

Killer Documents

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"It was a killer lease. Landlord's lawyers thought of everything, and resolved everything the landlord's way. Every paragraph seems to have a 'gotcha' in it. We'll just have to hunker down and negotiate every line of this damn thing."

It's a common reaction from tenants and their counsel when they receive a landlord's first draft lease. Much the same reaction often occurs in response to a first draft loan agreement, a first draft limited partnership agreement—or a first draft of almost anything.

Whoever receives one of these "over the top" documents knows they are in for a long slow slog. Counsel needs to read through the document, identifying everything that goes too far, everything that's unreasonable, everything that creates a risk that shouldn't be there. How much should we ask for? Will we lose the deal? Which issues really matter? How much will this all cost?

Then the process begins and lurches forward from there, through multiple iterations, conference calls, issues lists, markups and more conference calls. Eventually, the parties may sign a deal, if they are not so entirely alienated from one another that they decide to go their separate ways without signing.

There's got to be a better way, right?

What if we agreed, for example, that landlord's counsel would send out a reasonable and balanced lease document, and then tenant's counsel would only make essential and important comments, without trying to rewrite the document? Would it make a difference?

It sounds great in theory. It sometimes even works in practice. I've tried it. But when I send out a "reasonable" document as suggested, most of the time the other side asks for just as many changes as if I had sent out an unreasonable document; so we end up worse off than we would have if we had started with the "unreasonable" document.

As a variation, for certain landlord clients, every time I finish a lease negotiation, I identify all the concessions we made. I ask which of those concessions we would always make, and then update the standard lease to include them, to try to save time the next time. Then, when I send out the next lease, does my effort at prenegotiation shorten the process?

Sometimes yes, but often, no. Often, I receive the same volume of comments as I would for any other lease; they're just different comments. And no two lawyers seem to make the same comments. My efforts at prenegotiation simply mean the lease starts out "kinder and gentler" to the tenant, and ends up even more "kind and gentle" by the end. Still, I'm not ready to give up.

Other techniques to simplify document negotiations include:

- *Term sheets.* Try to negotiate business terms and many major legal terms before the lawyers start writing documents. It's usually quicker and easier to get rid of objectionable concepts at the term sheet stage than in documents.
- *Keep it simple.* Documents tend to just get longer and more complicated. We could shorten the process by covering major points once, perhaps leaving out some of the minor ones, or at least some of the very complicated variations.
- *Keep it normal.* Try to resolve routine issues the way the rest of the world resolves them, without creating complex new contractual schemes and concepts.
- *Say each thing once.* As our documents have encrusted themselves over time based on sad stories and bad court decisions, the lawyers who write them often haven't bothered to address issues in an organized way, or have only done so once. Instead, paragraphs accrete without structure, introducing inconsistencies and needless issues.
- *Blow it up and start over.* If you anticipate a series of similar transactions, consider tearing up the "standard" document and starting with a much shorter, simpler agreement that does only what it really needs to do. This requires some up-front investment, but there are plenty of circumstances where it makes sense.
- *Work from the last deal.* As an example, with a lease, start from the last fully negotiated similar lease for similar space and circumstances. The tenant and their counsel need to agree to control themselves—though as noted above, it doesn't often happen.
- *Write clearly and well.* No law says legal documents cannot be comprehensible to mere mortals. The principles of plain English can help make any document easier to deal with, although they won't do much to change its substance. Still, they can simplify the negotiation process.

These suggestions can potentially simplify and shorten the process of writing and negotiating legal documents—as well as reduce the risk of mistakes, misunderstandings and inconsistencies.

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