

# Teaching Contract Drafting: The Two Elephants in the Room

By Kenneth A. Adams

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Teachers of contract drafting, there are two elephants in the room! Their names are Quality and Process.

## Quality

Teaching drafting, whether at law schools or at law firms, has for the most part focused on topics such as the building blocks of a contract, turning the deal into a contract, spotting issues, and negotiating. These all ultimately relate to *what* you should say in a contract; hardly any attention has been paid to *how* you should say it. This discrepancy is also manifest more generally in how lawyers go about drafting contracts—witness the slavish following of precedent and the tendency to dismiss as “wordsmithing” any focusing on how to express a given provision.

The result is that while the average contract might address adequately, in general terms, who is doing what to whom, it is sufficiently cluttered with deficient usages—redundant synonyms, the traditional recital of consideration, a range of archaisms, use of *shall* to mean anything other than “has a duty to,” incoherent formatting, use of words and numerals to express numbers, and so forth—as to render it an utter chore to read, interpret, or use as a model.

And this reluctance to focus on the microscale of contract drafting encourages a general heedlessness as to meaning, thereby increasing the odds that a given piece of contract prose will contain a drafting flaw that leads to a dispute or deprives a client of an anticipated benefit.

It’s as if you were called on to build an engine:

All looks well on the drawing board, but due to deficiencies in the blueprints and specifications, many of the parts don’t fit together perfectly, and others aren’t of the appropriate grade of metal. You’ve built the engine, and it works, but it leaks oil and makes an odd rattling sound, and for all you know it could blow up when you least expect it.

Practitioners are at liberty to ignore shortcomings in contract prose. A practitioner’s overriding concern will be to get the deal done in a way that protects the client’s interests. If a contract appears to accomplish that, all other considerations, including clarity and efficiency, will generally be set aside. And even if a practitioner were so inclined, reworking model contracts generally takes more time than the exigencies of corporate practice permit, not to mention more time than any client would likely be willing to pay for.

By contrast, teachers of contract drafting presumably aspire to the normative approach of encouraging students to avail themselves of only the most efficient usages. The trick is how to identify those usages. It wouldn’t be enough simply to buy into the conventional wisdom of the corporate bar even if you were to weed out the obvious archaisms and redundancies. Practitioners are partial to “urban legends” of contract drafting—for example, that a party under an obligation to use *best efforts* to accomplish a goal is required to do everything in its power to do so, even if it bankrupts itself in the process.

Instead, establishing what constitute the most efficient drafting usages would require that commentators rigorously assess the alternatives and present their recommendations in an accessible manner. In this regard, writers have long been able to consult manuals of style, such as the *Chicago Manual of Style*. A manual of style could be particularly helpful for contract drafters, given that

the language of contracts is far more limited than that of, say, memoranda or litigation briefs, and given the importance of consistency in contract drafting. That is what prompted me to write my book *A Manual of Style for Contract Drafting* (MSCD).

MSCD is aimed at practitioners, but it would be a straightforward matter to make it part of a course on contract drafting. (I plan to make teaching materials available before too long.) The course I teach doesn't consist of the class working its way through MSCD—a mind-numbing proposition. In those parts of the course dedicated to the how-to-say-it aspect of contract drafting, I discuss with my students key concepts outlined in MSCD, and we work through class exercises, but for the most part I expect them to become familiar with the usages recommended in MSCD by consulting it as they complete their drafting assignments. It is, after all, a reference work rather than a textbook.

### Process

The other significant problem with how contracts are currently drafted relates to process.

At the vast majority of law firms, drafting contracts involves reinventing the wheel imperfectly, day after day. Most drafting is done by junior associates, who are usually expected to learn on the job, with little training. At the start of any new drafting project, a junior associate will be given, or will scrounge around for, a model contract; it will usually be of questionable quality and relevance. The junior associate will then, on a wing and a prayer, essentially regurgitate the model contract, unwittingly retaining, as likely as not, provisions that are not suited to the transaction at hand or, worse, reflect the give-and-take of negotiations in a previous deal. The resulting draft then goes through one or more rounds of review by more senior lawyers. All you can hope for is to make the best of a bad (and expensive) job.

What does this have to do with teaching contract drafting? For one thing, you might want to warn your students of the Sisyphean quality of the contract-drafting life. And if you instruct your

students in the finer points of efficient contract language, they should know that they might have a hard time putting that learning into practice, either because they don't have the time to overhaul model contracts or because senior lawyers insist that each new contract perpetuate their pet traditional usages, no matter how dysfunctional.

But you might also want to discuss with your students how change is afoot—that it would be a straightforward matter to create a document-assembly engine that would reduce the bulk of contract drafting to a commodity process. Such a system would allow lawyers to spend less of their time on what amounts to drudgery and more of it on tasks—such as planning strategy and negotiating—that allow them to bring to bear their expertise.

It's not clear when such systems will be widely implemented, because plenty of entrenched interests are hostile or indifferent to such an idea. But this is how the process would likely work: A lawyer looking to draft a new contract would go online, click the kind of contract involved, select among the various alternatives offered, based on basic transaction parameters, then spend a short amount of time—maybe 10 minutes, maybe 30, maybe more, depending on the contract and the lawyer's experience with the system—working through an on-screen “interview.” At every step, expert analysis and links to authorities would be just a click or two away. At the end of the process, out would spit a first draft of vastly higher quality than what would be produced using the traditional process. And it would be generated in a small fraction of the time.

This is not a new idea. But developments in technology make it a much more feasible proposition than previously. For one thing, such a system could use off-the-shelf software rather than a custom-built, document-assembly engine. And the dependability and bandwidth of the Internet would allow such a system to be made available online.

Equally important are the changes that have been taking place in the legal marketplace. Traditionally,

it's been the client who pays for the grossly inefficient way that many contracts are drafted. But with their static legal budgets, growing responsibilities, and increasing outside-counsel costs, companies are starting to grumble, with some calling for basic deal documents to be commoditized. In a competitive legal market, automated document assembly would allow the more nimble firms to offer a compelling advantage—higher quality work at more competitive rates.

You can't have commoditized drafting without a set of rules governing how the contracts are to be drafted. MSCD represents the only such set of rules currently available.

### Conclusion

Whereas a course in contract drafting could serve as an uncritical introduction to how law firms draft contracts, students would be better prepared for life as a corporate associate if they were made aware of the fundamental problems of quality and process that bedevil how contracts are currently drafted.

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## Another Perspective

"[W]riting that does not meet the profession's accepted standards of competence and public service [is unprofessional.] ... [Such] unprofessionalism ... harms the profession and society by staining the reputation of lawyers and the law, by making the profession a less congenial one for all who are in it, and by clogging the courts unnecessarily."

—Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk U. L. Rev. 1, 3–4 (1997).