Chapter 5:

Legal document drafting – Tools and practices that enhance a firm's competitive edge

By Patrick Dundas, associate at Schulte Roth & Zabel LLP

In many legal practices, a significant portion of attorney time is spent drafting documents. If an attorney spends this time efficiently – for example, by starting with an appropriate precedent or form, or by using a document assembly program, and finishing off the draft by utilizing expert drafting skills developed over years of practice – the end result is a high-value, high-quality document. Conversely, if the attorney does not have access to precedents, forms, or document assembly programs and lacks basic drafting skills, the end result may be a low-value, low-quality document that the client over pays for and exposes the law firm and the client to risk. A well-articulated document drafting strategy, prepared and executed by a firm's knowledge management department in collaboration with others, can set a firm on the right path by providing attorneys with the tools necessary to prepare outstanding documents, while increasing the firm's profit and improving attorney satisfaction. This chapter describes several elements that every law firm must consider when developing such a strategy.

Drafting as a product: Alignment of business strategy with document strategy

Law firms provide services to their clients in connection with disputes (such as civil and criminal cases), deals (such as mergers and acquisitions), entity formations (such as start-up businesses and investment products), regulatory advice, and dozens of other categories of legal services. One may think of legal services as falling into one of the following three major categories: (i) legal research, analysis, and advice (which may be dispensed orally or in writing); (ii) persuasion (such as negotiating a deal or preparing a brief for a litigation); and (iii) drafting agreements and similar written work. Each of these categories depends heavily on written work product. In many instances, the written work can be thought of as the product that the client is purchasing, which

presents the question: are there steps law firms can take to improve the quality of the product, reduce risk to the client and the firm related to the product (for example, due to product defects), reduce the cost of production, and generally increase the skills of the drafters?

Of course, the answer to this question is yes. Knowledge management personnel typically lead or collaborate with members of other law firm business departments on reaching these goals. However, taking the steps necessary to achieve these goals requires an investment of capital and internal resources, which could be significant depending on a firm's strategy. To improve document drafting, a firm may invest in training its attorneys to be better drafters, in document management systems (DMSs) and search engines, or in form documents or document assembly platforms. The more a firm invests, the better the product is likely to be (thereby decreasing risk to the client and the firm). However, as a firm gets better and faster at preparing documents, the less clients will have to pay for the product (assuming the firm bills by the hour). For some firms, this is a necessary and desired outcome – which could result in increased market share and increased profit. For others, it may be a threat (or perceived threat) to growing revenue. Every firm must determine what its long-term business strategy is and align its document strategy with the business strategy. A firm that does not risks investing in projects that are unnecessary or unwanted, or not investing in projects that are essential for the proper execution of its business strategy.

Amount of investment vs. cost of drafting

The level of investment (of capital or internal resources) varies depending on a firm's needs. When it comes to an investment in document drafting resources, there are four basic categories of investment: development of custom drafting skills, precedent management and location, form development, and document automation. The lower the investment in knowledge management tools, such as precedent search and form development, the more human labor is required to prepare a given document, which results in a higher cost of legal service to the client. This relationship is illustrated in Figure 1.

- **Level 1: Custom drafting –** An investment in developing the custom, or "bespoke" drafting skills of attorneys is required from all law firms. These skills are fundamental to the practice of law and are always needed, regardless of what other tools are provided by the firm.

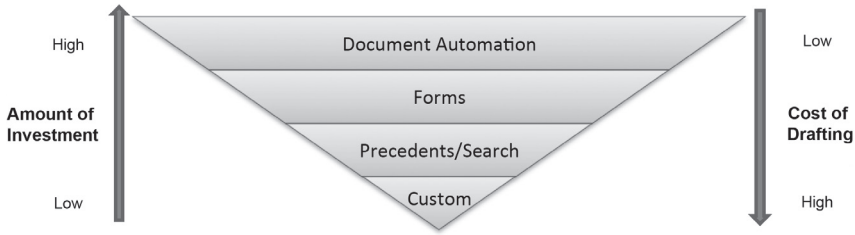

Figure 1: Amount of investment vs. cost of drafting

- **Level 2: Precedent management and location** – Once a firm has written work product, it can be reused. However, giving attorneys the necessary tools to locate the right precedent at the right time requires an investment in information technology infrastructure, and training the attorneys how to properly use the tools available.
- **Level 3: Forms** – When a firm expects to prepare the same kind of document repeatedly it should consider developing a form. Form documents require a significant amount of attorney time, but when done properly they provide extraordinary benefits to the firm and clients alike.
- **Level 4: Document automation** – When a document or suite of documents needs to be prepared in the most cost-effective manner, a document automation program should be used. A prerequisite to investing in document automation technology is having mature, well-tested forms. Given the significant amount of attorney time required to develop forms, capital required to purchase the technology platform, and attorney (and often consultant) time required to convert the forms into coded templates the platform can assemble, an investment in a document automation program can be the most expensive of all document drafting-related investments.

