

IMPORTANCE OF DRAFTING SKILLS BY BHUMESH VERMA

American actor Will Rogers famously said, “The minute you read something and you can't understand it, you can almost be sure that it was drawn up by a lawyer.”

So much appreciation for lawyers' drafting skills!

Till about mid - 1990s, it was a common sight in Indian legal chambers for stenos / junior lawyers to first take dictation from the senior partner and then type it (in case of stenos) or get it typewritten by typists in the court premises / office. The draft was then proof-read, re-read and re-typed several times. The reading of such drafts (mostly) dictated by senior lawyers resulted in a lot of legal education as well as developing drafting skills for young law trainees and freshly qualified lawyers. They learnt virtually everything from their seniors' drafts – applications, complaints, pleadings, agreements and so on.

Then, there came a revolution. Access to computers, internet, database and precedents came as a boon for lawyers – be it litigation lawyers or those on the corporate advisory side. Life became so simple, you did not have to work on anything from scratch or reinvent the wheel.

Somewhere or elsewhere in the world, someone or the other must have worked on a draft similar to the one you are supposed to draft. If a precedent is available within your team or office, you have access to it. Else, you ask your friends in other offices / firms for a draft. If that too fails, go to google and search for a draft.

Just pick up a draft, cut and paste, substitute the dates, place, parties' names and particulars, and your job is done. So quick, so accessible and reliable, one tends to think. Since the draft has already been executed (with no idea, if and where), it's efficacy or enforceability should also not be an issue.

Trust me, I have had associates coming to me with a legal position as per New Zealand laws on an Indian law query, coming with 5 definitions of the same person within one agreement, 20 definitions in a draft which are not used anywhere in the agreement. The list is quite long, so will not bother you more on this.

However, on a serious note, this has made some lawyers (particularly the younger lot) a bit lazy and vulnerable to short cuts and the standards of legal drafting are falling at most of the places.

Given my experience with corporate-commercial agreements, I can enlist some issues here.

A draftsman should always understand no two transactions are the same. The parties, their mindset, location, resources, expectations from a deal, governing laws, all these elements are different in each transaction. The status of the parties (individual, LLP, company, NGO, government, etc.) may be different in different transactions, so their rights, obligations, expectations could be different.

No one-size-fits-all works for corporate / commercial transactions. It is not only that you need to delete certain provisions of your precedents which are not applicable to the present transaction, but you need to add several new elements which may be special requirements of the parties. For example, contracts for personal services would be different from contracts for institutional or mechanical services.

Many times, lawyers do not take time to actually read the documents they are supposed to have drafted. It is only when the client reads the documents and comes back to the lawyer with his comments on 50-odd issues that are either not required in the agreement or were never contemplated, that the mistakes or oversights are realised, putting the lawyers / firm to embarrassment. I have also seen new teams at law firms disowning drafts circulated by earlier teams at their own firm. It is better to read and fine tune any draft before circulating it outside your office (irrespective of the readings it takes from any number of people).

Relying on old drafts too much may not take note of new enactments, repeals or amendments in statutory provisions. While working on draft, you need to take the updated position on all legal provisions applicable to the present transaction.

Many lawyers are happy and content if they take a spell and grammar check on their computer and no mistakes are detected. They feel they are safe. However, please understand that computers may not detect the difference between a ‘Statue’ and a ‘Statute’ or ‘trail’ and a ‘trial’, or ‘abide’ and ‘avoid’. You need to carefully read throughout to detect these errors and correct them.

Any legal document must be concise and clear. The content and intent must be clear to anyone reading the document, not only the other party’s lawyers or the courts.

Good written communication skills are among the most important skills to succeed in legal profession. Senior lawyers expect a lot in this respect from their younger colleagues. Writing is at the heart of the legal profession. However, I do not feel much stress is given on drafting skills in law schools. It is more of an 'on-job' learning for lawyers.

Poor drafting reflects poorly on lawyers as well as their firm and can even ruins the reputation of the fraternity. It may lead to massive losses to the clients as well.

Whenever I go to a law college as a guest teacher or speak to young lawyers in my first interaction with them, I emphasise on drafting skills. I am always happy to work with institutions and students to improve their drafting skills since I strongly feel law schools as well as law students must pay much much more (deserved) attention to this aspect of legal education.