INSIDE TRACK WITH BROC: KEN ADAMS ON CONTRACT DRAFTING AND KNOWLEDGE MANAGEMENT

Kenneth A. Adams is a senior associate at Lehman & Eilen LLP and an adjunct professor at Hofstra University School of Law. His website is www.adamsdrafting.com.

Broc: Every once in a while, we at thecorporatecounsel.net remember that being corporate counsel involves a little more than knowing the securities laws, and now is one of those moments. So tell me about your new book; I gather that it's selling like hotcakes.

Ken: It's called "A Manual of Style for Contract Drafting," and it was published last month by the American Bar Association. It addresses how to express contract provisions in efficient prose that's free of the problems that often afflict contracts. Writers have long been able to consult manuals of style such as "The Chicago Manual of Style," and I thought that practitioners would benefit from having something similar to consult for purposes of drafting contracts.

Broc: Was it difficult to come up with something new to say about contract drafting?

Ken: What I've found so gratifying about writing books and articles on the language of contracts is that I've had the field pretty much to myself. The woods are full of authorities on what provisions to include in a given type of contract in order to protect your client's interests. But when I started researching the building blocks of contract language, I found little in-depth analysis, so I had something new to say on virtually every topic.

For example, a standard feature of contracts, and a bone of contention in many contract negotiations, is the phrase "best efforts," or one of its variants, such as "commercially reasonable efforts." The conventional wisdom among corporate lawyers is that "best efforts" is the most onerous of the "efforts" standards—that the promisor is required to do everything in its power to accomplish the goal, even if it bankrupts itself in the process. But the case law tells a very different story—that courts in fact interpret a "best efforts" obligation as requiring that a party use reasonable efforts. A factor contributing to lawyer misunderstanding of the meaning of "best efforts" is the lack of any useful discussion of the subject in the literature on drafting. My book devotes several pages to "best efforts" and its variants; that discussion is based on an article appearing in this month's edition of "The Practical Lawyer."

Similar confusion surrounds "material adverse change" provisions. That's another topic I address in my book, and my article on the subject will be appearing in the September 2004 edition of "The Fordham Journal of Corporate & Financial Law."

Broc: In my experience, practitioners are quick to dismiss as "wordsmithing" any discussion about exactly how a particular provision should be phrased. How would you respond?

Ken: In a couple of ways. First, if you and your client think that "best efforts" or "material adverse change" means one thing and the court that is interpreting the contract

you drafted thinks that it means something else, you'd likely regret not having devoted more attention to the meaning of the phrase.

But most of the topics discussed in my book are more subtle. To draft effectively, a drafter must make countless small decisions. How should I define this term? Should I use *shall* or *must* in this provision, or use some other verb structure? Is this sentence too long? And do I really need *witnesseth*? If you get enough of these decisions wrong, the result is a contract that is more time-consuming to read, negotiate, and interpret—deficient drafting acts as sand in the deal-making machinery, wasting colossal amounts of time and money. And amid the archaisms and excess verbiage and clumsy structure there might be hidden a subtle defect that could seized on by a litigator in order to deprive your client of the benefit of the contract.

It's as if you were called on to build an engine out of gleaming parts, and all the parts are there, but many of them don't fit together perfectly, and others are not of the right grade of metal, while yet others have tiny imperfections of uncertain significance. You've built the engine, and it works, but it leaks oils, makes an odd rattling sound, and for all you know, it could blow up when you least expect it.

Broc: What's your favorite example of bad drafting?

Ken: I'd say that the prize for "particularly useless provision occurring in virtually all contracts" would have to go the recital of consideration.

In a contract, the lead-in comes after the introductory clause and at the end of any recitals. It indicates that the parties are agreeing to that which follows. In most contracts, the lead-in refers, in a "recital of consideration," to the consideration for the promises made by the parties to the contract.

Recitals of consideration can take many forms, but here is a lead-in containing a relatively full-blown example: *NOW, THEREFORE, in consideration of the premises and the mutual covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto covenant and agree as follows*.

The ostensible function of a recital of consideration is to render enforceable a contract that would otherwise be held unenforceable due to lack of consideration. In this respect, however, the standard recital of consideration is of no help, since the case law shows that a recital cannot transform into valid consideration something that cannot be consideration, and a false recital of consideration cannot create consideration where there was none.

But the recital of consideration nonetheless survives. When revising a form contract, practitioners gloss over the recital of consideration. They're too busy with the daily demands of their practice to revisit concepts last encountered early on in their contracts course at law school; it's good enough for them that the recital of consideration has long been a standard feature. So the recital of consideration is passed down from contract to contract without a second's thought.

This explains why the recital of consideration has acquired other archaisms, notably hectoring *NOW THEREFORE*, the entirely obscure *in consideration of the premises* (meaning *therefore*), and the verb and noun *covenant*, which is presumably valued for its Old Testament atmospherics. It also explains the presence of outdated buzzwords of the law relating to consideration, such as references to *sufficient* or *valuable* consideration.

