The Inefficient Evolution of Merger Agreements

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Abstract

Transactional law is one of the most economically significant areas of legal practice and accounts for a large percentage of the profits and staffing at most elite law firms. But in spite of its economic importance, there has been little empirical work on the overall legal drafting process and the evolution of transactional documents over time. We have sought to fill this gap by analyzing the evolution of public company merger agreements in a data set that encompasses 12,000 merger agreements over a twenty-year period. Using computer textual analysis, we are able to identify the precedent, an earlier merger agreement, which serves as the template for the drafting of each deal. This approach allows us to construct comprehensive "family trees" of merger agreements, which we use to show how agreements are created and how they change over time.

We use this innovative approach to explore whether transactional drafting is driven by a rational process that minimizes the cost of deal documentation and risk to clients, or by an ad hoc process that increases billable hours and risk. We show that a high level of "editorial churning," ad hoc edits that appear to be cosmetic rather than substantive, takes place in legal drafting. Over half of the text of merger agreements is routinely rewritten during the drafting process even though the substantive provisions of merger agreements have similar features. Significant variation exists among merger agreements, even those involving the same firm, as there is no evidence of firm-specific templates or industry-specific templates in most cases. Lawyers appear to choose earlier merger agreements as templates based on familiarity with past deals rather than based on the economic needs of clients or cost mitigation. Our empirical findings provide strong evidence of significant (structural) inefficiency in the drafting process which raises costs and risk to clients.

This Article argues that this inefficiency calls for an industry-wide solution of creating standardized templates for merger agreements that could be used across firms. The use of standardized documentation would help to minimize the time consuming (and expensive) drafting process of lawyer- and firm-specific edits that do little, if anything, to protect clients or affect the substance of the transaction. Furthermore, deal-term standardization would have positive externalities, as judicial opinions crystalize the meaning of standardized text. In addition, this Article's analysis suggests that, somewhat counterintuitively, the failure to standardize text actually may stifle true innovation in the transactional context. This Article argues that by establishing an industry-wide set of "base documents," lawyers could create the technological platform

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on which to create truly innovative solutions for clients at lower cost. While lawyers may not have the self-interest to embrace a standardized set of documents on their own, this Article argues that repeat-player private equity firms or trade associations for the private equity industry may have the economic interest and leverage to push for greater standardization.

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Introduction

Transactional law accounts for approximately 32% of Am Law 50 firm revenue, nearly as much as litigation, and is an outsized driver of profitability and prestige for elite firms.[1] Transactional lawyers draft the terms contained in documents that delineate the rights and duties of parties involved in trillions of dollars of transfers every year.[2] This

[1] *See* Peer Monitor, Thomson Reuters, Rise of the Transactionals: How Transactional Practices are Increasingly Assuming Leadership for Law Firm Growth 1 (2015), https://peermonitor.thomsonreuters.com/wp-content/uploads/2015/06/Transaction-Practices-Spotlight_2015.pdf; *see also* Georgetown Law Ctr. for the Study of the Legal Profession & Peer Monitor, Thomson Reuters, 2015 Report on the State of the Legal Market 4 (2015), http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/FINAL-Report-1-7-15.pdf (documenting how transactional law has been a driver of law firm growth).

[2] *See* Maureen Farrell, *2015 Becomes the Biggest M&A Year Ever*, Wall St. J. (Dec. 3,

work product has staggering importance, as the legally operative terms in these agreements have the potential to meet or frustrate the economic motivations of enormous transfers of capital in the United States and world economies.

Despite its economic importance, there has been little empirical work on the overall legal drafting process in transactional law.[3] Most articles about transactional drafting deal either with pedagogical issues in teaching legal drafting or with specific substantive aspects of law.[4] In contrast, the process by which transactional lawyers draft doc-

2015, 6:58 PM), http://www.wsj.com/articles/2015-becomes-the-biggest-m-a-year-ever-1449187101 (discussing how global mergers and acquisitions surpassed $4.3 trillion in 2015).

