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Dysfunctional Drafting

Kenneth A. Adams

In terms of both quality and process, the drafting of business contracts is dysfunctional.

Consider quality. Anyone looking for a reasonably representative example of the prose of big-time business contracts could do worse than examine the merger agreement between JPMorgan Chase & Co. and Bear Stearns. What might first catch your eye is the centered heading after the introductory clause and before the recitals: “WITNESSETH,” followed by a colon and featuring, as a pompous flourish, a space between each letter.

If a drafter is willing to employ a fatuous archaism such as “WITNESSETH,” you can assume that second-rate contract prose will follow. That’s indeed the case with the JPMorgan/Bear Stearns agreement, which is chock-full of the sorts of problems that turn contract prose into “legalese.” And it’s entirely representative—any given business contract is likely to be a mess that could do with a major overhaul.

Who cares? The wheels of industry keep turning and deals keep getting done. But legalese renders a contract a chore to read, negotiate, interpret and use as a model. As a result, companies waste vast amounts of time and money that, increasingly, they can ill afford. And the fog of legalese makes it more likely that a contract will contain a drafting flaw that deprives a contract party of an anticipated benefit. That, in turn, could lead to a dispute—much litigation has its roots in mishandled contract language.

The state of contract prose is a function of the universal practice of drafting contracts by revising, or cutting and pasting from, precedent contracts. That practice makes sense, as any given transaction will closely resemble any number of other transactions. But lawyers don’t have the time and expertise to methodically scrutinize and retool precedent contracts, so contract drafting is in large measure an exercise in uncritical regurgitation.

Drafters tell themselves fairy tales to convince themselves that all is well with contract prose—for example, that legalese is more precise than standard English and that departing from the traditional usages could be risky, given that they’ve been “tested” by the courts. But those notions have been thoroughly debunked.

Often reinventing the wheel

Traditional contract drafting is also problematic from the standpoint of process, in that it’s time consuming to make extensive improvised revisions to a precedent contract in order to reflect the deal. It’s commonplace for a significant portion of any law firm bill for contract drafting to be attributable to having associates reinvent the wheel, with the resulting drafts being circulated—once, twice, several times—up the food chain for review then back down for remedial work.

One way to tackle these problems of quality and process would be for drafters to improve their contract prose. Lawyers now regard contract drafting as a craft, with the drafter being free to select from

alternative yet equally valid usages. But contract prose is limited and highly stylized—it's analogous to software code—so it would make sense to employ only those usages that are most efficient.

But if you're seeking to convert lawyers, one at a time, to the cause of rational contract prose, you can expect progress—if any—to be achingly slow. And fixing contract prose does little to fix the process.

Another solution presents itself—document assembly. Although using information-technology (IT) tools to automate contract drafting isn't a new idea, only recently has the technology shown itself to be more than up to the task. Yet IT by itself isn't going to cure what ails contract drafting. Instead, you'd need to ensure that any language loaded onto a document-assembly system is clear, efficient and consistent. The benefits of a system that addresses issues of both quality and process are clear: speed, increased reliability, reduced risk, improved training, and the potential for increased profitability and competitiveness. And drafting contracts would become a commodity task, allowing transactional lawyers to focus on tasks that add the most value—determining strategy and negotiating the deal.

But it's likely that few organizations would be willing or able to commit the resources necessary to implement and maintain such a system. Law firm template initiatives tend to be half-hearted and short-lived. So it would make sense for law firms and law departments to outsource much of their contract drafting to a vendor that offers a broad range of document-assembly templates reflecting exceptional command of language and substance. No such vendor now exists, but it's perhaps just a matter of time before one appears, given the inroads that document assembly has made in niche markets, notably lending and construction.

The legal profession is notoriously conservative. And it's not just law firms—law departments pay for the current dysfunction, but even they have been dragging their heels about putting their own drafting on a rational footing and insisting that their outside counsel do likewise.

But the costs of the current dysfunction are too drastic, and the benefits of change are too compelling, not to hold firms and law departments to account for the quality and process of their contract drafting.

Kenneth A. Adams is a consultant and speaker on contract drafting and a lecturer at the University of Pennsylvania Law School. He's the author of *A Manual of Style for Contract Drafting* (American Bar Association 2d ed. 2008). He can be reached at kadams@adamsdrafting.com