By Kenneth A. Adams

In my discussions with lawyers and professional-development personnel at law firms in the U.S. and Canada, I’ve gotten the sense that some law firms are lukewarm to the idea of bringing in a speaker to do a CLE program in contract drafting. (Company law departments seem generally more open to the idea.) Below are some of the reservations that lawyers have expressed to me, along with the responses I could imagine giving.

We always get Frank to give our junior associates a talk on contract drafting.

I suspect that at a large proportion of law firms with a couple of dozen junior associates or lawyers, once a year a partner volunteers, or a dozen or more corporate lawyers, to junior associates on contract drafting. However interesting or thoughtful such talks may be, they tend to consist of a grab bag of insights and war stories rather than a systematic treatment of the subject.

They also tend to be quite narrow in scope—those I’ve sat in recent years, in which an outsider who specializes in contract drafting can bring to bear a different perspective.

We have our own way of doing contracts and we’re not about to listen to an outsider.

Some lawyers feel that their firm has developed a particular drafting expertise that they’re loath to monkey with—at the prospect of change, they offer a response to the effect that “that’s not the way we’ve always done it around here.”

But while a few law firms—particularly those in Commonwealth countries—have established a degree of centralized control over contract drafting, at the overwhelming majority of law firms the process remains essentially an artisanal one, with lawyers willing to use form contracts from a variety of sources both within and outside the firm.

One result is that in any given firm you’ll see a wide variety of drafting usages, with questions of language and layout largely being left to personal taste.

And it follows that it’s unlikely that any law firm will have a proprietary drafting style. If that was ever the case, it no longer is, now that the work product of hundreds of law firms (including Canadian law firms) is available on the SEC’s Edgar database, to be copied at will by anyone who is so inclined. Instead, it’s safe to say that a broad set of contract drafting usages are used throughout the legal profession.

The upshot is that there’s little point in worrying about an outsider expert adulating your firm’s drafting style, because it likely is a thorough mishmash.

Our lawyers don’t need instruction in contract drafting—they’re already proficient.

I suspect that if you were to ask lawyers to list areas of concern in contract drafting, the quality of contract prose would not be among the issues most frequently cited. Nonetheless, it is generally accepted among commentators that the prose of contracts is at the bottom of the legal-writing barrel. Any given contract will likely feature archaisms, redundancies, unnecessary lawyerisms, idiosyncratic grammar, structural flaws, an inefficient layout, and other problems.

These shortcomings are hardly trivial. Deficient drafting can deprive a party of an anticipated benefit under a contract and is the source of countless lawsuits. And it wastes vast amounts of time and money, in that it makes contracts more time-consuming to draft, read, negotiate and interpret.

To draft effective contract prose, you need to be able to avoid problematic usages and select the most efficient alternatives. A CLE course would provide a good introduction to this process.

We like CLE programs that are engaging, and contract drafting is dull.

While I maintain that contract drafting is more accessible than many a CLE subject, I can understand someone having reservations about making it the topic for a lunchtime CLE program, a format best suited to big-picture discussions.

But considering how lawyers go about drafting contracts brings into play all sorts of weighty issues, such as how law firms staff their work and bill for it, whether drafting should be a commodity task, and how technology can help make the drafting process more efficient—all topics that should give participants in a lunchtime CLE program plenty to think about.

Kenneth A. Adams

FOCUS ON CONTINUING LEGAL EDUCATION

Can lawyers be trained in contract drafting?

Kenneth A. Adams gives a number of reasons why law firms would benefit from a CLE seminar on contract drafting. Deficient drafting can deprive a party of an anticipated benefit under a contract and is the source of countless lawsuits.

To date, nine countries have adopted the Model Law, which doesn’t resemble any other adaptation of the Model Law anywhere in the world. In dealing with cross-border cases abroad, Canadian insolvency representatives will be hard-pressed to persuade foreign courts that Canada has adopted the Model Law.

Those who hope that Canada can have the proper insolvency legislation it deserves have had their hopes dashed on previous occasions and again this time. There is only a slim hope that a Parliamentary Committee review of the shortcomings of the new legislation will produce modest improvements in it. The Lawyers Weekly will keep readers up to date on developments.

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