CHAPTER 18

HOW TO AVOID AND RESOLVE DISPUTES

Professional writers begin, maintain, and end many business relationships in the course of their careers. The nature of these relationships makes a writer vulnerable to disappointment, lost money, and career damage if the other side to the transaction does not live up to its promises, or worse. As this book tries to demonstrate, well-crafted and carefully negotiated contracts can protect you to a substantial degree from potentially harmful disputes and help foster mutually advantageous relationships. Even a clear, enforceable contract does not guarantee smooth sailing every time, however. People and organizations sometimes disregard their contractual obligations for various reasons, financial and otherwise. If that happens to you, you might eventually be able to enforce your contract, but it is obviously much better to keep a breach from happening in the first place. Your first line of defense, then, is to recognize warning signs that a potential partner might renege or perform poorly before committing, and to find another situation if you can.

DUE DILIGENCE

The more well versed you are about the business, the savvier you will be when choosing and negotiating with the other side of any transaction. Take

advantage of the free and low-cost industry resources described in chapter 1 before you begin negotiating any publishing-related transaction. When a publishing house or an agent expresses interest in your work, investigate them thoroughly to ensure that they are not an unknown quantity and that they have not earned a reputation for unfair dealings with writers.

When dealing with editors, try to avoid anyone who shows a lack of interest in your project. An editor who is unenthusiastic about a book or article at the outset is unlikely to help you if difficulties with the publishing house arise down the line. Also, be wary of editors who do not have some experience in the field in which you write, especially if you cover specialized subjects or formats. An inexperienced editor can make unrealistic demands, not just of you but also of the publisher's other personnel involved in the project, and could well be incapable of giving you any meaningful editorial assistance.

Avoid publishers that have unrealistically low budgets, set unrealistic deadlines, or present you with unusually one-sided contracts. If a publisher that makes you an offer is unfamiliar to you, check it out with your writing colleagues, professional writers' group, editors or agents you know, even the local Better Business Bureau. The industry is small, and word of dishonorable behavior, payment problems, financial shakiness, and other inside information about a publisher usually spreads quickly. As well, you do not want an agent who will inquire with only a small number of editors regarding your work, who does not seem to understand your work (or the business), or who is difficult to reach, churlish, or evasive about answering your questions.

You should generally take a step back from anyone—freelance editor, publisher, agent, coauthor, or packager—who is reluctant to sign a contract that sets forth your mutual understanding of the deal. Once you have entered a contract, clear and timely communication between you and the party with whom you are working is paramount to avoid misunderstandings and maintain good relationships. Of course, you should not call or email your agent and editors too often or without a specific reason. Understand that they are very busy with other writers' business, too. And no matter how upset or alarmed you might be about a party's behavior, always maintain your composure and keep your tone cordial and professional. Remember that the industry is very small. Viral media can conceivably magnify throughout the industry any communication you make in

writing or via voice mail. Unfair or not, the way you conduct yourself with your agent and editors—regardless of the provocation—will earn you a reputation, either neutral, good or bad. Writers who flame their agents or editors or lose their tempers could soon find their opportunities trickling away.

NEGOTIATING DISPUTES OUTSIDE COURT

What should you do if, despite your precautions and due diligence, a dispute arises between you and a third party with whom you are doing business? What if you believe the other party has clearly breached your contract or is otherwise harming your interests? At what point should you consider bringing a lawsuit? In almost every case, the best answer to that last question is "not yet." Litigation involves time, energy, and inordinately high costs, and you will almost certainly never again do business with the other side. Most of the time, litigation should be your last resort.

The best way to help yourself initially is to join the Authors Guild and contact its Legal Services Staff. They counsel approximately 1,200 writers annually about specific industry issues. A large portion of the inquiries they address involves writers with contract disputes. Often the Guild will intercede on the writer's behalf or help the writer prepare a demand letter or find qualified counsel when necessary. At the least, the Guild will review and assess your situation and tell you the most realistic prospects for resolving it.

