Successfully Administering and Reviewing Standard-Form Agreements

(Eight Annual *Insight* Securities and Business Law Forum for Junior Associates and Law Clerks)

January 19, 2009

Andrew Frei[1]

(Dale & Lessmann LLP)

Standard-form agreements are both the bane and the lifeblood of the legal profession. We all have been exposed to them, likely as both recipients and drafters.

In this paper I review a number of facets of the administration and use of standard-form documents by law firms and legal departments in order to serve their clients' business-to-business transactions.

From my perspective there are two types of documents that can be standardized – the substantive document for a particular transaction and the subordinate documentation used in closing the transaction. Examples of substantive documents would be a loan agreement or a share purchase agreement. Subordinate documents are such things as certificates, declarations and releases.

Introduction

The focus of my review will be two principal areas: (a) setting up and maintaining a set of standard documents, and (b) certain issues that arise in the use in negotiations or commercial relations of those standard-form documents. Although a number of my references are to "deal" documents where there is a one-time event such as a purchase transaction closing, I also consider documents governing long-term arrangements such as distribution or shareholder agreements.

My comments reflect, of course, my own experience. I have been a lawyer for more than 25 years. During that time I have been in-house at two major corporations, a sole practitioner, and a member of both large and smaller law firms in Ontario and elsewhere. My topic is very timely from my perspective, because my firm is currently revamping its approach to and use of precedents, to try to make use of the latest software and prepare for software that is not yet commercially available.

---

[1] Member of Dale & Lessmann LLP. The opinions expressed in this paper are the personal views of the author and not of his firm. Nothing in this paper should be viewed as legal advice. The assistance of the author's colleagues at Dale & Lessmann, Thomas Timmins and Garth Dingwall, in the preparation of this paper is gratefully acknowledged, as is the input of Alex Spyridakis of the Hamilton office of Gowling Lafleur Henderson LLP.

Some of the best examples of use of standard-form documents I see on a daily basis at my firm of Dale & Lessmann are in the preparation and updating of corporate minute books and the condominium development and mortgage lending work we do. These areas are well suited to the development and use of standard forms, both for the major documents used (such as loan agreements) and for the subordinate documentation such as statements of adjustments, declarations and directions.

In my experience, in a business law practice the agreements are not as easily standardized as in the real estate world, unless you are acting for a lender. This difference arises primarily, in my view, because there is greater variety of potential business terms that may apply to "standard" documents such as purchase agreements or shareholder agreements. Nonetheless, large portions of text in these agreements are common to many situations and can therefore be incorporated into forms that can be used in a variety of circumstances. And of course, as in the real estate context, subordinate business law transactional documents are subject to much less variation and thus standard forms can quite readily used from transaction to transaction.

As mentioned, it is not only deal documents that can be standardized. I suspect many of you have been involved in creating a "made to measure" document that a client will use as a standard form it applies to a number of (or many) situations. Examples include standard terms and conditions of sale of goods or services, equipment leases and employment agreements – to name but a few.

Let's now address a number of substantive points about standard-form or precedent agreements.

Setting Up and Maintaining a Set of Standard-Form Agreements

In this area I touch on four aspects:

(a) Putting an effective standard-form agreement management system in place

(b) Best practices for using standard forms as templates or precedents

(c) Updating standard forms as law and circumstances change

(d) Using a standard form for a particular transaction.

Effective Standard Form Management Systems

What are some of the key issues in developing and implementing an effective management system for retaining and organizing standard-form agreements?

As those of you who are already involved in precedent maintenance are aware, it is a lot of work to both set up and then maintain a precedent databank. There is always institutional

inertia to overcome if you are setting one up. To then continue and adapt your system as required over time also requires a lot of determination.

A precedent bank can be viewed as infrastructure of a firm or of a company legal or contract administration department. And, as with many kinds of infrastructure aspects that do not directly generate revenue, it is important that senior management of the firm or department either leads or supports standardization initiatives.

Some basic issues to consider when setting up or revamping a standard-form system are as follows. I proceed on the basis that the system will be electronic as opposed to hard-copy (although hard-copy versions may be available as back-up or for reference for those users who prefer paper over a screen).

