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## The New Associate and the Future of Contract Drafting

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Welcome, new transactional associates, to the world of contract drafting!

I know that you've been at it for a few months—doing due diligence, handling securities filings, and yes, preparing contracts. Now that you've gotten your feet wet, here are some thoughts regarding the present and future of contract drafting.

### *The Present*

Although my focus is contract language, that doesn't mean I've always enjoyed drafting contracts. In fact, when I was a law-firm associate I found the process tedious and frustrating, and for a number of reasons.

#### *Dysfunctional Language*

First, the traditional language of mainstream contract drafting is highly problematic, no matter how exalted the law firm that produces it. It's full of archaisms, redundancies, opaque jargon, and other suboptimal usages.

How did that come to pass? It's a safe bet that any transaction will closely resemble previous transactions, so drafting has always consisted of copying precedent, with the drafter making only those changes required to reflect the new transaction. In effect, drafting has become largely an exercise in regurgitation, with most contract language being given a pass.

Because of that reliance on precedent, it has long been standard practice to have junior associates learn drafting by doing, rather than through rigorous training, much as one might learn to swim by being thrown in at the deep end of the pool. And if you can simply copy rather than coming up with your own language, who needs guidelines as to what works and doesn't work in contract usages?

#### *Uncertain Substance*

Copying and pasting the language of precedent contracts creates problems with respect to not just language but also substance. Without rigorous training materials containing dependable annotated contract language, drafters often rely on habit or stale conventional wisdom to justify including a given provision. To pluck an example at random, a standard feature of contract boilerplate is a statement that

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the agreement “is binding upon and inures to the benefit of the parties and their respective successors and assigns,” but it’s debatable what function it serves.

Furthermore, any precedent contract reflects many decisions. For a new transaction, it might make sense to revisit some issues or consider additional issues, but when you’re basing your new contract on a precedent contract, it’s unrealistic to expect that you’ll be able to crawl back up the decision tree and reimagine the options that had been omitted for purposes of the precedent contract. You’re likely to make do, to a greater or lesser extent, with what’s in the precedent contract.

### *Inefficient Process*

Yet another problem with the copy-and-paste method of contract drafting is that it’s inefficient. If anything other than a cookie-cutter deal is involved, you can end up rooting around for suitable precedent, then stitching the bits together and filling the gaps with riders. All that takes time and can require a round or two of remedial review.

### *Serving Inconsistent Masters*

In the absence of coherent guidelines, it has become widely accepted that contract drafting is an artisanal activity—a craft—with lawyers being free to develop their own drafting “style” by helping themselves at a buffet of contract usages, all equally valid. This not only leads to contracts with inferior usages, it also makes it more likely that you’ll draft for Partner A, based on Partner A’s favorite precedent, a contract for a given kind of transaction, only to have Partner B ask you to draft the same kind of contract, but using entirely different precedent. The result? You’re confused and frustrated, and you end up wasting time that someone has to pay for.

### *Skewed Incentives*

Cleaning up the language and substance of a law firm’s contracts requires a centralized effort of the sort that’s problematic for law firms—the landscape is littered with the rusting hulks of law-firm template initiatives.

One problem is that compared to most company law departments, law firms are called on to draft a relatively broad and unpredictable range of contracts. That makes it harder to commoditize the process.

Furthermore, every law firm that contemplates implementing and maintaining a broad set of templates has to face the fact that clients will presumably be unwilling to pay for the work required.

And then there’s the curse of the nonbillable hour. As a general matter, no one climbs the law-firm greasy pole by doing nonbillable work. That’s why you hear of law firms giving to lawyers passed over for partnership the task of overhauling templates. Besides the fact that the skills required to run a deal are very different from the skills required to ride herd on contract language, putting one of your also-rans in charge of an initiative sends a clear signal that it’s a low priority.

Finally, implementing a rigorous firm-wide template initiative would require that partners surrender some autonomy. Given the balkanized power structure at many law firms, that could be a tall order.

### *Illusions*

Given how hard it is for law firms to improve their contract process, it shouldn't come as a surprise that lawyers rely on fairy tales to explain away shortcomings in their contract language: Of course it reads like no prose on earth—it regulates conduct! And if we tinker with tested contract language, who knows what havoc will result! But examine these rationalizations and they quickly fall apart.

Another obstacle to change is that we like what we're used to, no matter how dysfunctional. How you view your own writing is particularly susceptible to that sort of disconnect. In the absence of coherent guidelines, it's easy to think you're a great drafter.