Custom drafting

A blank sheet of paper lies before an attorney tasked with preparing an agreement. If the firm for which the attorney works has made no investment in a precedent bank, model forms, or a document automation program, the attorney's experience and education are the only resources from which the attorney can draw to begin drafting. Of course, this scenario rarely occurs in practice; often attorneys begin drafting from precedents, whether the assignment involves persuasive writing (such as when preparing a brief for a litigation) or contract

drafting. Nevertheless, drafting skills are basic skills of the trade that every lawyer must master, as they are required regardless of the drafting tools available. Even documents based on precedents or documents assembled on an automated basis often require custom alterations to meet the needs of a particular client.

Professional development investment

Though most law schools require students to take persuasive writing courses, many do not require aspiring lawyers to study contract drafting at all. As a result, most attorneys learn how to draft contracts on the job through a combination of mentoring from other attorneys, self-teaching, and continuing legal education (CLE) classes that enhance their basic writing skills. Law firms that have professional development departments should focus significant resources on making sure junior attorneys have these resources available. In the absence of these resources, the product of the firm will likely suffer.

Mentoring

Mentoring can take many shapes at law firms. Law firm partners and other senior attorneys should spend time training junior associates one-on-one during the course of a legal project, as is always necessary, but a mentoring program should include additional mentoring opportunities. For example, office sharing and informal team lunches can provide learning opportunities. Finally, knowledge management practice support lawyers (KM PSLs) can be especially useful. When performing well, KM PSLs serve as the go-to attorney to answer any questions junior attorneys have. This is especially useful for those junior associates that are nervous about asking "stupid" questions of superiors who will review their performance at the end of the year. Thus, the KM PSL can serve as the mentor and counsel to the practice group, accelerating drafting and substantive legal skills of the junior associates and raising the caliber of the group generally.

Self-teaching

While an essential component of professional development, mentoring cannot replace self-teaching. The challenge of self-teaching is that clients are not interested in paying for it and junior attorneys often do not have the time to engage deeply in self-teaching exercises. Nevertheless, it must be done. When mentoring, or providing legal advice to junior associates, senior attorneys should encourage the junior to not just take the senior attorney's advice, but to confirm the accuracy of the advice by reading primary and

secondary sources. When it comes to drafting, there are several reference works that all attorneys should have at arm's length, including legal dictionaries (such as *Black's Law Dictionary* and *Garner's Dictionary of Legal Usage*) and style manuals (such as *The Chicago Manual of Style*, *A Manual of Style for Contract Drafting* (Kenneth A. Adams), *The Redbook: A Manual on Legal Style* (Bryan A. Garner), and *Typography for Lawyers* (Matthew Butterick)). By supporting and promoting self-teaching, firms can accelerate the skills of junior attorneys and improve their products.

CLE programs

Finally, CLE programs that focus on legal drafting skills should be offered regularly, especially to junior attorneys. These can be taught by internal attorneys or outside experts. Internally developed courses should focus on how to draft specific kinds of documents that are common to a particular practice, while courses that teach general drafting skills should be taught by outside experts.

Technology investment

There are several classes of technology products (in addition to word processing programs, such as Microsoft Word) designed to support legal document drafting. The most commonly used technology products are briefly described below.

Document comparison

Every law firm should have a document comparison tool, which enables attorneys to compare one version of a document to another, or any selection of text to another. The most commonly used products are Microsoft Word (native comparison function and track changes), Litéra ChangePro, DocsCorp compareDocs, Esquire iRedline, Microsystems DocXtools Compare, and Workshare Compare DeltaView.

Proofreading

There are several products that use logic to analyze the writing within a document and detect common drafting errors (for example, defined terms that are not used, capitalized terms that are not defined, numbered items that are not in order or are missing items, incorrect internal cross references, etc.). Logic-based proofreading technologies have matured in recent years to the point where they should be seriously considered as a must-have investment of any law firm. However, many lawyers are hesitant to use proofreading technologies. A successful deployment of any proofreading technology will likely depend on support from the top

of the firm and a strong promotional effort. Even then, adoption can be a challenge, despite the benefits proofreading technologies bring. Several commonly used proofreading products include Microsystems EagleEye, Thomson Reuters Deal Proof, WordRake, and XRef.

Precedent management and location

Imagine a newly minted solo practitioner who has just negotiated and drafted their first contract following dozens of hours of negotiation and rewrites. Though they spent a significant amount of time (and the client spent a significant amount of money) on this contract, the next time the practitioner is asked to draft a similar agreement, they will spend less time (and the client will spend less money) if they begin with the last client's contract as an example.