Uniform Software

The current and potential users of your documents should all be using the same word-processing software. This may sound like a very basic requirement, but I can tell you that it has presented a major challenge in firms where a large database of knowhow and experience captured in documents created with one kind of software needs to be migrated to another. Although the substance of the documents is easily transferred, formatting of documents and tying in to arithmetic calculation aspects of the previous software is anything but a smooth process.

Naming Protocol or Searching (Indexing) Software

A protocol needs to be set up (and followed!) for the naming of documents, and for revisions of documents. This can be difficult to arrive at, and it likely that no approach will satisfy all users. However, it will reduce the amount of time spent searching your hard drive or precedent area for that missing standard form, which with the search function in usual word-processing software is a frustrating and sometimes fruitless process.

Naming protocols may be somewhat less important if you have document management software. The software often imposes a basic naming protocol for each document, but more importantly has a better search function than word-processing software, thus allowing you to locate a particular form or precedent more easily. If you opt for document management software, those who are most comfortable with named and/or numbered directory structures have to change their frame of reference to some degree – a document is not necessarily found by referring to its location, but by the terms in it or its name that the search engine locates.

Regardless whether one has a document management system or not, the standard-form databank likely will be organized with directories or folders with basic names that describe the types of standard forms the user has access to. For instance, I would expect both a document-managed shop and one that simply uses word-processing directories to have folders of business

law standard forms with such names as, and containing one or more precedents for, “shareholder agreement” and “general security agreement”.

When considering document management software, a desirable quality is that the software can search quickly within documents for specific words or phrases, for instance when you are looking for that one variation of a particular clause that you recall you had in a previous transaction some time ago.

One Location

Another simple rule is to put all of the precedents and standard forms in one place.

With the enhanced search capability of document management software this location requirement may be less relevant. However, the requirement of ease of access to users dictates that even in a document managed firm there be a single location (e.g. a button to click on) where lawyers and clerks look to find the precedents.

Gatekeeper

A central question is who is authorized to approve and make changes to precedents. If you have an ad hoc precedent database, no-one has been assigned that role. As either your firm or legal department grows, or the number of precedents grows, at some point it becomes necessary to have someone who is “in charge” of the database. The “gatekeeper” function is important, to provide order and integrity to your precedent bank. The gatekeeper is the only person who can add, delete or amend documents; users have access to them in read-only form but save and edit the copy under a new document name. From my perspective the approval of documents and their changes should be carried out by a lawyer, even if the actual depositing of finalized precedents is carried out by someone else. In addition, “sanitizing” the precedents of client information must be done, although care must be exercised by the secretarial support doing so in order to ensure that all identifying material (including addresses and information that may be in schedules) is removed.

However, can the gatekeeper lawyer spend the time required? Large firms have infrastructure and revenues that can support having one or more lawyers providing the precedent gatekeeping function. In a small firm or inhouse legal department there is not the budget and perhaps not the volume of precedents to dedicate a lawyer to this function. So, having a lawyer doing this who also has revenue-generating obligations means that you can easily develop a bottleneck as soon as that person becomes busy with paying work.

Two solutions to the gatekeeper bottleneck problem in a smaller environment are obvious: have more than one gatekeeper, and/or have an informal precedent bank in addition to the formal one maintained by the gatekeeper.

Additional "Informal" Precedents

The standard-form documents in a precedent database will be amended by users for specific transactions. Many of those amendments may be very useful to others in your firm or legal department, but it may take some time or perhaps not be warranted to elevate them to "firm precedent" level by sanitizing them of client information and subjecting them to whatever your organization's precedent review process is. To deal with this, it is very useful to have an informal precedent location where anyone can deposit these kinds of documents for others to refer to or use before the review and the removal of client information has occurred.

As mentioned above, this is also a partial solution to the gatekeeper bottleneck problem in smaller organizations.

Of course, we would not be in the legal world if we didn't make sure that there is a general internal disclaimer that the sufficiency and appropriateness of precedents in the informal database should not be relied on.

