

Trust No Agent: Building Strong Negotiation Skills

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Library Technology Conference

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“Let every eye negotiate for itself,
And trust no agent.”
Much Ado About Nothing, Act II, sc. 1

Introductions & Backgrounds



IAAL, IANYL

(I Am A Lawyer; I Am Not *Your* Lawyer)



IANAL

(I Am Not A Lawyer)



TINLA

(This Is Not Legal Advice)

About Sunshine

- Negotiating library licenses for the University of Minnesota since 2005 (UMD + UMTC)
- Since 2014, review or negotiate ~8 licenses per month for University Libraries
 - Primarily e-resources
 - Increasingly physical multimedia
- Manage E-Resource Management Unit (7 FTE)

About Nancy

- Instructional Tech Libn at Umich for 5 yrs
- JD 2009, licensed in MN
- Mostly -don't- practice law; do help the Library draft and/or negotiate non-vendor contracts
 - Grant and other partnership agreements
 - Donor agreements
 - Click-through uploads, etc.

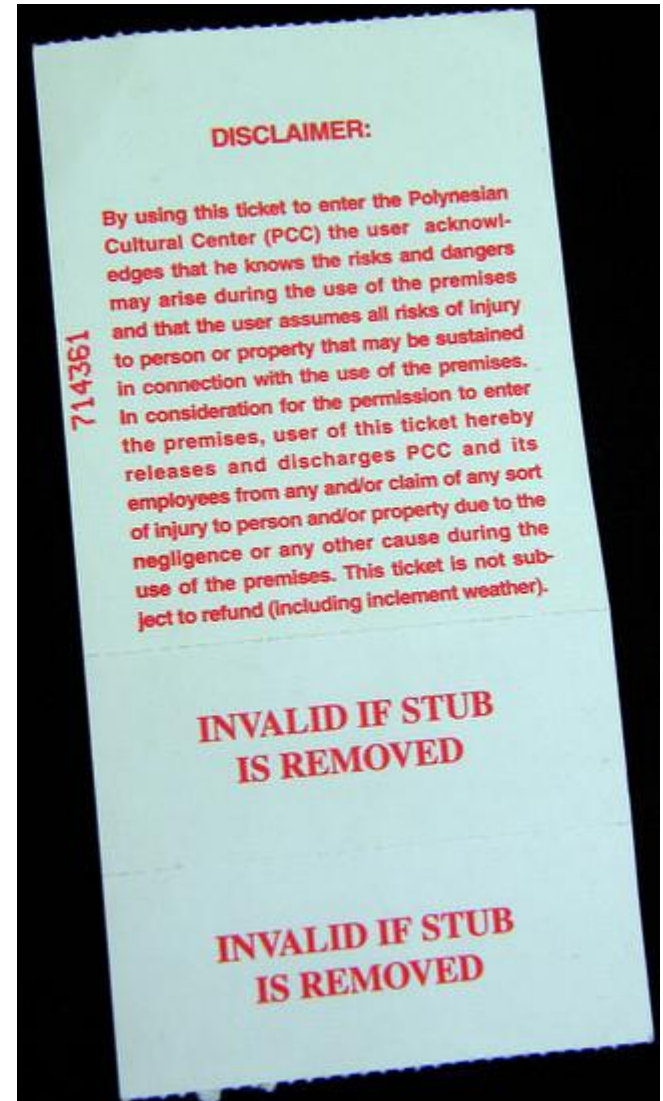
Let's Begin!

What are contracts good for?

Where do you find them?

Why is negotiation cool?

When can you negotiate?



Contract Basics

Offer and Acceptance

- Consideration
- “In writing”
 - Contracts of adhesion
- Battle of the forms
 - Clickthroughs
 - Browsewrap

Rules of Interpretation

- “Plain meaning”
 - “plain” doesn’t mean “common”
- Lists: usually considered to include only the items listed
 - “You can deliver the ILL documents via fax, or Ariel.”
 - “Such as”, “including but not limited to”
- Constructed in favor of...
 - Contracts of adhesion: in favor of the person who got stuck.

