How To Prevent Mistakes in Transactional Legal Work

Joshua Stein

Small mistakes can ruin major transactions. Here are some tips on how to avoid them.

MAJOR REAL ESTATE, finance, and corporate transactions involve large numbers and in many cases long-term relationships. If something goes wrong with the documentation, negotiation, or other aspect of the legal work, the client may have many years to ponder the

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problem—and to regret the decision to engage the attorneys who caused it.

You can systematically reduce the probability of trouble by identifying and following some specific guidelines and techniques for handling, negotiating, and closing business transactions. This article describes those guidelines and techniques.

1. EARLY DOG-CATCHING • When matters first come into the firm, someone needs to identify the "dogs": transactions and disputes that, by their nature and history, portend unsatisfactory results, unhappy clients, billing problems, and an unreasonable risk of claims against the firm regardless of how good a job the firm does.

Mad Dog! Mad Dog!

A firm may, for example, want to think carefully before taking on an assignment for a new client who:

- Announces it has already fired two previous law firms, one of which the client plans to sue for malpractice;
- Is under extreme and inordinate time pressure for reasons not clear;
- Presents a case history that is inappropriately complex, involving an abnormal amount of poorly organized paper, and a constantly changing cast of characters;
- Has been victimized by other parties but might not be innocent; and
- Otherwise brings along a load of excess baggage unrelated to the business end of the transaction.

The Trip To the Pound

Make the decision to decline the matter quickly and at the outset. If you take on a problem matter, you—and anyone else working on the case—will have the burden of exercising special care to prevent mistakes. Bad cases always present the risk of unjustified blame for whatever problems may inevitably occur. To put it another way, if you decide to lay down with the dogs, you had better anticipate a few flea bites.

2. UNDERSTAND HISTORY • The natural instinct of any attorney in the early stages of a matter is often to *do something:* get matters moving, give the client advice and a new strategy, take charge, show how much better and quicker he or she is than the client's previous or other counsel.

Don't Jump the Gun

Those tendencies, though reasonable, understandable, and often intensified by the client and the situation, can lead you to take shortcuts, overlook events and history, and pro-

vide "preliminary advice" (which the client may regard as carved in stone) that is wrong, inappropriate, or inadequately thought through.

Devil in the Filing Cabinet

For example, suppose you give some quick "preliminary advice" based on a quick reading of a contract. The next week, after you find time to read through a file of "minor correspondence," you realize that a series of letters completely waived the most important terms of the contract. By the time you retract the initial advice, the client may have already acted and forgotten that the "preliminary advice" was only that.

You can prevent mistakes like this by taking the time to fully understand the history and facts and by carefully reading all relevant documents before giving any advice or doing anything for the client.

3. MAINTAIN GOOD FILES • It's bad enough to make a mistake based on an inadequate understanding of the matter's history. But it's particularly troubling to make that kind of mistake when you or your firm have handled an earlier related matter for the client. Failing to maintain thorough, well-organized files invites exactly this kind of problem. Maintaining well-organized and accessible files and records, so that an attorney trying to find out the history of a matter can easily do so, can avert the problem.

Using the same documents as used in an earlier transaction may burden you with every concession, negotiated omission, and deal-specific variation from the first transaction.

Bad Systems Cause Problems

Realistically, the harder your firm's files are to deal with, the less likely you or your colleagues may be to take the time and invest the effort to find out all of the details about the client's affairs. That will increase the risk of mistakes and problems.

4. A SUITABLE STARTING POINT • Start the documentation process with a good precedent. Do not waste time and risk mistakes, particularly omissions, by trying to reinvent and customize the wheel when a stock wheel from the wheel bin will do just as well.

But Don't Use a Square Wheel

But be careful when choosing a model to follow: working from "the documents we used in the last deal" can create problems. This is especially likely when the current transaction involves different parties, different property, and a different business deal. Using the same documents as used in an earlier transaction may

burden you with every concession, negotiated omission, and deal-specific variation from the first transaction, in addition to whatever new inconsistencies and imperfections the drafting and negotiating process for the new transaction might create.

5. BEWARE OF PERSONAL INVOLVEMENT • If you are personally involved with a client or a transaction in any way other than as an attorney, your involvement will be viewed in the worst possible light, perhaps even as evidence of wrongdoing and culpability, if anything goes wrong.

