



THURSDAY, FEBRUARY 19, 2009

## CONTRACT DRAFTING

# Retrofitting Your Contract Process for the Downturn

By  
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Company law departments haven't been spared the pressures of the current economic crisis. According to a recent national survey by consulting firm Altman Weil, three-quarters of the law department leaders who responded are facing budget cuts for 2009.

The survey indicates that 65 percent of respondents propose cutting costs by bringing more legal work in-house in 2009, and 53 percent plan to use law firms that offer lower rates. Some plan to trim lawyer and staff jobs and compensation. And 12 percent of respondents said they would look to cut costs by sending work overseas.

But given the scale of the current upheaval, such responses seem unimaginative. Even sending work overseas simply represents another way of doing the same work more cheaply, at least for the time being. Instead, what's called for is rethinking the way your law department operates. As Bruce MacEwen, a consultant to law firms on strategic and economic issues, suggests on his blog, "It's not about cutting costs, but about doing things differently, and smarter. A decent rule of thumb is this: Simplify."<sup>1</sup> This advice applies equally to law departments.

One area that's ripe for simplification is your company's contract process—or more specifically, the process your company uses in drafting (based on templates), negotiating, signing, archiving, and monitoring performance under a high volume of commercial contracts, whether sale-side or procurement-side. Litigation, for example, may come and go, but companies always need to buy and sell. In particular, sales are a company's lifeblood. And not only is the contract process an essential one, it can also require commitment of resources on a grand scale, particularly when it's handled inefficiently.

## Redrafting Templates

One aspect of your contract process that merits scrutiny is the templates themselves.

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First, consider the language they use. Because any given transaction will closely resemble many previous transactions, and because lawyers tend to be risk-averse and wary of change, as things stand contract drafting is essentially an exercise in regurgitation. Add to that the specialized nature of contract language—it's akin to a cross between regular writing and computer code—and it's not surprising that business contracts are riddled with redundancies, archaisms, misconceptions, and other drafting glitches.

In any given template, the cumulative effect of such glitches likely would be considerable. If that template is used hundreds or thousands of times a year, the endlessly repeated inefficiencies would act as a constant drag on the contract process. Deals would take longer than necessary to close; even worse, delays could result in your company's losing out to more nimble competition. And you'd be exposing yourself to greater risk of a mistake that results in a dispute or causes you to lose an anticipated benefit under a given contract.

The substance of your templates would also merit scrutiny. If the terms you offer sales prospects are more onerous than the transaction requires or more onerous than those offered by your competitors, particularly with respect to hot-button issues such as indemnification, you can expect to lose sales prospects.

The way to address shortcomings of language and substance in your templates would be to redraft them. In terms of language, skillful redrafting using standard English would likely reduce by up to 25 percent the number of words in a given template without cutting any substance, and it would ensure that what remains is vastly clearer. In terms of substance, the benefits of redrafting would depend entirely on the context, but they could be significant.

All told, you'd speed up the contract process significantly, saving time and resources and, in all likelihood, increasing the rate at which you convert prospects into customers. You'd also be reducing the likelihood of a drafting glitch metastasizing into a serious problem.

## Decisions on Redrafting

When your company is considering whether to redraft its templates, it would be a good idea to involve personnel who are not directly responsible for the templates. Those who've been working with the templates wouldn't be in much of a position to assess them objectively, and it would be natural for them to protect their turf by resisting scrutiny. Furthermore, the decision whether to redraft would involve broad budgeting considerations that would likely be beyond the purview of contracts personnel.

As to whom should be given primary responsibility for redrafting templates containing less-than-optimal language, an unpromising choice would be any in-house lawyers responsible for those templates—it would be unrealistic to expect them to remedy their own work.

And in any event, making in-house lawyers primarily responsible for redrafting could be problematic: They likely would have their hands full with the day-to-day press of business. They couldn't be counted on to have the necessary expertise in contract language. And you might well end up with drafting by committee—a recipe for muddle and bureaucratic inertia.

An obvious alternative would be to have the

job handled by outside counsel. Law firms are good at getting deals done and telling you what the law is, but when it comes to preparing templates, the odds are that any given law firm would offer the dysfunction of mainstream contract drafting, and at a steep price—the equivalent of serving you a TV dinner on a silver platter.

When it comes to redrafting contracts, exactly who does the work is less important than ensuring that they have demonstrated a commitment to, and a grasp of, clear, modern, and efficient contract language. They needn't be well-versed in the transactions in question—such information could be provided to them by designated company personnel.

### Risks in Traditional Process

The contract process for any given transaction has traditionally been straightforward: Someone in the legal or contracts function uses word processing to revise a template so as to reflect the deal terms; the draft is negotiated; the final version is distributed and signed; signature pages are exchanged; and a copy of the signed contract is put in a filing cabinet somewhere.

