



# CASTING CLOSE CALLS

SIX MISTAKES TO AVOID WHEN CHOOSING AND SIGNING YOUR STARS

**N**o matter how careful a producer is during the production of a movie, something unexpected will always go wrong. Savvy producers prepare for as many potential problems as they can foresee and place their fate in the hands of the film gods for those potential problems over which they have no control. Your goal as producer is to eliminate as many potential issues that can be foreseen so you can better devote time, energy and money to attend to those problems that cannot be avoided. Here are six mistakes reflecting poor practices regularly engaged in by even some of the best and brightest in the industry.

Yet all six of these pitfalls are easily avoidable by proactive producers. One important caveat: If your casting director is not on the same page as you are with this, all of your efforts will be for naught.

## **MISTAKE #1: FAILING TO DOCUMENT OFFERS AND ACCEPTANCE IN WRITING.**

**PROBLEM:** You make a verbal offer to an actor's agent and the agent verbally accepts on his client's behalf. Days before production—while lawyers are still arguing the fine print—the agent wishes to deny a binding contract because the actor has just been offered a better role on a different film. However, compare the way agents react if the roles are reversed—where an agent verbally accept an offer and then, four hours later, you learn your *real* first choice in actor is actually available for the part. When you call the agent to

convey this unfortunate information, the agent claims that the offer has been accepted and you end up in a legal fight and may need to pay to get the actor to go away. Verbal acceptances place agents in a power position to claim offers are binding when it works in their favor and not binding when that is what works in their favor.

**SOLUTION:** Offers should be in writing with concise material terms and the document should state: "This offer can only be accepted by signature of Artist and must be returned to Production Company by 5 p.m. on X Date."

To further emphasize the contingent nature and ability to pull the offer, you might also add this phrase to the memo: "This offer can be revoked at any time prior to Artist's written acceptance." Remember, if the original offer memo leads to subsequent telephone

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negotiations, at the end of each call, a revised offer memo reciting the new counter-offer should be sent to the agent with the same condition—that acceptance may only occur by the artist’s signature.

This technique creates an unambiguous memorialization of the intentions of you, the agent and the actor. The ability for agents to argue out of both sides of their mouths, depending on what best fits their needs, is eliminated (or at least when they try to do it, they can be soundly rebutted). Everyone is bound by the same objective rules: If the artist never signs and returns the offer memo, the role can be recast (or the actor can walk). Likewise, if the artist returns a signed offer memo, you know that he is locked for that role subject to legal consequences if he later changes his mind.

### **MISTAKE #2: FAILING TO INCLUDE “PRODUCER’S RIGHTS” LANGUAGE IN THE OFFER MEMO.**

**PROBLEM:** Written offer memos sent by casting directors traditionally—but mistakenly—only set forth the terms important to the actor. This practice ignores the fact that the offer memo has legal effect. An actor might never sign a long-form acting agreement. If the film shoots and the actor only has an offer memo with terms important to her—compensation, credit, schedule and dressing room size—then you may literally have to “give away far more than was bargained for” to obtain the cooperation of the actor. If you obtain a distribution deal, but cannot completely deliver the film to the distributor because there is no likeness release from the actor and her representatives are ignoring pleas for a signed agreement (or trying to extort profit participation that was never originally discussed in exchange for her cooperation in executing the release of likeness and other terms that compose basic “Producer

Rights”), then your distribution deal may be in jeopardy. Moreover, if the actress dislikes the final cut, injunctive relief (i.e. an action to stop distribution) can be pursued by her if nothing is in place preventing that type of legal remedy. **SOLUTION:** Offer memos from a casting director need boilerplate language that reads: “If Offer is accepted, all services shall be deemed ‘work-for-hire’ and Artist grants the right to use his or her name, voice and image for all purposes in relation to the Picture and its promotion for use in any and all media presently known or hereafter created throughout the universe in perpetuity. In the event of a dispute, Artist agrees to forgo any injunctive relief.” This, coupled with the actor’s signature, which constitutes acceptance, eliminates an unfair bargaining position if a written, long-form agreement is never actually signed by the actor.

