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# Negotiations Between the WGA and AMPTP: How to Avoid Strikes and Still Promote Members' Needs

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## I. INTRODUCTION

“Every day, families, neighbors, couples, employees, bosses, businesses, consumers, salesmen, lawyers, and nations face . . . [the] dilemma of how to get to yes without going to war.”<sup>1</sup> In late 2007, the Writers Guild of America (WGA) and the Alliance of Motion Picture and Television Producers (AMPTP) spent months trying to get to yes; however, they were unsuccessful and started a war in the form of a strike.<sup>2</sup>

The WGA is a union that represents thousands of writers from television shows, movies, news programs, documentaries, animations, and “new media.”<sup>3</sup> Its principal duty is to bargain with the AMPTP on behalf of writers to ensure that their rights are upheld.<sup>4</sup> Primary issues addressed by the WGA include writers’ credits, residuals, education, legislation,

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1. ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* xi (2d ed. 1991).

2. *See generally* Carole E. Handler, James D. Nguyen & Marina Depietri, *The WGA Strike: Picketing for a Bigger Piece of the New Media Pie*, ENT. & SPORTS LAW., Winter 2008, at 2.

3. *Guide to the Guild*, WGA WEST, 1, [http://www.wga.org/uploadedFiles/who\\_we\\_are/fyi09.pdf](http://www.wga.org/uploadedFiles/who_we_are/fyi09.pdf) (last visited Aug. 25, 2011). Writers are represented by two affiliated organizations, the Writers Guild of America, West (WGAW) and the Writers Guild of America, East (WGAE), collectively referred to as the WGA. *See* Bernadette A. Safrath, Comment, *How Improvements in Technology Have Affected the Entertainment Industry: Writers and Actors Fight for Compensation*, 26 *TOURO L. REV.* 115, 116 (2010).

4. *See Guide to the Guild*, *supra* note 3, at 1.

registration of written materials, and ultimately, the enforcement of contracts.<sup>5</sup>

The AMPTP is an association that represents over 350 production companies and studios (the studios) in negotiating collective bargaining agreements.<sup>6</sup> It negotiates with essentially all entertainment industry unions, including the WGA.<sup>7</sup>

The agreement that eventually ended the 2007 strike expired May 1, 2011, marking the first time since the strike that the WGA and AMPTP faced the challenge of bargaining.<sup>8</sup> The parties were successful in reaching an agreement six weeks prior to the expiration date, which is a rare occurrence.<sup>9</sup> Unfortunately, the speedy agreement cannot be attributed to improved bargaining techniques. Further, the 2011 negotiation was not the only time the parties needed to be on high alert; a potential strike will be a concern every three years, when it is time to negotiate a new agreement.<sup>10</sup> Future years may well present a bigger test because, with time, the parties will forget the destructive impact the strike had on the industry and may become less risk averse in their approach to bargaining.

Part II of this article describes the collective bargaining agreement that is the subject of WGA and AMPTP negotiations. Part III outlines the history of WGA strikes, including descriptions of previous strikes and the strategies that led to an impasse. Parts IV and V describe strategies that could have prevented the 2007 strike and improved the 2011 negotiations if the parties had implemented them, including negotiation and mediation techniques. Part VI examines the impact previous strikes had on the most recent negotiations and provides suggestions for what strategies will be most effective in the future. Part VII concludes this article.

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5. See *Guide to the Guild*, *supra* note 3, at 1-5.

6. *About Us*, AMPTP, <http://www.amtp.org/aboutus.html> (last visited Aug. 25, 2011).

7. *Id.*

8. See Richard Verrier, *Writers Guild Inks Bargaining Goals for Upcoming Contract Talks*, L.A. TIMES, Dec. 22, 2010, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/12/writers-guild-.html>.

9. See Dave McNary, *WGA, AMPTP Agree on New Contract*, VARIETY, Mar. 30, 2011, <http://www.variety.com/article/VR1118034164>.

10. See *2008 Writers Guild of America: Theatrical and Television Basic Agreement*, WGA WEST, 6, [http://www.wga.org/uploadedFiles/writers\\_resources/contracts/MBA08.pdf](http://www.wga.org/uploadedFiles/writers_resources/contracts/MBA08.pdf) (last visited Aug. 25, 2011) [hereinafter *2008 Agreement*]; *Memorandum of Agreement for the 2011 WGA Theatrical and Television Basic Agreement*, WGA WEST, 1, [http://www.wga.org/uploadedFiles/writers\\_resources/contracts/MOA2011.pdf](http://www.wga.org/uploadedFiles/writers_resources/contracts/MOA2011.pdf) (last visited May 7, 2012).

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## II. THE WGA'S COLLECTIVE BARGAINING AGREEMENT

The WGA and AMPTP bargain periodically to set the terms of a collective bargaining agreement<sup>11</sup> called the Theatrical and Television Basic Agreement, also known as the Minimum Basic Agreement (MBA).<sup>12</sup> This agreement is negotiated every three years and dictates the employment terms and compensation of WGA members.<sup>13</sup> It controls areas such as credits for screen authorship and writers' residuals and includes a "no strike" clause.<sup>14</sup> In this clause, "[t]he guild agrees that *during the term hereof*, it will not call or engage in any strike, slowdown, or stoppage of work affecting theatrical or television motion picture production against the Company."<sup>15</sup> However, because the contract expires after three years, the WGA has the right to call a strike when the term expires if the parties do not agree to a new MBA.<sup>16</sup>

## III. HISTORY OF NEGOTIATIONS

### A. Previous Strikes

In 1988, the entertainment industry was going through similar transformations as it is today, with new technologies and markets emerging, viewer habits shifting, and writers' demands changing.<sup>17</sup> At the time, the studios demanded that writers accept a sliding scale residual payment

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11. The AMPTP negotiates eighty collective bargaining agreements annually, one of which is the agreement with the WGA. See David P. White, *High Stakes: Negotiators for the Guilds and Studios Are Locked in a Showdown Over the Allocation of New Media Revenues*, 30 L.A. LAW., no. 3, 2007 at 24. The agreements contain specific language setting forth the employee-employer relationship throughout each stage of the production process. See *id.* They "delineate a contract's jurisdiction, minimum compensation rates, work conditions, and resolution procedures for disputes that arise during principal photography and pre- and post-production activities." *Id.*

12. See *2008 Agreement*, *supra* note 10, at 6. The process used to negotiate the MBA is made available by the WGA West. See *Process of Negotiating the WGA Minimum Basic Agreement*, WGA WEST, [http://www.wga.org/contract\\_07/process\\_neg.pdf](http://www.wga.org/contract_07/process_neg.pdf) (last visited Aug. 25, 2011) [hereinafter *Negotiating Process*].

13. See *2008 Agreement*, *supra* note 10, at 6.

14. See *id.* at 27-29, 197.

15. *Id.* at 27 (emphasis added).