3 Some notable empirical works examine changes in contractual provisions in other transactional contexts. *See, e.g.*, Stephen J. Choi & Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 Emory L.J. 930, 932–34 (2004) (conducting empirical analysis of sovereign bond offerings to show that boilerplate provisions changed in response to significant shifts in the interpretation of key provisions, but only after an industry-wide delay which reflected the relocated of lawyers to change boilerplate provisions); Mitu Gulati & Robert E. Scott, The 3½ Minute Transaction: Boilerplate and the Limits of Contract Design 3–10 (2013) (using empirical data to show that once a boilerplate provision is in place it often becomes part of a transactional checklist regardless of its actual value-added); Jonathan C. Lipson, *Price, Path, & Pride: Third Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)*, 3 Berkeley Bus. L.J. 59, 113–14 (2005) (using qualitative interviews to assess the logic behind lawyers' drafting third-party closing opinions).

4 *See generally, e.g.*, Afra Afsharipour, *Transforming the Allocation of Deal Risk Through Reverse Termination Fees*, 63 Vand. L. Rev. 1161 (2010) (discussing attempts at reallocating deal risks through reverse termination fees that compensate target companies should the buyer walk away, and assessing the impact such attempts have on acquisition agreement drafting); William T. Allen, *Understanding Fiduciary Outs: The What and the Why of an Anomalous Concept*, 55 Bus. Law. 653 (2000) (discussing the role of fiduciary outs in providing an "escape hatch" to targets to consider unsolicited higher offers from third-party bidders); Thomas W. Bates & Michael L. Lemmon, *Breaking Up Is Hard to Do? An Analysis of Termination Fee Provisions and Merger Outcomes*, 69 J. Fin. Econ. 469 (2003) (arguing that deals with target termination fees entail greater premiums for target shareholders and higher completion rates than deals without such provisions); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 Yale L.J. 848 (2010) (arguing that before closing the deal, the intentional vagueness of material adverse change ("MAC") clauses creates more efficient incentives for the seller, rather than more precise and less costly proxies); Yair Y. Galil, *MAC Clauses in a Materially Adversely Changed Economy*, 2002 Colum. Bus. L. Rev. 846 (discussing how unclear judicial interpretations of the contours of MAC clauses and material adverse effect ("MAE") clauses cast a shadow over merger deals); Ronald J. Gilson & Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions*, 21 J.L. Econ. & Org. 330 (2005) (using economic modeling to analyze the role that MAC and MAE clauses play in the structure of the standard acquisition agreement and the incentive effects for acquirers and targets); Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 Fordham L. Rev. 1899 (2003) (discussing the significance of Delaware's judicially created limitations on deal protection provisions meant to resolve the conflicting incentives of the acquirer's and target's management when facing last minute third-party bids); Claire A. Hill, *Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts*, 34 Del. J. Corp. L. 191 (2009) (arguing that the legal terms in acquisition agreements are intentionally ambiguous to deter

uments that shape capital flows of trillions of dollars remains understudied.[5]

This study seeks to fill this gap by analyzing the evolution of public company merger agreements in a dataset encompassing 12,000 agreements over a twenty-year period. Using computer textual analysis, it is possible to identify the precedent (an earlier merger agreement) which serves as the template for the drafting of each deal.[6] This approach allows us to construct comprehensive "family trees" of merger agreements which can show how agreements are created and how they change over time.

