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David Spratt

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BY DAVID H. SPRATT
PROFESSOR, AMERICAN UNIVERSITY

Debunking the Efficacy of Standard Contract Boilerplate – Part III

In November, what was meant to be a simple toilet repair revealed asbestos in my bathroom and utility room. To remove the asbestos, the floors in both rooms had to be demolished. Although it would have been quicker, cheaper, and less emotionally taxing to simply replace the flooring and toilet, we decided to fully remodel. Both rooms had served their purposes, but after all these years, it was time to update. The result was worth the effort, as both rooms are more contemporary and enhance the home's aesthetic and resale value.

Today, we continue our journey into updating contract boilerplate. Although my experience is grounded in family law, similar paragraphs are found in all contracts, and the legal writing principles I address apply to all disciplines. Although your contract boilerplate might have served its purpose well for decades, like my bathroom and utility room, do not shy away from updating the language. Doing so will

bring you into the 2020s, be easier for your clients to understand and perform, and improve your marketability and aesthetic as a lawyer. In most family law agreements, parties must keep one another apprised of where they live and how they can be contacted. Below is a standard provision used by many family lawyers:

KNOWLEDGE OF RESIDENCE

For so long as the minor children are less than eighteen years of age and/or either Party still has obligations hereunder, each shall keep the other informed of his or her address of residence and business and home telephone number.

There are several things wrong with this paragraph. First, the heading "Knowledge of Residence" is underinclusive, as the paragraph concerns more than where each party lives. A more inclusive and effective heading would be "Knowledge of Contact Information." Second, the introductory phrase is ambiguous, as one could read "for so long as the minor children are less than eighteen years of age" as requiring the parties to exchange information only until one of the parties' children turns 18. Moreover, "eighteen years of age" is archaic and clunky legalese. Keep it simple, solicitors: "eighteen" or "age eighteen" would suffice. Applying these revisions, the introductory phrase now reads "Until the parties' youngest child turns eighteen."

'Any' and 'all' mean the same thing;
eliminate the redundancy.

An even more egregious example of outdated asbestos language (catchy, right?) is “address of residence.” Who says that? Perhaps a bewigged barrister in the 1700s, but no one in 2021 should use such language. If you are putting a friend’s contact information into your smartphone, do you say, “Now, give me your address of residence”? Of course not. You would instead say “home address.” Finally, just because this provision served its purpose for years (like my bathroom and utility room) does not mean that it should not be updated. Require the parties to also exchange cell phone numbers and email addresses.

Another standard contract provision follows:

ENFORCEMENT

The parties agree that if one party incurs any reasonable expenses in the successful enforcement of any of the provisions of this Agreement, the other party will be responsible for and pay forthwith any and all reasonable expenses, including attorney’s fees, thereby incurred; provided, however, that in the event compliance occurred on the eve of, or on the date of, a hearing scheduled to compel such compliance, then all fees and costs reasonably incurred by the party seeking compliance shall be borne and paid by the other party forthwith. Any such costs incurred by a party in the successful defense of any such enforcement action shall be reimbursed by the party seeking to enforce compliance.

This paragraph effectively motivates both parties to fully perform their duties under the contract because it requires the prevailing party in an enforcement hearing to pay the other party’s attorney’s fees.

But it uses far too many words to make its point, and a layperson may not see the benefit of complete performance because she cannot understand what the paragraph means. Contract language should be accessible to its parties; if they cannot figure out what the provision says, then it is extremely difficult for them to know what they are supposed to do and when they are supposed to do it.

First, the phrase “[t]he parties agree that” can be deleted from this and all other provisions in a contract. Every provision represents the parties’ agreement – that is the whole point of entering into a contract: reciprocal promises. Including this kind of throat-clearing phrase in each provision is superfluous and distracts the reader. Second, the phrase “the other party will be responsible for and pay forthwith any and all reasonable expenses” can be much more concise. “Any” and “all” mean the same thing; eliminate the redundancy and pick one word. Also, writing “promptly pay all reasonable expenses” would be much clearer to the parties.

Next, tighten up the writing whenever possible to eliminate excess words without sacrificing substance. “[I]n the event” can be replaced by “if.” “[O]n the eve of, or on the date of” can be replaced by “the night before or the day of.”

There you have it. Even though boilerplate is tried and true, it does not mean that each provision is perfect and cannot be improved. Just like renovations take forever, so does updating outdated contracts. See you next time for more language remodels. ■

This columnist agrees that you are welcome and may endeavor to send any and all asbestos-free comments to dspratt@wcl.american.edu.

David H. Spratt

is a professor of legal rhetoric at The American University, Washington College of Law, where he teaches legal writing, contracts, and family law litigation and practice. In 2001, he was a founding partner of Schwartz & Spratt, PLC, a family law firm in Fairfax, Virginia. Previously, he worked as an associate at the Law Office of Betty A. Thompson, Ltd., and at The Lewis Law Firm. Professor Spratt joined the VBA in 1995 and is a member of the Domestic Relations Section. He also serves as the civil reporter of decisions for the Court of Appeals of Virginia.