16. See *Negotiating Process*, *supra* note 12.

17. See Sam Schechner, *This Writers' Strike Feels Like a Rerun from 1988*, WALL ST. J., Nov. 12, 2007, <http://online.wsj.com/article/SB119482950368089597.html>.

structure, and writers demanded a greater portion of foreign sales revenue.<sup>18</sup> The parties reached an impasse, leading the WGA to endure a twenty-two-week strike, which reportedly cost the industry \$500 million.<sup>19</sup> Some strikers lost their homes, some were not able to send their children to college, and others sought job opportunities in entirely different industries.<sup>20</sup> With more reruns airing than usual, the television industry as a whole suffered a decrease in viewership.<sup>21</sup> The studios were not as unfortunate, however, as the strike occurred during the spring when television production typically slows down.<sup>22</sup> This timing allowed the production companies to survive the strike almost unscathed.<sup>23</sup>

With the help of a conciliator, a new MBA was developed in which writers agreed to sliding scale residual payments, and the studios agreed to a revised formula for foreign revenues.<sup>24</sup> While much of the strike's impact was lasting, the loss of viewers was only temporary because, with the main media distribution platform at the time being analog television, viewers had few substitutes to turn to for home entertainment.<sup>25</sup>

After almost twenty years without another strike, the AMPTP and WGA had difficulties reaching an agreement again in 2007.<sup>26</sup> The primary demands of the WGA in these negotiations included higher revenues from home video sales and new media.<sup>27</sup> Anxiety levels in negotiations were high

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18. *See id.*

19. *See* Jonathan Mandell, *Recalling 1988 Strike*, CBSNEWS, Feb. 11, 2009, <http://www.cbsnews.com/stories/2007/11/02/entertainment/main3447509.shtml>.

20. *See id.* As a result of the 1988 strike, Fran Drescher and her husband launched Loaf & Kisses Gourmet Croutons, a business that continued even after the strike. *Id.*

21. *See* Handler, Nguyen & Depietri, *supra* note 2, at 5.

22. *See* Schechner, *supra* note 17.

23. *Id.*

24. *Id.*

25. *See* Handler, Nguyen & Depietri, *supra* note 2, at 5.

26. *Id.* at 3.

27. *Id.* Although there are various definitions,

[T]he term "new media" essentially applies to the expanding set of distribution platforms for traditional entertainment content as well as the evolving nature of the content, which is increasingly designed for emerging technologies and formats. The term also includes a surfeit of innovations that recently have inundated the marketplace, particularly those capable of exploiting digital technology.

White, *supra* note 11, at 25. This category of content includes, but is not limited to, television shows and movies that are broadcast over the Internet, advertisements for television shows on mobile phones, and programs that are sold on iTunes. *See* Safrath, *supra* note 3, at 117-18. New media is central to the debate because of the "increasing popularity of content distribution through new media technologies and the publicity new media has received as an important source of expected future revenue as major studios enter these markets." Handler, Nguyen & Depietri, *supra* note 2, at 3.

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due to the “unknown effect of recent advancements in technology on the very nature of film and television production, and on the business models that will yield the most revenue in such an unpredictable setting.”<sup>28</sup> Although new media was of utmost importance to the WGA members, writers also sought authority over reality television and prime time animated shows.<sup>29</sup> Alternatively, the studios sought to preserve the existing DVD payment plans, and claimed that writers’ new media market demands were premature, as the structure of the industry and size of the pie were unknown.<sup>30</sup>

The bargaining efforts were fruitless, and writers joined together in a strike that persisted for an arduous 100 days.<sup>31</sup> The strike was detrimental to the industry, causing writer layoffs and a loss of viewers that might never return to pre-strike levels.<sup>32</sup> Unlike television distribution in the 1980s, several major channels of communication now deliver entertainment content to viewers; although a settlement was reached to end the strike, viewers need not return to television for access to entertainment.<sup>33</sup>

The 2007 contract that ended the strike expired May 1, 2011, marking the first time the WGA and AMPTP faced each other at the bargaining table since the strike.<sup>34</sup> The big question was whether the parties would take a different approach to reach an amicable agreement. The writers and studios shocked everyone by reaching an agreement in a mere two weeks, which was six weeks prior to the existing MBA’s expiration date.<sup>35</sup> However, given how detrimental the 2007 strike was to the entertainment industry,<sup>36</sup> the parties should not get too comfortable just yet. Taking into consideration

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28. White, *supra* note 11, at 25.

29. See Handler, Nguyen & Depietri, *supra* note 2, at 3.

30. See *id.* The studios claimed that they needed the present revenue share for DVD sales in order to offset marketing and production costs. See *id.* They also saw Internet as another way of promoting shows rather than seeing it as a revenue source, thus denying writers’ demands for a portion of Internet revenues. See *id.*

31. See Michael Cieply, *Writers Vote to End Strike*, N.Y. TIMES, Feb. 12, 2008, [http://www.nytimes.com/2008/02/12/business/media/12cnd-strike.html?\\_r=1](http://www.nytimes.com/2008/02/12/business/media/12cnd-strike.html?_r=1).

32. See Handler, Nguyen & Depietri, *supra* note 2, at 5.

33. See *id.*

34. See McNary, *supra* note 9.

35. See *id.* It is rare for the parties to reach an agreement this quickly; the two rounds of bargaining prior to the 2007 writers’ strike extended past the expiration of the agreements existing at the time. *Id.*

36. According to AMPTP assessments, writers collectively lost \$285 million in wages, and other film union workers lost \$500 million. See Cieply, *supra* note 31.

the rareness of this speedy agreement and the fact that the devastation was still relatively fresh in the disputants' minds, red flags remain and peril still looms for future negotiations when the parties become less risk averse.

*B. The WGA's and AMPTP's Strategy in 2007 Negotiations*

“Whether a negotiation concerns a contract, a family quarrel, or a peace settlement among nations, people routinely engage in positional bargaining.”<sup>37</sup> When utilizing the positional bargaining technique, each party takes a position based on its primary goals and then argues for that position, ideally making the concessions necessary to reach an agreement.<sup>38</sup> This technique is commonly used in negotiations; however, it tends to be inefficient and generally fails to generate sensible and amicable results.<sup>39</sup> It was positional bargaining that made the WGA and AMPTP incapable of producing an efficient and amicable agreement in 2007, eventually leading the writers to strike.

When engaging in positional bargaining, parties start “with an extreme position, by stubbornly holding to it, by deceiving the other party as to [their] true views, and by making small concessions only as necessary to keep the negotiation going.”<sup>40</sup> The WGA and AMPTP did just this.<sup>41</sup> The WGA stated its positions, which included establishing (1) a new formula to calculate writers' DVD sales residuals; (2) authority for writers in the animated and reality television markets; and, (3) a plan for writers to receive residuals in the new media markets.<sup>42</sup> The AMPTP also stated its positions, which were basically to resist the WGA's demands and not allow writers to earn higher residuals at the expense of the studios.<sup>43</sup> The parties tenaciously held to their positions and refused to make considerable concessions, as evidenced by the lengthy and costly writers' strike.<sup>44</sup> The parties presumably made insignificant concessions to make it appear that the

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37. FISHER, URY & PATTON, *supra* note 1, at 3.

38. *Id.*

39. *Id.* at 4.

40. *Id.* at 6.

41. *See Negotiating Process, supra* note 12. “The WGA and the Companies begin with opening proposals for changes in the MBA. Some proposals are rejected outright and some lead to counter-proposals. After much discussion and debate, the Guild and the Companies usually hold firm on some proposals, revise others and withdraw yet other proposals.” *Id.*

42. *See* Handler, Nguyen & Depietri, *supra* note 2, at 3.

43. *See id.* The studios sought to maintain the status quo with regards to DVD sales. *Id.* They claimed “to need their present revenue share to offset the ever-rising marketing and production costs of filmed and televised entertainment.” *Id.*

44. *See* Handler, Nguyen & Depietri, *supra* note 2, at 3.

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negotiations were progressing, but were ultimately too stubborn to settle the disputed terms of the agreement.

Negotiations may involve several parties, but “[t]he more people involved in a negotiation, the more serious the drawbacks to positional bargaining.”<sup>45</sup> This is a case with many parties to the agreement—thousands of writers and hundreds of studios.<sup>46</sup> When thousands of writers collectively established that they deserved new media residuals, the AMPTP was hard-pressed to convince them that they did not—results would be similar for positions adopted by the hundreds of studios.