This practice of reusing past work product, or "precedent", is used by lawyers to reduce the cost of their services and improve the quality of the work, among other things. The challenge for law firms is providing lawyers with tools that enable them to find the right precedent when they need it. Several tools may be made available, including curated precedent repositories, search engines that enable searching for documents by matter/party and document classification, and mechanisms to support the sending and searching of requests for information/precedent. Each practice group within a law firm should determine which of these tools best fits its culture, needs, and budget, with a combination of several tools often providing the best solution.

Precedent repositories

Many law firms employ KM PSLs who are tasked with identifying and storing documents that are considered to include the "latest and greatest" language for a given type of legal project. These are different from forms in that they are not "fill in the blank" documents, but examples of how certain clients (and attorneys) have crafted their documents. Collections of these documents may be organized in DMSs or simple folder structures in shared computer hard drives.

Precedent repositories are attractive to many law firms mainly because they appear to require a lower investment than, for example, developing forms; all that needs to be done is to put the "latest and greatest" document into the precedent folder. However, many precedent collections fail because they are not maintained over time. It is very common for a practice group to assemble a collection of what the partners consider to be the gold standard documents today, only to leave the collection sitting for years until it comprises only what used to be cutting edge.

Any precedent repository must be actively maintained, which typically requires regular involvement by support staff (such as KM PSLs) and practice group leaders. However, even with proper resource allocation and management buy in, precedent repositories are extremely difficult to keep current. This is because the "latest and greatest" documents change daily in many practices, and support teams are always one step behind.

Matter/party classification

When seeking precedent for a given document or group of documents, an attorney is nearly always seeking such documents in the context of working on a particular matter or providing services to a particular party. Accordingly, searching based on the attributes of the matter or party will often lead the attorney to the right precedent.

To be able to perform such a search, the search engine must have connections established between documents and matters and parties, and these need to be classified properly. This is no small task. Indeed, few law firms have been able to thoroughly tackle matter/party classification. Nevertheless, matter and party classification presents law firms with rewards far beyond the ability to search for precedents. For example, it supports marketing and business development, conflicts clearance, accounting, and legal project management (including pricing). By comparison, efforts to maintain precedent repositories benefit only knowledge management efforts.

A detailed discussion of how to develop matter and party taxonomies is beyond the scope of this chapter; however, given the broad benefit a successful matter and party classification initiative would provide to a law firm, if resources permit, such an initiative should be considered by all firms (and would likely be a better investment than a precedent repository).

Document management systems and search

The most efficient and effective mechanism an attorney can use to locate precedent is a DMS, combined with a strong search engine. In the modern law firm, a DMS should serve as the repository of record for all attorney working documents (that is, all documents prepared by the law firm for its clients). Many firms expand the scope of the DMS to include emails and other electronic records (e.g. PDF versions of executed agreements) due to the scalability, the technological maturity, and the security features typical of a DMS. As a result, the DMS serves as a significant resource for knowledge management purposes (precedent location), as well as records management.

Of course, a repository is of little use if its contents cannot be searched effectively, and there are certainly many law firms that have made a sizable investment in a DMS without also establishing procedures and installing a search engine that facilitate precedent location. To take full advantage of the information within a DMS, firms should develop and enforce standard document naming conventions and document type taxonomy, and implement a document search engine.

Document naming convention

Saving document files so the file name includes words and phrases that describe the contents of the document is fundamental to storing files and benefits internal users (attorneys) and external users (clients). A proper file name enables users to more quickly find a document and sort the results once they are found. Finally, a consistent and logical file naming standard simply looks nicer than inconsistent and sloppy file names. The test is always, will a person who knows little about the project/document be able to find the file?

The challenge to establishing a firm-wide document naming convention is that different practice groups may have different preferences. This challenge can be overcome by establishing a different document naming standard for each practice group. Multiple standards will interfere with the sorting of documents, but not searching, so long as all document names include the following key components: (1) a description of the type of document; (2) the parties related to the document; (3) the date related to the document; and (4) a description of the status of the file.

As noted above, the order of these components is irrelevant for search purposes; however, the order should be consistent if users expect to sort the files based on any particular component. Regardless of which file naming standard is used by a given practice group, the standard is only useful to the extent that it is used consistently across the practice, so user training is essential to adoption.

