LAW FIRMS AND CONTRACT DRAFTING

A panel discussion at the University of Pennsylvania Law School.

I teach a course in contract drafting at the University of Pennsylvania Law School. It's the first such course the school has offered—an increasing number of law schools are waking up to the need for training in transactional skills.

A course in contract drafting could be structured any number of ways. My course reflects my view that to articulate clearly and efficiently the substance of any agreement the drafter must have a disciplined grasp of the building blocks of contract language. The course text is my book *A Manual of Style for Contract Drafting* (2d ed. 2008).

The bulk of the coursework consists of a series of written assignments, but I also bring into the classroom voices from outside the law school. In particular, in the fall 2008 semester one class was devoted to a panel discussion on issues relating to how contracts are drafted at law firms. On the panel were three corporate partners at substantial law firms: Jim Brashear, Larry Bell, and Howard Dicker (see sidebar). The following exchange is based on the transcript of that panel discussion.

I had in mind two criteria for the panel members: they had to be law-firm partners attuned to the particular constraints involved in how contracts are drafted at law firms, and they had to have demonstrated a willingness to rethink traditional approaches. I know from firsthand experience that all three panel members more than fit the bill. The views they express in the following exchange are their own and not those of their respective firms.

Kenneth A. Adams

Kenneth A. Adams is a consultant and speaker on contract drafting, a lecturer at the University of Pennsylvania Law School, and author of *A Manual of Style for Contract Drafting* (ABA 2d ed. 2008). His e-mail address is kadams@adamsdrafting.com.	Lawrence M. Bell is a partner with the Corporate and Securities Practice Group of Benesch in Cleveland, Ohio. His e-mail address is lbell@beneschlaw.com.
James F. Brashear is a partner with Haynes and Boone in Dallas, Texas. His e-mail address is jim.brashear@haynesboone.com.	Howard B. Dicker is a partner in the corporate department of Weil, Gotshal & Manges LLP in New York. His e-mail address is howard.dicker@weil.com.

The Role of Junior Associates

Ken: It's a given that at law firms, junior associates do most of the drafting. What are the implications of that?

Larry: It's generally the case that work is pushed down the chain, from senior partner to junior partner, then from junior partner to senior associate, and finally to a junior associate. There's always a risk that junior associates will be thrust into a substantial transaction without the benefit of relevant experience.

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Howard: I've found that senior lawyers are generally good about providing guidance and realize that they must supervise and act as a safety net. But that certainly doesn't diminish the important role of the junior lawyer. For one thing, senior lawyers just don't have the time to read every word in a longer contract—junior lawyers shouldn't assume that a senior lawyer will catch everything. A couple of words here and there can turn a provision from one that is beneficial to your client to one that is detrimental, so junior associates have lots of opportunity to show that they can add real value.

Larry: But it's great that informal guidance is now being supplemented by formal training of the sort that Penn Law is providing to those students who are able to take Ken's class. Who provides that training, law schools or law firms, doesn't really matter—the more the merrier.

Traditional Contract Language

Ken: You're all aware that I'm not a big fan of the language of mainstream contract drafting, and I know that you share that view to some degree. Contracts should be drafted in standard English, in other words the English used by the average educated English speaker. No "dumbing down" is involved—a contract will be as complex as the concepts that it needs to articulate, but you don't need to further complicate matters by expressing those concepts in the mutant form of English that is legalese.

Howard: It's likely that when any associate who has been taught by Ken Adams lands at a law firm and is handed some precedent contracts to use, that associate's first reaction will be "This isn't what contract language should look like!"

Larry: I suspect they'll use more colorful language!

Jim Once lawyers get in the habit of using certain contract language, it's very difficult for them to change. That's why a lawyer's command of contract language generally doesn't improve over time but instead becomes fossilized. That's particularly the case when it comes to "boilerplate"—the provisions that aren't central to the deal.

Ken: Drafters tend to treat such stuff as if it's invisible. For example, the traditional recital of consideration—"in consideration of the premises and other good and valuable consideration," and so on—is archaic and is useless in all but certain very limited contexts, but you find it in the vast majority of contracts.

"Tested" Contract Language

Howard: A big reason why lawyers resist changing traditional contract language is that they're worried that they'll be changing language that's been "tested." That certainly sounds like a legitimate concern—if in an opinion a court says what a bit of contract language means, then sticking with that language in the future would provide some certainty. But I know Ken is itching to chime in!

