

The New York Law Journal

February 15, 2007

WIKI, ANYONE?

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Corporate lawyers can draw on any number of sources for contract language, from the resolutely old-fashioned to those that rely on information technology. That technology has spawned yet another vehicle that could be used for developing contract language—the wiki.

This article considers issues that might arise in using a wiki to draft contracts. It also considers an alternative approach that would avoid the shortcomings of wikis, not to mention problems inherent in the traditional drafting process.

What Are Wikis?

A wiki is a type of Web site that allows visitors to easily add, remove, and otherwise edit content. Wikis can be public or private, and in either case can be open or restrict access by password. Depending on the software and how it's configured, visitors either make edits anonymously or after having logged on and identified themselves. Wikis generally list recent changes made to, and retain previous versions of, any given page. Edits are generally accepted without review, the idea being that although such openness makes mistakes more likely, it also makes it easy to correct them.

The wiki concept is more than ten years old, but it seems to have caught on over the past couple of years. The best-known wiki is, of course, the online encyclopedia Wikipedia, but there are plenty of other public wikis. And it may be that the most prolific growth in wikis is occurring behind corporate firewalls. For example, according to the information-technology magazine *Baseline*, Motorola is currently home to approximately 3,200 wikis.

And wikis are being built into the technology infrastructure. For example, Google recently purchased wiki software maker JotSpot, and Microsoft is incorporating a wiki feature in Office 2007 and SharePoint 2007, for release this year.

Use in Contract Drafting

The simplicity of wikis would seem to make them an effective tool for collaborative authoring. As such, they could be used in contract drafting, whether for purposes of exploring issues, generating template contracts, or revising any given set of contracts to reflect a particular deal.

I know of one organization that's using a wiki to allow its members to collaborate on issues related to contract drafting. The International Association for Contract and Commercial Management (IACCM) recently launched a wiki to explore issues raised by, and language used in, confidentiality agreements. (Their choice of agreement isn't

surprising—because they are used with such frequency yet are relatively straightforward, confidentiality agreements are the logical guinea pig for innovation in contract drafting.)

IACCM's wiki consists of pages devoted to the purpose of confidentiality provisions, negotiation issues, strategic considerations, sample clauses and agreements, and variations by industry, region, and legal system. Tim Cummins, president and CEO of IACCM, has told me that he hopes that by making it easier for IACCM members to keep abreast of issues that arise in negotiating any given provision, the wiki will help ensure that the parties to a given confidentiality agreement understand each other and are better able to resolve any disputes. Cummins made it clear that the aim isn't to provide off-the-shelf contract language. He expects that IACCM will use wikis to explore other aspects of contracting.

But what about using open wikis to generate contract language, relying on the collective wisdom of one's visitors? (I know of one effort, still in its very early stages, to make use of this approach. Its test contract is—of course—a confidentiality agreement.) I see significant drawbacks to this approach.

Rudimentary Text

One shortcoming is that wiki text isn't up to reflecting the many permutations, and permutations on permutations, that face the drafter of even the simplest contracts. Mind you, word-processing software isn't much better in that regard. Using footnotes and bracketed text—an approach used in, for example, the model documents prepared by the National Venture Capital Association—is a rudimentary way to show permutations.

As a means of customizing documents to reflect permutations, nothing compares to document-assembly software. But preparing the raw text underlying a document-assembly version of a given contract isn't conducive to the open collaboration that is the hallmark of wikis.

Skewed Incentives

Another problem is the skewed incentives inherent in open wikis. In this regard, the case of Wikipedia is instructive.

In a December 2006 blog post, Professor Eric Goldman of Santa Clara University School of Law discusses how a very small fraction of visitors to public wikis—perhaps as low as 1%—contribute to content. He goes on to suggest that “for the model to sustain itself, these contributors must remain motivated—or, at least, the rate of new hardcore Wikipedians joining must exceed the rate of their departures.” Given that the Wikipedia model provides Wikipedians with no cash or reputational benefits in return for their contributions, Goldman suggests that “it's going to be hard to recruit large numbers of Wikipedians over time, and it's going to be even harder to keep power Wikipedians contributing at a consistent rate as they experience ennui or life changes” that make it less worth their while. This is one factor that leads Goldman to suggest that Wikipedia will fail in four years.

Goldman's skepticism over Wikipedia's long-term future could apply to the notion of relying on a broad group of corporate lawyers to generate and maintain sophisticated model contracts.

And this skepticism doesn't only apply to wikis, as there's no shortage of more prosaic examples of how skewed incentives can bring down a drafting initiative. Traditionally, any law firm looking to create some sort of template contract would assign the task to perhaps one associate reporting to one partner and would appoint a group of partners to vet the result. Given the primacy of the billable hour, those working on the initiative would derive relatively little in the way of extrinsic benefits. They would itch to move on to other things, and their colleagues would go out of their way to avoid being involved. After sufficient inattention, the initiative would no longer be reliable, if it ever was, and the firm's lawyers would stop using it. In filing cabinets and document management systems across the land one can find the relics of drafting initiatives, propped up on bricks with weeds growing into the engine.

So the skewed incentives that could afflict any ambitious contract-drafting wiki represent just another version of a problem that has long afflicted group efforts at drafting.

One solution would be to provide sufficient incentives by devoting significant resources to any drafting initiative, but that would be impossible for any volunteer-driven organization and would likely strain the resources of law firms and law departments, even the biggest—witness how a few years ago Jones Day invested in a significant centralized drafting initiative only to turn around and dismantle it.