Battles often ensue when parties participate in positional bargaining, with negotiations essentially becoming a “contest of wills.”<sup>47</sup> Parties to these battles often end up feeling resentful and angry.<sup>48</sup> This anger and resentment was apparent in WGA negotiation committee member Howard Gould’s speech to 3,000 writers:

[New media] residuals are going to go from what they are towards zero if we don’t make a stand now. . . . [T]his is such a big issue that if they see us roll over on this without making a stand—three years from now, they’re going to be back for something else. . . . I might have been the most moderate one up here when we started, but I sat there in the room the first day and they read us those thirty-two pages of rollbacks. And what they wanted us to hear was that “if you don’t give us what [we] want on the important thing, we’re gonna come after you for all those other things.” But what I heard was, if we give them that thing, they’ll *still* come after us for those other things. And in three years, it’ll be “we want to revamp the whole residual system.” And in another three years, it’ll be “y’know what, we don’t really want to fund the health fund the way we’ve been.” And then it’ll be pension. And then it’ll be credit determination. And there just is that time when everybody has to see—this is one where we’ve just gotta stand our ground.<sup>49</sup>

WGA members who witnessed the speech gave Gould a standing ovation,<sup>50</sup> showing approval of the idea that the writers should stand strong and not compromise. By adopting positional bargaining techniques, the WGA and AMPTP lost all trust in each other and refused to accept defeat, resulting in a contest of wills. The impending strike was inevitable.

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45. FISHER, URY & PATTON, *supra* note 1, at 7. When there are several parties to a negotiation, committees will sometimes be formed to negotiate for the majority. *Id.*

46. *See Guide to the Guild, supra* note 3, at 1; *About Us, supra* note 6.

47. FISHER, URY & PATTON, *supra* note 1, at 6.

48. *Id.*

49. wgaamerica, *Writer Speaks Out*, YOUTUBE (Nov. 6, 2007), <http://www.youtube.com/watch?v=beMNePzqpzQ> [hereinafter *Writer Speaks Out*].

50. *Id.*

Once the strike began, 100 days passed before the writers agreed to lift the injunction and put an end to the strike.<sup>51</sup> The final agreement gave writers jurisdiction in the new media market, provided Guild members with fair compensation for their Internet content, and established residual payments for content reused on new media.<sup>52</sup> However, this agreement did not include increased DVD residuals or authority in the animation market, which the writers had originally demanded.<sup>53</sup>

#### IV. NEGOTIATING AS A STRATEGY TO PREVENT A STRIKE

“The answer to the question of whether to use soft positional bargaining or hard is ‘neither.’ Change the game.”<sup>54</sup> At times, parties employ principled bargaining practices rather than positional bargaining, focusing on their fundamental interests, discussing options that are mutually beneficial for both parties, and maintaining fair values.<sup>55</sup> Principled bargaining can produce sensible and harmonious solutions.<sup>56</sup> If the writers and studios had utilized this technique, they could have reached a settlement in a more economical manner and without the hostility demonstrated by Gould’s speech. Principled bargaining can be broken down into four points: “People: Separate the people from the problem. Interests: Focus on interests, not positions. Options: Generate a variety of possibilities before deciding what to do. Criteria: Insist that the result be based on some objective standard.”<sup>57</sup>

##### A. *Separate the People from the Problem*

When dealing with major disputes involving organizations, the parties must keep in mind that human beings are at the bargaining table, not just organizations.<sup>58</sup> The actions of the writers and studios suggest a failure to treat the opposing party as humans and an inability to focus sufficient time on the people problem. “To find your way through the jungle of people

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51. See *Writers Guild Members Overwhelmingly Ratify New Contract*, WGA WEST (Feb. 26, 2008), [http://www.wga.org/subpage\\_newsevents.aspx?id=2780](http://www.wga.org/subpage_newsevents.aspx?id=2780). With 4,060 votes cast in New York and California, 93.6% of guild members voted to end the strike and agree to the terms of a new contract. *Id.*

52. *Id.*

53. See generally *2008 Agreement*, *supra* note 10.

54. FISHER, URY & PATTON, *supra* note 1, at 10.

55. *Id.* at 14.

56. *Id.*

57. *Id.* at 10-11.

58. *Id.* at 22.

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problems, it is useful to think in terms of three basic categories: perception, emotion, and communication.”<sup>59</sup>

While awareness of the impartial reality of a dispute is valuable, problems typically arise when the parties’ perceptions of reality are not aligned.<sup>60</sup> Looking again at Gould’s speech, although the studios alleged that they would compromise on the less significant components of the dispute in order to “win” on the more substantial issues—which they may have actually intended to do—the writers did not perceive this as a truthful claim.<sup>61</sup> This is due in part to the never-ending disputes between the AMPTP and the WGA regarding fair pay, revenue sharing, and the AMPTP’s failure to follow through with promises.<sup>62</sup> For instance, when the cost of producing VHS tapes was excessive, writers agreed to receive low residuals in the VHS market in exchange for a promise from the studios to increase the compensation when earnings improved.<sup>63</sup> Yet when VHS, and later DVD, profits grew, the studios never modified the formula used to calculate writers’ residuals.<sup>64</sup> In simple terms, one writer saw the WGA as the Charlie Brown and saw the AMPTP as the “arrogant and menacing Lucy.”<sup>65</sup> When Lucy would prop up a football and tell Charlie Brown to kick it, Charlie Brown would repeatedly attempt to do so, and then Lucy would always pull the ball away.<sup>66</sup> Just as Charlie Brown began to doubt Lucy’s intentions, the WGA could not help but doubt the AMPTP’s intentions. Based on past negotiations, the WGA’s version of reality was that even if the writers compromised on the more significant components of the dispute, they would not “win” on the less significant issues as promised

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59. *Id.*

60. *Id.* at 23.

61. *See Writer Speaks Out, supra* note 49.

62. *See e.g.,* Mark Dawidziak, *Possible Writers Strike Could Threaten TV Season, Movies*, THE PLAIN DEALER (Oct. 30, 2007, 6:00 PM), [http://blog.cleveland.com/top\\_entertainment/2007/10/possible\\_writers\\_strike\\_could.html](http://blog.cleveland.com/top_entertainment/2007/10/possible_writers_strike_could.html) (stating that the 2008 writers’ strike was the fifth writers’ strike since their first strike in 1973, with issues commonly being centered around residuals); *Conglomerates Not Making New Media Payments to Writers*, WGA WEST (Nov. 19, 2008), <http://www.wga.org/content/default.aspx?id=3384> (explaining that the AMPTP media conglomerates failed to comply with the contract that ended the 2008 writers’ strike).

63. Michael Russnow, *The WGA Strike for Dummies: Why Is It Taking So Long*, HUFFINGTON POST (Jan. 20, 2008, 11:41 PM), [http://www.huffingtonpost.com/michael-russnow/the-wga-strike-for-dummie\\_1\\_b\\_84190.html](http://www.huffingtonpost.com/michael-russnow/the-wga-strike-for-dummie_1_b_84190.html).

64. *Id.*

65. *Id.*

66. *Id.*

by the studios;<sup>67</sup> even if the studios promised future residuals, they would never be paid.<sup>68</sup> Thus, while the studios bargained as if their claims were true, the writers bargained based on their perceived reality that these claims were false, and therefore, the parties never reached an agreement.

