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Debunking the Efficacy of Standard Contract Boilerplate: Part 1

During the past few months, we were all stuck at home. Instead of wrestling with our inner thoughts, fears, and demons, many turned to home improvement projects (aka obsessive cleaning rituals). Seeking to fill time normally occupied by dining out, shopping, or socializing in person with friends, we searched for ways to declutter and improve our surroundings and make a physical fresh start.

At my house, we started by organizing drawers, moved to cleaning out the garage, dabbled with digitizing old photos, and finally settled on cleaning out the attic. For my family, cleaning out the attic is truly a monumental task. The attic is huge. Filled with pretty much everything one could possibly need (or at one time think she needed), my attic could double for an Amazon warehouse of misfit toys and other objects. Each week, we make progress, laugh at items we forgot we had, and reminiscence about stories and memories we hadn't thought of in years.

Which brings me to the point of this column: I would guess that many lawyers in Virginia and elsewhere need to declutter their documents. Most lawyers, I imagine, haven't

revisited their contract boilerplate provisions in some time. After all, the boilerplate has been used for years, even decades, to great success, right? Perhaps, but one can always improve on what has worked well in the past using tools of the trade and conventions that might not have existed before. After all, as best articulated by British economist John Maynard Keynes: "The difficulty lies not so much in developing new ideas, as in escaping old ones."

In the next few columns, I will walk through some typical contract boilerplate and encourage — ahem, implore — you to review the contract boilerplate used in your office. Here is another way to declutter, develop new ideas and eschew those that are outdated, and move forward with more effective and tailored boilerplate language. Now, I am not saying revisiting old boilerplate will bring back a flood of old memories, but being more contemporary and easier to understand might bring in a flood of more satisfied clients.

DOCUMENT TITLE

Make sure to change the document title to reflect the main topics covered by the contract. Simply stating "Agreement"

as the document title could lead to confusion or require extra investigation to determine the document's scope, particularly in cases where a client has executed numerous contracts. Being specific, for example, by calling the document "CUSTODY AND CHILD SUPPORT SETTLEMENT AGREEMENT," immediately tells the reader what subjects the contract addresses.

INTRODUCTION

Many contracts start with an introductory paragraph like this one:

THIS AGREEMENT is made and entered into said 5th day of June, 2020, by and between JOHN JONES (hereinafter referred to as "Jones") and MARY SMITH (hereafter referred to as "Smith"), hereinafter referred to together as "the parties."

Where do I find my red pen? There are so many problems with this introduction, I might run out of ink.

First, the phrase "made and entered into" is redundant. Perhaps in the old days, a lawyer wearing a white wig, using a quill pen, and hunching over a Dickensian desk, might have found legal significance in these words. The phrase "made" *might* have referred to entering into a bargain, i.e., a meeting of the minds or simply to the act of drafting; the phrase "entered into" might have referenced an act of voluntariness. Conversely, even back then, these words might have carried no independent meaning. But today, the words mean the same thing, and by choosing just one, you can eliminate the archaic and repetitive legalese.

Even more alarming and outdated is the phrase "said 5th day of June, 2020." First, never use "said" as a synonym for "the"; only use "said" as a synonym for "stated." It does not read or sound like a badge of upper-class society, and we are not living at Downton Abbey. If you were conducting a deposition at opposing counsel's office and needed to use the restroom, would you say, "Where is said restroom?" Of course not! Use plain language. Enough said. (And just write out the date like we all learned in elementary school: June 5, 2020).

Next, we move to "by and between." Is there any difference between these two words? Not that I can think of. Eliminate redundant phrases to make the sentence more readable and concise.

Finally, banish the old stalwart "hereinafter referred to as." When I was in law school, legal writers were taught to use this language, and it still appears in far too many documents.

Why? Because it has always been so. Is this reason enough to keep churning out dusty, clunky contracts? No Siree Bob!

Fortunately, times seem to be changing — slowly. Several years after I started practicing, the phrase "hereinafter referred to as" was shortened to "hereinafter," e.g., "(hereinafter 'JONES')." More recently, the correct way to designate a shortened reference was simply this: ("JONES"). Most recently, legal writing scholars recommend eliminating the shortened reference entirely unless doing so would otherwise cause reader confusion. So, in the example, if there was only one JONES and only one SMITH, using those shortened references would not require any explanation.

Accordingly, applying all of these revisions, your new-and-improved introduction would now read more concisely as follows:

THIS AGREEMENT is entered into on June 5, 2020, between JOHN JONES and MARY SMITH, together "the parties."

WITNESSETH

Take a look at a contract or two in your files. I hazard to guess that in many of these contracts, the heading after the introduction is a centered word: "WITNESSETH."

This "word" — and I use that term loosely — is one that was made up more than 500 years ago. It is part of contract lore, and, for some unknown reason, many legal drafters are afraid to remove it. Why? If you ask these drafters, I would love to hear their answers. *It has always been there.* Perhaps, but so what? *It is in all the forms we have in our files.* Again perhaps, but doesn't good lawyering demand creativity and adaptability to current times? *It needs to be there to ensure the legal significance and import of the document.* No, it doesn't. The word, in fact, has no legal impact whatsoever and can be freely eliminated. To bring the document into the current century, if you must retain the heading, use the more descriptive "RECITALS" instead.

Sadly, I am at the end of my column and haven't touched upon the recitals or actual boilerplate. More next time! ■

COMES NOW, your loyal columnist, and says unto you, comments of any and all parties, as long as the same are well-edited (unlike said sentence), are welcome at dspratt@wcl.american.edu.