ROLE OF THE DOCUMENT DRAFTER AND THE DRAFTING PROCESS

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2012
IMPORTANCE OF THE DRAFTER

Many think of drafting as a boring and unimportant part of business.

Au Contraire -- it is a vital part of business and can be very challenging and rewarding.

The world’s best negotiator is useless if what she negotiates does not get properly reflected in writing.
Some times, the transactional lawyer is also the negotiator – especially in “legal” documents – not problem.

When negotiator and drafter are separate, they are co-equals, with equally important roles.

It is imperative to involve the drafter at an early stage of contract negotiations.
DOCUMENTS THAT MADE A DIFFERENCE

- Code of Hammurabi
- Ten Commandments
- Lex Romana
- Shariah
- Magna Carta
- Declaration of Independence
- U.S. Constitution
- Napoleonic Code

**Note:** The drafters of these documents probably underestimated the importance of what they were doing at the time – just as you may be underestimating what YOU are working on.
THE CONTRACT DRAFTER AS A PRIVATE LEGISLATOR

“That’s Against the Law!” – implies a violation of a statutory provision under public law, prohibiting or requiring some specific behavior, such as wearing a motorcycle helmet.

“You’re in breach!” – implies a violation of a contractual provision under private law, prohibiting or requiring some specific behavior, such as, wearing a hard-hat at the worksite.
DIFFERENCE BETWEEN PUBLIC AND PRIVATE LAW

- Under *public law* (statutes), non-compliance with law results in the imposition of various *judicially imposed sanctions* (prison terms, fines, disqualification) enforced through the police power and courts.

- Under *private law* (contracts) non-compliance with obligations, the non-breaching party can call upon the *coercive power of the state* to compel compliance or compensation.

*EITHER WAY THE RESULT IS SIMILAR*
In a primitive, barter-based economy, contacts and contract drafters are not necessary.

In a modern economy a future exchange of goods and services must be enforceable.

Parties would not be willing to invest vast sums of money to unknown parties based on trust alone.

The contract drafter is responsible for producing contracts that are clear, unambiguous and enforceable at law.

**BOTTOM LINE:** Modern economies could not exist without competent and conscientious contract drafters.
Contract drafters (also known as transactional lawyers) play a role as important as the negotiator, the supplier of goods or services or the marketer.

Transactional lawyers also are as important to a company's success as the more glamorized litigation attorneys.

The mark of a success transactional lawyer is one whose contracts seldom need interpretation.

Proficient transactional lawyers can reduce the role of litigation attorneys to instances of unequivocal breach rather than disputed contract interpretation.
ETHICAL CONSIDERATIONS IN CONTRACT DRAFTING

- The transactional lawyer must represent his client vigilantly – however, there are limits to this vigilance.
- Obviously, the drafter must act in accordance with his licensing entity’s ethical requirements, and cannot perpetrate fraud through his drafting efforts.

CAVEAT: Mere sharp dealing does not constitute fraud.
KNOW THE LAW!

- Being a successful transactional lawyer requires more than good drafting skills.

- The transactional lawyer must make sure the law is *enforceable* under applicable law *and* not volatile of specific statutes or regulations.

- The best drafted contract is not worth the paper it is written on if not enforceable.

- Be careful with application of unfamiliar laws to contract without consulting *knowledgeable* local counsel.

**Caveat:** some times drafters will suggest a specific country’s laws for purposes of “neutrality” when in reality they are trying to gain advantage. (example)
OBJECTIVE

- To draft contracts that are clear, easy to understand and FAIR!!!
- A lot of lawyers make the mistake of drafting one-sided agreements – that just wastes time and erodes trust.
- Your real contribution is to quickly convert loosely conceived verbal deals into solid agreements that are followed and not disputed.