In addition to gaps between reality and perceived reality, the writers' pessimism was damaging to the bargaining process. Potentially productive ideas are often rejected when viewed with pure cynicism.<sup>69</sup> Writer Michael Russnow, bitter from previous relations with the AMPTP, used terms such as "absurd" and "pitiful" in his description of WGA and AMPTP bargaining.<sup>70</sup> With such a pessimistic attitude, even if justified, writers were bound to perceive almost any offer from the studios in a dismal light. As soon as the writers determined that the studios were willing to make false claims in order to gain their desired results, there was no longer trust between the parties, and all ideas were rejected regardless of their potential to advance bargaining efforts.

Misperceptions and pessimism are not the only things that harm the negotiation process, emotions have created problems as well.<sup>71</sup> Disputants must clearly communicate their emotions to one another and refrain from writing these emotions off as illegitimate.<sup>72</sup> For example, writers Howard Gould and Michael Russnow made their emotions known to fellow WGA

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67. See *Writer Speaks Out*, *supra* note 49.

68. See Russnow, *supra* note 63. Russnow pointed out, [Writers] believed the AMPTP when they cajoled us to accept the cable deal in 1981 with the understanding that when they stopped rerunning old black and white shows and started making serious money they would take care of us.

We believed the AMPTP when they cajoled us in 1985 to accept the definition of gross to be one fifth of the monies they received, because the VHS industry was new and those cassettes were expensive to make. When it became really profitable they would take care of us.

Well, they did become profitable, even more so when they switched to DVD and its much cheaper manufacturing costs. And of course, the cable industry grew and grew as it became more and more the norm for shows to rerun directly from their original broadcast network home not on broadcast local stations, but rather on cable networks . . . . Ad rates for those reruns—hot off the network—soared through the roof.

And guess what, they didn't change the payment formula.

*Id.*

69. See FISHER, URY & PATTON, *supra* note 1, at 25.

70. See Russnow, *supra* note 63.

71. See FISHER, URY & PATTON, *supra* note 1, at 29.

72. *Id.* at 30.

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members and to readers of the Huffington Post,<sup>73</sup> but there is no indication that they communicated these emotions to the studios. Directly communicating their emotions to each other would have enabled the parties to focus their time and energy on the more meaningful issues of the dispute.

Basic communication is another area of concern when dealing with people, for “[w]ithout communication there is no negotiation.”<sup>74</sup> Proper communication requires parties to go beyond simply speaking with one another, both must make a good faith effort to sincerely listen to and understand what is being said.<sup>75</sup> Parties often listen only to their own side and pay no attention to that of the opposing parties, causing negotiations to be unproductive.<sup>76</sup> In the WGA’s negotiations with the AMPTP, the writers told the studios that they felt they deserved residuals in the new media market and higher residuals in the DVD market,<sup>77</sup> but the parties never properly communicated because the studios did not sincerely listen to and understand the writers’ stated positions. The AMPTP ridiculed the writers’ demands for higher residuals,<sup>78</sup> but it does not appear that the studios truly knew of what the writers’ demands consisted. Specifically, the studios dismissed “any comparison between the Internet and broadcast or cable, and [said] it’s absurd to presume that the \$20,000 hour-long prime time residual would be possible or relevant for reruns on the Internet.”<sup>79</sup> But according to Russnow, the writers never said “that either \$20,000 or the \$12,000 prime-time residual fee that half-hour shows receive should be paid for reruns transmitted on the Internet.”<sup>80</sup> This may have been an error in the writers’ attempt to correspond clearly with the studios, an error in the assumptions made by the studios, or both, but the result was a failure to properly communicate.

While avoiding misperceptions, expressing emotions, and properly communicating may help solve people problems, the most effective way to

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73. See Russnow, *supra* note 63.

74. *Id.* at 32.

75. *Id.* at 33.

76. *Id.*

77. See Handler, Nguyen & Depietri, *supra* note 2, at 3.

78. Russnow, *supra* note 63.

79. *Id.*

80. *Id.* When broadcast or cable is replaced with the Internet, the fees should be adjusted to accurately reflect the amount writers, directors, and actors receive in syndication, which are fees significantly lower than the prime time rerun rates of \$20,000 or \$12,000. *Id.* “These monies are in the mid-thousands for subsequent runs and descend in value as rerun usage increases until the payments are in the hundreds of dollars.” *Id.*

deal with these problems may be to avoid them altogether.<sup>81</sup> The writers' strike may not have occurred had the WGA and AMPTP evaded the people problems initially by considering each other as partners pursuing a mutually beneficial solution to their disputes.

### *B. Focus on Interests, Not Problems*

“The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's [interests, such as its] needs, desires, concerns, and fears.”<sup>82</sup> Parties' interests are generally the primary considerations when adopting positions.<sup>83</sup> Interests should be the parties' primary focus as more than one position can fulfill each interest.<sup>84</sup> For instance, the writers wanted an adaptation of their DVD sales residuals and wished to earn residuals in the new media market.<sup>85</sup> The concealed interests the writers sought to fulfill by making these demands were to rectify issues with the existing formula,<sup>86</sup> to earn fair compensation for new media work, and to be economically stable during the cycles of joblessness anticipated in this line of work.<sup>87</sup> The studios simply resisted the WGA's demands when they should have looked for substitute solutions to fulfill these underlying interests.

Disputants often focus too much on how to further their own interests and fail to acknowledge the interests of others.<sup>88</sup> The writers publicly announced a concern that “[e]very issue that matters to writers, including Internet reuse, original writing for new media, DVDs, and jurisdiction, has been ignored.”<sup>89</sup> The studios were seemingly too consumed with their own interests, not wanting to give up a portion of their residuals, and neglected to acknowledge the writers' desires. “[I]f you want the other side to appreciate *your* interests, begin by demonstrating that you appreciate *theirs*.”<sup>90</sup> Had the AMPTP exhibited an appreciation for the WGA's desires, even if they did

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81. See FISHER, URY & PATTON, *supra* note 1, at 33.

82. *Id.* at 40.

83. *Id.* at 41. Interests define the problem, therefore the “basic problem in negotiation lies not in the conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears.” *Id.* at 40.

84. *Id.* at 42.

85. See Handler, Nguyen & Depietri, *supra* note 2, at 3.

86. See *supra* notes 63-64 and accompanying text.

87. See *Writers Guild of America Strike*, GAFOOR LAW (Feb. 28, 2008), <http://www.gafoorlaw.com/writers-guild-of-america-strike>.

88. FISHER, URY & PATTON, *supra* note 1, at 51.

89. *Contract 2007 Negotiations Statement*, WGA WEST (Oct. 31, 2007), [http://www.wga.org/subpage\\_newsevents.aspx?id=2526](http://www.wga.org/subpage_newsevents.aspx?id=2526).

90. FISHER, URY & PATTON, *supra* note 1, at 51.

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not agree with them, the parties may have been productive enough in negotiations to prevent the strike.

