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BY DAVID H. SPRATT
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Debunking the Efficacy of Standard Contract Boilerplate – Part V

My son made the JV baseball team this year as a starting pitcher. He was elated. Countless hours of conditioning, practice, and Little League and travel team games had finally paid off. Unfortunately, the elation was short-lived. The day after he made the team, he tore his meniscus. At first, given the pain he experienced when he moved his knee, we thought his season had ended before it began. After meeting with his doctor and coaches, however, we realized that with some adaptations to the way he typically pitched, he could play out the season before having surgery. And play he did! He was the first starter on his team to pitch a winning game.

I am clearly a proud papa. But that's beside the point! My son's willingness to "change up" the way he pitched for the season to combat his injury (pun intended, baseball fans!) is applicable to legal writing. Do not be wedded to your contract boilerplate simply because it has always worked well in the past. Do not assume that change cannot lead to victory. Sometimes, adapting to changing circumstances by employing contemporary legal writing best practices makes a good thing even better.

In the past four installments of this column, I have dissected standard contract boilerplate to remove extraneous or redundant words and phrases and eliminate legalese. Lucky for you, I have even more to say about the subject and how to make your writing clearer, more concise, and to chalk up a "win" for your clients.

Below is a standard provision seen in many contracts

INCORPORATION INTO COURT ORDER AND/OR DECREE

The parties agree that this Agreement shall be submitted to the Circuit Court of _____ County and it shall be ratified, approved, and shall be incorporated, but not merged, into and made a part of a court order of that action. The parties each agree not to oppose such incorporation, and they agree that subsequently, said Agreement shall be enforceable as part of said order or independently as a contract between the parties.

In previous installments, I advised that the phrase "the parties agree that" should be eliminated from contract drafting because every paragraph in a contract represents an agreement between the parties. And, I hope, I have *said* enough already about the archaic and stuffy use of the word "said" as a synonym for "the."

But this provision has more problems. First, the word "it" is almost always subject to ambiguous interpretation and should be avoided in legal writing whenever possible. Instead, be specific with what "it" means, so your reader can figure out what the provision requires. Second, an increasing number of legal writers now eschew the word "shall"; this group includes the judges on the Supreme Court of Virginia, who in November 2020 amended the Rules of Court to eliminate the word "shall" from almost every rule. What *shall* I do instead? I *will* tell you. To state a mandatory provision, use "will" or "must." To state a permissive or optional provision, "may" is most appropriate.

Implementing these suggestions and a few other minor changes, the provision now reads as follows:

This Agreement will be submitted to the Circuit Court of _____ County to be ratified, approved, and incorporated, but not merged, into and made a part of a court order. Neither party will oppose such incorporation, and subsequently, this Agreement will be enforceable as part of the order or independently as a contract between the parties.

Here is another standard boilerplate provision:

PRIOR AGREEMENTS INVALID

In consideration of the covenants and agreements contained herein, the parties do hereby cancel, nullify, and invalidate any and all prior agreements as to the subject matter covered in said Agreement, and the parties acknowledge that this Agreement contains their entire understanding of the subject herein.

Admittedly, this provision is not particularly hard to understand. Nevertheless, the provision is chock full of redundancy and legalese. First, the introductory consideration clause is not necessary because each provision does not need to recite consideration. Consideration is present when both parties have rights and obligations under the Agreement. Second, is there a legally significant difference between the words “cancel,” “nullify,” and “invalidate”? Yes and no. Technically, in contract lingo, “cancel” means to cross out something with lines, and “nullify” means to make legally invalid, i.e., to invalidate. So, at a minimum, we can use “nullify” or “invalidate,” not both terms. Third, if “any” prior agreements are invalidated by this Agreement, aren’t “all” prior agreements invalidated by this Agreement? Strike out one of these two words because they have identical meanings. Finally, for utmost clarity and to cover all your bases (this will be the last baseball pun, I promise), be specific with “the subject herein,” e.g., “of custody, timesharing, and other issues pertaining to the minor children.”

Accordingly, stripped free of extraneous words, the provision now reads as follows:

The parties cancel and nullify all prior agreements concerning the subject matter covered in this Agreement. This Agreement contains the parties’ entire understanding of custody, timesharing, and other issues pertaining to the minor children.

And finally, here is another boilerplate favorite:

CAPTIONS

The captions are inserted only for convenience of reference and in no way define, limit, or describe the scope or intent of this Agreement or of any particular paragraph or section thereof, nor the proper construction thereof.

Now, I have no problem with the language itself. In any interpretation issue, contracting parties want the court to read the text of the provisions and not simply rely on a caption (or paragraph heading) to discern meaning or determine each party’s rights and responsibilities. Remember, however, that the contracting parties must understand the contracts they sign to be able to abide by their terms. The parties must also be able to easily find a particular provision in the contract. Accordingly, draft the captions to be reflective of the subject matter that follows. For example, if the provision talks about real property, then the caption should be “Real Property.” Think of the captions as an index or table of contents that acts as a signpost of the terms that follow. For the same reason, do not talk about personal property or anything other than real property issues under the “Real Property” caption.

After five installments, we can end our discussion of contract boilerplate. We have slashed the outdated language and emerged as a clear and contemporary legal writer. Be willing to adapt what has worked well in the past because change is the foundation of human ingenuity. ■

Please send any comments or other adaptations of contract boilerplate that you find helpful to dspratt@wcl.american.edu.

Who knows, maybe a future column can be based on reader submissions?

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