

Virginia

Regulatory Hot Tip 2011 –2

Professional Insurance Agents Association of Virginia and DC, Inc. Recycling Old Legal Documents

Several times during the last couple of months, clients have asked me to review and comment upon legal documents recycled by them from earlier documents. These earlier documents were either in their file, or were provided by a business acquaintance, friend or relative. Oftentimes the original author is unknown, whether an attorney, a forms book, or a cut-and-paste job from an earlier document. In each case, the document that I was asked to review, discuss, or just answer a question about, had been basically *edited* or *created* by the client.

We all know how it is done. One merely takes a WORD document and changes the names of the parties and date on the document from some earlier transaction. In each case I was asked to review, the client confessed to me that he had not read the document before signing, and admitted that the executed document was simply filed away until the current problem arose. I was being asked to become involved and reflect upon the instrument only after something *bad* happened and long after the

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document and whatever it reduced to writing was put into effect. Many times there were fragmented or incomplete sentences in these executed agreements.

I want to emphasize that in this *Hot Tip*, I am not talking about using standardized forms where one merely fills in the blanks. Some of these standardized forms can be found in office supply stores. We authored a *Regulatory Hot Tip* on the perils and pitfalls of using of standard forms some time ago. The situation I am addressing now is different from those. In the situations I'm addressing today, one is implicitly taking *false* comfort in the fact that some author several versions ago was an attorney, maybe licensed in the state that the document is being prepared for or interpreted in, or maybe not, and that the document adequately reflects your current deal. The exact genesis of the original document remains a mystery, as does the consequences if or when *something bad* happens.

As noted above, technology makes this sort of thing relatively easy. You and someone else have verbally: (i) reached an agreement on deal terms, (ii) formed a new entity, (iii) negotiated an employment agreement, or (iv) come to terms on some other legally binding transaction. You use another document prepared for what you believe to be a *similar* situation that was housed on your word processor or in your hard copy files. You look it over briefly. It must be okay because it's multiple pages long, contains numerous boilerplate paragraphs and has a title that sounds similar to what you are currently negotiating. Keeping legal costs down is important, and getting the transaction consummated *now* has a real value to you. You sign.

From my perspective, the real problem is not using a recycled document as

a platform to develop the new binding agreement. Secret Confession: Lawyers sometimes rely upon other documents from their experience as a basis to draft something new and different for the next client. The problem is that, over time, the foundation for such documents can change, the law can change, the integrity of a document can be compromised by the computer, or the original document was drafted under the laws of another state. Most importantly, the original document has probably undergone many revisions over time and some of the changes may not be positive ones.

For example, unequal bargaining strengths between the negotiating parties can cause documents to be revised and those revisions should not be perpetuated unknowingly in other deals. In buy-sell situations some agreements are purposely drafted to protect the interests of the Buyer more so than the Seller. If you chose to use such an agreement and you are the Seller, do you know how to redraft it to ensure that your interests are protected.

Likewise, Client #1 wants paragraph 7 to read differently. Client #2 wants to eliminate paragraph 6 and is unhappy with the way the indemnification provision reads. By the time we get to Client #3, can you really be sure what the document says or whether it contains the vital provisions you once had in place? And that scenario assumes that **your attorney** drafted the original document being relied upon, and that originally, at least, it protected your interests. If the document began life for another person with a completely different purpose, the possibilities for mishap expand greatly.

Without adequate review and knowledge of the current transaction, how are you to be sure that the document you are signing is EXACTLY like the last one, or even if it should be? Or whether it even does what you want? In at least one of the transactions I

was ask for advice on, the controlling Virginia law had changed since the older agreement had been drafted, and important provisions no longer made sense or, indeed, some of those provisions are now considered to be unlawful. But, from a strictly legal perspective, since **you** prepared the document, a judge will construe the terms of the document most strictly **against you** (should it ever come to that...)

The danger of using prior documents without reflecting upon what you are now trying to achieve or what actually needs to be included in the written, binding agreement is obvious. Especially if, like at least one of my clients, you don't even read the final product....But you say everyone does it, and besides it looks pretty, so it must say the right thing.

So how can you protect yourself?

The answer, in my judgment, is simple to give, but often hard to take: Don't use the recycled document. Instead, a better approach might be for you to simply write the other party a letter confirming the verbally agreed upon deal/transaction/employment agreement. A letter outlining terms is far more likely to be read by both parties, thereby insuring that a meeting of the minds has actually occurred. The act of writing the letter to the other party will also cause you to focus on the deal terms in a way that simply "cutting and pasting" a recycled document will never do. It will take a bit longer, of course, but as the old saying goes, "act in haste, repent at leisure." Such a letter will make it easier and hopefully less expensive for your attorney to draft the final contract for signature.

And if you plan to include in your letter such items as indemnification between the parties, break up fees, security, etc., remember: they aren't just boilerplate language

that can be copied from any prior document. Those paragraphs give rights and they take them away. Be sure the ones you use are not taking away YOUR rights. At least if you write the letter, the parties (and a judge if it comes to that), will be better able to determine the intent of the parties when they negotiated the deal, rather than trying to interpret several pages of boilerplate provisions that may or may not be inconsistent with the rest of the agreement.

My suggestion is to treat each business transaction as the unique opportunity it is. My experience says that no two deals are alike. Recycled documents may appear to save money in the short run, but they are not reliable and can cost you a lot of money when they really don't accomplish what you need done even when you thought you had *wrapped the deal up into a bow*. The process of talking through the deal with a disinterested third party like your attorney could facilitate your making sure that the document reflects what you believe the deal to be and save you money and heartache in the future. If you don't like that advice, try and confirm the deal in a letter to the other side recording your understanding of the contemplated transaction. Consider doing this rather than changing the names, the date and signing a recycled document that no one has read and most importantly may not reflect the terms of the deal.