### *C. Invent Options for Mutual Gain*

Often when bargaining, “[t]here seems to be no way to split the pie that leaves both parties satisfied.”<sup>91</sup> Likewise, with the principle dispute between the AMPTP and the WGA rooted in the division of money, the parties were at a loss as to how to split the pie.<sup>92</sup> Four barriers often hinder parties when developing options: “(1) premature judgment; (2) searching for the single answer; (3) the assumption of a fixed pie; and (4) thinking that ‘solving their problem is their problem.’”<sup>93</sup>

Disputants often make impulsive decisions because the ability to devise and consider various options is typically a learned skill.<sup>94</sup> The studios alleged that the parties were at an impasse “because the WGA continued to press a series of *unreasonable* demands that have nothing to do with new media and the real concerns of most working writers.”<sup>95</sup> Their conclusion that the writers’ requests were too demanding was hasty and prevented the parties from considering mutually beneficial alternatives. It is a common problem for competitive negotiators to consider the interests of the opponent irrelevant unless those interests in some way maximize their own returns.<sup>96</sup> Further, disputants worry that presenting alternatives puts their negotiating power at risk by revealing sensitive information.<sup>97</sup> For example, the studios may have been concerned that the writers would interpret the presentation of options as an indication that they were definitely willing to concede on particular matters. Allowing disputants to present alternatives without requiring them to commit to one right away can minimize this risk.<sup>98</sup> It would have been wise of the parties here to brainstorm to discover mutually

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91. *Id.* at 56.

92. This method of negotiating is referred to as distributive bargaining. *See Distributive Bargaining*, U. COLO., <http://www.colorado.edu/conflict/peace/treatment/distbarg.htm> (last visited Aug. 25, 2011).

93. FISHER, URY & PATTON, *supra* note 1, at 57.

94. *Id.*

95. *The State of the Strike: Day 47 An Open Letter to the Entertainment Industry from the AMPTP*, AMPTP (Dec. 21, 2007), <http://www.amptp.org/statements/122107.html> (emphasis added).

96. *See* John S. Murray, *Understanding Competing Theories of Negotiation*, 2 NEGOT. J. 179, 182 (1986).

97. *See* FISHER, URY & PATTON, *supra* note 1, at 58.

98. *See id.* at 60.

beneficial alternatives, or at a minimum to better explore solutions to the primary issues.

When parties adamantly believe that there is only one answer to a problem, they will not explore other options.<sup>99</sup> The AMPTP and the WGA fell victim to this trend and failed to invent alternatives for fear of complicating the bargaining process. If the writers and studios choose to brainstorm in the future, they must look for options of varying strengths rather than one best solution.<sup>100</sup> For instance, if a request for authority in the new media market is too demanding, a feebler request may be authority in a particular niche of this market. The more alternatives the parties develop, the more hope they have of discovering a mutually beneficial solution.

Third on the list of things preventing the development of mutually beneficial options is the fact that disputants often believe that in order for one party to gain a bigger piece of the pie, the other must give something up.<sup>101</sup> This was a difficult issue for the writers and studios, because as the parties saw it, the writers demanded larger pieces of pies that would make the studios' pieces smaller. Nevertheless, the WGA and AMPTP need not have given up. "Even apart from a shared interest in averting joint loss, there almost always exists the possibility of joint gain."<sup>102</sup> Several pies were the subject of bargaining between the writers and studios, such as the new media and DVD pies.<sup>103</sup> Therefore, making a compromise in one pie could encourage an expansion in a different pie to the satisfaction of all involved.

Finally, the development of options is hindered when the parties are all consumed by their own interests, which is typically getting a larger slice of the pie.<sup>104</sup> An agreement will not be achieved if the parties refuse to explore options that satisfy both groups. In the negotiations between the WGA and AMPTP, both the studios and the writers were so concerned with their own interests that they were unable to appreciate that *both* parties could gain by making the pies larger. For instance, they could have enlarged the new media pie by making use of the market's superior demographic records and targeted marketing capabilities, thus enlarging each party's slice of pie. The studios would likely have been more agreeable to a solution that benefited both parties rather than a solution that fulfilled only the writers' desires.

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99. *See id.* at 58.

100. *See id.* at 69.

101. *See id.* at 59.

102. *Id.* at 71.

103. *See* Handler, Nguyen & Depietri, *supra* note 2, at 3.

104. *See* FISHER, URY & PATTON, *supra* note 1, at 59.

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#### *D. Use Objective Criteria*

“However well you understand the interests of the other side, however ingeniously you invent ways of reconciling interests, however highly you value an ongoing relationship, you will almost always face the harsh reality of interests that conflict.”<sup>105</sup> Here, the WGA suggested solutions that spoke to writers’ interests and refuted the studios’ interests, the AMPTP declined to agree with these suggestions, and each party awaited the withdrawal of the other. Bargaining is more effective when based on objective standards instead of efforts to make the opposing party surrender.<sup>106</sup>

Objective standards are often discovered utilizing fair procedures or fair standards.<sup>107</sup> The existing DVD sales residuals formula would be made objective if rooted in a fair standard such as market value, instead of being based on arbitrary demands for double what the existing formula yielded. Furthermore, this same formula would be made more objective if derived from a fair process such as employing an arbitrator or expert to divide DVD earnings as they see fit.

#### V. MEDIATING AS A STRATEGY TO PREVENT A STRIKE

Even principled bargaining has its weaknesses,<sup>108</sup> and if this approach proves unsuccessful, the parties should consider mediation before calling a

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105. *Id.* at 81.

106. *Id.* at 83.

107. *Id.*

108. *See* Murray, *supra* note 96, at 184. Murray lists the common weaknesses associated with positional bargaining techniques, also known as “problem-solving” bargaining techniques:

1. Strong bias toward cooperation, creating internal pressures to compromise and accommodate.
2. Avoids strategies that are confrontational because they risk impasse, which is viewed as failure.
3. Focuses on being sensitive to other’s perceived interests; increases vulnerability to deception and manipulation by a competitive opponent; and increases possibility that settlement may be more favorable to other side than fairness would warrant.
4. Increases difficulty of establishing definite aspiration levels and bottom lines because of reliance on qualitative (value-laden) goals.

strike. In mediation, a neutral third party, also known as the mediator, helps participants in the dispute come to an agreement.<sup>109</sup> Mediation allows the parties to maintain control of the case and to shape a conclusion with the help of a third-party neutral.<sup>110</sup> Parties should choose to mediate “[w]hen any or all of the following are factors: costs, time, confidentiality, efficiency, effectiveness, resource conservation, a desire to preserve the relationship of the parties, civility or when traditional judicial remedies do not serve the needs of the parties.”<sup>111</sup> While the preferred alternative dispute resolution method varies by industry, most firms across all industries list mediation as their preferred technique.<sup>112</sup>

#### A. Confidentiality of Mediation

Confidentiality is one of the most important characteristics of mediation for a variety of reasons.<sup>113</sup> “Effective mediation requires candor” in order to identify issues, explore options for agreement, and to uncover unknown causes of conflict between the parties; this process would be impossible if the parties were constantly concerned that what they said may later be used against them.<sup>114</sup> Confidentiality is also necessary for the fairness of the parties because they do not expect to be bound by what they say in mediation discussions.<sup>115</sup> Additionally, the mediator must keep information confidential in order to remain neutral in fact and neutral according to the perception of the parties.<sup>116</sup> The WGA and AMPTP may not have been completely honest with each other, fearing that the other side would take

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5.Requires substantial skill and knowledge of process to do well.

6.Requires strong confidence in own assessment powers (perception) regarding interests/needs of other side and other’s payoff schedule.

*Id.*

109. See *There Are Options to Litigation: What Are My Options?*, L.A. SUPERIOR CT., <http://www.lasuperiorcourt.org/adr/UI/Info/whatis.aspx?source=> (last visited Aug. 25, 2011) [hereinafter *Options to Litigation*].

110. See Judith P. Meyer, *The Pros and Cons of Mediation*, DISP. RESOL. J., Summer 1997, at 8, 11. The mediator cannot conclude the case without the consent of both disputants. *Id.* at 13.

111. *Id.* at 12.

112. See David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, DISP. RESOL. J., Feb. 1999, at 66, 69.

113. See Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. DISP. RESOL. 37, 37 (1986).

114. *Id.* at 38.