Even if you are not a member, you should follow the basic steps the Guild legal staff employs in legal and business disputes. First, determine what your position is and what exactly you want or need to be satisfied. Then, if you cannot resolve the problem by talking about it, write a polite but firm letter to the appropriate person—usually the individual with whom you are having the problem. Set forth clearly and succinctly your version of the relevant events and why a certain course of action (i.e., your demand) is appropriate at this time. Request relief specifically, and always state in a demand letter and settlement communications that your letter is "without prejudice to any claims, privileges or defenses" so as to preserve all available legal arguments. Carbon copy anyone you think would be interested and helpful to you, but be politic about doing so. It is often better to give the individual at fault one opportunity to address the problem

on her own before involving her supervisor or an outsider. Using this tactic allows you to escalate the pressure iteratively if the first request does not work.

Although in any given case you might be entitled to full relief, be realistic about the likelihood you will get it in light of the other side's current position and situation. Consider whether any compromises would be acceptable to you. Of course, do not disclose your final fallback position at the outset, but having one can help you avoid an impasse. If it becomes clear that no redress will be forthcoming without pressure, then try at least a second round of communications, through email, letter, phone calls, and eventually a promise to involve the Authors Guild, the Association of Authors' Representatives (for agents), or the Better Business Bureau. If these actions do not work to obtain relief or an acceptable compromise, then consider consulting a private attorney, who will escalate the communication, probably beginning with a demand letter.

MEDIATION AND ARBITRATION

Litigation should be the last resort for most writers with a business dispute. The costs, duration, and uncertainty are just too high for most people. Two popular alternatives to a lawsuit are mediation and arbitration.

Mediation involves a disinterested and trained third party who actively tries to help adversaries reach a settlement. The parties pay the mediator; sometimes she will negotiate for a "success fee" from the parties if the process results in a settlement. If they choose mediation, the parties will also agree that the information disclosed to each other and the settlement discussions will not be used against each other if there is no settlement and a lawsuit is brought. Courts sometimes order parties in litigation to mediate before their cases will be heard.

If the amount in dispute is higher than the small claims court limit but less than $15,000, it makes little sense to bring a lawsuit because attorneys' fees will probably devour the recovery, if any. Arbitration gives you an opportunity to obtain redress in disputes involving amounts that are too large for small claims court and too small to bring in a state court. Arbitration is akin to a private trial, but it is less formal, faster, and usually less expensive than a trial. The parties present their cases to one or more trained arbitrators chosen and paid by the adversaries. The arbitrator does

not try to get the parties to settle; she rules for one party or the other and decides the amount of recovery.

Despite their advantages over litigation, arbitration and mediation are voluntary endeavors. While nobody has a choice about being haled into a lawsuit if jurisdictional requirements are met, both sides must agree to use mediation and arbitration, either at the contract stage or after the dispute arises. Often, the financially stronger party prefers to go to court instead, so as to wear down the other party.

If they appear in a contract, arbitration and mediation clauses are generally enforceable. Mediation clauses typically require both parties to submit any dispute to mediation for a specific period of time and describe how the mediator is to be chosen. Arbitration clauses require that any dispute must be addressed through arbitration according to particular terms and procedures. They usually specify that the arbitration is "binding," i.e., the arbitrator's decision is final and may be recorded in the appropriate court, where it has the force of a nonappealable verdict, or that it is "non-binding," allowing the loser to bring a lawsuit without reference to the arbitration.

To obtain additional information about mediation and arbitration, contact a nearby office of the American Arbitration Association, JAMS (formerly, Judicial Arbitration and Mediation Service, Inc.), your nearest bar association or volunteer lawyers group, or a writers organization.

SMALL CLAIMS COURT

Most small claims courts are very inexpensive; parties usually handle their cases without a lawyer, and a small claims court verdict is as enforceable as that of any official court. The maximum amount at stake allowed in small claims courts varies from a low of $1500 to $5000 or more depending on the locality. Call or check your local bar association or courthouse's website for information on the location of small claims court, complaint templates and instructions on procedures.