Instead of relying on a traditional recital of consideration, a drafter would be advised to simply state in the lead-in that *The parties therefore agree as follows*.

Broc: Do you expect drafting standards to improve?

Ken: Not if it's something that individual lawyers are expected to address on their own. Instead, the major law firms and their clients would have to get involved. For that to happen, I doubt that it would be enough to tout the vast improvements in quality that you could achieve by abandoning many standard drafting usages. I think that instead, you have to demonstrate that law firms would serve clients better, and become more profitable to boot, if they were to change how their lawyers draft contracts.

It's not simply a question of the usages you incorporate—perhaps more important is the process. While the scale of contract drafting at the larger law firms is entirely industrial, for the most part the approach remains artisanal. At most law firms, a drafter will rummage for precedent in form files, the firm's document-management system, or the SEC's Edgar system. Such precedent is of uncertain relevance and quality, and usually it incorporates negotiated provisions. The drafter then spends time, often significant amounts of time, revising the selected precedent, and as likely as not introduces further deficiencies. So day in, day out, law firms are engaged in the process of reinventing a wobbly wheel.

The alternative is a centralized approach—making available to a firm's lawyers firm-sanctioned form contracts that are annotated, regularly updated, and cover, for any given kind of transaction, a range of basic permutations. The aim would be to allow a lawyer to produce a first draft in a fraction of the time that it would take to do so by traditional means, while producing work that is of a much higher quality. Such a system would also help ensure that a firm's work product is consistent.

Most law firms have periodically undertaken form-contract initiatives—they have long recognized that there are benefits to centralized control over contract drafting. Most such initiatives ultimately fall by the wayside for one or more of a number of possible reasons: the quality of the forms is inconsistent; partners resent contributing firm resources to the initiative; skewed incentives mean that lawyers are rewarded more for billable hours than they are for working to enhance the firm's practice in other ways; and having squads of associates drafting away inefficiently provides the firm with an essential source of revenue.

Broc: Wouldn't a law firm be shooting itself in the foot if it used a knowledge-management system to reduce significantly the time associates spend drafting contracts?

Ken: I don't think so, for four reasons. First, the legal marketplace is sufficiently competitive that a firm may not have the luxury of inefficiency—if another firm can offer the same services and charge less, you may lose the client.

Second, if an associate is able to produce a first draft very quickly thanks to your firm's knowledge-management initiative, that suggests the possibility of billing that work at a premium rate while still charging the client less than you would have under the traditional system. If the associate were able to spend the time saved doing work for another client, the result would be increased profitability.

Third, a solid knowledge-management system for contracts could open the door to novel client services. For instance, once your firm prepares a form credit agreement for a bank, the agreement could be housed in the system's library of documents so as to benefit from the regular updating that would be a feature of the system while remaining accessible to the bank's in-house lawyers.

Fourth, if you start charging a client less for drafting their contracts, they may well spend the money saved by asking you to perform other services, perhaps motivated by the fact that a greater proportion of your services would consist of actual counseling as opposed to the unedifying process of drafting contracts the traditional way.

Broc: Have firms made any moves toward implementing a knowledge-management approach to drafting?

Ken: Because of developments in technology in recent years, the process of compiling, annotating, customizing, and updating form documents and making them available to lawyers throughout a firm has become much cheaper and more efficient. As a result, some law firms in the Commonwealth countries have made significant efforts in this direction.

But American firms haven't followed suit. While some have made modest steps, for instance by engaging a "practice support lawyer" to draft contracts, most have limited themselves to traditional forms initiatives. A good example of this ambivalence is the fact that one of the major U.S. firms built up the infrastructure for a knowledge-management approach to contract drafting but soon dismantled it due to lack of enthusiasm on the part of the corporate lawyers it was meant to benefit.

Broc: So what does the future hold?

Ken: I don't know, but I can suggest any successful knowledge-management system for contracts would have to be incremental. Don't spend significant resources on manpower and infrastructure in setting up a system that may or may not be used. Instead, start small, focusing on documents that aren't too complex and are used often, such as the basic forms of corporate organizational documents. If you offer lawyers a very efficient way to produce high quality work very quickly, the demands of corporate practice are such that they will use it. As lawyers become used to the system, you can add additional kinds of documents.

It wouldn't be enough to put the system in the hands of a regular deal lawyer. You'd certainly need someone with plenty of deal experience, but they'd also have to be expert in contract language and understand systems.

And a further essential ingredient for a successful knowledge-management approach to contracts would be adopting a "house style" for the contracts that are to be included in the system. Without that, the contracts would likely be mediocre, and your system would be chaotic and inflexible, as you would have a hard time building coherent and consistent contracts using components lifted from other contracts. My book represents the first such set of drafting guidelines, and any firm that doesn't have the resources and expertise needed to produce its own set of guidelines might want to consider adopting "A Manual of Style for Contract Drafting." I was recently heartened to learn that one organization is contemplating doing just that.

Broc: Thanks very much, Ken. Anyone who'd like to find out more about Ken's book should go to his website by clicking on this link, and if you want to buy the book, go to the appropriate page of the ABA's website by clicking here.