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litigation and incentivize negotiators to close the deal); Robert T. Miller, *Canceling the Deal: Two Models of Material Adverse Change Clauses in Business Combination Agreements*, 31 CARDOZO L. REV. 99 (2009) (advocating a judicial framework for interpreting MAC clauses that places the burden of material changes on targets and the burden of immaterial changes on acquirers during the closing period); Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements*, 50 WM. & MARY L. REV. 2007 (2009) (arguing that the reciprocal allocations of deal risk in MAC clauses serve to further efficiency in transactions by decreasing the likelihood that parties will exercise termination rights); Brian JM Quinn, *Optionality in Merger Agreements*, 35 DEL. J. CORP. L. 789 (2010) (arguing that reverse termination fees that are equal in size to termination fees inefficiently leave targets exposed to more risk from exogenous events); Christina M. Sautter, *Rethinking Contractual Limits on Fiduciary Duties*, 38 FLA. ST. U. L. REV. 55 (2010) (advocating contractual limits on fiduciary outs to allow target company managers to sidestep fiduciary duties to make merger recommendations on third-party bids during the closing period); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010) (arguing for interpretative default rules in construing MAC clauses); Andrew A. Schwartz, *A "Standard Clause Analysis" of the Frustration Doctrine and the Material Adverse Change Clause*, 57 UCLA L. REV. 789 (2010) [hereinafter Schwartz, *Standard Clause*] (arguing that MAC clauses transform conventional default rules by (1) allowing a contractual exit in cases of frustration of secondary purposes or partial loss of value and (2) shifting exogenous risk from the acquirer to the target); Eric L. Talley, *On Uncertainty, Ambiguity, and Contractual Conditions*, 34 DEL. J. CORP. L. 755 (2009) (arguing that MAE clauses are a tool for allocating the risk of market uncertainty present while negotiating the acquisition agreement).

5 One notable exception is Ronald Gilson's seminal article on the value added from transactional lawyers which focused attention on their constructive role in deals. *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing©*, 94 YALE L.J. 239, 243, 254–55 (1984) [hereinafter Gilson, *Value Creation*] (observing that "the academic literature assume[s] that business lawyers *increase* the value of a transaction" and arguing that M&A lawyers add value by designing provisions in acquisition agreements that reduce transaction costs and increase mutual gain); *see also* Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 487–88, 506–07 (2007) (using survey data from transactional lawyers and their clients to argue that lawyers add value to transactions primarily by reducing regulatory costs through legal expertise, rather than more broadly reducing transaction costs or adding reputational value).

6 *See* TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 335–36 (2007) (discussing the benefits of heightened efficiency and legal certainty from precedent-based legal drafting).

This innovative approach allows us to explore the extent to which the transactional drafting is driven by a rational process that minimizes the cost of deal documentation and risk to clients, or by an ad hoc process that increases billable hours and risk. This study shows that a high level of "editorial churning"—unnecessary and ad hoc edits that appear to be cosmetic rather than substantive—takes place in legal drafting. This churning appears to go far beyond the necessary deal-specific edits,[7] with over half of merger agreement text being routinely rewritten even though the substantive provisions of merger agreements have similar features.

This Article demonstrates that public merger agreement terms are not based off a common "form" agreement, but rather are the product of an "evolution" over many generations. This is true even within large law firms where drafts are based on prior agreements rather than standardized form language. The absence of even firm-specific forms has led to haphazard and inconsistent lawyering, as lawyers add significant amounts of extraneous information to each deal and inadvertently retain deal-specific information from prior deals. This fact underscores the inefficiency of current deal drafting processes and undercuts the argument that merger agreements are distinctively crafted (at great expense) to suit the needs of clients.

This Article argues that the remarkable heterogeneity of acquisition agreements reflects lawyers' tendency to use precedents that they are more familiar with or that relate to the particular client they are dealing with, rather than those that may be more readily adapted to the transaction at hand. The result is a path-dependent process of deal-term evolution that thwarts standardization even within firms, and leads to systematic inefficiencies in the acquisition agreement drafting process which raises costs and risk to clients.

The high degree of drafting inefficiency suggests the desirability of transitioning to greater standardization of acquisition agreements.[8] This Article provides an approach that could assist that process by enabling drafters to see the edits that have been made over the past few generations of a draft lineage so that they can more easily reverse non-standardized text embedded in a precedent document. This ap-

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7 *See* Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 277 (1990) (discussing the tradeoffs between standardization and customization in contractual drafting).

8 *See* Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1431–38 (2009) (providing an overview of the benefits of standardization for contracting).

proach would help transform acquisition agreements from opaque, byzantine documents into easily comparable agreements that would entail lower costs to produce and create higher legal certainty. This Article suggests how private equity firms (or trade associations representing the private equity industry) could take the lead in the standardization process based on their repeat-player interaction with law firms.