Ken: The notion of "tested" contract language sounds plausible, but it's a fantasy. For one thing, only relatively few usages are scrutinized by courts, so the notion of "tested" contract language cedes most of the argument. And saying that the courts have tested contact language suggests a comprehensiveness and finality that doesn't in fact exist. What a court has to say about a given bit of contract language likely depends heavily on the facts and may

have no bearing on what that court or courts in other jurisdictions have said, or might say in the future, about comparable language.

Jim: And anyway, why stick with language that gave rise to litigation! Instead, articulate the intended meaning so that you don't need a court to decipher it.

Ken: Court opinions obviously affect substance, sometimes in quite unexpected ways. For example, the Ninth Circuit Court of Appeals has held that under California law a provision limiting the period for bringing claims for indemnification won't constitute a waiver of the statute of limitations unless the provision includes explicit waiver language. [See Western Filter Corporation v. Argan, Inc., 540 F.3d 947 (9th Cir. 2008).] But when it comes to expressing clearly whatever you need to say, don't look to courts for guidance. For instance, courts have shown themselves to be confused as to the meaning of "and" and "or."

Larry: But one thing opinions *are* useful for is telling you what usages to steer clear of. Ken's book is full of examples of contract parties landing in court due to deficient contract usages.

Treating Drafting as a Craft

Jim: Junior associates may be better equipped than more senior lawyers to check whether language that's been used for years without question actually makes sense.

Ken: On the other hand, any associate who tinkers with a partner's favored legalese is likely to be chided for it. That's because many partners consider that contract drafting is a craft and therefore subject to individual preferences. I have a very different approach: If you employ one drafting usage to accomplish a given drafting goal and I use another, one of us is being less efficient than the other. The trick is to identify and use consistently only the most efficient usages.

Larry: Treating drafting as a craft gives rise to the biggest challenge that a new associate is likely to face—serving different masters. It's a source of real frustration to associates. I hope that Ken's approach will take hold and that over time you'll find greater consistency in the contract language used at any given firm. But there are plenty of lawyers with ingrained drafting habits who will still be practicing decades from now and inflicting their idiosyncratic preferences on junior associates.

Howard: Traditionally, the one way law firms have tried to bring some consistency to select contracts is by using annotated templates. Such initiatives can be very valuable, even essential, but compiling and maintaining templates makes significant demands on a firm's resources. And if you're not rigorous about it, your lawyers will be reluctant to devote non-billable time to your template initiative, the drafting will be questionable, and actual use of the templates will be patchy. And there's always the risk that a template initiative will fall by the wayside if the partner who championed it moves on.

Constraints on Change

Howard: The language in your average business contract may be an inconsistent mess, but there are real constraints on what you can do about it. No associate is going to have the time to turn every draft into a thing of beauty, and certainly no client is going to pay for that. So your best bet is to fix what stands a chance of causing real problems and otherwise to redraft the rest

piecemeal, focusing on those provisions that you're going to use repeatedly, so you get a quicker return on the time invested.

Ken: I'd just add that there's some stuff you can fix very quickly, such as getting rid of the obvious archaisms.

Jim: My in-house experience suggests that a client is indeed likely to ask what any given drafting project is going to cost in terms of lawyer time and in terms of potential delay. If I'm in-house counsel, I'm going to ask whether I really need to pay for A-plus work if a dozen comparable deals have been successfully closed using a C-plus contract. Law firms that are eager to be responsive to these concerns will draft contracts that may not be things of beauty but will get the job done.

Larry: And of course how extensively you can rework contract language will depend on whether your side is drafting or reviewing. We've all received drafts from the other side that make you grind your teeth in frustration, they're so poorly drafted. But before you launch into an extensive redraft, you have to ask whether the added clarity is worth it. Sending a draft back with a bunch of changes not only adds to the other side's work, it may well antagonize them. For many lawyers, a big part of their professional sense of self is invested in the notion that they write well. Anyone who threatens that illusion can expect a hostile response!

Jim: The one context where a company is likely to be vigorous about redrafting is when it decides to retool a template that it uses for high-volume transactions. That's something companies periodically do to reflect developments in the industry and changes in the law, or just to make the contract clearer and more effective. But typically that's not the kind of engagement a major law firm is going to get—we tend to work on sizeable one-off transactions.

Making Contract Drafting a Commodity

Ken: Shouldn't contract drafting be a commodity task? For the most part, each deal closely resembles any number of other deals. That should make it a simple matter to paper any given transaction, but that's not the case if you're making improvised word-processing changes to contract models. But the precedent-driven nature of contract drafting could be turned from a weakness into a strength if you were able to prepare deal documents using document-assembly software. Users would complete an online questionnaire, plugging in information and selecting from among available options. The system would then instantaneously pull together preloaded text. You'd be able to create drafts in a fraction of the time it would take using the traditional process, and the result would be more consistent and should be of much higher quality.

