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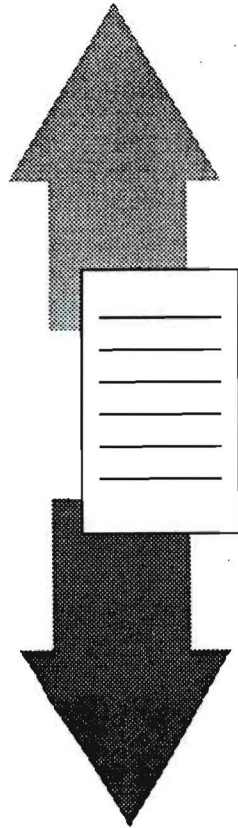
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How To Amend Transactional Documents

Joshua Stein

Amendments should change — not ruin —
your transactional documents.

ALMOST EVERY TRANSACTION, no matter how carefully negotiated and closed, will eventually need to be amended or modified in some way.

Many transactions require a series of amendments, as the parties' needs and expectations, and the circumstances, change over time.

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The same people who scrutinize every paragraph of every article, who labor over every minor schedule or exhibit of the original closing documents, often treat amendments as incidental, even trivial, and just not worth the same time or attention.

Attorneys and their clients often approach the amendment and modification process with only a small fraction of the care they brought to the original transaction and closing. The same people who scrutinize every paragraph of every article, who labor over every minor schedule or exhibit of the original closing documents, often treat amendments as incidental, even trivial, and just not worth the same time or attention. In the worst case the client, still in shock from the time, expense, complexity, and rancor of the original negotiations, may decide not to involve attorneys at all as the transaction and the transactional documents change shape over time. This is a formula for disaster. If amendments are not handled with care, they can produce inconsistencies, uncertainty, and thus litigation. At the very least they will represent lost opportunities.

FINDING THE STARTING POINT • If a client needs you to prepare an amendment to an existing set of legal documents, begin by thinking about (or remembering, if you handled the closing) the context for the amendment.

By asking a few questions, spending a few minutes with the client, and reviewing the documents, you can lay the right foundation to assure that today's amendment works, without sowing the seeds for tomorrow's problems.

Start with the Original Documents

Begin with the documents from the original transaction, including any side letters, ancillary agreements, and similar items that the current amendment should or should not supersede. Even a simple amendment may affect more than one of the original closing documents.

Understand History

Depending on the circumstances, though, the original closing documents might not be the right starting point. Have those original documents already been amended in some way, perhaps not intentionally? Have the parties sent letters back and forth, amounting to an implied amendment that should at least be considered as possibly affecting the newest amendment?

THE LARGER CONTEXT • Beyond the documents themselves, you need to consider some broader history. Have disputes arisen that ought to be resolved as part of the amendment? How have the documents worked so far? Has the client discovered any shortcomings or problems in the transaction structure or documents that ought to be cleaned up?

What Does the Client Want the Amendment To Accomplish?

Even if the documents seem to be working, the client might want to use the amendment process to renegotiate or rethink elements of the transaction:

- Is there anything that the client has realized it needs from the transaction, but the original documents did not provide?
- Were parts of the original documents excessively burdensome?
- Would the client like to change the deal or the documents in any other way?

If the answer to any of these questions is "yes," the other party's request for an amendment might give the client the best opportunity it will ever have to solve problems or plug gaps in the original transaction. (This process will, of course, be subject to the constraints of good faith and the frequent practical need to conduct business in a

way that assures the possibility of conducting business with the same parties again.)

Changes in the Law

Also consider whether the governing law has changed in ways not contemplated when the original documents were signed. Does the change in law require any changes in the transaction? Does it create any new risks or costs that the parties should allocate between themselves?

The Role of Third Parties

Don't overlook third parties. If a lease is being amended, can the client safely amend it without the mortgagee's approval? If a guarantor stands behind the other party's performance, should you insist on having the guarantor consent to the amendment? If one of the parties is a partnership, does the amendment constitute a major decision that requires the partners' approval?

Approaching the Third Party

Whenever an amendment will require a third party's consent, the other parties need to decide how to approach the third party, when to do so (but always well before the last minute), and who should do so.