Common Clauses

- Definitions
 - Long Thing, hereafter LT
- Indemnification/Liability
- Jurisdiction/Applicable Law
- Arbitration
- Integration/Merger
- Severability

Statutes & Public Policy

- Contracts can overrule statutory law
- Including substantive rights
- Except “void as against public policy”
 - servitude
 - discriminatory clauses
 - restraint of trade/monopolies
 - more specific pieces:
 - custody (best interests may override)
 - non-compete (for employees)
 - etc

Void/voidable

- A party that cannot contract:
 - Incapacitated, duress; not legally enabled to act
 - Bad faith; lying; fraud
- A thing you cannot contract *about*:
 - State actors: confidentiality, indemnification, jurisdiction.
 - Public policy, illegal activities
- Impossibility

Common tricky things...

- Including terms that aren't enforceable
- “We can't agree to that” when they can agree to not agree to anything about that
- Your experience?
 - tech licenses?
 - library content licenses?
 - personal licenses?

Exercise - Evaluating a Contract

Evaluating a contract

You are taking on an adjunct teaching job at your state University. This is your hiring agreement. (You live in the state of Awesome.)

Look over and discuss the agreement, to find clauses or language you'd want to change.

Reactions?

PUBLICATION REQUIREMENTS: Any publication resulting from this Agreement must include the following acknowledgement of support: “This material is based upon work supported by....” The University and/or the sponsoring government agency reserve a royalty-free, nonexclusive and irrevocable License to reproduce, publish, otherwise use and to authorize others to use the work for government purposes.

PUBLICATION REQUIREMENTS: The University and/or the sponsoring government agency reserve a royalty-free, nonexclusive and irrevocable License to reproduce, publish, otherwise use and to authorize others to use the work for government purposes with the appropriate attribution to the contractor.

APPLICABLE LAW: This Agreement shall be construed under the laws of the State of Awesome Jurisdiction and venue for any disputes under this agreement shall be in Brilliant County, Awesome. The Contractor shall at all times comply with and observe all federal and state laws, local laws, ordinances and regulations which are in effect during the period of this contract and which in any manner affect the work or its conduct.

APPLICABLE LAW: The Contractor shall at all times comply with and observe all federal and state laws, local laws, ordinances and regulations which are in effect during the period of this contract and which in any manner affect the work or its conduct.

INTELLECTUAL PROPERTY: The Contractor warrants that to the best of its knowledge all materials furnished and used are its own original material or material which they have obtained permission to use for the purposes of this Agreement.

The parties agree that Contractor's work under this Agreement is a "work for hire" and that the owner of such work, including any inventions made during the performance of the work, is The Board of Regents of the University of Awesome. If for any reason the work performed by Contractor under this Agreement is found not to constitute a work for hire, then, in consideration for the payment set forth under this Agreement, Contractor hereby assigns all rights in the intellectual property created to The Board of Regents of the University of Awesome.

The Contractor agrees that all other rights pertaining to the work furnished under this agreement, including any royalties or fees that may accrue, shall belong to the Board of Regents of the University of Awesome.

INTELLECTUAL PROPERTY: The Contractor warrants that to the best of its knowledge all materials furnished and used are its own original material or material which they have obtained permission to use for the purposes of this Agreement, or material for which use for the purposes of this agreement is permitted by law or by license.



Negotiation - Strategies, tips and tricks

Positions are Problems

Me: “I need to sleep with a nightlight.”

Him: “I must sleep in total darkness.”

Me: “Our contracts must allow interlibrary loans.”

Publisher: “We don’t allow interlibrary loan.”

“Getting to Yes” approach

To negotiate successfully....

1. Don't bargain over positions
2. Separate the *people* from the problem
3. Focus on *interests*, not positions
4. Invent *options* for mutual gain
5. Insist on using objective *criteria*

Negotiators

As negotiators AND human beings we have two interests:

- 1) the deal
- 2) the relationship

Don't confuse the person with the problem.

