

NEW JERSEY LAWYER

Magazine

LAWYER'S BOOKSHELF

Negotiating and Drafting Contract Boilerplate

Tina L. Stark
ALM Publishing, 2003

I didn't know what to expect when I received *Negotiating and Drafting Contract Boilerplate*, which was recently published by ALM Publishing. Although a significant part of my practice involves negotiating and drafting contracts, my first thought (concern would be more accurate) was that I would be bored to tears reading about boilerplate provisions (it's not exactly a sexy topic). To my surprise, the book presents the subject in an interesting manner and proved to be enlightening. It will certainly change (I hope) the way I negotiate and draft contracts.

Tina L. Stark planned and wrote several chapters of the book. She also served as its editor-in-chief. Twenty-two other authors contributed to the book, and two of them also assisted in the editing.

Stark has fine credentials. She is a graduate of New York University School of Law and clerked for a judge on the New York State Court of Appeals. She is a former banker, as well as a former partner in the law firm of Chadbourne & Parke, LLP. She is now an adjunct professor of law at Fordham University School of Law and runs her own consulting firm that develops and conducts continuing legal education seminars.

In the book, Stark notes that the boilerplate provisions in a contract frequently are negotiated and drafted last, if at all. One reason for this is that many attorneys do not believe, understand or appreciate that boilerplate provisions require review and revision in order to protect a client's rights and interests, regardless of whose form of contract is being used in the transaction. In other words, neglecting boilerplate provisions can translate into damage to clients and, possibly, malpractice liability for attorneys. As a result, Stark urges attorneys not to lose focus on the boilerplate provisions.

Stark uses a common boilerplate provision on governing law to make her point:

The laws of the State of [New Jersey], without regard to its choice of law provisions, govern all matters with respect to this Agreement.

Stark asks whether this provision governs tort claims such as fraudulent inducement. Would the use of, or the failure to revise, this provision harm the client in the event that it was fraudulently induced to enter into the contract? As a result, does the use of, or the failure to revise, this provision constitute malpractice?

Stark suggests that the client can be protected through a minor revision to the boilerplate provision:

The laws of the State of [New Jersey], without regard to its choice of law provisions, govern all matters with respect to this Agreement, *including tort claims*.

Is the foregoing revision too obvious? Then how about:

The laws of the State of [New Jersey], without regard to its choice of law provisions, govern all matters *arising under or relating to* this Agreement.

The book covers the boilerplate provisions typically found in a standard contract: assignment and delegation, successors and assigns, third party beneficiaries, governing law and forum selection, waiver of jury trial, arbitration, cumulative remedies and election of remedies, indemnities, *force majeure*, transaction costs, confidentiality, announcements, notices, amendment and waiver, severability, merger, counterparts, number and gender, captions and further assurances.

Each chapter begins with an analysis of the law relevant to the contractual provision that is the focus of the chapter. The analysis is illustrated by contrasting well-drafted provisions against flawed provisions. The recommended boilerplate provisions are annotated with notes explaining the purpose of selected phrases. This includes possible alternatives as well as how the phrase reflects different business and negotiating postures of the parties and how the phrase minimizes or increases the risk for each party.

Some common themes run through the book. First, the use of present tense is better than the use of past tense. Stark used the following example: “The laws of the State of [New Jersey] *will* govern this Agreement.” Stark points out that, as written, the provision provides that New Jersey law will govern at some point in the *future*. It should provide that New Jersey law will govern *at all times*. A minor point, perhaps, but one that can be simply corrected by using the present tense: “The laws of the State of [New Jersey] govern this Agreement.” By using the present tense, there is no question that New Jersey law will apply at all times.

Second, the language will be easier to understand if false imperatives are eliminated from the contract. As Stark points out, an imperative is used when a party promises to do or not to do something, and it is usually signaled by the use of the word *shall*. With a false imperative, some inanimate object rather than a party is obligated to do or not to do something. Stark provides the following example of a false imperative that we have all used in our agreements: “This Agreement shall inure to, and be binding upon, the parties and their respective successors and assigns.” As written, the *agreement*—and inanimate object—is required to do something. Stark notes that a better

worded provision would eliminate the false imperative: “This Agreement inures to the benefit of, and is binding upon, the parties and their respective successors and assigns.”

Third, the use of the active rather than the passive voice makes sentences shorter and easier to read. Stark compares the passive voice (“The interest shall be paid by the Borrower to the Lender.”) to the active voice (“The Borrower shall pay the interest to the Lender.”). It should be obvious that the active voice is much easier to read and understand, especially in a lengthy contract.

Finally, Stark encourages the use of formatting to provide clarity in contracts. In other words, use subsections, indentations and white space to clarify contract provisions rather than using blocks of paragraphs.

Stark should be congratulated for putting together a fine book, and for presenting the topic in a concise and readable format. As word spreads, I am confident that *Negotiating and Drafting Contract Boilerplate* will find its way into law firm libraries and onto the desks of transactional attorneys negotiating and drafting contracts.

Reviewed by Gianfranco A. Pietrafesa