

## Outside Counsel

## Expert Analysis

# The Illusion of Quality In Contract Drafting

**T**he notion of quality looms large in law-firm marketing materials and in discussion of law-department capabilities. But traditional contract language has little to do with quality. The same goes for the traditional copy-and-paste process of creating contracts. Instead, contract drafting is ripe for reform.

The term “the quality movement” has been used to describe approaches that transformed manufacturing starting in the mid-20th century. Landmarks in the quality movement include the U.S. war effort in World War II, with its focus on standards and inspection; Japan’s embrace of the work of W. Edwards Deming and other U.S. quality experts in its post-war rebuilding; and the subsequent spread in the United States of “total quality management” and a related strategy, “Six Sigma.”

The quality movement is having a profound influence on engineering, social work, education, and medicine. But this trend has bypassed the legal profession, where the production process underlying legal services remains largely unchanged.

That is the thesis advanced by William Simon, a professor at Columbia Law School, in his new law review essay “Where Is the ‘Quality Movement’ in Law Practice?”<sup>1</sup>

In addition to systematic error detection, peer review, and performance measurement, a pillar of the reform sought by the quality movement is standardized work based on detailed protocols or checklists. The World Health Organization’s surgical safety checklist—discussed in Atul



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Gawande’s book *The Checklist Manifesto: How to Get Things Right*—is an example of such standardized work.

According to Simon, “The function of rules in the new quality movement is different from their function in traditional bureaucracy. Their primary goal is not to minimize discretion. ... Their key function is to facilitate change by making practice more self-conscious and transparent.” To know what needs to be improved, first you must standardize.

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Simon notes that standardization has long been used in some legal tasks, notably due diligence. But he goes on to say that current standardization efforts “seem to be disproportionately focused on relatively simple and repetitive tasks,” with an emphasis on cost-cutting rather than innovation or improving quality.

Simon’s article resonates with us. He doesn’t mention contract drafting, but it represents a glaring example of the legal profession’s reluctance to standardize.

### Dysfunctional Language

First, consider contract language. Any kind of writing benefits from guidelines. Contract language

is limited and stylized, and the stakes are high, so it’s bewildering that contract drafting has for so long done without a set of guidelines for the building blocks of contract language. Instead, because any given transaction will closely resemble previous transactions, the impetus has been to copy from precedent contracts of uncertain quality and relevance and make only those adjustments required to reflect what’s different about the new transaction—everything else is given a pass. And in the absence of guidelines, lawyers are free to treat drafting as a craft, making it subject to individual whim.

As a result, dysfunction is the norm. Among other problems, traditional contract language is full of archaisms (for example, use of “witnesseth” and “whereas” in recitals); redundancy (as in “terms and conditions” and “books and records”); chaotic verb structures (including drastic over-use of “shall”); and misconceptions as to the legal effect of phrases such as “best efforts,” “indemnify and hold harmless,” and “represents and warrants.”<sup>2</sup>

If a contract exhibits the standard shortcomings of traditional contract language, the result will be confusion and delay in drafting the contract, in reading it, in negotiating its terms, and in monitoring performance. The cumulative effect is that traditional contract language wastes vast amounts of time and money. It also greatly increases the risk of dispute—it’s routine for contract parties to find themselves fighting over contract language that turned out to be less than clear.

The main objection to any critique of traditional contract language is that it’s dangerous to change “tested” contract language. In the abstract, that sounds plausible, but it’s paradoxical, as it requires that you stick with language that was manifestly dysfunctional. After all, the contract parties had to ask someone else—a judge—to explain what it means.

A far safer approach is to express in standard English the meaning intended by

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the parties, taking care to avoid any hot-button usages that could give rise to a dispute. Implementing that approach consistently throughout your organization would require taking three steps: First, adopt a style guide that specifies guidelines regarding how to state obligations, create and use defined terms, avoid ambiguity, and handle many other issues. (It would make sense to piggy-back off of an existing set of guidelines rather than attempting to create one yourself. For an example of how to do that, see Koncision Contract Automation's model "statement of style.")<sup>3</sup> Second, train your personnel in drafting and reviewing contracts consistent with the style guide. And third, revise your templates so they're consistent with the style guide.