Review and Approve Changes

There needs to be some sort of process to review and approve changes to precedents. Where there is a person whose full-time job involves precedent maintenance, that person can set a protocol or propose one to those in charge. In inhouse or small firm environments, this is likely to be an ad hoc approach; however, someone should take charge of this aspect, because a precedent bank that is not maintained up to date can become a liability rather than an asset as law and practice change. Again, there has to be senior management drive or at least support for the maintenance process (including allocation of time or budget or both), or else those involved will be too easily diverted or dispirited.

Also, it is important to have those who work with the nuts and bolts of the process involved in the commencement or updating of precedents. Secretaries or clerks who are adapting precedents either themselves or on the instruction of a lawyer should be encouraged to pass on their comments, as should junior lawyers. I certainly have seen a disconnect in this area from time to time.

Talk to Each Other!

Having precedents and standard form documents is not much use if no-one in your organization knows about them. The same goes for improvements or situation-specific modifications you may make. As with keeping up with the law generally, it is important that both the basic precedents and improvements that have been made be communicated to your colleagues. If I come up with a useful clause or refinement to an existing clause, there needs to be a way for me to disseminate that information to others. This simple and obvious point is

harder to follow if there is no precedent-focussed person in your organization and everyone is busy with other direct income-generating work.

Where there is a person in charge of precedents, the ability to email him or her a revised provision, or a comment on an existing provision, is a tremendous feature that did not exist when I was younger. Meetings where you discuss changes in law are also good opportunities to discuss recent changes to or use of precedents.

Best Administrative Practices – Standard-form Agreements as Templates and Precedents

Here are a number of items to consider in setting up and operating a precedent bank.

Various Forms of One Agreement

Does it make sense to have one very detailed and compendious version of your standard form, such as a shareholders agreement, that you amend for every situation? Or should you develop more than one form? At our firm we have opted for the latter course of action. We have a very long and detailed shareholders agreement, and one that is shorter. The same goes for our general security agreement, and for other corporate or commercial standard-form documents that we have or are developing. Some firms also have a medium-length version of common precedents such as shareholders agreements.

Obviously the forms need to reflect your clients' needs. As a simple example, if you are drafting a shareholders agreement for a small entrepreneurial business, I generally would not expect the client to want to see (or pay for!) a draft incorporating the wonderful 60-page standard shareholders agreement your firm might have developed for large sophisticated parties.

Document Assembly

Consider the extent to which the creation of a first draft of your document can be automated. At a simple level, the "bullet searching" function of your word-processing software can help you move quickly from one blank to be filled in to the next. Similarly, the "cut and paste" function can be used to delete or import provisions from precedents.

A more sophisticated document creation approach would be to have a standard-form agreement linked to a dialogue box with blank spaces you fill in and which are then populated into the document and may even also choose which of various clause options are applied in certain situations. Minute book software uses this approach in the creation of draft articles, by-laws and resolutions.

In our firm we are refining our use of the first two approaches, bullet-searching and cut-and-paste, to create draft agreements from our precedents. Ultimately we may go further to use dialogue box questions and answers to pre-populate draft agreements for lawyer review and

refinement. A small unscientific survey I recently conducted suggests to me that not many law firms or legal departments have automated their business law agreements to this extent yet.

Explanatory Text in the Precedent

Annotated versions of precedents can be quite useful for users, but do raise a couple of issues:

(a) Do you have the time to insert all the annotations, and does waiting for complete annotations mean the document is delayed in being available to potential users? Adding an unannotated version of the agreement to an informal precedent database addresses part of this question.

(b) Beware of the comment function in word-processing packages. I have had difficulty removing comments from drafts, and am not comfortable that meta-data deletion software that is supposed to remove previous blacklining and comments actually always does so. Although I am often told that the solution is to send documents in PDF format, that does not work in the usual corporate or commercial situation, where both parties may actually be amending the document during the negotiation process so it needs to be exchanged in word-processing format.

Some software packages in use in law firms provide a one-button deletion feature that allows the drafter to remove comments before the draft is sent out.

Precedent Document Size

Although electronic storage space is no longer expensive, having an electronic version of a very detailed precedent shareholders agreement, for example, is not necessarily any less cumbersome than using the massive (450 page) binder our firm still has sitting on a shelf from a previous era when the hard copy of the then-current version of its standard shareholders agreement was stored in paper format. It can be difficult keeping both the all-important overview, and the details, straight while you are drafting from a very long electronic version of your precedent.