Think Twice—or More

Think twice, or more, before acting as anything more than an attorney in a transaction, even if you can somehow defend, justify, or rationalize what you did. Even if you have "just a very small piece of the deal," you may well be the target of complaints (or worse) when the limited partners in the transaction decide they are unhappy with how it turned out and decide to hire a new attorney to try to make it right.

6. RAISING THE RED FLAG • Keep an eye on the big picture. If you sense that something may be wrong with the big picture—too many risks, too many elements that do not feel right, legal uncertainties, doubts about the other parties involved—step back and warn the client of danger signals beyond the legal issues.

Be a Bearer of Bad News

You may want to do this even if the client does not want to hear about it, or thinks the attorney's job is merely to figure out a way to do what the client has already decided to do. By speaking up, and writing down your concerns, you may keep the client away from trouble and yourself away from blame.

7. COMPLEXITY • The more complicated a transaction becomes, the harder it is to make the documents and the transaction work correctly, regardless of how the facts turn out. Complexity, though intellectually stimulating, increases the risk of mistakes and problems.

Combine Like Elements

For example, if a transaction involves two separate components that vary slightly—thus requiring completely separate documentation that must be kept consistent and coordinated—ask whether the pieces can somehow be combined and dealt with only once. Aside from saving time (and hence money), this can eliminate any need to think about how the two components interact, to check and recheck cross-references between the two parts of the transaction, and to remember to edit the second batch of documents to reflect all the negotiations that affect the first batch.

Keep it simple when circumstances allow.

8. CUTTING CORNERS • When the client wants to save time or money, or must close on an unrealistic schedule, he or she will sometimes tell you to cut corners and "do the best you can," assuring you that if all does not go well you will nonetheless be held blameless. Don't believe it.

Selective Amnesia

When the client tells you not to worry about any of the following (for example), keep in mind that the client may soon forget those oral assurances:

- Obtaining customary evidence that the documents have been executed by the right signers;
- Checking the leases to make sure they are consistent with the rent roll; or
- Closing the transaction in a simpler but less reliable way, perhaps because the client feels comfortable with the parties or does not expect problems.

In other words, if the client suggests that you cut corners or do less than a top quality job, remember that the client may (intentionally or unintentionally) suffer selective amnesia about those suggestions when the transaction goes bad.

9. EDUCATING THE CLIENT • A client legitimately expects an attorney to be responsible for achieving a particular legal and business result. If the attorney is willing to be responsible for achieving that result within the constraints set by the client, then he or she should accept that responsibility. But if the client's constraints are unrealistic or inappropriate, you need to say so, to try to convince the client they are wrong, and perhaps decline the assignment.

Keep a Record

If you still proceed—full speed into the thunderstorm—you may be able to limit your exposure by unambiguously memorializing, in writing, any advice and warnings you give, and trying especially hard to apply the other techniques in this article.

10. WATCH THE DEADLINES • When a client faces a deadline to perform an action or give a notice, figure out when that deadline will occur and exactly what the client must do before then. Make sure the client does it, before the last minute.

Get an Early Start

If a transaction is time-sensitive, start the job early enough to complete it gracefully before the deadline without a last-minute crush likely to produce sloppy work and hence mistakes. Take advantage of whatever calendaring systems, tickler files, and other tracking systems may be available.

The Time Bomb

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signers or other parties to the transaction decide to take their long deferred vacations, or a major snowstorm prevents the messenger from delivering a time-of-the-essence notice by the close of business on the deadline date. Don't risk it.

11. SPEED KILLS • Not too many years ago, you could promise to send a document by Federal Express, thereby gaining a few extra hours, until the Federal Express deadline, to rethink and recheck the document. The fax machine has eliminated that breathing room for work of up to a certain size. Electronic mail is rapidly eliminating it for most other work. Yes, you should always try to prevent mistakes by taking the time to do the job slowly and properly; but this advice is becoming harder to follow as every new technological advance makes it possible—and hence ultimately expected—that you deliver work product ever more quickly.

How Fast Is Fast Enough?