Some examples of good document file names are as follows:

- POA – John T. Smith – January 3, 2016 – Executed
- LPA – ABC Partners, L.P. – March 2, 2016 – Final
- 2016–11–03 – Jones vs Smith – Motion for Summary Judgment – Filed
- Term Sheet – XYZ Transaction – Draft

Detailed descriptions of the components of a file name are set forth below:

- **Document type –** The document type description that is included in the document name could be a full description of the document (e.g. Private Placement Memorandum; Power of Attorney) or an abbreviation of the full description (e.g. PPM; POA). Depending on the context and the established practice among a group of attorneys, either approach works, though often document type abbreviations are preferred because they result in shorter file names.
- **Parties –** Similarly, the party descriptions could be the full name of each party or an abbreviation. However, in this case, the full legal name is much preferred over any abbreviation, as abbreviations of party names almost always hinder search. Consider the following two file names, "POA – John T. Smith – January 3, 2016 – Executed" and "POA – JTS – January 3, 2016 – Executed". A user searching for John Smith's power of attorney will probably not know, unless they personally worked on the document, that the best search term is "JTS" and not the words "John" and "Smith".
- **Date –** Whenever a date would be a useful term for searching or displaying a document among search results, it should be included in the file name. This is typically the case with final versions of documents (whether a working document or final PDF version). As with the other file name components, the formatting of the date information varies. Some prefer year/month/day (e.g. 2016–01–03), some prefer writing out the date, which could be done in several different ways (e.g. January 3, 2016; 3 January 2016). The choice of format will depend on the sorting and searching needs of the users. For example, if the users will not need to sort files by date, but do expect to search by month and year, writing out the month may be useful. On the other hand, if the users will need to sort by date, the date should be expressed numerically (e.g. 2016–01–03) and the date information should start the file name.
- **Status –** If a file version is the final version or a PDF of an agreement is a scan of a fully executed copy, it should be made clear in the file name. Typically, this is done by simply including the words "final" or "executed" in the file name.

Document categorization

A universal feature of DMSs is the ability to add additional metadata to a given document. Among these metadata, the "document type" field is especially useful for precedent location purposes. Traditionally, document classification has been achieved manually by the attorney that saves the document by either assigning a specific document type (e.g. Power of Attorney) or saving the document to a folder in the DMS that automatically assigns the document type. Both of these approaches have shown to be subject to significant user error (or inattention). Most DMSs require the user to spend 5–10 seconds determining the document type. Unfortunately for data enthusiasts, most attorneys are not interested in spending any time categorizing documents and, rather than finding the proper type or folder, will save all documents under a generic document type (e.g. "doc").

In response to cultural obstacles to properly categorizing documents, some industry consultants and law firms suggest doing away altogether with document categories. This may be acceptable in a minority of firms, but the vast majority of law firms continue to find value in categorizing documents, despite the uphill battle to convince some attorneys that it is worth their time.

Though generally unexplored in the legal industry, there are technologies available that could enable firms to automatically classify DMS content; however, deploying such a technology would require a significant investment in developing a document type taxonomy and creating logic that matches document types to documents that meet a set of criteria. Few firms have shown an interest in this approach, though it is likely the most cost-effective solution to the problem of poor document classification.

Document search

Once documents are properly named and categorized in a DMS, users have two basic ways to locate them: browse folders or search for documents. Browsing folders may be an acceptable way to locate a suite of documents curated under a client or matter, but when locating precedent, it is no substitute for search. Without a sophisticated search engine that allows for full text Boolean searching of document names and the full text of documents and the filtering of results based on metadata (such as the document type), the utility of the DMS is significantly impaired.

For reference, the following are DMS products, matter/party classification products, and search technologies that are commonly used by law firms: Autonomy Universal Search; BA Insight; HubbardOne Experience Manager; iManage; IntApp; Lexis Search Advantage; Lexis

Total Search; MatterSphere; Microsoft (SharePoint; Matter Center); NetDocuments; OpenText/Hummingbird; ProLaw; Recommind; West km; and Worldox.

Requests for information/precedent

The final precedent location tool is one that is commonly derided but nevertheless essential for most firms. It is the "request for information" (RFI) or "request for precedent" (RFP) message. Often manifesting themselves as emails sent, completely untargeted, to the entire firm or practice group, in the worst case scenario, these emails pose questions with such obvious answers that many recipients cringe at the ignorance of their colleagues, with some taking it upon themselves to privately or publicly let the sender know how ill-advised and unnecessary the email was. Many view RFI/RFPs as a source of distraction and lost productivity, and as producing little actionable intelligence.

However, no matter the sophistication of a firm's knowledge management function, there is always a need for some kind of ad hoc knowledge-gathering mechanism. This need could be satisfied by an email system, an electronic bulletin board, a social media platform, or any other technology, so long as the platform enables information seekers to connect with information holders and memorializes the event and the information sought and found so other attorneys can search and find the information without sending a similar, duplicative request.

When used appropriately, an RFI/RFP is sent only after all other methods of information location have been exhausted, is stored in a searchable repository, and is tagged with the identity of the sender and the client/matter number (but not client or matter names to protect confidentiality in the event that ethical walls are applied to the client or matter). It is crucial that these requests include the name of the sender and the client/matter number so that when the request is found later by an attorney, that attorney knows whom to contact and what client/matter number might hold information of interest.