The Future? Collaborative Precedent Development and Updating – Using "Wikis"

An approach that is being developed for precedent creation is the use of "wikis" – software that facilitates the creation, maintenance and upgrading of a document by multiple authors. This builds on the concept behind the Wikipedia online encyclopedia – rather than making it difficult to create a document or change it, the software makes it easy to correct mistakes.

The wiki approach is as follows. Each document has an editor (gatekeeper). Anyone can make changes to the document, because it is not in read-only form. Each change is highlighted and attributed to the author. The editor reviews changes and approves or disapproves them by marking them as such. Approved changes become part of the formal precedent. Disapproved changes can either be deleted from the precedent or can be left in the precedent (perhaps annotated with reasons for disapproval or situations where they do apply) and thus become part of an informal precedent within the formal one.

Direct involvement of users in the creation and maintenance of the precedent is intended to improve the responsiveness of the precedent databank and the quality and currency of the documents in it.

As an aside about nomenclature, please note that my use here of the term "wiki" does not refer to how some firms are already using the Wikipedia approach, namely in internal webpages where aspects and provisions of a precedent agreement (or other legal topics) are discussed or explained by members of a firm.

Our firm is considering introducing wiki document-creation software when it becomes available. Whether and how well it will work is as yet unknown.

Blackline Your Drafts

I hope this goes without saying, but please ensure that each time during negotiations when you modify a document you provide to the other side a blackline showing all changes you have made. Blacklining, whether with separate software or by using the "track changes" function in word-processing software, is easily available and not difficult or expensive to use. We should all be proud of our legal drafting and ability to convince others of the validity of any position we take, and should not rely on "sneaking something in" to a draft so as to catch your counterparty unawares. The only occasions where I think it is not necessary to send an accompanying blackline is where the change is truly minor and has been described or mentioned in the cover email you send with the document.

Vetting Standard Form Agreements to Update Information and Reflect Changes in Law

Updating Information

It is important to keep the information in your standard forms up-to-date. The now well-known magic of the search-and-replace function in word processing software is of great assistance in updating information. If the name of a statute or a party to the document changes, simply replace all occurrences of the former name in the document. Of course, we have all made the mistake of doing a global replace and having some embarrassing replacement of the term. Therefore I always, and request any assistant working with me to always, do an occurrence-by-occurrence replacement of terms being updated.

The people involved in the updating need to understand what is in the document, so they know where to look for things that need to be replaced. Not all changes are merely search-and-replace. Marvellous as it is, the computer's search function does not necessarily catch all relevant changes (such as where an extra space has been inserted inadvertently between the words in some occurrences of a multi-word defined term).

Reflecting Changes in the Law

This involves a multiple-step approach to keeping your standard-form agreements up to date:

(a) knowing that there are changes in the law

(b) appreciating what standard documents you have may require changes

(c) understanding how the changes affect the document in question

(d) wordsmithing relevantly to incorporate the change.

All of this requires a team effort – if someone learns of a change, the firm or inhouse environment has to encourage sharing of that knowledge with others in a timely fashion. And each of the other steps mentioned above (which may not be an exhaustive list) requires a similar team effort. Does your firm regularly "patrol" its precedents to consider if recent changes in law need to be incorporated into precedents?

The "Do's And Don'ts" Of Tailoring Standard Forms To A Specific Transaction

Here are a number of brief aspects to consider.

The important question when reviewing a document always is: what is missing? (with respect to both business points and legal points). Although checklists, which can also be part of a precedent database, may help in this regard, frequently that question can only be answered through experience, particularly as regards business points.

Do not underestimate the importance of reading the form fully and properly. Many of you may have heard the (?apocryphal?) story of the large firm that inserted in a standard long-form agreement two small sections that had no substantive impact. It was astounding how frequently those two redundant provisions later showed up in precedents presented by other large firms as their own.

There is no substitute for stepping away from the draft agreement you are creating from a precedent during the drafting process in order to reflect on the overview of the deal in question and what the important business and legal aspects are that need to be addressed. The shorter your precedent is, the easier this may be to do.