If the third party decides to use the amendment process as an opportunity to rethink parts of the transaction, then someone needs to push that

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process along and make sure the third party's consent is ultimately in place when needed.

As in most other transactions, third-party consents are probably the most common reason for delays and problems in amendments and modifications.

Intervening Liens

Also ask whether the document being amended was recorded, or secured by a recorded mortgage, and if so whether the amendment should also be recorded. If the answer to both questions is "yes," think about intervening liens and the need to obtain consent from the intervening lienors and updated title insurance.

MAKING THE CHANGES • Once you understand the larger context for the amendment, the process of preparing the amendment itself is often the smallest and easiest part of the job.

Cleaning Up the Document Trail

If the trail of past amendments is long and complicated, start by asking whether it is time to simplify and clean up the documentation.

Creating a Newly Restated Agreement

In the most extreme case, you may want to recommend restating the original agreement in its entirety to reflect all of the amendments entered into, including the current one.

Advantages of a Newly Restated Agreement

The newly restated agreement would have at least two clear advantages:

- It would reflect all amendments as well as whatever changes in circumstances have occurred since the original document was signed; and
- It would supersede everything that preceded it. A restated agreement would create a completely clear understanding.

Disadvantages of the "New Document" Approach

Although completely restating the agreement can maximize clarity and simplicity, it often tempts the parties and their counsel to try to achieve the perfect document. They will reopen and renegotiate points that were and should remain closed, perhaps producing delays and extra expense. (In some cases, a "restatement" can also

detrimentally restart time periods, such as the time period for setting aside a fraudulent transfer.)

Restating the Amendments Only

As a compromise between maximizing clarity and minimizing expense, you may want to leave the original document alone, and instead restate only the amendments themselves. One single restated amendment would supersede the entire convoluted series of amendments, old and new. Anyone trying to understand "the deal" would need to read only the original document and the single restated amendment.

THE SCOPE OF AMENDMENTS •

Whether the amendment is one in a long series or a stand-alone amendment, the attorney who prepares it may be tempted to structure it as a quick summary of the various business or legal points that need to be covered, address them in some logical order, and move on.

This approach, although quick and easy—and quite common—creates the risk that the amendment will not fully or correctly deal with everything it needs to cover, or with particular nuances in the original transaction.

For example, if an amendment affects the rent commencement date of a lease, merely stating the new rent commencement date might not address:

- The fact that certain portions of the space may have had different rent

Ideally, an amendment will consist of a sequence of unambiguous cut-and-paste instructions.

commencement dates and how today's amendment should deal with those differences;

- The possible need to extend the termination date of the lease so the net value of the lease to the landlord remains the same; and
- Changes that might be appropriate in the timing or calculation of escalations and pass-throughs.

Aim for Specificity

Rather than paint with a broad brush—preparing the amendment in some logical order that addresses deal points in the abstract—think through all the implications, and address them directly. Don't wait for a court, after the fact, to piece together how the amendment implicitly changed parts of the original document that it did not expressly address.

Cut-and-Paste Instructions

Rather than write in terms of concepts and the "business deal" the parties have agreed to, specify individual changes to discrete sections and lines of the document. Ideally, an amendment will consist of a sequence of unambiguous cut-and-paste instructions

which, if presented to a typesetter or a secretary along with a pot of glue and a pair of scissors, would allow either of them to convert the “old document” (pre-amendment) into the “new document” (post-amendment) merely by following the instructions in the amendment.

Interest Rate Changes

If the parties have agreed to change the interest rate on a promissory note, the amendment should specify exactly where the interest rate appears in the note, specifically delete the outdated words and numbers, and indicate the words and numbers that replace them. The amendment should do this for every reference to the interest rate in the promissory note.

Changes in Dollar Amount of Payments

Not as obviously, the amendment may also need to specify line-by-line changes in the dollar amount of payments that must be made under the note. This will reflect changes in the payment stream that follow from the change in interest rate.

Resulting Changes in Amortization Schedule

And if the change in interest rate will change the amortization schedule, the note may also need to be modified—again with line-by-line instructions to a hypothetical typesetter or secretary wielding scissors and a

pot of glue—to reflect changes in the formula for releases of collateral or permitted prepayments.