Forms

Many practices operate well relying solely on precedents. However, if a practice finds that it is drafting the same documents repeatedly and frequently, it should explore whether these documents should be made into forms. Using forms improves the quality and consistency of the product, reduces risk to the client and the firm, increases efficiency, accelerates associate training, and supports increased leverage, as more fully described below.

Quality and consistency

A law firm's brand is based in large part on the quality and consistency of the documents that it produces. Maintaining this quality and consistency can be a challenge if a firm relies only on precedent when preparing documents because precedents evolve over time. Every time a precedent is reused for a new client, the drafting attorney and the client, and often opposing counsel, make edits, for better or worse, that result in diversity. Over time, a firm could have dozens of different examples of the same document type, all with minor variations based on a particular client's needs. Some of these variations will be substantive differences and required, but others will be only stylistic variations. A firm that synthesizes the variations among precedents into a suite of form documents that have a consistent style and take into account the majority of possible client conditions will be able to produce documents that have a consistent look and feel, and maintain the substantive quality of the original precedents. (For a technology product that supports the creation of forms, see KMStandards.)

Risk

Without a single authoritative source for a given document, associates prepare documents based on precedent that may or may not include every provision appropriate under the circumstances. This increases the risk that the firm's product has a material defect. Well-maintained standard forms reduce this risk. Though most forms cannot include all possible permutations, they often can include provisions that cover the most commonly encountered client needs, thereby greatly reducing the risk that a document will be drafted without an essential component.

Efficiency

Though attorneys generally do not like to analogize the business of law to other businesses, there are lessons to be learned and processes to be borrowed from non-service industries. The advisory services provided by attorneys are labor-intensive exercises that are difficult to make less so, but the labor required to prepare many documents can be reduced by replicating processing pioneered and perfected by the manufacturing industry. Standard forms make this efficiency possible.

There are several ways form documents increase efficiency. First, finding a standard form requires less time than researching which precedent to use. Second, it often takes less time to draft based on a form than it does to draft based on a precedent. The pace of drafting is not only increased because the form generally includes all the necessary instructions and

language for an attorney to complete the draft, but over time attorneys become familiar with the form so that time need not be spent reading every word of the document every time – once an attorney has drafted 50 of the same document based on the same form, they need only review the variations. Third and finally, knowledge embedded within forms as annotations and drafting instructions accelerates attorney training, resulting in more knowledgeable attorneys who are able to respond to client questions with less research, as discussed below.

Training and leverage

Perhaps the most valuable function of standard forms is that of a training resource, which accelerates an attorney's skill level, and therefore allows partners to delegate work to associates with less partner support. Indeed, an attorney should be able to draft a document based on a form with no previous training at all. All the information necessary to draft (other than the facts applicable to the related parties) should be embedded within the form. This information can be classified under two categories: drafting instructions and annotations.

Drafting instructions are often included in form documents as footnotes and explain to the drafter how to draft a particular provision or which sample language is appropriate to use under a certain set of factual circumstances. Think of drafting instructions as the "how" of the form. Annotations are the "why" of the form. The best annotations clearly and concisely explain why a form works the way it does or why certain language is in the form at all. When appropriate, citations to primary sources (e.g. laws, regulations, cases, etc.) and secondary sources (e.g. memos, treatises, etc.) should be included. To clearly differentiate drafting instructions from annotations, annotations may be embedded within the document as "comments" in Microsoft Word.

Finally, and most importantly from a business perspective, to the extent that an associate can use a form to draft a document without partner guidance, the firm can increase its leverage ratio (that is, the ratio of associates to partners), which in turn may have a positive effect on the profit per partner of the firm.

Storage of form documents

The best place to store form documents is in a DMS. In the DMS, a form document can be tagged as a form and categorized by document type for easy retrieval. It may be secured so it may be edited only by a limited group of users (or, if the form is restricted for use by a limited amount of users, viewed only by a limited group of users), and new versions of

the form may be stored together so that the evolution of the form may be tracked over time. In some practices, the ability to track the evolution of a form by running blacklines of newer versions against older versions may be crucial for training and client service purposes. For these reasons, storing forms on a shared drive in a simple folder structure or presenting them solely as links in an intranet page may result in missed opportunities.

Sources of form documents

There are three sources of forms in law firms: laws and regulations (statutory forms); third-party information platforms (commercially developed forms); and in-house developed forms.

Statutory forms

Many laws and regulations prescribe specific forms to be used for compliance or other purposes. In addition, many governmental agencies produce their own forms to, among other things, improve the efficiency of their operations. Some examples include powers of attorney, healthcare proxies, and certificates of formation, among others. These forms are typically publicly available. Law firms may use these forms as the basis for internally developed forms, supplementing the statutory forms with instructional footnotes and annotations.