There is also the bias issue. Just because a provision in an agreement is mutual does not mean the agreement is fair to both parties. A shotgun buy-sell arrangement in a shareholders agreement is not fair to both sides if one side has easy access to capital and the other does not.

Similarly, do you set up your precedents so that they are fair? A simple example is having a "vendor-oriented" version of a purchase agreement, and also having in your precedent bank a "purchaser-oriented" version. I think this is a useful internal division, but beware when using one with any bias that it may not be well-received by the other party to the transaction.

A final consideration is to have another pair of eyes (person) review the draft agreement you have created from your precedent. I still do this on an informal basis from time to time for quality control purposes, even in circumstances where the extra time spent may not be billable despite the value brought to the situation by a second review.

Use of Standard Documents in Negotiations and Ongoing Commercial Relations

Standard-form documents offer plenty of scope for use by both law clerks and junior lawyers. In this portion of the paper I review a number of considerations that apply when using standard-form documents. I touch on the following topics:

(a) the battle of the forms – whose standard form gets used when both sides have one?

(b) addressing high-risk provisions in a standard form

(c) what is the extent of the activity that can be conducted by law clerks or contract administrators in negotiations involving standard forms?

When Both Parties Insist On Using Its Standard Form Agreement, Who Prevails?

There can be differences in approach in one transaction between the major documents and the subordinate documents. There are certain conventions that one might discern as applying to the major documents in the following types of transactions.

On Purchase Of A Business

Generally I would expect the purchaser to draft the agreement of purchase and sale and make amendments as the negotiations proceed. This is for two reasons. First, it is a convention that the purchaser does so, probably arising from the fact that the bulk of a purchase agreement (the representations and warranties) contains detailed statements the purchaser wishes the vendor to make and thus should be drafted at the instance of the purchaser. Secondly, the "golden rule" often applies – the person supplying the money dictates how documentation is going to be approached.

However, where a transaction process is being run or facilitated by an investment banker or other intermediary, the intermediary may suggest to the vendor that it provide a standard form

of purchase agreement that the finalists in the bidding process would use. In other situations, the vendor simply may prefer to present the initial draft.

My recent experience in purchase/sale transactions is all over the map, leading me to think that either the "purchaser drafts" convention is weaker than it was when I first learned how to do deals, or parties to deals are becoming more flexible. An interesting example we recently had at my firm was where we represented a publicly-traded Austrian company buying a privately-held Canadian company. Our client required that an Austrian approach to the purchase agreement be used, but in English (and Austrian law applied to the agreement!).

With respect to subordinate documents in acquisitions, in recent transactions my experience has tended to be that the parties will divide up this documentation, so that each party's standard forms are used in some aspects.

In Other Situations

Generally I would expect the owner of the subject matter of the particular contract to insist that his standard form be used. For instance, I would expect the "principal" to require its form of a distribution or agency agreement to be used. The same would apply to intellectual property licences. This could almost be viewed as a variation of the "golden rule", as the principal or licensor often is the larger party or at least has the leverage to require that its form of agreement be used. Of course, there is another sound rationale – anyone granting rights to its products around the world wants to deal with only one form of agreement and (presumably) one system of governing law.

In another context - good luck trying to use something other than the lender's standard documents in a loan transaction (another application of the "golden rule"!)

Similarly, where a big party and a small party are contracting, the big party will frequently have a form it wishes to use (there's that golden rule again). However, I've certainly had more than one occasion in the last few years where a small party I have acted for has been able to make major changes to a shockingly inadequate standard form of agreement used by a major player.

Where I have really run into the battle of the forms in the past is on NDAs (non-disclosure or confidentiality agreements) and releases. Here it often comes down to one of two scenarios. The first is that one party is intransigent. The second is where it could almost be said that the race goes to the swiftest.

In the intransigent-party situation my experience is that it is a large multinational that is being intransigent by requiring the other party to use the multinational's standard form of agreement. Not only does the intransigent party refuse to deal with any form other than its own,

but in addition it frequently is loath to make any changes. As you might expect, the document often is one-sided in favour of the intransigent party.

