

Settling With Boilerplate
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Los Angeles Daily Journal
December 19, 2006

Standard provisions, often referred to as boilerplate, are an important component of any settlement. In negotiating settlements, the parties and their attorneys are often preoccupied with the substantive provisions of the deal. Those provisions are understandably the focus of settlement discussions; after all, if they are not resolved satisfactorily, there is no settlement.

If a settlement materializes, one or both parties may insist on incorporating the terms of that settlement into a deal memorandum to be signed by both parties and both attorneys. The purpose of a deal memorandum is to resolve all disputes, end the negotiations, and ensure enforceability of the settlement.

The fact that boilerplate provisions are less important does not mean that they are unimportant. To the contrary, even after the substantive issues have been resolved, the parties or their attorneys may disagree with respect to the boilerplate. This is particularly true if boilerplate provisions are omitted from the deal memorandum. For this reason, discussion of boilerplate should not be deferred until the parties and their attorneys are reviewing a draft of the Judgment.

If no reference is made to boilerplate in the deal memorandum, both parties run the risk that one side will object to a provision the other considers standard. A fundamental principle of contract law is that if the Court will not write a contract for the parties. Without even a reference to boilerplate, the Court would have no basis to import any such provisions into the parties' deal.

Sometimes, there is a reference to boilerplate along these lines: "The Judgment shall include customary boilerplate." The problem is that there may not be a shared understanding of what boilerplate is customary. A general reference makes it more likely that there will be disagreements, particularly if one side considers that a specific boilerplate provision would be disadvantageous. At the very least, however, there would be a basis for the Court to resolve any disputes.

A list of the boilerplate provisions to be incorporated into the Judgment is preferable to a general reference. One well known private judge incorporates a provision into the deal memorandum along the following lines:

The parties understand that additional "boilerplate" provisions will be added to the Judgment, including, but not limited to: waiver of further discovery and discovery not completed, paragraph re after-discovered assets per statute, a waiver of interest in property acquired after separation and in future earnings and acquisitions, a reciprocal waiver of inheritance, advice of counsel and accountant had and received, voluntary agreement not under duress, the document can't be modified except by another signed writing, each party must cooperate to sign and execute and provide all documents upon 48 hrs ex parte notice and clerk may sign upon failure to do so, etc.

None of these options fully serves the interest of all concerned in a comprehensive settlement that is also complete. If the shared goal is to eliminate additional disputes or even further negotiations, all boilerplate provisions should be incorporated into the deal memorandum. The best way to accomplish this goal is to prepare the boilerplate in advance.

The first choice is for the boilerplate to be prepared by the private judge or mediator. It is more likely to be acceptable to both parties if it emanates from a neutral source. In anticipation of resolving the case, the neutral can provide it to both sides for their review. Ideally, this would occur prior to the settlement conference, but it could also be postponed until the outset. The main point is that the parties and their attorneys should have ample opportunity to review and approve the proposed boilerplate. It would then be incorporated into the deal memorandum. This would minimize the possibility of further disputes between the parties and ensure that important boilerplate ends up in the Judgment.

The following is a basic list of boilerplate provisions that should be considered for inclusion in any deal memorandum resolving a family law matter.

- *Statistical Facts.* The date of marriage, date of separation, names and birth dates of minor children are usually uncontroversial.
- *Mechanism for Division/Responsibility for Taxes and Liens.* The parties should know how their community property is to be divided as a practical matter, as well as how liens and taxes will be paid or provided for.
- *Representation and Warranty re Community Property.* Any community property not listed in the Judgment and divided between the parties is subject to the continuing jurisdiction of the Court pursuant to Section 2556 of the *California Family Code*.
- *Reimbursement and Credits.* The reimbursements and credits to which each party is entitled should be listed; all other claims should be waived.
- *Separate Property and Separate Liabilities.* Each parties' separate assets and debts should be listed.
- *Social Security Benefits.* If it always helpful for the parties to understand that their rights to Social Security benefits are controlled by federal law, and are not subject to the jurisdiction of the Court.
- *Qualified Domestic Relations Order.* If a qualified domestic relations order is necessary, the parties should specify how, when, and by whom it will be prepared, as well as how that person will be paid.
- *Basis of Support Orders.* If the parties disagree about income, deductions, or custodial percentages, it may not be possible to fill in the blanks ahead of time.
- *Modification of Spousal and Child Support.* The parties have the right to request the exchange of current Income and Expense Declarations, supported by their most recent tax returns, once

