



Nit-picking or Significant Contract Choices?—Part I

by **K.K. DuVivier**

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Request for feedback by March 11, 2002: We hope that this column generates discussion about whether proposals of alternative language in a contract are necessary, advisable, or just nit-picking. If you have experience and opinions on this topic share them with us by March 11, 2002, so they may be addressed in the next Scrivener column. Please e-mail kkduvivier@law.du.edu or write to K.K. DuVivier, University of Denver College of Law, 1900 Olive St., Denver, CO 80220.

Stanton D. Rosenbaum, of Isaacson, Rosenbaum, Woods & Levy, P.C., recently wrote to tell me about one of his clients, a landlord, who truncated negotiations with a potential tenant because of what he characterized as “inconsequential revisions” or “nit-picking” of his proposed lease. “If this was the type of attorney his tenant chose, he wondered what the tenant would be like to deal with in the future. Accordingly, he found a new tenant. I wonder sometimes whether some lawyers feel they are paid to break deals rather than make deals,” wrote Rosenbaum.

Because I practiced primarily as a transactional lawyer for the eight years before I started teaching, I can sympathize with both sides of this dilemma. In practice, I ran across two alternative approaches to leases or contracts: the short “gentlemen’s agreement”¹ and the comprehensive agreement.

The Gentlemen’s Agreement

Some of the executives my firms represented made gentlemen’s agreements. These contracts relied more on the trust that came from a handshake between the parties than on anything written on a piece of paper. Consequently, these executives asked their attorneys to draft short, sometimes one-page, leases or contracts to memorialize the parties’ handshake agreement. They felt any attempt to get into details at this point was a waste of time and attorney fees.

In his letter, Rosenbaum quotes a good faith rule that forms the basis for such gentlemen’s agreements: “Every contract imposes on each party a duty of good faith and fair dealing in its performance and execution.”² Thus, these short agreements are based on two assumptions: (1) the parties agree about what constitutes good faith in negotiating and (2) the parties agree about what constitutes good faith in performing.

First, there seem to be diverging views about what constitutes good faith in negotiating. Some attorneys I have encountered feel their role is to draft balanced contracts or leases that do not give either party a significant advantage. Other attorneys, however, believe it is their duty under the Colorado Rules of Professional Conduct to act as “zealous advocates”³ for their clients, not only in litigation, but also when drafting contracts or leases. These advocates propose language that favors their clients, even if it is at the expense of the other parties to the contract. In their opinion, other business parties hire attorneys, and it is the responsibility of those attorneys to advocate for their clients. If each side’s attorneys are doing their jobs, the result is a fair deal. Apparently, Rosenbaum’s client interpreted efforts to change wording in his proposed lease as an indication

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through the *Scrivener* column. Send your questions to: kkduvivier@law.du.edu or call her at (303) 871-6281.



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of this more aggressive way of negotiating and decided he was not comfortable with such a business relationship.

The second difficulty with a gentlemen's agreement is the assumption that both contracting parties agree about what is good faith in performance. As we enter contracts in more international settings, we may be dealing with business partners from different cultures. Normative assumptions about what is expected or fair may not be shared universally from culture to culture. Furthermore, lawsuits over contract terms attest to the fact that even parties from the same country, and presumably from the same culture, have disagreed when attempting to exercise good faith in performance.

The Comprehensive Agreement

Many of my law firms' clients requested comprehensive leases and contracts. These clients preferred to haggle over any problems they could anticipate while the parties were still in the handshaking stage of the deal. By explicitly addressing in detail each term in the agreement, they hoped to avoid litigation later when something in the agreement went awry, and the parties were doing more fist-shaking than handshaking.

If you encounter attorneys who are attempting to take this cautious approach, do not be offended or assume their stance is aggressive. These attorneys or their clients may have had some experiences that have taught them to be more explicit. Perhaps they suffered through litigation over indefinite clauses in prior leases. The rise in attorney malpractice suits also might be motivating greater caution. As long as any additional attor-

ney fees are reasonable, the client and the attorney both benefit if the parties avoid misunderstandings down the line.

Specificity Versus Nit-picking

Mr. Rosenbaum quotes one of his mentors, Louis Isaacson, as saying, "If an attorney drafts something and gets you to where you want to go, even though you may write it differently, leave it alone. No nit-picking!" This is excellent advice, but the difficulty lies in determining whether the original lease "gets you to where you want to go." Litigation has shown us that the addition or deletion of one word, or even one comma, can sometimes have a significant impact.

The problem for the transactional lawyer is in deciphering why or how certain words should be changed. If you know of helpful references for choosing specific lease language, please let me know so that I can share these with other readers. At the firms where I practiced, we generally created our own resources. Some of my assignments involved researching specific language for contracts or leases the firm was drafting. Other times, to help in developing contract or lease forms, I was asked to create notebooks with cases that interpreted various clauses.

The process of developing a lease or contract with language that minimizes unanticipated interpretations is difficult and time-consuming. In addition, not every possible phrasing or issue has been addressed by a court, much less a court in the controlling jurisdiction. If other attorneys propose language that is unfamiliar or appears ambiguous, the dilemma is deciding when is it worth asking the other side to make a change and when such a change might be a waste of everyone's time. The focus of the next *Scrivener* column will be on determining when a word change is a significant contract choice and when it is just nit-picking. To spark the discussion, here are a few of the changes requested by the tenant's lawyer that Rosenbaum thought were nit-picking:

—**Lease:** "At all times during the continuance of this Lease, Landlord shall . . ."

Change: Delete the word "continuance" and substitute the word "term."

—**Lease:** "Landlord shall make all structural repairs. . ."

Change: "Landlord shall make all structural repairs at Landlord's own and sole expense."

—**Lease:** "Tenant agrees to pay, as additional rental, 10% of the gross expense of lighting."

Change: Insert the word "reasonable" before the word "expense."

If you have experience or an opinion about these examples, or similar word changes, please share your ideas with me. In the next column, we will try to sort out when such changes are worth raising, and when they are just nit-picking.

NOTES

1. A true gentlemen's agreement is not legally binding, but "is binding as a matter of personal honor." See *Random House Dictionary of the English Language: The Unabridged Edition* (New York, NY: Random House, 1971) at 591.

2. Senn, *Commercial Real Estate Leases*, 3rd ed. (Gathersburg, MD: Aspen Law & Business, 2000) at § 1.06.

3. Colo. Rules of Prof. Conduct, *Preamble: A Lawyer's Responsibilities*, CRS Vol. 12 (2001).

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