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News for Associates and Young Lawyers

Legal Writing

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DRAFTING A CONTRACT

For junior corporate associates, drafting a contract can turn into a stressful experience that finds them scrounging around for model contracts and copying and pasting, on a wing and a prayer, pages of seemingly impenetrable provisions. So here is some unsolicited advice on the process of drafting.

Finding Model Contracts

A partner has just outlined for you the terms of a deal and has asked you to draft the contract. How should you proceed? To draft it from scratch would be to reinvent the wheel. Ideally, you would have to hand a contract that you had drafted for a similar deal, but that is unlikely to happen

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with any regularity until you've had a fair amount of experience. Instead, you will most likely follow standard practice and base your contract on models prepared by others. Which models you choose will in large measure determine how smoothly the drafting process goes and how effective and efficient the resulting contract is.

The odds are slim that you'll find a model contract that addresses all the terms of your client's deal. Instead, it will likely reflect the same basic structure and cover some of the other aspects of your deal, and to fill the gaps you will rely on a range of other models that you can judiciously copy from.

Where should you look for model contracts? The instinct of most lawyers is to look to their colleagues. Some firms institutionalize this process to a greater or lesser extent by maintaining form contracts that are, with luck, periodically updated. Also, at most firms you should be able to word-search the documents on the computer system; this allows lawyers to trawl for contracts that might serve as models. Often, however, a lawyer in need of a model contract simply wanders down the hall, picks up the phone, or sends an all-hands e-mail, and in response colleagues scan their deal closing binders, root in their form files, or check the word-processing system and perhaps find something that fits the bill.

If I want to supplement the models that my colleagues and I are able to come up with or need precedent for a particular

provision, my next stop is usually to search the SEC's EDGAR system, more particularly the "Exhibit 10, Material Contracts" filings. When I'm searching Exhibit 10 filings for a particular kind of agreement, I'll do a Lexis "allcaps" search; for more detailed guidance, consult your friendly Lexis representative.

Using Pre-negotiation Drafts

You should, however, be cautious when using as a model the final version of any agreement, whatever the source, since it likely will reflect the give-and-take of negotiation. You could end up unwittingly incorporating from the model any number of provisions — such as more extensive representations or less-advantageous indemnification provisions — that your counterpart on that deal fought against and only ended up including because the client had little bargaining power or because the other party made suitable concessions elsewhere in the document.

The perils of using as a model the final version of a document has led to the recommendation that you use, whenever possible, the first draft of any agreement. The value of this advice depends on what you consider to be the first draft of an agreement. If it is the first version saved on your computer system, that could well represent a valiant first effort by someone two weeks out of law school, with the subsequent three versions representing changes wrought by more senior lawyers

and the two versions after that reflecting further changes based on input from the client. The best document to work from would be the first version that is submitted to the other side, since it presumably represents the drafting side's most coherent statement of its position, before the waters were muddied by negotiation. Establishing which version that was might require some detective work.

Comments by Other Side

While I think it generally best to use the last pre-negotiation draft of any contract that you are using as a model, comments by the other side to a transaction have often allowed me to significantly improve a draft. Consequently, when I use as a model an early draft of a contract that is on my firm's computer system, I usually prepare a computer-generated comparison of the early draft against the final version and add to a copy of the early draft any of the later changes that I regard as improvements.

If you use as a model a contract from a deal that you did not work on, you would probably benefit from consulting someone who is familiar with that deal, presumably someone at your firm. He or she should be able to tell you who drafted the document, which side they represented, and what the balance of bargaining power was.

There's another benefit to using a contract that was drafted by someone at your firm: you (and, more importantly, the partner on the deal) will probably feel more comfortable working with a document produced by one of your colleagues, particularly one who is known to be a reliable drafter, rather than one drafted by the lawyer on the other side of a previous deal or, in the case of a document retrieved from EDGAR, a complete stranger.

Finally, a further source of models is form contracts contained in books and

articles. For example, I occasionally consult the ABA's "Model Stock Purchase Agreement" and "Model Asset Purchase Agreement" and forms included in publications of the Practising Law Institute, but only for inspiration on specific issues.

Revising and Editing

After sufficient rummaging, you have assembled one principal model and a stack of secondary models. Then begins the process of revising and editing. This can be a significant undertaking. Revising involves cutting away irrelevant provisions, reordering those that remain, inserting pertinent provisions from other models, drafting from scratch those you have not found models for, and making global changes to party names and the like. You will then need to edit, in other words apply to the whole your own house style. My system is rather rudimentary: I start from the top and slowly churn my way through the document, applying in one fell swoop the usages that I prefer. Then I go over it again, and probably a third time, to catch whatever I missed the first time around. As the contract progresses through later drafts, you will need to do further revising and editing to incorporate comments from your colleagues, your client, and the other side.

Before you can confidently revise a provision, you have to understand it. When you're a junior associate, the temptation is to leave, say, the indemnification section pretty much alone on the assumption that if it worked in a previous deal, it will do for a first draft. But don't accept any provision on blind faith: even if it doesn't incorporate negotiated provisions that are adverse to your client, it could for other reasons be unsuited to your deal, or it could simply be poorly drafted and so require significant surgery. Over time you will become familiar with

the various drafting options open to you in any given context and will be able to discern which is the best fit. It's unlikely that you will be able to come by this knowledge solely by working on deals; you might want to root around for reference materials in your firm's library and online.

Reviewing Your Drafts

Every draft contract would benefit from being reviewed by someone other than the drafter. An astute colleague might suggest a more efficient structure for your transaction, spot a potential hazard that you hadn't noticed, or recommend any number of other improvements. On a more mundane level, no drafter can be expected to catch all typographic errors or internal inconsistencies.

The extent to which one of your drafts would benefit from being reviewed depends on a number of factors. How complex or unusual is the transaction? How frenetic is the pace? Do you have the luxury of being able to set the document aside for a day or two and return to it refreshed? Do you have someone else do the word processing or do you do it yourself? (You are not the best proofreader of your own typing.) There are times when, due to a particularly inauspicious interplay of these factors, I simply cannot bring myself to read a given draft yet one more time, but you shouldn't wait for such dire circumstances before bringing in a fresh pair of eyes.

Deal Proof, a software tool developed by Expert Ease Software, can assist in the checking process. It scans legal documents and highlights errors and inconsistencies, such as defined terms that are not used and cross-references to sections or exhibits that don't exist. A number of major law firms have purchased licenses to Deal Proof; if you're moderately computer-savvy, you might find it helpful.