Automatically Assembling Agreements

There's software that can free up lawyers to do the real work

By Jason Mark Anderman / American Express Company

I'm going to ask you a question. Your answer probably determines how you feel about the future of practicing law and using legal technology. Think of yourself falling along a continuum. If you fall at one end, you're in a group of lawyers who believe that any given legal matter is an almost wholly unique endeavor, drawing on a novel intersection of insights and skills each time. At the other end, you stand with a team that believes there is almost nothing new under the legal sun, with every matter capable of systematic classification and reaction based on a preset approach.

In my experience, most lawyers will lean toward the first end. We see the complexity involved in a new challenge, the interplay of personalities across the stakeholders involved, and the need to demonstrate significant value in serving our clients' needs. We can all recognize that practicing law necessitates sophisticated negotiating skills, understanding people's intents, navigating nuanced indications offered by body language and tone of voice and reading between the lines. All of these efforts are quite hard to automate.

At the other end of the spectrum, a minority of lawyers feel that we can predict the likely issues that may materialize in any negotiation. And these issues may be amenable to technological intervention. It is relatively easy to automate, for instance, the most common issues and how they are typically handled. Most matters are not singular.

My work focuses on transactional and regulatory work. I find that about 95 percent of the issues I encounter are ones I've seen many times. But there's a kernel, that 5 percent, which offers something new. It might be a clause I've never seen before, or a complex overlay of multiple conflicting agreements, or a previously unknown guidance document that demands compliance. Handling these challenges is where we shine. They often require the benefit of many years of experience and the pulling together of analogous principles to build a new schema to close the matter successfully.

For instance, let's say you are tackling the most heavily negotiated contract clause: limitation of liability. Your client is a wearable-device manufacturer and the supplier is a small, innovative cloud-software vendor. The vendor is adept at creating lead-generation mobile applications and websites known for turning interested users into paying customers. As a result, the vendor will access the personal data of the manufacturer's customers.

> ***Some legal work is complex, but a good deal is not and could be amenable to technological intervention.***

The manufacturer's risk managers expect a limitation of liability clause that protects the manufacturer from exposure while preserving the ability to pursue substantial damages from the vendor, particularly if the vendor faces a cybersecurity breach where thousands of personal data records are compromised. This kind of transaction often involves a heavy negotiation, with numerous red lines traded back and forth over the course of months. But what if you could massively reduce that cycle time, homing in on the most knotty issues involved right away?

Document assembly software makes this possible. This kind of software, offered by providers such as Contract Express, Exari and HotDocs, allows you to atomize any contracting question down to its key elements. (Full disclosure: I used to own a document assembly company called WhichDraft.com.)

Here's an example. For a limitation of liability clause, you usually maneuver through two hurdles in reaching agreement: limiting consequential damages and inserting a hard dollar liability cap. A consequential damages limitation typically takes indirect, special, incidental, punitive, exemplary and consequential damages off the table in any litigation between the parties (as shorthand, most lawyers refer to all these damages simply as "consequential damages"). So it's a given that any clause will include a description of these damages. What the parties negotiate, however, is whether there are any types of claims where the damages will be excluded from this limitation, meaning, essentially, that there are certain claims where one party can sue the other for consequential damages.

Using document assembly software, you can offer up a menu of exclusions that, when selected by the user, appear in an automatically drafted clause. The menu of options normally includes intentional/willful misconduct, gross negligence, breach of confidentiality, breach of applicable law, intellectual property violations and contractual indemnities for third-party claims. You'll also want to choose whether your clause should only shield the manufacturer or be mutual, and which party (one or both) can take advantage of the exclusions.

For the hard dollar cap, you would want to similarly determine whether the exclusions apply when picking a dollar figure that one or both parties' liability will not exceed. Your menu of options includes amounts paid in the year prior to the date the claim arose; the amounts paid under the term of the agreement prior to the claim; an even larger number equal to the amounts paid, due and payable over the entire projected term of the agreement; or a multiple of that amount (usually three to five times the amounts paid, due and payable). You also want to determine if the hard cap applies on a per-claim or aggregate basis and specify that the clause applies no matter the liability theory, despite the foreseeability of damages, and even when expected remedies fail.

If you automate all of these issues via a simple question-and-answer interface, with the language automatically drafted based on each menu answer you choose, a slew of benefits accrue. A senior lawyer saves herself valuable drafting time, allowing her to offer the client more competitive fees and making alternative fees profitable while thrilling the client with a faster contract negotiation cycle time. A more junior lawyer spots issues he might otherwise miss. A firm losing an attorney to a new employer doesn't have to watch his knowledge walk out the door.

But by far the most important advantage is that an attorney can move up the value chain. Instead of spending significant time battling back and forth over the automated issues above, you can quickly deploy your desired language while aligning with your client on the right negotiating strategy. Doing so allows you to channel your efforts instead into more challenging issues.

Now let's return to our device manufacturer and software vendor negotiation. The manufacturer likely opens by asking for a consequential damages limitation for itself and none for the vendor, with no hard cap. The vendor counters by proposing a mutual consequential limitation and a hard cap at amounts paid in the year before any claim. The manufacturer accepts mutuality, but with all of the typical exclusions and no cap. The vendor states that this is a deal-breaker.

By using document assembly software, you fly through this part of the negotiation. Now you need to close the deal. Using all of your experience, you suggest that the manufacturer actually accept a hard dollar cap, but that it be tied to the most likely and substantial claim: damages due to a data security breach. You determine the amount of the vendor's cyber insurance, validate that this is sufficient to cover the compromise of the personal data records involved, and choose that amount as the hard dollar cap. The deal quickly closes, satisfying both sides as you maximize the legal value delivered.

Due to the plethora of drafting styles, folk wisdom and industry traditions, document assembly has little market penetration. Contract negotiators are hesitant to change their ways, and I often feel that technologically we haven't traveled very far from the way contracts were prepared decades ago. Perhaps adventurous and influential law departments that are embracing innovation will create a tipping point leading to widespread adoption. And once they realize that they can speed up service and increase revenue and savings by doing so, while delivering even better quality, this shared insight may convince the wider legal world to embrace this grand experiment.

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