



Nit-picking or Significant Contract Choices?—Part II

by K.K. DuVivier

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The March 2002 *Scrivener*¹ asked readers for feedback about how to distinguish nit-picking from requests for significant word changes in an agreement. The majority of respondents believed that the examples provided in the March article raised legitimate concerns.² The July 2002 *Scrivener* will address those specific revisions quoted in the March article. This June article focuses on readers' general comments about crafting agreements to avoid nit-picking.

Readers' Comments

Daniel Hazen, of Sage & Vargo, P.C., in Lakewood, wrote to say that the agreements he writes are mostly tort-related settlement stipulations or releases. He tries to cover the global issues, and his suspicions are raised if he sees an attorney attempting to insert details or non-typical language. He notes:

Your article reminded me of an agreement drafted by another attorney a couple of years ago in which he inserted a clause proclaiming something to the effect "the usual rule that the document shall be construed against the drafting party shall not apply to this agreement." I refused to agree to that clause on the general principle he must have had a sinister purpose in mind. It also caused me to scrutinize the rest of the agreement with extra care.

Chuck Sensiba, of Van Ness Feldman, P.C., in Washington, D.C., wrote to give his feedback about the March column. Although he agreed that the proposed agreement revisions quoted in that column raised legitimate concerns, he also noted:

My biggest complaint on this issue of editorial vs. substantive changes to an agreement is when clients and attorneys focus on (relatively) insignificant portions of an agreement, such as the "whereas" clauses, recitations, or other *pro forma* sections that really have no bearing on the rights and duties of the parties. In my practice before the Federal Energy Reg-

ulatory Commission, I have worked on several lengthy and complex settlements, and I am amazed at the time parties devote to word-smithing these portions of settlement agreements.

George Reeves, of Denver, has written a book about drafting mining leases and related documents.³ He also agreed that the proposed changes quoted in the March column were legitimate, and not simply "nits." Yet, he stated:

On the other hand, it is tiresome to negotiate an agreement in which the attorneys seek every minuscule "advantage" for their clients, whether the "advantage" is actually advantageous or not. For example, where notice periods are customarily 30 days, I have seen situations where landlord's counsel seeks 45 days for all notices to landlord, but 10 days for all notices to tenant, all without regard for any concern as to whether the extended notice period is necessary, or the shortened notice period is adequate, but merely to score points.

Gene Thornton, of Colorado Springs, who calls himself a business *litigation* attorney (his emphasis), wrote to say that his experience as a litigator has changed his perspective whenever he has an opportunity to work at the negotiating end of a contract.

I really know about the costs of litigation and how nasty people are when they end a contractual relationship. So forgive me, I look out for my client in the "hugs and handshakes" phase. I hate spending one or two times the annual salary of the employee to litigate the meaning of a comma in the employee's contract.

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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Hints for Negotiating Contracts

As a final note, I am sharing with you some suggestions from George Reeves about how to negotiate an agreement:

1. All of the objections, changes, suggestions, and "nits" should be identified on the first review of the draft lease. Matters passed over on the first review, no matter how important, will be seen as nits when raised only on subsequent reviews.

2. If both parties are interested in producing a craftsman-like document, it can be done relatively expeditiously. On the other hand, if one party is concerned merely with (a) getting the document done and signed (the "swoosh syndrome"); (b) maintaining the original language of the draft at all costs; or (c) extracting every imagined advantage, whether real or not, from the negotiations, the end product will necessarily reflect that attitude.

3. At the end of the day, of course, in deciding whether to enter into a lease, a party must decide whether a particular item is a nit or a significant contract provision, or more to the point, must decide whether to take the risk that a court will look at the item as one or the other.

4. All too often, the negotiator who claims "nit-picking" during the negotiations is the one who will play "gotcha!" further down the road.

Conclusion

Contract negotiation is an art, and sometimes how you present a proposed revision has more of an impact on whether you will be charged with nit-picking than the words you choose to debate. Tune in to the next column for a discussion of specific contract terms.

NOTES

1. See DuVivier, "Nit-picking or Significant Contract Choices?—Part I," 31 *The Colorado Lawyer* 43 (March 2002).

2. Here are the examples quoted in the March column that will be discussed in depth in the July *Scrivener*:

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

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

For further feedback on a couple of these examples, see "From Our Readers" in this issue of *The Colorado Lawyer* at page 57.

3. See Reeves, *Mining Lease Handbook* (Boulder: Rocky Mountain Mineral Law Foundation, 1992). ■

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University of Colorado Center of the American West Seeks Assistance With Colorado Legal History Project

The Center of the American West at the University of Colorado, Boulder ("CU"), in collaboration with the Department of History, CU School of Law, and the Faculty of Federal Advocates, is engaged in the "Colorado Legal History Project" ("Project"), an effort to identify and catalog existing historical resources related to the history of law and jurisprudence in the state of Colorado. At the nexus of the mountains, plains, and desert regions of the American West, Colorado continues to play a significant role in shaping and defining the larger legal trends in the region. Accordingly, the Project collaborators are undertaking a broad exploration of the legal history of Colorado that will enable lawyers and judges to practice better law, while helping legal scholars understand more fully the past development and future course of law and jurisprudence in the American West.

The Project collaborators are seeking the aid of Colorado Bar Association members in identifying resources and uncovering evidence and stories related to Colorado's legal past. For information on how to contribute or about the Project itself, please contact Tom Romero II, Western Legal Studies Fellow, Center of the American West, by phone: (303) 492-5131 or e-mail: ttromero@colorado.edu.