### Inefficient Copying, Pasting

Creating contracts by copying and pasting helps perpetuate dysfunctional contract language, in that it permits promiscuous copying and gives lawyers free rein to improvise.

And copying and pasting has other shortcomings: It's slow. It allows for only limited customization. It allows drafters to use out-of-date templates. It allows drafters to make unauthorized changes. It results in contracts incorporating provisions that are unrelated to the deal. It results in mistakes.

The alternative is to use document-assembly software, which allows users to create contracts by answering an annotated online questionnaire. The questionnaire is "logic-driven," in that answering a given question might prompt conforming adjustments in the rest of the questionnaire, to ensure that the user is asked only relevant questions. When the user has completed the questionnaire, the system pulls together and adjusts the preloaded contract language in accordance with instructions included in the contract language, and the user is presented with the resulting contract as a Word document or a PDF, depending on the user's role and the organization's compliance policy.

Document-assembly software is now sophisticated and intuitive, and it's in use in some manner at a substantial proportion of the biggest law firms and an increasing number of major companies. It requires an up-front investment, namely the cost of the technology and the time required to create the questionnaire and the contract language, but the benefits of being free of the cost and risk associated with copy-and-paste drafting quickly accumulate.

### A Source of Inertia

In our experience, many organizations that might benefit from retooling their contract lan-

guage and process don't give the idea serious consideration.

That's because of a fundamental obstacle that Simon mentions in his article. He says, "The profession attracted people who liked to work on their own and disliked supervision. Part of the prestige and dignity of the professions was tied to these conditions. Thus, it is not surprising to find professionals resisting the pressures for standardized work or performance measurement of the sort promoted by the quality movement."

Lawyers should consider surrendering counterproductive autonomy—the freedom to continue performing inefficiently and inconsistently what should be commodity services isn't freedom worth preserving. Handling the contract process more effectively would spare lawyers the task of coming up with all or most of the verbiage to articulate a given transaction. Instead, they could focus on higher-value tasks, primarily counseling clients and assisting in negotiations. And we agree with Simon that reform could help foster service "that is more reflective, adaptive, and transparent to clients."

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### Cost-Benefit Analysis

If quality (in terms of language and process) were the only consideration, determining whether to overhaul your contract language and load your templates on a document-assembly system would require just a cost-benefit analysis: Do the costs and risks of copying and pasting traditional contract language outweigh the costs of change?<sup>4</sup>

It's not clear that an organization would be penalized for failing to undertake such a cost-benefit analysis: for all the turbulence in the legal profession in recent years, most organizations continue to draft contracts as they always have. But the potential benefits of change are clear, so any organization looking for an advantage should shrug off inertia and reassess its contract language and contract process. And any company looking for efficient contract drafting from its outside counsel should check whether in fact all they have to offer is the traditional dysfunction.

By putting quality ahead of inertia, the legal profession would be aligning itself with the rest of the business world. Companies battle relentlessly, using incremental efficiencies and innovations to seize extra market share. It's not for the faint-hearted, but there's no reason why contract drafting should be exempt from such pressures.

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1. 2012 Wis. L. Rev. 387, <http://wisconsinlawreview.org/wp-content/files/6-Simon.pdf>.

2. Kenneth A. Adams has pointed out such shortcomings in a representative mergers-and-acquisitions contract and a representative commercial contract. See Kenneth A. Adams, "Shortcomings in the Drafting of the Google-Motorola Merger Agreement," *The Koncise Drafter* (Aug. 22, 2011), <http://www.koncision.com/shortcomings-in-the-drafting-of-the-google-motorola-merger-agreement/>; Kenneth A. Adams, "Koncise Drafter Giveaway: My 'Before' and 'After' Versions of an Extract of a Master Professional Services Agreement," *The Koncise Drafter* (Feb. 7, 2011), <http://www.koncision.com/koncise-drafter-giveaway/>.

3. Available at <http://www.koncision.com/resources/model-statement-of-style/>.

4. See Kenneth A. Adams, *Contract-Drafting Metrics?*, *The Koncise Drafter* (April 30, 2012), <http://www.koncision.com/contract-drafting-metrics/>.