Commercially developed forms

There are several companies that offer forms to the public (or to law firm subscribers) for a fee. The products these companies offer are particularly attractive to law firms that do not have the resources to develop forms on their own. For firms that have developed an expertise in a particular practice area, however, commercially available forms are often seen as inferior to the in-house forms that include years of in-house experience and knowledge.

In-house developed forms

Many practitioners view their in-house forms as superior to forms from other sources, and with good reason. When done well, these forms reflect years, perhaps decades, of legal experience and are tailored to the firm's particular practice and workflows, accelerating associate training and enhancing the firm's leverage and profit. However, in-house forms are no small investment.

Form development projects are easy to begin, but extremely difficult to finish. It is not uncommon for a form project to begin with enthusiasm, but to fail because, for example, client work diverts resources from developing the form. Obstacles abound. While one partner may be a champion of a form project, another – for example, an expert whose input is essential to the success of the project – may view the form as a threat to their value to the firm and a threat to high billable hours (after all, efficiency may lead to lower billable hours, which is perceived by many as the source of profit). As described in detail below, a form project has a higher likelihood of success if there is a lawyer dedicated to leading the project (who typically is also the primary drafter), the project has support from management and involves the entire practice group, and resources are dedicated to maintaining the form over time.

Managing an in-house form development project

Form projects vary in scope from simple to extremely complicated. As a result, the workflows and teams required to support a form project vary depending on the nature of the project, available resources (human and financial), and the culture of the firm. For the sake of concision, below is one example of how a team could support a form project, but other structures could be used.

Team structure

At the heart of the form project team is the project leader. This is the person that will manage the project by doing the bulk of the drafting and coordinating contributions from the partner leader, users (that is, attorneys that use the form(s)), internal experts (if necessary), external experts (if necessary), and clients (to the extent that clients provide feedback to the attorneys). The partner leader is the primary person at the partner level responsible for reviewing and approving the form(s). This person may defer certain questions or issues of law to the practice committee, or to internal or external experts, and the authority to approve any element of a form may be centralized or decentralized, as discussed in greater detail below. This structure is illustrated in the diagram in Figure 2.

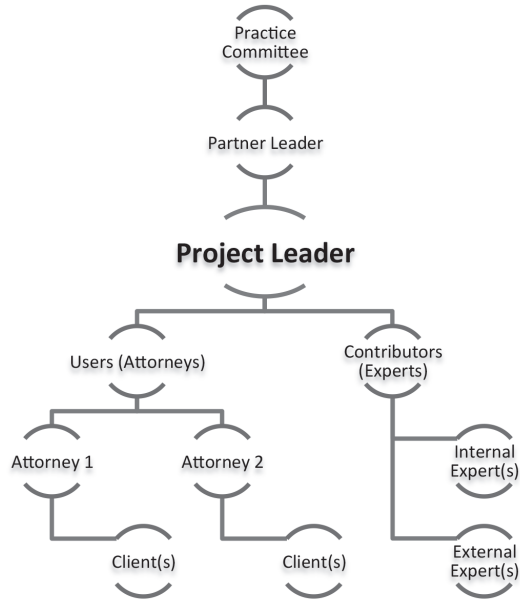

Figure 2: Form project team structure

Dedicated project leader

The leader of a form project should generally not also be servicing clients, should be an experienced attorney who is dedicated to forms and other knowledge management projects, and should be a highly skilled drafter, collaborator, and sales person with good social and political standing that has an entrepreneurial spirit.

Developing even a simple form requires several hours of attorney time at multiple levels of the organization (i.e. junior associate level, partner level, and practice group leader level). If the project involves multiple related forms, hundreds of hours of attorney time could be necessary to finish the job. As with any project, forms projects need a point person: a project leader that has time to sell the project to contributors/collaborators and practice group leaders, do the initial drafting, discover drafting issues, and resolve open questions that arise during the course of the project. If the project leader is regularly pulled away for client projects, the form project will likely fail from lack of leadership and inattention.

The project leader should be an attorney with expert drafting skills and excellent collaboration skills and solid social and political standing. Accordingly, staffing a non-lawyer or junior associate as the leader on a form project will likely not result in the best outcome. A junior likely does not have the drafting skills necessary to produce the best product

and also will likely not have the skills to collaborate effectively with other members of the team (who are often partners) to whom the project leader may be averse. If a supervising partner provides poorly drafted comments to a form that is inconsistent in style or substance to the form as a whole, a junior associate might not have the skills to improve and harmonize it with the rest of the form and might not feel comfortable correcting any errors of a superior. For these reasons, well-seasoned attorneys are usually the best choice to lead form projects.

Finally, the form project leader should have an imaginative, entrepreneurial spirit and the grit and tenacity to push the project forward against possibly apathetic and oppositional collaborators. Every form project will encounter obstacles, and the project leader needs to be able to manage the project to overcome them.