Advancing technology, coupled with client demands, ultimately forces you to figure out how to produce work of the same substantive quality, free of mistakes, in less time every time. But you might also step back and ask whether the document really needs to go out as quickly as you initially think it needs to go out (merely because instant turnaround is technologically possible), or whether the situation actually allows you to take the extra time to make sure you have done the best job you possibly can. In many cases, clients will quickly forget if they receive draft documents a day or two later than they wanted them. Clients will never forget if the documents, as signed, contained a fundamental flaw.

12. THE WRITTEN RECORD • Write for the judge. Not just in the final transactional documents but in any memos, letters, and notes that may stay in the permanent file. Every piece of paper may ultimately be subject to broad discovery requests and fishing expeditions if the matter ever goes into litigation.

Think Like the Plaintiff

Assume that any poorly thought through piece of paper that supports any adverse theory—such as a memorandum that broadly characterizes the motivations of the client in a way that can readily be "misinterpreted"—will be "Exhibit A" to a summons and complaint in which the client, or even you, may be a defendant. Train the client to think the same way.

13. NEVER LOSE SIGHT OF THE FUNDAMENTALS • You have to pay attention to the details, but you should never spend so much time tinkering with provisions that involve relatively small amounts of money or remote possibilities that you overlook the broader, more fundamental provisions.

Where To Troubleshoot

Problems often don't arise from the subtle interaction of arcane subsections and third provisos of long paragraphs buried in the middle of secondary documents; they arise instead from basic points staring you in the face—such as who does what when, where the money goes and when, or a list of all property involved in the transaction and exactly what is excluded. You may, for example, regret spending two hours negotiating a partial condemnation clause in a lease if you later find out that the tenant is actually not the creditworthy parent company but rather an assetless waif of a subsidiary with an impressive name.

14. DON'T MAKE IT UP • If you run into an issue or a problem outside your expertise, you may be tempted to use your best instincts and judgment and do what seems logical and rational under the circumstances. The timing pressures of most transactions plus many clients' extreme and heightened sensitivity to attorneys' fees have only increased this temptation. In areas outside your expertise, however, intuition and common sense can produce disaster.

Ask Someone Who Knows

For example, a corporate attorney who represents the borrower in an asset-backed financing might offhandedly agree to provide the lender, post-closing, with title insurance covering all of the borrower's unrecorded leases. Although the lender's request might have seemed routine, it could turn out to be extremely expensive, or worse, when the leases turn out to be unrecorded and at rental rates far below market, and the landlords are neither obligated nor otherwise inclined to cooperate. A real estate lawyer would have prevented the problem in a two-minute conversation.

15. PLAN AHEAD FOR BANKRUPTCY • Transactional attorneys who do not fully consider bankruptcy issues, and bring in bankruptcy expertise when needed, can leave behind surprises for their clients. The following are just a few of the many bankruptcy pitfalls that arise repeatedly in transactional work.

Separateness or Integration?

If the transaction involves numerous elements, is it structured as a single integrated whole, so that the trustee or debtor in possession must take it all or leave it all? Does the documentation instead invite the trustee

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or debtor in possession to pick and choose, keeping the favorable parts of the transaction and rejecting the rest? For example, if a lease affects numerous locations, can the tenant (in bankruptcy) pick and choose which locations to keep and which to reject? Or must the tenant take or leave the entire package? Decide which result is intended and make sure the documents reliably achieve it.

Perfection of Rights

Have all estates been fully and correctly created and recorded? Any loose end or technical deficiency creates an opportunity for a bankruptcy trustee or debtor in possession. Even outside bankruptcy, these gaps can be gold mines for anyone trying to challenge the transaction or the exercise of remedies.

For example, in one recent New York City case, the mortgagee of a hotel thought it was fully secured by having a leasehold mortgage. The lender never obtained and filed a U.C.C.-1 financing statement on the air conditioners, televisions, laundry equipment, or telephone system in the hotel. When the hotel operator filed for bankruptcy, it was able to obtain significant leverage by arguing that the lender's mortgage was worthless because the collateral did not include major items of equipment that were crucial to operate the hotel.

