one year; and
- contracts for works of art that are left on consignment.

Some contracts may not be enforceable. Examples include contracts made by minors, people who are intoxicated and the legally insane. To be enforceable, a contract must not be a result of fraud or duress. If a party to the contract commits fraud, giving you false material information that you rely on in signing the contract, the contract may not be enforceable. Finally, if the terms are unconscionable (unfair and one party is clearly taken advantage of), the contract or the unconscionable terms may be voided. You may also be a party to an illegal contract if the work resulting from that contract is found to be obscene or libelous.

Contracts do not have to be long and intimidating. Instead, they should be written in terms both parties can understand. Contracts should be clear and specific. Vague language leads to misunderstandings, disputes and lawsuits. Use simple language that accurately expresses the agreement.

At very minimum, contracts should include:

- the date of the agreement;
- the names of the parties;
- a detailed description of the goods being sold or the service being performed;
- the price or fee;
- a payment schedule; and
- the signatures of the two parties.

In some situations, asking for a written agreement may be awkward. A less threatening and more informal approach is to write a follow-up letter reiterating the understanding. Ask for confirmation by adding, “agreed to and accepted” and a space for the other party’s signature and the date.

Another informal approach is to start with a sample contract, which can serve as a discussion checklist. But remember, model contracts with boilerplate (standard) provisions are “off the rack.” They’ll need custom tailoring to your specific situation.

At VLAA, we recommend Tad Crawford’s business and legal forms series published by Allworth Press. Crawford includes negotiation tips and sage advice on standard contractual provisions. While a book cannot replace the advice of a lawyer, especially in a complicated situation, it can be a valuable learning tool.

Whenever possible, you should be the one to adapt the model contract or draft the new one. This allows you to commit your understanding of the agreement to writing and tie up the loose ends surrounding the deal. If you are the responding party, recognize that you have been presented with a one-sided document. Make certain that the written terms match the terms of your oral agreement. Don’t leave points out of the contract, even if the other party says, “We don’t need to put that in writing.”

Make sure you understand each clause and its effect. Look for omissions. Change and initial provisions that are incorrect.

If talking about money fills you with anxiety, disgust, dread or some combination of these feelings, you aren't alone. Remembering that the other party really wants to do business with you may make important money conversations easier.

The most common breach of contract experienced by artists is a failure to be paid for their work. To obtain a measure of security, savvy artists negotiate a partial payment arrangement under which they will receive some compensation in advance of the project's actual completion. Other provisions that should be given careful consideration include copyright ownership, the length (term) of the deal, exclusivity and termination clauses.

Well-crafted contracts anticipate contingencies. You may want to include an escape clause, a provision that allows the parties to be relieved of any obligation if a certain event occurs.

One way to avoid litigation (or resolve a problem before it gets to the belligerent point of no return) is to agree, in advance, to mediate disputes. Usually, this is done in the contract. If you live in Missouri or Southwestern Illinois, you may want to include the following mediation clause in your arts-related agreements:

All disputes arising out of this Agreement shall be submitted to mediation in accordance with the rules of the Arts Resolution Services, a program of the St. Louis Volunteer Lawyers and Accountants for the Arts.

Before you sign any agreement, think about what could go wrong or what could make performance of your obligations difficult or expensive. Enter into the contract only if you believe that you can meet your commitments.

Do you need a lawyer?

Most creatives think about consulting a lawyer only when a problem arises. However, competent lawyers help their clients avoid problems, not just solve them. They are familiar with applicable laws and customary business practices. Getting advice before you sign on the dotted line is far less expensive, traumatic and time consuming than trying to repair the damage at some future date.

You should seriously consider consulting an attorney when:

- You're being asked to sign a document that you don't fully understand;
- The terms of the contract don't seem fair;
- The scope of the project is significantly larger than usual;
- There's a lot of money at stake;
- The contract will result in a long-term commitment;
- The other party is being represented by an attorney;
- You're signing a commercial lease;
- The relationship will result in the creation of intellectual property; and/or
- You're considering signing away the copyright in a work that you have created.

If you live in Southwestern Illinois or Eastern Missouri and would like an attorney to help you draft or review a contract, St. Louis Volunteer Lawyers and Accountants for the Arts can provide assistance. Visit our site (www.vlaa.org) and submit an application form.

Time is money, whether you are working with a volunteer lawyer or are personally paying for the legal services. To prepare for your first meeting:

- Read the contract. Read it again. Highlight everything you don't understand or that could be problematic;
- Make a written list of your questions;
- Gather and organize all the relevant documents;
- Make sure you have the names, mailing and email addresses, and phone numbers of all the key parties; and
- Remember, no question is too stupid to ask.

Consider Mediation

Where can members of the arts community turn for help when they find themselves embroiled in a dispute? Through Arts Resolution Services, a program of St. Louis Volunteer Lawyers and Accountants for the Arts, there is a non-litigious way in which to resolve (or, better yet, prevent) conflicts. VLAA's arts mediation service is designed to help artists and arts organizations resolve contract issues and other disputes in an atmosphere of conciliation and fairness.

Mediation is an innovative and informal process in which trained neutral mediators guide the discussion between the disputing parties. The mediation process allows the parties to control the outcome, rather than accept the decision made by an outsider (such as a judge or arbitrator).

Mediation is particularly well suited for the arts because it addresses relationship issues (like trust, respect, fairness and friendship) and procedural issues (like how decisions are made) as well as substantive issues (like money). The process is faster and much less expensive than going to court or arbitration. And it is confidential.

Disputes common in the arts that are well suited for mediation include:

- Conflicts arising from collaboration;
- Breach of contract;
- Issues of reputation;
- Damage to works of art;
- Intellectual property rights;
- Cultural facilities issues;
- Board-staff relations;
- Board governance problems;
- Conflicts between landlords and tenants;
- Collections; and/or
- Creative content.

How does it work? Participation is voluntary. After hearing from the first party, VLAA staff contacts the second party, describes the process, assigns a volunteer mediator (or co-mediators) and schedules the mediation session(s).

Resources

Books by Tad Crawford

Business and Legal Forms for Authors and Self-Publishers

Business and Legal Forms for Crafters

Business and Legal Forms for Fine Artists

Business and Legal Forms for Graphic Designers

Business and Legal Forms for Illustrators

Business and Legal Forms for Interior Designers

Business and Legal Forms for Photographers

Fisher, Roger, William L. Ury and Bruce Patton. *Getting to Yes, Negotiating Agreements Without Giving In*. This worldwide bestseller provides a concise, step-by-step, proven strategy for coming to mutually acceptable agreements in every sort of conflict.

Fisher, Roger and Danny Ertel. *Getting Ready to Negotiate: The Getting to Yes Workbook*

Shell, G. Richard. *Bargaining for Advantage: Negotiation Strategies for Reasonable People*. Shell's systematic, step-by-step approach comes to life in this book, which combines storytelling, tactics and insights gleaned from the latest negotiation research. The recently updated edition includes a Negotiation I.Q. test that reveals each reader's unique strengths and weaknesses as a negotiator.

Stark, Peter B. and Jane Flaherty. *The Only Negotiation Guide You'll Ever Need: 101 Ways To Win Every Time In Every Situation*. Stark and Flaherty provide an overview of negotiation including listening skills, non-verbal communication and the importance of aiming for win-win agreements. Their section on power and their concrete tactics for getting the best possible deal are especially helpful.