### **MISTAKE #3: FAILING TO UNDERSTAND SAG RULES.**

**PROBLEM:** You and your casting director are not familiar with all of the loopholes and pitfalls set by SAG rules, and fail to consult attorneys who fully understand the minutia of those rules because you opt to save money. No matter what your actor contracts state, if the applicable SAG agreement scale amount is more, you will be obligated to pay more. Some provisions of the low-budget deals are only in effect if the actor specifically waives his or her rights in the written contract. For example, SAG permits low-budget projects to waive consecutive employment rules (i.e. the need to pay actors for non-shooting days occurring in between their shooting days); however, this provision can only be utilized if the actor’s contract references the waiver and the actor agrees to it.

**SOLUTION:** Make sure that you know in advance the rules, including

the fine print, related to payments owed to the actors. Understand what’s mandatory, what’s permissive and what must be affirmatively elected via contract. Remember: No matter how much the actor loves your project, neither you nor the actor can contract around the SAG minimum requirements unless a specific SAG provision permits such a waiver.

### **MISTAKE # 4: FAILING TO UNDERSTAND THE MEANING AND EFFECT OF BONUSES AND/OR PROFIT PARTICIPATION.**

**PROBLEM:** You agree to box office bonuses or to provide “three points” from the back end in order for the actor to “participate in the success of the film” when the actor is getting paid low-budget scale. But too often no one is quite on the same page as to what the hell those phrases really mean or the actual effect they will have on the production.

Box office bonuses were never originally structured for use for independent films where a distributor is not firmly on board prior to agreeing to give the actor this bonus. Box office bonuses were designed as a way to avoid the creative accounting of distributors. But if you are subject to those creative accounting techniques yourself, then your commitment to give box office bonuses based solely on what *Variety* reports in regard to tickets sold will place you in a deep hole and indebted to an actor even though you may never see a dime from the distributor.

As for profit participation, on a traditional indie film actors participate solely from the “Producer’s Share” of the profits and not the overall profits of the production company itself, which is typically divided as 50 percent for the investor’s share and 50 percent for the producer’s share.

Agents are notorious for trying to argue that the actor’s percentage comes from the overall production



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company's profits, and not the producer's share. This doubles the amount that should rightfully be owed actors and invades the investor's share, which your investor's financing agreement probably prohibits you from invading. You will then need to pay twice as much from your own portion of the profits to the actor or you will need to beg your financier to renegotiate his or her own terms in order to keep the actor.

**SOLUTION:** Focus on real participation from the producer's share of profits and have final, clear profit participation language defined at the time of the offer. Explain that box office bonuses are tied to a distributor's success, not the production company's success. Box office bonuses should be avoided at all costs and, if made, should be subject to a distributor assuming the obligation.

**MISTAKE #5: FAILING TO UNDERSTAND "MFN" AND THE PERILS OF DEVIATING FROM IT.**

**PROBLEM:** Producers often don't understand how to best utilize most favored nations (MFN) terms and their implications (i.e. a term which promises no one will get a more favorable deal term than that given to this particular actor). For example, you decide that all of the actors will be MFN across the board for everything. All of the actor's deals are signed except for one, who demands box office bonuses. Since this "marquee name" will be great for the film, the producer agrees to the terms, not realizing that it triggers the MFN provisions of all of the already-signed agreements. Alternatively, you try to negotiate the assorted talent deals without invoking MFN terms for all of the lead actors and the terms end up varying widely among the final agreements, costing the production more than anticipated.

**SOLUTION:** Have a strategy for utilizing MFN: Decide which terms will be MFN from the very start, keep track of what deviations are made and provide yourself an escape clause for different levels of actors, such as lead roles or cameos.

**MISTAKE #6: FAILING TO HAVE A SECOND CHOICE FOR THE ROLE.**

**PROBLEM:** The actor insists you give more than you can actually afford in order to secure her because you made some or all of the above mistakes, and you now have no other choice but to agree with her terms because filming starts tomorrow.

**SOLUTION:** Falling in "casting love" with an actor is easy. But love is rarely associated with objective reasoning. Always have a second available choice for each role, and be willing to walk away from your first choice if it is going to be financially detrimental to the film. **MM**

David Albert Pierce is managing member of Pierce Law Group LLP, a boutique entertainment law firm providing production legal services for marquee entertainment production companies, as well as first-time moviemakers and numerous production companies.



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