Tips for Negotiating with People

- “Don’t shoot the messenger”
 - They are the outward- and inward- facing messenger.
 - They *may* have no sway though on certain issues.
- Strategic Communication
 - Email is ok, but a phone call can be better
 - Give thanks and/or apologize as needed.
 - “We need....” rather than “You don’t...”
 - Listen

Prepwork

- Who are you negotiating with?
 - Established or new relationship?
 - What is their reputation or history?
 - What are their interests/needs?
 - Who is on your team? Counsel needed?
- Understand the terms
 - Read the entire agreement & take notes
 - Are the terms negotiable?

Prepwork (cont.)

- What is the product/service?
 - New or established?
 - Cost options
 - Who will use the product/service?
 - What are other options to this product?
- When does the negotiation need to be done?
 - Is there a deadline (e.g. a class or renewal)?
- What are your interests/needs
 - Business needs (e.g. ILL, multiple users)
 - Legal needs (governance, confidentiality, liability)

Interests

- Each side has interests shaping their position
- Know your interests & needs
- Develop interest language of varying degrees:
 - Minnesota jurisdiction
 - Minnesota, with the exception of its conflict of laws principles
 - Strike clause
- Tell the other side about your interest: *“the University was created by the Constitution of the State of Minnesota. Therefore, it is difficult for us to agree to be bound by the laws of any other jurisdiction.”*

Options

- Make a bigger pie
 - It's not an either/or issue
 - Interests could align or be in opposition
 - Alternatives may exist above “either/or”
- BATNA
 - “Best Alternative To a Negotiated Agreement”
 - What will you do if you can't reach a deal?
 - Brainstorm, develop, pick one
 - A good BATNA = power
 - The other side has a BATNA

Helpful phrase starters...

“I’m not sure if you aware, but....”

“One fair solution might be....”

“What’s the principle behind your action?”

“We are concerned about fairness.”

“Let me get back to you.”

“We are concerned about xyz. Is there anyway to reword clause X to address those needs?”

Last tips/tricks

- Ask “Why?”
- Always ask. They can only say no.
- Ask for the most desired outcome.
- Keep track of changes and verify final version
- Sometimes you won’t be successful. You can try again another time.

Exercise - Negotiating

Exercise #2



Pie! CC BY-NC-SA Teresa Stanton

What kind of pie did you make?

- Apple? Blueberry?
 - Other?
- Did you “give in”? Did someone “give in” to you?
 - How did that feel?
- Were there unexpected challenges? Was anything unexpectedly easy?
- Did you use any strategies?

Exercise #3

- If you have brought a license, now is the time to pull that out, or
- With your partner choose one sample from the list.
- Decide who will take which role.
- Each of you find *one* issue you would like to change in the contract, and negotiate.

If we have time, you can repeat with new issues/samples.

Reactions?

Museum contract w/publisher

- Issues:
 - Royalty amount
 - Net/Gross
 - Museum invoicing
 - 30 days to pay
 - Others?

Webinar presentation contract

- Issues:
 - Terms of license, esp exclusive & perpetual
 - Pricing/discounting
 - If discontinued, rights revert?
 - Warranty
 - Note only part of the warranty is subject to “to the best of Presenter’s knowledge”.
 - Others?

“Contract for Professional and Artistic Services Under \$5,000”

- Issues:
 - **Under \$5,000**
 - Extent and specificity of insurance rules in general
 - “limits not less than \$1,000,000 per claim and \$3,000,000 in the aggregate”
 - “Failure to comply with insurance requirements may be regarded as a breach of contract terms.”
 - Others?

Publisher License for Journal Content

- Issues:
 - Indemnification in general
 - “of Authorized Users and/or Other Users,...”
 - Publisher reserving right to modify via website
 - Definitions of “non-material”
 - Others?

Publisher License, usage rights section

- Issues:
 - How much use?
 - Sending a single paper copy via snail mail
 - Scholarly sharing to already authorized users not really scholarly sharing
 - Others?

Questions?

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