

What's Special About Contract Drafting?

Theme Introduction

By Vincent A. Wellman

This theme issue of the *Michigan Bar Journal* grew from an appreciation of three important ideas. First, contract drafting is a centrally important task for lawyers. Second, contract drafting is special: the skills and attitudes needed to draft well are different from the skills and attitudes needed for other legal writing. And, third, both the importance and the distinctiveness of contract drafting are underappreciated by the legal profession.

Why is drafting so important? Because every lawyer has to draft agreements of some kind. This is obvious for “transactional” lawyers, who are hired to negotiate and draft contracts for their clients. But even litigators depend on contracts. What controls the course of discovery? An agreement of some kind. How will parties wrap up a dispute if they settle before trial? Hint: it’s an agreement. And of course, lawyers of every stripe regularly draft engagement letters and fee agreements. All lawyers draft agreements, even if only some recognize the fact.

What makes contract drafting special? In advocacy, lawyers write for the sake of their respective clients, striving to present their clients’ cases in the best light. Then, a judge or arbitrator chooses between the presentations, makes a decision, and tells the parties what to do. But when drafting, lawyers react to decisions made by both parties, so the sequence and the lawyers’ challenges are different. The parties must agree on their future relationship, and the contract is drafted to spell out each party’s role and responsibility. Since the parties will need to live according to that agreement, the drafter’s job is to design a road map for future interactions.

The distinction between the goals of contract drafting and those of advocacy leads to some important differences in the craft. Good prose is different from good poetry, and good brief-writing is different from good drafting. When you write to persuade, rhetorical flourishes can serve a purpose. If your client is suing because of a service provider’s slow performance, the lawsuit might complain about the provider’s delay, culpable delay,

material delay, and so on. But if the drafter uses “delay” on some occasions and “material delay” on others, without a reason related to the agreement, he or she creates confusion. We assume that every word in a contract is there for a reason; differences in wording should be presumed to convey important differences in meaning and application. If section 4 of an agreement refers to “delay” but section 8 refers to “material delay,” the reader is entitled to assume there’s a reason for the difference. In a contract, rhetorical flourishes can mislead the reader and undermine the drafter’s best efforts.

Drafting is special, but its distinctiveness is underappreciated. It can be sobering to contrast the number of books, classes, and conferences that offer assistance for taking depositions with the number of resources for drafting contracts. Only some lawyers litigate, but every lawyer drafts agreements. So why isn’t there more discussion of, and instruction about, how to draft agreements? We can’t know for certain, but it’s plausible that lawyers aren’t accustomed to reflecting on the distinctiveness of drafting agreements. So often, the drafter is derogated as a wordsmith or mere scrivener. This same fact helps explain why so many lawyers draft badly: if you don’t think contract drafting is special, then you won’t ask about the skills, attitudes, or techniques useful in drafting a contract.

The literature of contract drafting is growing, but still embryonic. To further that growth, this theme issue highlights both the importance of contract drafting and some of the skills necessary for success. The hope is, if sophisticated practitioners (and a teacher) reflect on some of the challenges they face, they can illuminate the craft of contract drafting and help others to recognize the importance of that craft. If lawyers think more about what makes some contracts successful and others not, then we can all be more thoughtful, and ultimately more successful, in drafting future contracts. ■

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