Authority

The authority to approve final language within a form runs on a spectrum between centralized and decentralized. In theory, the authority to approve a final form should always be entirely centralized. With one partner or a committee of partners serving as gatekeepers for the quality of all language in all forms, consistency and quality may be ensured. Firm-approved forms are designated as such by the leaders of the firm and users may rely unequivocally on the language as the "latest and greatest" available. However, in practice, the more centralized the authority is, the more likely the project will fail due to bottlenecks in the review and approval process. It is extremely common for forms projects to fail for this reason.

Decentralization, while often more practical, is not without its own risks. Under this model, each form is best thought of as a group or firm-wide product. It is not the result of decisions made exclusively by the leaders of the firm, but is a crowd-sourced document, evolving based on the feedback of associates, partners, and clients. Each edit certainly must be subject to some level of review, but not every edit needs attention from the top. Certain edits may be approved by designated contributors, others by the project leader, with only those that are worthy of escalation brought to the attention of the practice committee. Every attorney is encouraged to use the form, but to view its contents skeptically and as a document in a state of continual evolution; to engage actively with the forms, and not passively rely on them. The more decentralized the approval process, the greater the risk that some imperfections (or at least perceived imperfections) will creep into the forms. However, this risk may be managed and mitigated by the diligence of the project leader. In

addition, with adequate partner review of any work product based on the forms, any imperfections may be detected and corrected.

Management, practice group, and firm-wide support

A form should be thought of as a product of the firm, not of one person. The best forms are a result of collaboration among firm management, practice group leaders, subject matter specialists, and clients. Attorneys should be able to rely on forms, but they should never rely blindly. Each person that uses a form should be encouraged to review it critically and bring improvements to the attention of the project leader. Ultimately, clients choose counsel partly because of the relationship partner, and partly because of the team assembled behind the relationship partner, and the expectation of many clients is that the expertise of the firm is brought to bear on their legal projects. Forms are an excellent mechanism for harnessing that collective expertise.

Maintenance

Forms are never final. As the law, drafting style, typography, and language evolve over time, so must form documents. The project leader should be in regular contact with other attorneys to encourage comments on the forms. As discussed above, form documents should be stored (and viewable by users) in a DMS so that users may run blacklines to view changes that have been made to the forms over time. Clients expect that they are getting the "latest and greatest" language in their documents, and some of them may have an interest in understanding how and why standard language has changed over time. With blacklines and detailed annotations available to attorneys, there should be few client questions that junior associates lack the resources to address without senior attorney support.

Document automation

Document automation programs can be essential tools to support the drafting of documents for law firm clients under many circumstances. These platforms are often dismissed as being appropriate only if a firm is engaged in high-volume "commodity" drafting work, or if the firm is under pressure to deliver work at a lower cost or in connection with alternative fee arrangements; however, doing so could result in a missed opportunity.

Document automation programs should be considered whenever a firm finds that personnel are spending time engaged in mechanical drafting exercises. Any drafting that is done following a logical instruction can

be done faster, cheaper, and better by a machine than by a human being. Though certainly most cost effective when applied to high volume work, using document automation technologies to draft highly complicated documents (and suites of related documents) not only makes the firm more competitive, but can produce better work than humans are capable of (thereby reducing risk to the firm and enhancing the firm's reputation).

The determinative factor is not the volume of work, but the volume of mechanical drafting – the volume of edits that human beings make that a machine could make. So, for example, if a 200-page securities offering prospectus form includes 1,000 mechanical edits, it should be a candidate for document automation, even if the document is prepared at a low volume.

Finally, an often-overlooked benefit of document automation programs is attorney satisfaction. Attorneys want to be engaged in interesting work. Indeed, attorney compensation is high because legal work generally requires the labor of highly educated individuals with excellent judgment and unique skills. To the extent that an attorney spends time engaged in mechanical drafting, the attorney is at risk of feeling underutilized and bored. Document automation programs can mitigate this risk.

How document automation programs work

Document automation programs generally operate by reading instructions that are embedded within word processing files, such as Microsoft Word files (programmed Word files are known as "templates"), to make mechanical edits to the document. The development process for a document automation project generally consists of three phases: first, establish the fields (also known as "variables") and calculations (collectively with variables known as "components") that will be used by the document template; second, embed the document template with code that links points within the template with the necessary variables and calculations; and third, develop the end user interface (or the "interview") that the attorneys will use to enter the data for a particular project.

When drafting a document based on a traditional form, the attorney starts at the beginning of the document and reads the drafting instructions, making edits as instructed. If a variable occurs more than once in a document (for example, the party names in an agreement will typically appear at least twice, in the preamble and the signature blocks), the drafter will need to make the edit multiple times. A document automation program, by comparison, makes all edits based on the established logic, which enables the platform to make several, if not hundreds, of

edits based on a single variable. By using the technology to make all mechanical edits, the program can make thousands of edits in seconds that would have taken a human being hours.