Complex Notice and Other Procedures

Consider the following questions:

- Do the documents require numerous notices and other requirements to be satisfied before declaring a default or beginning to exercise remedies?
- Do those requirements overlap or create inconsistencies or cumulative unexpected delays, particularly when combined with the requirements of otherwise governing law and bankruptcy law and procedures?
- Will the party trying to declare a default and enforce remedies be able to comply with the procedures and requirements before the defaulting party goes into bankruptcy?
- Are the remedies restricted in a way that will create problems in bankruptcy?

Transfers Too Good To Be True

Any transfer of an asset may, under certain circumstances, be recharacterized later as a fraudulent conveyance, a preference, or some other form of

questionable transaction. If the transfer is on terms that might later be deemed unduly favorable, from a party that may be at risk of bankruptcy, then the transaction should set off especially loud bankruptcy alarm bells.

A Borrower on the Brink

Is the borrower teetering on the financial edge? Is the current transaction an urgent last gasp to try to (supposedly) prevent bankruptcy? Is the borrower insolvent already? In any of these cases, all the normal bankruptcy and related concerns require special attention. They are especially likely to produce problems.

16. A SECOND PAIR OF EYES • Regardless of how junior or senior you may be, you should, if time and circumstances permit, try to have one of your colleagues critically check and review your work. A second attorney, not intimately involved in the minute-by-minute work on the transaction, may be more likely to catch inconsistencies, mistakes, and omissions than the first. Another person's perspective adds value and prevents mistakes every time.

17. NAMES, NUMBERS, AND DATES • Legal documents are full of names, numbers, and dates, all of which can look right but easily be wrong. Names, numbers, and dates take on authority because they are in written form. This is just as true for an incorrect name, number, or date as for a correct one. Nothing about an incorrect name, number, or date looks wrong until one scrutinizes it to consider its validity and correctness.

Check Everything Twice

Therefore, check and recheck names, numbers, and dates, even if it is not intellectually stimulating. Omission of "just" one word from the name of a grantee in a deed, or "just" one or two zeros from the amount of a mortgage, can doom the entire transaction. And one more tip: whenever possible, leave the arithmetic to the businesspeople. Lawyers often cannot do numbers right, even simple numbers.

18. LAST-MINUTE CHANGES • When parties negotiate a transaction "down to the wire," the attorney will often revise and edit deal documents until the moment of closing. These revisions invite mistakes for at least three reasons: the need to conform other documents to reflect the changes, the typically broad brush nature of the changes, and their distracting effect.

Conforming Changes

One change in a document can require many conforming changes in that document and others. In the press of time, you might not focus on those conforming changes. For example, if the parties decide to change the interest rate on a note they might for-

One common source of new mistakes is, ironically, correcting old mistakes.

get to revise the exhibit that describes, in dollars, the exact amount of each month's payment.

An attorney can help prevent this kind of problem in the first place by setting up documents so "conforming changes" are easy to find and make, such as by setting up a well structured foundation of interacting defined terms.

The Broad Brush

Last-minute changes are often sloppy, painted with a broad brush when they require a fine-point pen, and not thought through, checked, and rechecked with enough care.

For example, if a document contains very restrictive prohibitions on transfers, and the parties negotiate some exceptions at the last minute, the attorney who writes up those exceptions might not think about the protections that the other party requires to protect against unexpected problems from a permitted transfer. If the parties had considered the issue earlier, the attorney would have had more time to fully think through the implications of the change.

Distraction

Making last-minute document changes can often take the spotlight away from other, less interesting, elements of the transaction and the closing. Those elements—deliveries of minor certificates, clarifications of documents that are already delivered but not quite adequate, one last sign-off or consent from a limited partner—can fall through the cracks.

19. PERILS OF THE PAPERLESS OFFICE • If you use a computer on your desk to do your own document drafting, you may find that it is easier to find typos, factual errors, and even substantive misconceptions on paper than on the computer screen. On paper a document looks different. When you print out a document, you can consider it as a whole—something you can't do on a computer screen. A computer can certainly help you to be more productive, but it can also lead you to focus on line-editing and detail (and endless fussing with format) rather than structural and big-picture issues.

Take Your Eyes Off the Screen

Computerized attorneys should step back from their computer screens and critically think about their work, printing it out on paper, and then reading through it as if they were seeing it for the first time. Think about the deal as it takes shape beyond the four corners of the particular written documents—and beyond the begin-