### ***The Future***

So that's the far-from-perfect present. What does the future hold? Just as the current problems relate to contract language and contract process, so do the solutions.

### *Document Assembly*

Document-assembly software is likely to play a significant role in the future of contract drafting. To draft a contract using document-assembly software, you answer an online logic-driven questionnaire, supplying party names and other information and selecting deal terms from among the alternatives offered. The system then pulls together in a Word document, or a PDF, the relevant preloaded contract language, as supplemented by information provided by the user.

You can start each transaction afresh, without being limited by choices made for previous transactions. You're assured a measure of firm-wide consistency, in that first drafts of a given kind of contract are created from the same pool of preloaded language. The questionnaire includes guidance that explains the implications of the choices offered, so the drafter is provided training when it's most valuable—while the contract is being drafted. And answering an online questionnaire takes a fraction of the time eaten up by the traditional process, so lawyers can devote more of their time to determining strategy and assisting in negotiations.

### *Disruption*

Of course, document assembly represents a challenge to the traditional law-firm economic model. If taking longer to perform a task results in your getting paid more, why would you want to be more efficient about it?

But that sort of complacency has been relentlessly questioned in recent years. Inertia still predominates, both at law firms and their clients, but for some forward-thinking law firms, the future is now, in that they're using document-assembly software to facilitate drafting of their higher-volume contracts.

You can see the disruptive effects of document assembly in Goodwin Procter’s “[Document Driver](#).” Visitors to the Document Driver page of Goodwin Procter’s website are invited to draft, for free, a suite of startup documents by using a sophisticated ContractExpress document-assembly system loaded with Goodwin Procter content. A comparable offering is Wilson Sonsini’s “[term sheet generator](#).”

But such loss leaders aside, document assembly would allow nimble law firms to become more profitable. They could premium bill for drafting tasks while still saving the client money, and they could spend the time saved working on other matters. And they could slash the written-off time that’s a feature of the traditional copy-and-paste process.

One objection to document assembly is that it deprives associates of a valuable learning experience. But copying from precedent contracts of questionable quality and relevance involves more drudgery than learning.

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### *Outsourcing*

You can expect more law firms to embrace document assembly for drafting contracts. And adoption will likely accelerate as the technology becomes ever more sophisticated, intuitive, and accessible.

But because of the obstacles outlined earlier, many law firms will find that implementing and maintaining their own document-assembly system is nevertheless beyond their reach. And besides, it seems grossly inefficient for many different law firms to each invest in its own system to generate what should be a commodity product.

A more efficient approach would be to have law firms create the bulk of their first-draft contracts by using a vendor’s library of document-assembly templates. Currently, you find such outsourcing in certain industries, notably construction and mid-market lending. To serve law firms, any such vendor would have to offer the best technology, superior credentials, and access to state-of-the-art substance. (By way of disclosure, I’m involved in this sort of outsourcing.)

### ***Survival Strategies***

While you’re waiting for the brave new world of efficient contract drafting to reach you, what do you do? Here are some suggestions:

- Become an informed consumer of contract language. In terms of clarity and consistency, every kind of writing benefits if writers are able to consult a reliable and accepted manual of style. That should apply particularly to contract drafting, given the limited and stylized nature of contract language and given how high the stakes are. In the absence of any such reference work, I wrote “A Manual of Style for Contract Drafting.”
- Never include something in a draft on the assumption that if it made sense in some other transaction, it will make sense in yours. Instead, if you don’t understand something, ask.

- Don't expect to turn each draft into a thing of beauty. Although you can quickly eliminate obvious archaisms, such as the traditional recital of consideration, retooling contract language is slow work that you likely won't have time for and that the client likely won't want to pay for. Instead, focus on those issues that can affect the deal.
- When you have time to make contract language clearer and more concise, concentrate on those parts that you'll use repeatedly, so that you get a quicker return on the effort expended. Over time, the pool of contract language that you're comfortable with will grow.
- When you're contemplating changing suboptimal language in a precedent contract you'd been instructed to use, be mindful of who will be reviewing your draft. If the partner is a traditionalist, consider limiting yourself to deal-related changes, as opposed to changes that serve to make the contract clearer. If the partner is open to new ideas, you can be a little bolder, but always be prepared to explain your changes.
- When you're reviewing the other side's draft, resist the urge to tidy up non-substantive shortcomings in the drafting. Such tinkering won't win you friends.

Beyond that, I hope you don't have to wait too long for the future of contract drafting to arrive.