

## Deal-Breakers

By Joshua Stein, Joshua Stein PLLC



"We've really got a problem here. If we don't get past these issues, you're going to lose the deal. We're not going to keep going. We're walking out. So, do you want to lose the deal or not?"

It's dramatic. It's fun. It's an ultimatum. It gets everyone excited. It's also a great performance, if one is in the mood for that.

Rewind. Another approach to the same situation: "We've got a few issues to talk about. Some of them are big, others little. Let's try and get through the big ones first. Then we can turn to the smaller ones."

Each of these two examples demonstrates a totally different view of a process that we go through again and again in every commercial real estate negotiation. The parties make their business deal, then the lawyers get involved. They find issues and concerns to negotiate that the business people never thought of. No two lawyers will find all the same issues and concerns in any document or deal structure. But whatever the lawyers find needs to get resolved or the deal won't close. And some of those issues and concerns are more important than others. Maybe they're even deal-breakers if you can't get through them.

That's true every time. But you can turn it into a dramatic production with ultimatums and lines in the sand, and Big Problems, and maybe even something to yell about — the first example above. Or, in the alternative, you can start at the beginning and keep going until you get to the end and a closing — the second example above.

In my experience, yelling and screaming — with threats to walk out of the deal — works no better than a more cooperative and less dramatic approach. And the latter approach seems very much, though not always, the prevailing technique among most of the lawyers and business people I work with. Out in the world, though, one will still sometimes run into the occasional person who takes ordinary disagreements and turns them into major problems and threats to "blow the deal," sometimes even verging on personal attacks. It's unpleasant but it's part of the territory.

If someone blows up every significant issue into something that might potentially blow up the deal, does that produce better results? Does the other side get so terrified that they give up substantive ground just to avoid the risk that negotiations will end prematurely? Certainly not in my experience.

Today's smart negotiators, regardless of style, know what they need and know what they can give up. They work with their counterparts across the table by talking about issues, seeing what each side needs, and figuring out a way to give each side what it needs. Maybe there was a communications problem. Maybe one side or the other misunderstood the deal or what the parties expected. It happens. You resolve it. And one party or the other won't necessarily get everything they want, but they'll probably get what they need.

We've all dealt before, many times, with practically every issue that comes up on every commercial real estate transaction. We're not achieving great medical breakthroughs for the benefit of humanity. It's mostly the same things over and over again. We get through them every time, and it works out, at least if the parties want to make a deal. Histrionics and lines in the sand typically don't help.

One can remove some of the drama from the process by agreeing on the major pieces of the deal before rather than after the lawyers start to prepare documents. If a letter of intent or term sheet deals with every issue that could become substantial, that leaves less room for differences of opinion and table-banging by the lawyers. It also ultimately saves time, because it's quicker and easier to resolve issues in a five-page letter of intent than it is when issues are spread out over hundreds of pages of legal documents.

And if "the whole world" typically resolves some legal/business issue in a certain way, that's often a pretty good starting point, though of course not always.

Maybe at the very end of a protracted negotiation it may make sense for one side or the other to draw a line in the sand — "we need these changes or we just don't want to do the deal" — but that doesn't happen very much, and it certainly doesn't require the drama of making dramatic announcements about losing the deal. More often, the parties will fairly quickly get to some middle ground. That's especially true if the parties and their attorneys are practical; know what matters and what doesn't; and have been on the other side of the same deal. We just get it done.

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