115. *Id.*

116. *Id.*

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advantage of this honesty. With mediation, they could have been open and honest with the mediator without fear that their positions would be revealed to the other side, allowing the mediator to help determine what information may be beneficial to the discussions and what should remain private. Confidentiality is often the most desired characteristic of mediation.<sup>117</sup>

### *B. Efficiency of Mediation*

Another significant factor driving parties to choose mediation is the cost and time savings it provides.<sup>118</sup> Sources often compare the costs of alternative dispute resolution methods to costs of litigation,<sup>119</sup> but as already shown, the cost of a writers' strike is also very high.<sup>120</sup> Further, sources often compare the length of time spent on alternative dispute resolution methods to the time spent on litigation,<sup>121</sup> but the time spent on a writers' strike can also be lengthy.<sup>122</sup> Mediation saved one company at least \$50 million in litigation costs, and they "typically last [only] the better part of a day."<sup>123</sup> The 1988 writers' strike alone lasted twenty-two weeks, not including the months spent in negotiations prior to the strike, and cost an estimated total of \$500 million.<sup>124</sup> Had the WGA and AMPTP employed mediation, negotiations could have been shorter and millions of dollars could have been saved.

### *C. Preservation of the Relationship*

Research has shown that high stress can negatively affect otherwise cooperative behavior.<sup>125</sup> Mediation provides an atmosphere in which the

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117. *Id.*

118. See Meyer, *supra* note 110, at 12.

119. See Lipsky & Seeber, *supra* note 112, at 71.

120. See *supra* text accompanying note 19.

121. See Lipsky & Seeber, *supra* note 112, at 71.

122. See *supra* text accompanying notes 19, 31.

123. Miguel A. Olivella, Jr., *Toro's Early Intervention Program, After Six Years, Has Saved \$50M*, 17 ALTERNATIVES TO HIGH COST LITIG. 65, 65 (1999).

124. Mandell, *supra* note 19.

125. See Jeffrey L. McClellan, *Marrying Positive Psychology to Mediation: Using Appreciative Inquiry and Solution-Focused Counseling to Improve the Process*, DISP. RESOL. J., Jan. 2008, at 29, 31.

expression of emotions can be controlled,<sup>126</sup> and while the expression of emotions can be detrimental, a skilled mediator can help the parties put a more objective spin on their negative emotions.<sup>127</sup> Without a neutral third party assisting them, the WGA and AMPTP were not provided the opportunity to express emotions in a controlled environment. These uncontrolled emotions proved to be detrimental to the negotiations. Mediation can remove the adversarial component, helping to enhance the future relationship of the parties.<sup>128</sup>

#### *D. The Mediator's Role*

Mediators generally use one of two basic styles: facilitative or evaluative.<sup>129</sup> Evaluative mediators provide more direction as to the appropriate grounds for settlement, while facilitative mediators give the parties more control of the process.<sup>130</sup> As a result, facilitative mediators simply enhance and clarify communications between the parties rather than provide evaluative direction.<sup>131</sup> The choice of mediator type would be the decision of the WGA and AMPTP, allowing the parties to control the process even with the involvement of a third party.

Leonard Riskin created a grid containing four categories of mediators to assist disputants in selecting a third-party neutral.<sup>132</sup> The categories of mediators are (1) evaluative-narrow, (2) facilitative-narrow, (3) evaluative-broad, and (4) facilitative-broad.<sup>133</sup> The parties should use the grid to select

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126. See William A. Blancato & C. Allen Gibson, Jr., *Controlling Your Own Destiny: You Can with Mediation*, DISP. RESOL. J., Oct. 2008, at 14, 20-21. "The uncontrolled expression of negative emotions by a party or counsel can quickly derail a mediation." *Id.* at 21.

127. See *id.*

128. *Options to Litigation*, *supra* note 109.

129. Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111, 111 (1994).

130. *Id.* Evaluative mediators use law, industry practices, and technology as their bases for evaluation. See *id.* Facilitative mediators recognize that the parties are "intelligent, able to work with their counterparts, and capable of understanding their solutions better than either their lawyers or the mediators," and in turn, give the parties more control of the process. *Id.*

131. *Id.* According to the facilitative mediator, providing an opinion is inappropriate because this might impair the appearance of impartiality. *Id.* Additionally, the mediator might not have the knowledge to provide an informed opinion. *Id.*

132. *Id.* at 114.

133. *Id.* at 112. Evaluative-Narrow mediators "help the parties understand the strengths and weaknesses of their positions and the likely outcome at trial" by providing assessments of relevant documents, pleadings, mediation briefs, etc. *Id.* Facilitative-Narrow mediators "help the parties become 'realistic' about their litigation situations" without making their own assessments, predictions, or proposals. *Id.* Evaluative-Broad mediators take a similar approach to that of an Evaluative-Narrow mediator, but they emphasize their understanding of the parties' interests rather than focusing on narrow issues, and propose solutions to accommodate these interests. *Id.* at 112-13.

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a mediator based on “informed expectations about the problems to be addressed and what they need from a mediation.”<sup>134</sup>

Subject matter expertise can be an important factor to consider when selecting a mediator.<sup>135</sup> For the WGA and AMPTP, a mediator with specialized knowledge in the entertainment industry and familiarity with the writing process would have been ideal. The need for subject matter expertise typically increases when the parties seek an evaluative mediator and is less important when the parties are capable of developing solutions themselves.<sup>136</sup> However, even when the parties are capable of developing solutions, they may still need a skilled mediator to facilitate the process.<sup>137</sup> The WGA and AMPTP may have been knowledgeable regarding their circumstances, but they lacked the ability to develop solutions during the 2007 negotiations; therefore, a highly skilled mediator with subject matter expertise would have been valuable.

## VI. IMPACT

### A. *Strategy Used in 2011 Negotiations*

During the most recent negotiations, as the writers and the studios converged at the negotiation table for the first time since the 2007 strike, the issue was whether the parties would take a different approach in order to reach an efficient and more mutually beneficial agreement. There was great speculation that negotiations would not be easy.<sup>138</sup> Many may have predicted that with the resistance of the AMPTP in the previous negotiations, and considering the fact that the WGA did not get the deal they had hoped for in 2007, the writers might come to the table with less

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This style of mediator provides predictions, assessments, and recommendations to the parties. *Id.* at 113. Facilitative-Broad mediators help the disputants identify, comprehend, and settle problems, encouraging them to consider underlying interests. *Id.*

134. *Id.* at 114.

135. *Id.* Subject matter expertise can include knowledge about the relevant law or the customary practices in the industry. *Id.*

136. *Id.*

137. *Id.*

138. See Jonathan Handel, *WGA Sends Out 'Pattern of Demands' Seeking Major Contract Improvements*, HOLLYWOOD REPORTER (Dec. 22, 2010, 5:28 PM), <http://www.hollywoodreporter.com/news/wga-sends-pattern-demands-seeking-65036>.

demanding requests this time. But this was not the case. The “Pattern of Demands” released by the WGA was of an ambitious scope.<sup>139</sup>

Much to everyone’s surprise, the writers and studios reached an agreement in only two weeks, six weeks before the 2007 MBA was even set to expire.<sup>140</sup> Key gains for writers in the 2011 MBA included an increase in pension contributions and an increase in pay television residuals.<sup>141</sup> A major concession made by the writers was a freeze in prime time residuals for the term of the three-year contract.<sup>142</sup> While this may be viewed as a success, with the writers making some advances and given the promptness of the settlement, WGA President John Wells admits that “much remains to be done.”<sup>143</sup> He acknowledges that the writers have positioned themselves “for some hard and important work in the years ahead as [they] endeavor to further the needs and rights of [their] members.”<sup>144</sup> With so much progress to still be made, there is still great danger of future strikes.