If I am acting for the smaller party dealing with the multinational, the following are some of the strategies that I have been able to use to reduce the impact of the most one-sided or unfair provisions. At times I have been able to amend standard forms by interlineations, or striking out lines in the agreement and inserting other words with a typewriter or using PDF. If that is not acceptable, sometimes I have been able to deal with the one or two major objections I have had to such documents by having a side letter signed by the parties that amends the relevant provisions. But if even that does not work, what I have had to try to resort to is having my client sign the agreement "as is" but in the cover letter or email that accompanies the signed document back to the multinational say that the document is executed by my client on the basis that the offending provision does not apply fully or at all. Obviously, the more indirect one is in either making an amendment or how one states the substance of the amendment, the more likely that the attempted blunting of the offending provision(s) may not be successful.

In the second scenario ("race to the swiftest"), the parties are often more flexible and prepared to have a measure of give-and-take, with the party who is quickest to provide their standard form having primary drafting responsibility.

Except in the case of the completely intransigent standard-form owner, my experience has been that parties are willing to merge their forms or clauses from their forms to provide a document that meets the need of both parties.

One caution: when I was a young in-house lawyer fiercely promoting and defending my client's business interests (or so I thought), my insistence on covering off many eventualities in a confidentiality agreement so annoyed the other party that they refused to deal any further with my client – or at least so they said. In other words, be careful that the "legal" tail does not wag the business-deal "dog".

On the other hand, at times it is useful for the client to "blame" its legal team for insistence on certain agreement provisions. That I have no objection to if it is discussed between lawyer and client in advance. However, it is objectionable if a party blames its own lawyer for a transaction that goes sideways without having discussed this "tactic" with the lawyer first. I have recently had the experience of the other side in a transaction blaming the second-in-command of my client for tanking a deal as a means to drive a wedge between the second-in-command and the owner of the business, when the second-in-command was simply requiring quite usual protections for the significant investment of new money his principal was making in an existing project that was having difficulty.

Spotting Problem Or High Risk Clauses And Reporting To Lawyer And Client

When you are drafting a contract that is to be used as a standard form, obviously you can identify in advance those provisions that should not be amended by the client without lawyer input. This can be done using electronic locking features on provisions that are not to be changed, or by giving blank lines where one fills in the only items that can be varied (we have all seen that on bank forms). Also, one may by accompanying memo provide a client with answers to questions that may be asked by the other party proposing to sign the client's standard document, as well as alternate forms of provisions to address what are expected to be common objections parties may raise before being willing to sign.

Two specific "high risk" areas spring to mind with respect to existing contracts.

The first is an obvious issue related to purchase agreements that arises when conducting contractual due diligence as part of an acquisition. Assignment and change of control provisions in material contracts of the target (which may be standard forms) need to be brought to the purchaser's attention. This can frequently lead to discussion and/or additional negotiation between seller and buyer in respect of those contracts.

The second issue that I come across with some regularity is the client who speaks glowingly of the five-year agreements he or she has with either key customers or key suppliers. The first place I look when I get a copy of the contract, which is often the counterparty's standard form, is at the termination provision. Frequently the stated five-year term of such a contract is terminable on 90 days' notice at any time. That is a 90-day contract, and not a five-year contract.

Another high-risk area to consider is whether the deal document reflects what was agreed by the parties in their letter of intent. It is very important to go back to the original expression of the parties' intent every once in a while. That being said, however, of course the parties may have amended part of their deal in a way not reflected in the letter of intent.

An aid to ensuring you have addressed issues that are high risk because they may have serious adverse consequences for your client is to consult the many checklists that are available in precedent books or your own firm's or legal department's precedent databank.

In terms of reporting high risk clauses, a couple of quick thoughts are the following. Of course you should advise your client of the existence of a provision that you think may pose a significant risk, not only from the strictly legal perspective but also from the business perspective. Beware as a practical client relations matter, though, the client who only wants your legal input and does not want you addressing business issues at all.

It is important to understand the overall transaction and some part of the history and motivations for the parties entering into the deal. If the client fails to mention an important

background fact, the contract you are drafting from your standard form, or the legal advice you are providing, will be lacking.