Changes to Defined Terms

When possible, an amendment should specifically change particular defined terms already set up in the original document. If the contract defined a “target closing date” and an “outside closing date,” the amendment should modify one or the other or both, rather than refer to “the day the parties intend to close the transaction.”

Advantages of a Line-by-Line Approach

If you write the amendment in the form of line-by-line editorial changes that refer to every provision of the original document the amendment affects, you will minimize the risk of inconsistencies, gaps, or ambiguities—and thereby minimize future work for the judicial system. Nor will either party ever need to argue that by implication an amendment “clearly” did or did not have some secondary effect on other provisions of the original document. Neither party will ever need to argue that when the amendment changed a fundamental economic term, some secondary term should be deemed to have changed as well.

Take It from the Top

As a matter of discipline, amendments should be written in the same order as the original document, to

make it easy to verify that the amendment addresses everything it needs to address. Review the entire original document, from beginning to end, and deal sequentially with every change to be made.

Consider every document provision in the amendment process. Parts of that process can be quick. For example, a change in fundamental economic terms will rarely affect the detail of the “remedies” section or the “miscellaneous” provisions just before the signature blocks.

MORE BASES TO COVER • When preparing an amendment, keep the following suggestions in mind.

Know the History

A carefully prepared amendment should also recite, in its opening paragraphs, the previous history of the transaction—both the original document as well as any previous amendments.

Aim To Prevent Disputes

If particular elements of the transaction are likely to cause disputes—or have already been in dispute—you may want to use the amendment as a tool to contain the scope of future disputes and factual disagreements. You can do this by including in the amendment an agreed-upon “snapshot” of whatever factual matters could be the subject of future claims or disputes.

Helpful for Loan Modifications

This is particularly true with loan modifications, which usually represent the final step in a dispute and workout, in which the borrower has asserted (among other things) various theories of lender liability, excuses for nonperformance, and defaults and evil acts by the lender, all culminating in complicated reasons why the borrower need not repay the loan.

If a loan modification fails to wipe the slate clean, the lender has failed to obtain from the one outcome it needed most from the modification: comfort that the borrower acknowledges the validity of the loan and the obligation to pay it.

Even outside a workout, amendments can eliminate future theories and disputes by including appropriate “estoppel” assurances. For example, in amending a partnership agreement to reflect some change in the assets and business of the partnership, it may be wise for the partners to mutually reconfirm their current capital accounts and lack of claims against one another.

Conversely, if the parties do not want to consider, negotiate, resolve, or otherwise deal with whatever claims they might have against one another, the amendment should expressly say that it is not intended to waive any prior claims—thereby negating any argument that the amendment amounted to an implied waiver of claims.

Nonrecourse Clauses

If the original transaction was “nonrecourse” or contained limitations on personal liability, the amendment should expressly reaffirm those provisions and negate any argument that they were not intended to apply to whatever new or incremental obligations arose under the amendment.

The Entire Agreement?

Any amendment should conclude by reaffirming the original agreement as modified. The amendment should usually also state that it, and the previous documents it expressly refers to, collectively embody the entire agreement between the parties, assuming this is the case.

In some cases, the parties may have entered into side letters which should continue to apply, but which the original documents and amendments may not refer to. If this is the case, the parties should agree to a separate letter that specifically and unambiguously states that they want the existing side letters to survive. The right time to do this is when they amend the original documents.

The new letter agreement would specify, in detail, the precise scope of the documentation that continues to be legally binding. An updated “mer-

ger clause” would appear in the side letter rather than in the amendment itself.

FINISHING THE JOB • Once the final amendment has been fully agreed upon, the attorneys need to handle the process of executing and delivering the amendment as if it were a miniature closing.

Although amendments are often executed and exchanged by mail, make sure the clients complete this process. Then make sure the final signed amendments do not end up buried in the clients’ correspondence files—time bombs waiting to create some unwelcome excitement if the transaction ever descends into litigation.

Instead, distribute amendments in the same way, and to the same people, as the closing sets from the original transaction. Instruct recipients to keep the amendments in the same place as the original closing sets.

When the parties inevitably decide to amend the transaction again, they and their attorneys need to be easily able to track down the answers to the historical questions suggested at the beginning of this article. If you approach the amendment process the right way, this will be a much easier task.