Whether or not writers truly view the 2011 agreement as a victory, the settlement cannot be attributed to improved bargaining techniques. Rather than pursuing a mutually beneficial agreement in an efficient manner, the parties rushed into a settlement.<sup>145</sup> Several veteran writers have even gone so far as to “[call] this the worst deal they’ve ever been handed.”<sup>146</sup> As one critic points out, the agreement came at a time “when nearly all writers [were] wringing their hands and hanging by their fingernails to maintain their livelihoods under the studio and network cutbacks.”<sup>147</sup> Another critic brought light to the fact that the agreement was beneficial to Wells’s private interests and presumed that he encouraged writers to simply accept the studio’s first draft without addressing the areas most important to the majority of WGA members.<sup>148</sup> The interests the writers were forced to concede in order to end the strike in 2007, such as increased home video residuals, are still missing from the new agreement.<sup>149</sup> Accepting an

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139. *Id.*

140. *See supra* note 35 and accompanying text.

141. *See McNary, supra* note 9.

142. *Id.*

143. *Writers Guild Members Overwhelmingly Ratify New Contract*, WGA WEST (Apr. 27, 2011), <http://www.wga.org/content/default.aspx?id=4591>.

144. *Id.*

145. *See infra* text accompanying notes 147-48.

146. Nikki Finke, *Tentative WGA-AMPTP Contract: Writers Guild Negotiators Cave to Studios & Networks After Only 2 Weeks; Critics Say “They Accepted Producers’ First Draft”*, DEADLINE.COM (Mar. 20, 2011, 7:33 PM), <http://www.deadline.com/2011/03/wga-amtp-come-to-congract-agreement/>.

147. *Id.*

148. *Id.*

149. *See supra* note 30 and accompanying text.

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unsatisfactory settlement offer and failing to represent the interests of writers in order to reach a speedy resolution is not a successful negotiation technique. The WGA must vastly improve its definition of a successful resolution before it can claim a victory. The parties must adopt more effective bargaining techniques to ensure long-term success.

In order to be truly successful in future negotiations, the WGA should make demands that are mutually beneficial for all parties.<sup>150</sup> The writers failed to do this in the 2011 negotiations; many speculated before the process even began that their proposal was “likely to elicit concern among studio executives because it [sought] many different monetary increases plus significant changes in the script development process.”<sup>151</sup> Among the WGA’s one-sided demands were “increases in minimums and employer pension and health contributions and more money for new-media reuse and programs made for pay cable and basic cable,” a move away from one-step deals and toward multi-step deals,<sup>152</sup> increases in home video residuals,<sup>153</sup> and jurisdiction in animated television.<sup>154</sup>

The WGA made the same mistakes in 2011 that it made in 2007 by engaging in positional bargaining<sup>155</sup> techniques in its negotiations with the AMPTP. The writers created a high level of anxiety amongst the parties up front, likely on purpose in order to establish a power position, as this is the “first step in the posturing and positioning that marks most labor negotiations.”<sup>156</sup> Because the relationship already lacked trust,<sup>157</sup> creating

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150. See *supra* Part IV.C.

151. See Handel, *supra* note 138. This appears to be similar to the “Pattern of Demands” proposed for the 2007 negotiations, which also included several monetary demands: “[f]air compensation and residuals for writing for the Internet and other non-traditional media; [i]ncreased initial compensation in all areas; [i]ncreased minimums and residuals for The CW; [i]ncreased DVD and videocassette residual payments; [and] expanded WGA coverage of reality programs and animation.” *Writers Guilds Issue Pattern of Demands for Contract 2007 Negotiations: Key Issues Include New Media, Reality TV and Animation Jurisdiction, DVD Residuals, and Product Integration*, WGA WEST (May 18, 2007), [http://www.wga.org/subpage\\_newsevents.aspx?id=2370](http://www.wga.org/subpage_newsevents.aspx?id=2370).

152. Handel, *supra* note 138 (“Writers dislike one-step deals not only because the money is less (unless the writer is then hired to do revisions), but also because it gives the writers only one shot to get it right.”).

153. With the twenty-five-year-old formula for home video residuals, “80% of DVD revenue is swept off the table before the residual is even calculated.” *Id.*

154. *Id.*

155. Positional bargaining is a process in which the parties claim positions based on their ideal final outcome, argue for those positions, and make compromises in pursuit of a settlement. See FISHER, URY & PATTON, *supra* note 1, at 3. Positional bargaining is generally unsuccessful when a party is attempting to reach an efficient and amicable agreement. *Id.*

156. Handel, *supra* note 138.

anxiety before negotiations even began was risky, causing each party to bargain aggressively in order to show authority. While this did not pose a problem in 2011, this technique may make bargaining a “contest of wills” and create more of a battle than a mutually beneficial negotiation in future years.<sup>158</sup> Anxiety was also high in the 2007 negotiations,<sup>159</sup> and the results were damaging.

An increase in home video residuals was a primary concern of the writers during the 2007 and 2011 contract negotiations and remains a concern because the WGA has repeatedly withdrawn the request in order to reach agreements with the studios.<sup>160</sup> Better communication between the parties may help the writers realize this goal, as there were apparent miscommunications in 2007.<sup>161</sup> In order to be successful in the future, the writers must remedy the miscommunication that initially led the studios to assume that the WGA was demanding more in DVD residuals than it was actually seeking.

Jurisdiction in animated television was also one of the writers’ concerns during the 2007 and 2011 contract negotiations, but just as the WGA withdrew the home video residual request, it also withdrew this request in order to reach an agreement with the studios.<sup>162</sup> While this appears to be an ongoing issue, it has not been as predominant in the media as DVD residuals have been. Animation jurisdiction may be a good area for compromise, and the WGA may benefit from giving up this request in the future in order to appear to be seeking a mutually beneficial agreement with the AMPTP.

#### *B. Strategy Most Likely to Avoid Future Strikes*

The most effective approach, given the circumstances of the WGA and AMPTP negotiations, will be principled bargaining with an option of mediation if necessary.<sup>163</sup> While the parties may be experts in the industry

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157. Not only was trust lost during the strike, but the parties have had additional issues since 2007. *See Conglomerates Not Making New Media Payments to Writers*, *supra* note 62. In 2008, the WGA announced that the media conglomerates of the AMPTP “failed to comply with the contract negotiated to end the Guild’s 100-day strike and [were] not paying residuals for writers’ work that is reused in new media.” *Id.*

158. *See FISHER, URY & PATTON*, *supra* note 1, at 6.

159. *See supra* text accompanying note 28.

160. *See Handel*, *supra* note 138.

161. *See supra* text accompanying notes 79-80. Because the “Pattern of Demands” for the 2011 negotiations did not contain numbers and specifics of the writers’ demands, it is unclear how effectively this demand was conveyed in the most recent bargaining.

162. *See Handel*, *supra* note 138.

163. *See supra* Parts IV-V.