Can A Law Clerk or Contract Administrator Conduct the Negotiations?

My view is that the answer is “yes”.

As with any occupation in and outside the field of law, I think one of the most rewarding work experiences as one gains skill and experience is to handle increasingly responsible activities on any particular matter. This increase work satisfaction for the law clerk. It also benefits the client and the law firm. The client has a lower rate being applied to the matter. The law firm has the same benefit, plus the real but intangible benefit of having a motivated staff member. There is, however, the fine line between giving a law clerk responsibility and the responsible lawyer dumping so much on the clerk or not being available that the clerk becomes overwhelmed by responsibility. Of course, one needs to beware of lawyers and law clerks who say they can deal with something but are in fact overstating their qualifications or abilities.

I have had the pleasure of dealing with experienced law clerks on the other side in a number of transactions. Here are some examples.

A number of years ago I acted for a tenant proposing to lease office space in a building. The landlord had a large portfolio of commercial space and had a very knowledgeable in-house non-lawyer dealing with almost all aspects of the lease negotiations, only running certain aspects by the (external) lawyer. Although I was not completely happy with the deal I was able to negotiate, I thought the clerk did a very effective job. Contrast this with a recent experience I had with another landlord with a large portfolio of commercial space who only uses their (in-house) lawyers to negotiate leases.

I’ve also had excellent experiences with law clerks handling significant aspects of transactions. These range from a corporate acquisition a dozen years ago to two transactions in the past year - one was a sale of a significant parcel of development land and the other was a significant financing. When a law firm, legal department or business finds law clerks who are capable of significant negotiations and drafting, keep them - they are a godsend!

Note that the excellent experience I have had with clerks acting in substantive ways in business law transactions is unusual, in that I have not frequently seen clerks given such senior responsibility.

Of course, one must consider professional liability when a law firm uses law clerks to negotiate contracts or other deal documentation. To what extent should the lawyer in charge of the matter review “everything” the clerk does? As with so many other things, it seems to me this depends on the skill and experience of the clerk. One must of course contrast this with those

practices where the lawyer has neither trained the clerk properly nor kept involved in the deal with the clerk.

And speaking of professional liability in law firms, keep in mind the provisions of Rule 5 of the Law Society's Rules of Professional Conduct. Rule 5.01 addresses the delegation of matters to non-lawyers. The essence of the rule is that a lawyer must directly supervise any non-lawyer. The commentary to the rule addresses corporate/commercial matters specifically. It provides plenty of scope for law clerks to carry out the types of activities I have referred to above, by specific reference to such things as assisting in more complex matters and drafting security instruments, contracts of all kinds and closing documents.

One important recently-introduced requirement in the Professional Conduct Rules is that the non-lawyer must be identified as such when communicating with others, whether by voice or in writing. This important new requirement is easily complied with when using the most common form of business communication – by incorporating the law clerk's title (i.e. paralegal, or law clerk) into his or her automatic email signature.

One other important special non-lawyer it would be remiss of me not to refer to is the trade-mark agent. I am a transactional lawyer who deals with quite a few trade-mark prosecution and opposition matters. I was initially trained by a non-lawyer trade-mark agent many years ago. Trade-mark agents have made invaluable contributions to a large variety of trade-mark matters I have been involved with, and I have learned much from them over the years.

Allocating Roles Between Contract Law Clerk Administrator And Lawyer

As is clear from my previous comments, although there are some restrictions imposed by the Rules of Professional Conduct on law clerks' activities in law firms, the practical limitation is how comfortable both the lawyer and the clerk will be in having a clerk exercise senior responsibility. Part of the concern (which, frankly, applies also to junior and senior lawyers) is that you do not want to delegate to someone a task beyond their ability or competence.

One clear demarcation that can be used is to have the lawyer draft and negotiate the major contract documents and the clerk deal with subordinate transaction documentation, either by drafting it or by both drafting and negotiating it with the other side.

* * *

Standard-form agreements and subordinate documentation are frequently used in corporate/commercial transactions and make the rendering of service to clients easier and more cost-effective. The involvement of junior lawyers and clerks in the maintenance, use and negotiation of standard-form documents benefits all participants greatly.