Howard: Document assembly is a relatively straightforward matter if you're a company that enters into, say, two thousand equipment leases a year. By contrast, a substantial law firm can expect to be asked to draft, at short notice, a broad and unpredictable range of documents. It would be a tall order to expect a law firm to make the considerable investment in technology and manpower required to implement and maintain a broad document-assembly initiative.

Jim: An ambitious document-assembly initiative could be achieved with economies of scale. You could, for example, have a vendor that makes available to law firms, for a fee, an online library of document-assembly templates. The bigger firms would probably pooh-pooh the

idea, on the grounds that they'd be compromising their standards by buying contract language off the rack. But thanks to the SEC's EDGAR system, everyone's contract verbiage is readily accessible to everyone else. And at many firms, the process of rooting around for precedent contracts is hardly rigorous. Reliance on contract language provided by vendors and trade groups is becoming more commonplace, and I expect that if they want to remain competitive, ultimately an increasing number of law firms will have to swallow their pride and outsource much of their contract drafting.

Larry: Law firms could create and adopt a contract-drafting style guide, something I'm working on right now for my firm. Of course, you'd have a hard time forcing any partner to follow a style guide if they don't want to. And it would take a long time for its effects to be felt, as retooling your existing contract models, if you have them, would require inordinate amounts of time. But maybe the most salutary effect of a style guide would be to encourage lawyers to acknowledge that providing no guidance as to preferred usages results in contract language that's less clear and consistent than it should be and ensures that the contract process remains inefficient.

Effects of the Downturn

Ken: We're in the midst of an economic downturn unlike any that we've seen in a long time. The effect on the legal profession has been dramatic, with major firms shutting down and others laying off lawyers and support staff. What sort of effects do you see this as having on the contract-drafting process at law firms?

Jim: It should allow law firms to embrace innovation more readily than they would otherwise. In the current climate, a business-as-usual attitude can lead a firm to ruin. Firms that work smarter will do better than law firms that make cosmetic adjustments. So the sorts of innovations that Ken has been clamoring for, and that we've been discussing today, may come to pass more quickly than any of us would have thought even a year or two ago.

Howard: For a few years now there's been a lot of talk about alternative billing. The current climate would seem particularly hospitable to such arrangements. For purposes of contract drafting, that would probably mean according greater value to law-firm input on strategy and negotiation and less value to having junior associates cranking away on contracts. Sometimes the law firm would have to take a haircut, but such arrangements could also work to their advantage.

Larry: I think you can expect the elite law firms to be less affected by such pressures. General counsel are often looking for more than just someone to handle a given transaction—they're hoping that by selecting an elite firm they'll be protected from criticism if things go wrong. So those law firms will be able to exact a premium in the form of continued inefficiency. But we can perhaps expect that fewer firms will be able to get away with that.

Some Practical Tips

Ken: I'd like to round off our discussion by having each of you offer to my students a practical tip—something that will make their contract-drafting chores a little more manageable.

Jim: Here's a basic one: get to know Word! I constantly see contracts that have been drafted by attorneys who fail to take advantage of even rudimentary Word features. Instead they act as

if they're using a typewriter. They have no idea how to use Word styles, so they'll hit the "Enter" key to create space between paragraphs and hit the "Tab" key to create first-line indent. And they don't bother using automatic paragraph numbering and automatic cross-references. That makes the document-revision process more complicated than it needs to be. And don't assume that word processing is something best left to others—you should be the one ensuring efficient document architecture, and you should also be able to roll up your sleeves and make all the changes yourself.

Howard: I'd encourage your students to take responsibility for their own ongoing education. Law firms can be counted on to provide a certain amount of training, but education isn't something you can spoon-feed. Taking Ken's class is providing you with a great foundation—continue to build on it by approaching contract language critically. Don't assume something works just because it's in a contract model. If you don't understand a given provision, or if you think it might not belong, then investigate further. If a partner asks you, you should be able to explain why you included it.

Larry: Ken, I don't want to give you a swollen head, but I recommend that your students embrace your concept of categories of contract language. In your book you explain how a given provision falls within one of several categories of contact language—language of performance, of obligation, of discretion, and others—and you recommend the verbs you should use to articulate each category. I've found this analysis unique and helpful. It has vastly improved my own drafting, even after many years of practice.

Ken: I guess I should call a halt while I'm ahead! Jim, Larry, and Howard, thank you for taking part in this discussion.