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and skilled negotiators, there may come a time when the parties recognize that negotiations are fruitless and that they must choose another approach.<sup>164</sup>

By utilizing principled negotiating skills, the parties will be aware of people problems, thus separating the people from the problem and preventing them from getting in the way of reaching a settlement.<sup>165</sup> Because of the many years they have worked together, the parties inevitably have reputations and expectations, some false and some accurate, that may easily become the central issues in negotiations. However, the parties must recognize this potential trap and maintain sight of the more substantial issues present during negotiations.<sup>166</sup> Although the AMPTP may not have followed through on some promises in the past, assuming that this will be an ongoing pattern will be detrimental to future discussions.<sup>167</sup> If the writers hope to reach an agreement with the studios, they must come into negotiations with a positive outlook, rather than predict that everything will end up in the “worst case scenario.” Additionally, while it is good to express emotions, that expression should be limited in a noncontrolled environment.<sup>168</sup> When the writers or studios do express emotions, both parties should attempt to understand them and acknowledge them as legitimate rather than viewing the emotions as problematic.<sup>169</sup>

Most critical to preventing the people problem from dominating the issues at hand is to ensure effective communication between the WGA and AMPTP.<sup>170</sup> It will be natural for the studios to reject the requests of the writers automatically, assuming that the requests will be contrary to the interests of the studios. However, if the studios truly listen to and understand the writers’ requests, they may discover that there are ways to fulfill these requests without necessarily giving up anything.<sup>171</sup>

If the WGA and AMPTP use principled bargaining, they will focus more on interests than on problems.<sup>172</sup> Using this strategy, the parties will uncover various concealed interests that can satisfy a single problem,

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164. *See supra* text accompanying notes 135-37.

165. *See supra* Part IV.A.

166. *See supra* notes 61-68 and accompanying text.

167. *See supra* notes 67-70 and accompanying text.

168. *See supra* Part V.C.

169. *See supra* text accompanying notes 72-73.

170. *See supra* text accompanying notes 74-80.

171. *See supra* Part IV.C.

172. *See supra* text accompanying notes 55-57.

allowing for more settlement alternatives than they initially anticipated.<sup>173</sup> For example, the WGA wants a larger portion of DVD sales revenues, and they may think that taking a larger portion of this pie is the only answer. Instead, they should attempt to make the pie larger by changing marketing strategies or increasing sales in some way.<sup>174</sup> By making the pie larger, both parties can increase their DVD sales revenues, and both will benefit. Principled bargainers should be able to put themselves in the shoes of the opposing party, understand that the party's requests are legitimate, and work to find a mutually beneficial solution.

Principled negotiating will allow the writers and studios to come to an objective solution using fair standards and procedures.<sup>175</sup> They can use objective numbers in dividing revenue pies; for example, they can look at the time spent by writers versus the time spent by other talent involved in the process of certain media and then divide revenues accordingly. If the parties cannot reach an objective agreement, they may benefit from choosing a more fair procedure, such as utilizing a mediator in the process.<sup>176</sup>

The WGA and AMPTP may benefit greatly if a third-party neutral facilitates their negotiations.<sup>177</sup> Mediation would not only allow the parties to settle quickly, as they did in the 2011 negotiations, but would also allow them to maintain control of the process in order to better represent their members' interests.<sup>178</sup> The WGA and AMPTP may be concerned that bringing in a third party would cause them to give up control, thus surrendering their ability to pursue their members' best interests, but this concern is unwarranted because both parties must agree to a settlement.<sup>179</sup> For example, a mediator could not force the studios to give up DVD residuals, nor could he force the writers to give up their requests in the new media market.

Given that the public is highly interested in the WGA and AMPTP, these organizations<sup>180</sup> must strive to maintain confidentiality in their negotiations. Communications during the mediation will remain confidential from the public; therefore, the studios can make statements in mediation without fear that the other unions with which it negotiates will use

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173. See *supra* text accompanying notes 84-87.

174. See *supra* text accompanying note 104.

175. See *supra* Part IV.D.

176. See *supra* Part IV.D.

177. See *supra* Part V.

178. See *supra* notes 109-10 and accompanying text.

179. See *supra* note 110 and accompanying text.

180. This public interest is evidenced by the numerous news articles regarding their negotiations and strikes.

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these statements as leverage in their own bargaining efforts.<sup>181</sup> There will also be confidentiality between the parties; therefore, the writers will be free to admit to the mediator that they are willing to concede jurisdiction in animated television in order for their new media request to be fulfilled, without fear that this will be revealed to the studios prematurely.<sup>182</sup> This level of confidentiality will permit the WGA and AMPTP to communicate candidly enough to identify hidden interests and reach creative settlements.<sup>183</sup>

If the parties choose to mediate early in the negotiations, they can save time that might otherwise be dedicated to unproductive negotiations and strikes.<sup>184</sup> The writers and studios should agree on a time limit for negotiations, such as one month, and attempt mediation if they have not reached an agreement within that time. Mediation, even for large organizations, can be accomplished in as little as one day, which is preferable to spending months negotiating and managing strikes.<sup>185</sup> This process will not only save time, but will also save money for everyone involved, including the writers, studios, and others working in and affected by the entertainment industry.

Because the WGA and AMPTP negotiate every three years, they should have a strong interest in maintaining a positive relationship.<sup>186</sup> Although the parties' intense emotions have caused their relationship to break down in the past, in the future, a mediator can work as an intermediary to calm the parties' emotions and put a more positive spin on their negative views.<sup>187</sup> This may improve the relationship between the writers and studios enough to eventually eliminate the need for a mediator in future negotiations.

When selecting a mediator, parties will likely benefit from someone who is an expert in the industry, highly skilled in mediation, and has a broad focus.<sup>188</sup> The entertainment industry is unique, so it may be helpful to choose a mediator who understands the issues being presented. Additionally, a skilled mediator would also be valuable to these parties to ensure proper execution of the process. The WGA and AMPTP have been

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181. *See supra* Part V.A.

182. *See supra* Part V.A.

183. *See supra* text accompanying note 113-16.

184. *See supra* Part V.B.

185. *See supra* text accompanying note 123.

186. *See supra* Part V.C.

187. *See supra* notes 126-28 and accompanying text.

188. *See supra* Part V.D.

negotiating with each other for many years and likely have skilled negotiators leading the discussions for each party.<sup>189</sup> But if these skilled negotiators cannot reach an agreement, it may take a skilled mediator with subject matter expertise to dig deep and assist the parties in identifying hidden interests.<sup>190</sup> Alternatively, because the parties have specialized knowledge in a unique industry, a broader approach may also be sufficient. For example, the writers do not necessarily need the mediator to recommend what residuals are appropriate. However, they may need a mediator to put a positive spin on their negative emotions and help them determine what issues they should concede. Thus, the WGA and AMPTP do not need narrowly focused guidance as much as they need a broadly focused facilitator.<sup>191</sup>

## VII. CONCLUSION

Although the WGA and AMPTP reached agreements that ended the strikes in 1988 and 2007, the strikes were costly and inefficient uses of time and could have been avoided. Three years after the 2007 writers' strike, writers negotiated a new MBA with the studios, unexpectedly reaching an agreement in only two weeks. However the speed of the agreement can be attributed less to improved bargaining techniques and more to the risk aversion caused by the recent 2007 strike. The parties will need to remain aware of best practices for negotiations in future years to ensure efficient agreements that represent WGA members better than the 2011 agreement. Thus, if they separate the people from the problem, focus on the interests of each party rather than on their own positions, invent solutions that provide mutual gain, and use objective criteria, then negotiations between the parties will be more efficient and amicable. If the parties are unable to reach an agreement that is favorable to their members, they should hire a neutral third party to mediate their discussions. This mediator will help the WGA and AMPTP maintain control of the dispute while facilitating the discussions, allowing the parties to reach an agreement and avoid future writers' strikes.

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189. *See supra* text accompanying note 131.

190. *See supra* text accompanying notes 135-37.

191. *See supra* note 130 and accompanying text.