- per year pursuant to Section 3664 of the *California Family Code*.
- *Stay of Order/Notice to Withhold Income for Child Support and Stay of Earnings Assignment Order for Spousal Support*. The payor should not assume that the payee will agree to a stay of the earnings assignment orders that would normally be issued by the Court.
 - *No Right to Inherit*. This negates residual inheritance rights.
 - *Attorneys*. The deal memorandum should note limitations on the roles of the attorneys (*e.g.*, the parties' decision to dispense with further discovery).
 - *Mediator's Fees*. Particularly if the parties request the mediator to prepare a draft Judgment, there should be no uncertainty about responsibility for payment of the mediator's charges.
 - *Attorneys' Fees, Accountants' Fees, and Costs of Suit*. Even if the amount of one party's contribution to the other party's fees and costs remains to be determined, that is just one more blank that will need to be filled in.
 - *Tax Returns*. Tax provisions are usually a hybrid; part boilerplate and part unique to each case. The parties should cover filing statuses, right to claim dependency deductions, whether the parties will file a final joint return, allocation of responsibility to pay tax deficiencies, division of tax refunds, and so forth.
 - *Updating Wills, Trusts, Insurance Policies, and Retirement Plans*. The parties should be alerted to the importance of updating important legal documents.
 - *Discovery*. Whether the parties have conducted extensive discovery or no discovery, they should waive their rights to conduct additional discovery as part of the settlement.
 - *Mutual Full Release*. Except with respect to unadjudicated assets and liabilities, the parties often wish to release all other claims (*e.g.*, tort claims).
 - *Further Assurances*. The parties should agree to sign any additional documents necessary to implement the settlement.
 - *Voluntary Agreement*. The deal memorandum should recite that the parties are entering into the settlement freely and voluntarily, and attempt to foreclose potential claims of undue influence, duress, and so forth.
 - *Finality of Judgment*. The parties often agree to waive the statutory rights to attack the Judgment that might otherwise be available to them, *e.g.*, Section 2122(e) of the *California Family Code* and Section 473 of the *California Code of Civil Procedure*.
 - *Continuing Jurisdiction*. The Court retains jurisdiction to interpret and enforce all provisions of the deal memorandum, but not to modify any of those provisions.
 - *Insurance*. The amount of life insurance to be maintained for the benefit of the supported spouse and children are just two more blanks that remain to be filled in.
 - *Children's Assets*. If there are assets standing in the names of minor children, the details of management and control should be specified.

- *Admissibility.* The deal memorandum should provide that it is admissible into evidence.
- *Confidentiality.* The confidentiality of all discussions leading up to the deal memorandum should be preserved.
- *Indemnification.* The parties are usually willing to indemnify each other against the consequences of either party's post-separation conduct.
- *Exchange of Final Declarations of Disclosure.* The parties should specifically acknowledge that they have exchanged Final Declarations of Disclosure or will do so prior to signing the Judgment.
- *Revocation of Pendente Lite Orders.* The deal memorandum should confirm that all *pendente lite* orders will be revoked upon entry of the Judgment.
- *Basis for Court's Findings.* There should be a recitation that all of the findings by the Court set forth in the Judgment are based on the parties' stipulations, not a hearing.

The goal of any settlement is not just getting it done, but getting it done right. The parties and their attorneys are more likely to achieve that goal if appropriate boilerplate is included in the deal memorandum, and then transposed *verbatim* into the Judgment.

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