Commodification of contract drafting: a winning strategy

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In the world of contract drafting, Ken Adams is the guru.

For the past three years, the 48-year-old former corporate lawyer and self-described contract nerd based on New York’s Long Island has held seminars around the world for lawyers eager to learn how to use clear and concise language when drawing up contracts.


Now, Adams is hoping the manual will serve as a “style guide” for law firms and corporate law departments seeking to establish rules for their lawyers to comply with when drafting contracts.

“This is a specialized form of writing that regulates conduct,” he explains.

“The stakes are so high — every word matters. And mistakes tend to have bigger implications than they do in general writing.”

Drafting contracts has long been a source of law firm revenues, but it’s not a productive use of anyone’s time if there are alternatives in terms of document assembly.

It can involve a simple matter of punctuation, as witnessed in a contract dispute between Bell Aliant and Rogers Communications Inc. before the CRTC nearly three years ago over the use of a comma that created two possible interpretations of a clause.

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Creating unique contracts each time is “reinvent the wheel” and thus, is “grossly inefficient” and detracts from a lawyer’s prime tasks of determining strategy and negotiating a deal.

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“Software, such as Business Integrity’s ContractExpress DealBuilder, which drives Wilson Sonini’s term sheet generator, can upload authorized template language — with alternative provisions to address different scenarios — onto a document-assembly system. A user would generate a contract by entering information in

“You can’t count on them responding well,” he says.

“Furthermore, law firms are in the business of presenting themselves to clients as having unparalleled skills in certain areas and it would not be consistent with that for them to acknowledge that contract language is generic. They may well have strategic expertise that others don’t have, but the language used to build it is a commodity.”

In Adams’s view, lawyers are “regurgitating” words penned by other lawyers, and the resulting language of mainstream contract drafting used by law firms is “dysfunctional.”

“Having a set of rules to direct the process would correct that, and his manual could serve as a “foundation” for a law firm to develop its own style guide, says Adams, who teaches the first-ever contract-drafting course at the University of Pennsylvania Law School in Philadelphia, from where he graduated in 1989.

He points out that associates and partners would then have to learn how to use that guide and contract templates would have to be redrafted. “There’s no point in teaching people to draft contracts according to a set of rules if you’re working with documents drafted by people unaware of those rules.”

In some instances, law firms might have the volumes to warrant the commodification of the drafting process.

For instance, Palo Alto, Calif.-based Wilson Sonsini Goodrich & Rosati, which advises technology companies and venture capital firms in Silicon Valley, has created a free online WSGR (the firm’s initials) Term Sheet Generator. Entrepreneurs and investors can use the document assembly tool to generate an “initial draft” of a term sheet for a preferred stock financing and then craft a “final, customized” term sheet with the help of lawyers.

Adams believes that ultimately, contract drafting should be a “commodity.”

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The commodification of the drafting process.

The Indian Residential Schools Adjudication Secretariat seeks applicants for the contract position of DEPUTY-CHIEF ADJUDICATOR

The Indian Residential Schools Adjudication Secretariat is seeking to engage the services of a Deputy-Chief Adjudicator to assist the Chief Adjudicator with the adjudication of claims in French and to monitor the work completed by French speaking and bilingual adjudicators.

The “Request for Proposals (RFP)” will be available through the Government’s electronic tendering service (GETS). The RFP is open to all qualified firms and/or individuals.

Information on the IAP model is set out in the Settlement Agreement, which can be found on-line at: www.residentialschoolsettlement.ca

How to Apply:

- Individuals and firms wishing to propose their services can obtain all relevant details and related Request for Proposal documents from the Government’s electronic tendering service (GETS) - MERX website. The RFPs will be posted between June 30th and August 11th 2009. To obtain access to GETS bulletin board, individuals and firms must register on-line at www.merx.com.

How to Apply:

- Registered users can then search for a Request for Proposal documents under solicitation number: 20-09-0034 - Deputy Chief Adjudication Services. There is a service fee to download the documentation from MERX. Please address any questions to Vera Olivier at 613-949-9965 or oliverv@ainc-inac.gc.ca.

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DEPUTY-CHIEF ADJUDICATOR
Neighbours and summer gardens in a cold climate

An online questionnaire.

Another company, KHIAC (Knowledge Information Innovation Association, pronounced “kay-ack”), makes software that can analyze a group of contracts, and can extract language from the contracts, and then sort and organize the clauses they contain, how they are organized and display the standard and non-standard versions of a given clause.

But the language used in any contract must be "rigorous" and "clean," because it's the end of the day, and avoid potential litigation as well.

For example, should a deal be a promise? Is it a condition or an obligation? Is it a given word or a phrase ambiguous?

Adams says that when you rip out somebody's cactus in that neighbourhood, they would have kicked your behind, and the rest of the neighbours would have joined in. This was not a culture of "everybody's special" where you could extract from it general concepts that could apply to any commercial agreement.

If anyone caught you ripping out somebody's cactus in that neighbourhood, they would have kicked your behind, and the rest of the neighbours would have joined in.

"It doesn't make sense to have a contract that you can't decide what's important," says Houston, a knowledge management lawyer in the business law group of Fraser Milner Casgrain LLP who attended one of Adams' Toronto workshops.

But it is "standard English," not the "mutant form of English" courts have held that "everybody's special" where you could refer to "regular" law, was "reasonable and save harmless." The court said that "save harmless" is a "broader" contractual obligation than indemnification.

According to Adams, it's better to avoid relying on "jargon" and case law "that attempts to make sense of," and simply say, "indemnify against any losses and liabilities," and deal with defending non-party claims in separate provisions.

Similarly, Canadian and U.S. courts have interpreted the phrase "best efforts," differently. South of the border, courts have held that all efforts mean "reasonable and save harmless." Adams thinks "makes sense."

But in the British Columbia Supreme Court decision in Atmospheric Dynamics Systems Inc. v. International Hard Suits Inc. (1993), the court stated that "best efforts" imposes a higher obligation than a reasonable effort.

Adams says: "When you surrender to a court the role of giving meaning to your contract language, you don't know what the court is going to do with it."

Still, he admits that he'd like a court to note what he has to say. "My book has yet to be cited by a judge in an opinion. That's a sort of all new hands in the course of litigation as well."