Managing a document automation project

Document assembly projects are high-investment, high-risk projects for most law firms. Though the technology is relatively inexpensive, a substantial investment must be made to first develop the forms on which the automated templates will be based (see above), select the forms to be included in the platform, convert the forms into automated templates and build the user interview interface, and maintain the platform and the related templates and forms. At any point in this process, there is a high risk of failure if the project is not managed carefully.

Form selection

When determining whether to include a form in a document automation platform, several criteria must be evaluated, including the number of variables/components the form requires compared to the number of edits the program will make based on the variables/components, the level of custom drafting typically required, and the current workflow used to draft the document without a document automation program.

- **Ratio of variables/components to edits –** A document automation program is most valuable if the number of variables/components is a small fraction of the number of edits made based on those variables/components in the document or suite of documents. For example, if a template for a last will and testament includes 100 personal pronouns (e.g. his/her) that change depending on the gender of the testator, the user need only indicate once the gender of the testator and the program will make 100 edits, which could save the user about eight minutes of drafting time. This effect is magnified when applied across a suite of related forms and when a component is based on a sophisticated computation. Accordingly, if the ratio of variables/components to edits in a given document is one-to-one, the document might not be appropriate to add to a document automation platform.
- **Custom drafting –** Nearly all documents require some amount of custom drafting, but some require more than others. Of course, the greater the number of mechanical edits that a document automation

program can make to a document, the more appropriate the document is for the platform; and the greater the custom drafting, the less appropriate the document is for the platform.

- **Drafting workflow –** Some documents require only a single drafter, while others require several levels of review and comment from internal and external experts. Though a document automation interview may be designed with an electronic workflow built in so each expert fills in the relevant information at the time it is needed, building workflows around document automation platforms magnifies the complexity of the system and is rare in practice. Building a workflow may be appropriate and achievable for some firms, but extreme care must be taken when embarking on such a challenging project. More often, interviews are built so a single user enters the information in the interview. If the drafter typically does not have all (or most) of the information necessary to draft at the beginning of the drafting process, the program will often not be able to effectively assemble the document. Accordingly, for example, highly negotiated agreements are generally not suitable content for document automation platforms.

Technology selection

Once forms are finalized and determined as suitable for conversion into document automation templates, a document automation technology must be selected and deployed. Though a detailed description of how to select and deploy a technology solution for a law firm is beyond the scope of this chapter, it is worth noting that not all document automation technologies have the same capabilities (or price tags). When selecting the technology, the firm should understand, among other things, its requirements, the market penetration of the product, how long the product has been on the market, whether the product is that of an independent company or a subsidiary or division of a larger technology company, the experiences of current users of the product (functionality and support), to what extent third-party consultants will be required for deployment and maintenance of the platform, and the price. For reference, the commonly used document automation programs include Brightleaf, ContractExpress DealBuilder, Exari, and HotDocs. In addition, several practice management and other law firm technology products include document automation modules (for example, MatterSphere).

Designing variables/components, templates, and interviews

The process of designing variables and other components, templates, and interviews requires expertise in the document automation program's programming language and a deep understanding of the subject matter of the given form or suite of forms. This presents a challenge, as it is unusual for one person to have both of these skills. Document automation projects that outsource the entirety of the programming to third-party consultants have an increased risk that the structure of the data and the interview will not be consistent with user expectations. Furthermore, relying entirely on a consultant to build and maintain the platform may result in process bottlenecks and an over-reliance of the firm on a single consultant, which could lead to increased implementation and maintenance costs, among other negative consequences. However, it is equally unrealistic to expect an attorney, such as the project leader, to be able to become sufficiently knowledgeable in the programming language to design the platform on their own. Accordingly, the best approach to developing a document automation platform is for the bulk of the programming to be done internally by the project leader, with substantial training and support from consultants so that the system is built in a manner consistent with best practice.

Note that even after a form is added to a document automation platform, it may be appropriate to keep the form available to users outside of the platform, for example, in the DMS. Though assembly programs typically include a mechanism to view drafting instructions and annotations, some users may prefer viewing drafting instructions and annotations in the original form. Also, when proofreading the assembled document, users may need to compare the assembled document with the original form. For these reasons, the project leader may need to maintain duplicate versions of all forms, one as the document automation template, and the other as the original form.

Conclusion

As described above, there are many ways law firms prepare documents. The challenge for any law firm is to provide attorneys with the tools that enable them to prepare each document as efficiently as necessary to maintain the firm's competitive edge. The tools will vary by firm and by practice, but a firm that develops systems and processes that support the drafting of legal documents will have an advantage over one that does not, and in today's competitive legal services market, that could mean the difference between surviving and thriving.