Another alternative would be for a law firm or law department to conclude that most drafting should be a commodity, but that the process of commoditizing it would be beyond its scope, so it should in effect outsource its drafting. The best way of accomplishing that would be to use a vendor that offers a library of contracts to be compiled by means of document-assembly engine.

Questionable Quality

Related to the question of incentives is the issue of how you'd control the quality of the contributions to any open contract-drafting wiki. If any member of the public, or any member of a given organization, were free to make edits, you'd inevitably have problems with quality, such as drafting that incorporates ambiguities, redundancies, or a mistaken view of the law.

For Wikipedia, quality problems have so far proved manageable—a survey in the science journal *Nature* found four errors in Wikipedia for every three in the *Encyclopaedia Britannica*. But the consequences of errors in contract language could be altogether more serious than, for example, getting Einstein's birthday wrong. And in an open wiki, you couldn't be sure that errors and inefficiencies would be corrected.

But there's little cause to be smug about the potential for quality-control problems in contracts drafted by wiki. Out of the various forms of legal writing, contract prose may be the most problematic. Pretty much any example of mainstream contract drafting, no

matter how exalted the source, could be redrafted so as to make it markedly clearer, significantly shorter, and free of some significant glitches.

Even if the quality of contracts prepared on an open wiki were comparable to that of contracts from more traditional sources, a further obstacle to adoption would be the importance of reputation. (This could be referred to as the “CYA factor.”) If Fred down the hall is generally regarded in your law firm or company as being a rigorous contract drafter, then if you cadge a precedent contract from him, you’d have a measure of comfort that it’s reasonably efficient. And if it’s found to be deficient in some manner, your being able to say that you got it from Fred could help keep to a minimum your share of the blame. The same factor explains why outside counsel are often called on to draft contracts that could readily be handled in-house.

As an alternative to both wikis and the traditional drafting process, document assembly has not only economics in its favor, but also quality. If a vendor makes a given type of agreement available to many customers, it would be able to devote sufficient resources to that agreement to ensure that it is, and remains, state-of-the-art. The only glitches should be any introduced by the user when customizing a first draft produced by the document-assembly engine. As for the CYA factor, it would be up to the vendor to establish a sufficient reputation to ensure that users aren’t dissuaded from taking advantage of the economics and improvement in quality offered by such a service. That should be a feasible task.

Inconsistent Usages

A further problem with drafting by wiki relates to the nature of contract prose. As compared to general writing, it’s highly stylized and needs to be rigorously consistent. Nevertheless, contract drafting continues to be regarded as a craft, and as such is subject to the stylistic whims of individual drafters or groups of drafters. In a broad-based contract-drafting wiki, the result could well be chaos.

Again, it’s not only in the context of wikis that this issue arises. Many lawyers have the notion that their firms or law departments have a consistent drafting style, hence the commonplace put-down “That’s not the way we do things around here.” But it’s in fact highly likely that any given organization exhibits a crazy quilt of drafting usages.

Life would be simpler for the individual drafter and the organization if all drafting were done according to a house style. This would be easier to accomplish if the organization’s contracts were drafted using a document-assembly engine.

Bait and Switch

Open wikis could be a very useful tool for brainstorming and for making resources available to a contract drafter on the lookout for raw materials. IACCM’s wiki represents a good example of such a wiki.

But the shortcomings of open wikis—text that can't adequately reflect deal permutations; skewed incentives; questionable quality; and inconsistent usages—mean that open wikis are unpromising as a vehicle for an ambitious contract-drafting initiative.

And once you consider those shortcomings, you realize that they're shared by the traditional contract-drafting process, and that addressing those shortcomings requires a change in approach.

That's why in this article I've permitted myself something of a bait-and-switch: I can't recommend open wikis as a way to put contract-drafting on a more rational footing. Instead, a more promising solution would be for a well-funded and suitably staffed vendor to prepare, using a rigorous house style, a library of commonly used contracts and organizational documents. Over the Internet, the vendor's customers would use the vendor's document-assembly software to produce, in a fraction of the time required by the traditional process, first drafts of the highest quality.

Currently the only such service that exists in the U.S. is the American Institute of Architects' Contract Documents software, which is a comprehensive Microsoft Word-based document-assembly program for preparing contracts for construction projects. The economies offered by such a service are sufficiently compelling that one can expect broader-based offerings to appear on the scene, particularly given the increasing pressure on law-department budgets and recent improvements in document-assembly technology. (Note that I wouldn't be surprised to find myself involved in such an offering.)

The largest law firms are sufficiently profitable—for the time being, at least—that they probably wouldn't be interested in such a system. The most likely first-adopters would be company law departments and the hungrier law firms.

Closed Wikis

Could the shortcomings of open wikis be addressed by making a contract-drafting wiki accessible to only a few users? Using such a wiki (which I term a "closed" wiki) wouldn't address the problems of rudimentary text, skewed incentives, and inconsistent usages.

And while limiting access might allow one to limit quality problems to those prevalent in mainstream drafting, open access would seem to be the salient characteristic of wikis—eliminate that and you wouldn't have much left.

For instance, if I were working with a small group of lawyers to produce a new template contract or revise a template to reflect a particular transaction, I wouldn't want to have all of us working as equal contributors on a closed wiki, posting provisions piecemeal and editing at will text contributed by others. Instead, the normal way to handle such a process would be to have one person prepare a draft and have the others comment on it. You wouldn't need a wiki to do that. All you'd need to do is put the draft online, either on a document management system or by using a service such as Google Docs and Spreadsheets.

So when it comes to contract drafting, the choice boils down to using some form of the traditional drafting process or drafting using a vendor's document-assembly engine, with in-house document assembly as a compromise available to some. Wikis, whether open or closed, are unlikely to be a factor.

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