This approach has simplicity in its favor, but it presents a host of inefficiencies. Consider the process of turning a template into deal documents. Whoever does the drafting might inadvertently use obsolete templates, leading to contracts that incorporate out-of-date business or legal terms. Or they might make unauthorized changes. And if templates are freely accessible, unauthorized personnel would be in a position to create deal documents.

Furthermore, the traditional process of turning a template into a deal contract is subject to delays—changes are marked by hand, then input, with perhaps one or more further rounds of changes to follow. And this sort of low-level, repetitive work can be demoralizing and takes personnel away from higher-level work.

As for getting contracts signed, what should be a straightforward task is in fact often something of a nuisance, involving delays in exchanging signatures by a variety of mechanisms and the need to keep track of the signature pages and who has and hasn't signed.

Once a signed contract has been filed away and those involved have moved on to the next project, the contract might over time disappear from institutional memory. It's safe to assume that at any given moment, red-faced contracts personnel from some company are engaged in a hunt for an errant contract.

Even if copies of a contract are available, that won't do much good if you don't keep track of what's in it. An improvised approach to contract monitoring—for example, relying on a Word abstract of information compiled from a set of contracts—leaves undue room for human error in terms of both the accuracy of contract data and use made of those data. The possible adverse consequences include missing contract deadlines and failing to enforce rights or obligations.

### Automation

Problems of process are conducive to information-technology solutions. In recent years a range of effective software tools have been developed to address problems with the contract process. The tasks they perform fall into three basic categories (although contract-process tools increasingly seek to tackle more than one task): document assembly, which involves compiling contracts by selecting from, and plugging information into, preloaded text; signature automation; and contract lifecycle management (CLM), which alerts the user to key contract data.

One document-assembly tool is QShift, produced by Ixio Legal. It allows a company's lawyers to draw from, and freely edit, an online body of annotated contract language prepared by them. It's best suited to use by companies with a low to medium volume of contracts and companies that need to modify templates in unpredictable ways.

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An alternative would be to use a logic-driven online document-assembly engine to collate and supplement preloaded contract text based on how the user answers a questionnaire. Given the costs involved, such systems are geared to high-volume documentation that requires relatively predictable customization. Perhaps the leading product in this category is DealBuilder Author, by Business Integrity—it's used by a growing list of major law firms and corporations. (A comparable product is Exari.) Document-assembly functionality is also offered by some CLM products, although one would expect it to be more limited than that offered by DealBuilder.

As for signature automation, a number of sophisticated tools are available depending on your requirements and your budget. Vendors include EchoSign, DocuSign, and Sertifi. Of the contract-process tools, the CLM sector is the most mature, with an array of vendors, including Emptoris, I-many, and Selectica.

What solution or combination of solutions would work best for your company would depend on the nature of your contracts, their value, and

your contract volume. But for suitable candidates, the benefits are clear—you'd greatly reduce the time to closing, free up your legal personnel, reduce your costs, increase the likelihood of converting prospects into customers, and reduce the odds of the sort of unpleasant surprises that come with an improvised approach to the contract process. And bear in mind that these solutions can be combined with other, more traditional cost-cutting measures.

But technology isn't a cure-all. One sees state-of-the-art document assembly used with archaic contract language—an exercise in garbage in, garbage out. If you're going to automate your contracts, you should take the opportunity to redraft your contract language.

### Overcoming Inertia

By reputation, the legal profession is slow to change. That's particularly the case with the precedent-driven transactional world.

But change can come in the form of measured change rather than a leap into the unknown—overhauling your templates and your contract process need not be traumatic. The first step would be to determine the spectrum of potential change. Get someone with the requisite skill and objectivity to scrutinize your templates. Meet with vendors of information-technology tools that might prove useful. Speak with some of their customers. Attempt to quantify the benefits of change, taking into account your contract flow. Determine the costs.

And obviously, there would be costs—unlike change achieved simply through cost-cutting, creative change requires up-front investment. Whether such investment makes sense, and in what amount, would depend on the company. A given company might well decide to soldier on with its current contract practices, imperfect as they may be.

But what would be less understandable is not bothering to analyze the costs and benefits. The potential rewards of redrafting your templates and using information-technology tools in your contract process are too great to opt for succumbing to inertia.

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1. "Structural Breaks' and Other Timely Phenomena," Adam Smith, Dec. 12, 2008, available at [http://www.bmacewen.com/blog/archives/2008/12/structural\\_breaks\\_and\\_oth.html](http://www.bmacewen.com/blog/archives/2008/12/structural_breaks_and_oth.html).