Although this study focuses on the public company merger context, this Article's argument may extend to a far broader spectrum of transactional contexts. If there is evidence of systematic inefficiency in the merger agreement context where there is transparency of the end product, one would expect there would be an even greater risk of non-standardization and editorial churning in other transactional contexts where there is little to no transparency of the deal documents.[9] Deal lawyers face a paradox—standardization reduces transaction costs and thus helps their clients, but also may cut into the bottom line of their firm's revenues.[10] This Article argues that, just as merger agreement standardization may allow transactional lawyers to focus on where they can add value to a merger or acquisition, the same logic applies in other transactional contexts. But a similar challenge exists across transactional law, as lawyers have every temptation to stick with the lucrative status quo unless clients themselves push for greater standardization across the spectrum of transactional law contexts.[11]

Part I provides the background to transactional practice necessary to understand the approach of this Article and sets out the method by which this study was conducted. Part II analyzes the dataset of merger agreements and discusses the empirical findings of this study. Part III offers some steps toward solutions that will better integrate legal practice with the needs of modern capital markets.

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9 *See* Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 485–86 (discussing the lack of transparency concerning most corporate law documents).

10 *See* Maurits Dolmans, *Standards for Standards*, 26 FORDHAM INT'L L.J. 163, 166 (2002) (discussing how standardization reduces barriers to entry).

11 *See* Gilson, *Value Creation*, *supra* note 5, at 289–93 (discussing how the focus of transactional lawyers is often on upholding their reputations); Jeffrey Manns & Robert Anderson IV, *The Merger Agreement Myth*, 98 CORNELL L. REV. 1143, 1173–74 (2013) (discussing how much of the perceived value added by M&A lawyers appears to be from their reputational intermediary role and due diligence function); Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211, 260 n.279 (2009) (discussing the significance of the role of transactional lawyers as "reputational intermediaries").

I. Method of Studying the Evolution of Merger Agreements

A. Background of Transactional Practice

The deal drafting process has not been adequately studied by legal scholars. This issue is not limited to mergers and acquisitions, as legal scholarship has explored remarkably little about the entire deal drafting process.[12] Most corporate law professors' understanding of dealmaking appears to be formed by their own idiosyncratic experience of corporate law practice as shaped by the law firm, partners, and associates with whom they worked. The emphasis is on the word "idiosyncratic," as even a cursory examination of the products of transactional law reveals the remarkable degree of divergence in deal design, not only between firms, but also between transactions involving particular firms. This fact raises the concern that surveys of lawyers, or other more anecdotal methods of gathering information about the dealmaking process, would fail to capture what is actually happening in dealmaking across firms.

The dearth of academic research on legal drafting is so severe that little is known about where deal documents come from beyond the rudimentary insight that transactional lawyers start off with precedents from past deals as templates for the new deal. Even less is known about how deal documents evolve over time and who shapes the de facto standard setting process. The stakes are high because developing a better understanding of how deal terms develop and diverge in different areas of transactional law is key to creating incentives for greater standardization and reducing inefficiency so that lawyers can focus on truly adding value for their clients.

For this reason, this study seeks to step back from the perspectives of individual lawyers, and to instead deploy quantitative techniques to compare the deal documents that lawyers produce. The study addresses a number of unanswered empirical questions concerning legal drafting: Where do the terms contained in these documents come from? How standardized are the terms across transactions? How does the evolution of deal documents shape their form and substance? The answers to these questions have broad implications for transactional law scholarship, the training of law school students and

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12 *See supra* notes 4–5. The irony is that the legal drafting process itself is at the heart of the question of value creation, as inefficiencies in the drafting process raise costs and distract lawyers from focusing on where they can add value for their clients.

lawyers in transactional law practice, and clients in assessing the degree of inefficiency in transactional lawyering.

B. Process of Drafting Transactional Documents

To be able to assess the work product of lawyers, it is important to have an understanding of the goals of the transactional drafting process. The bulk of the work in transactional law practice involves memorializing deal terms in documents that delineate the transaction's details and structure. To create these documents, transactional lawyers do not write new documents from scratch,[13] but instead work from one or more "precedents" from past deals that provide a template of established law and practice with provisions that reflect firm-specific or partner-specific conventions.[14] For example, lawyers representing an acquirer in an M&A transaction typically choose the precedent used in the deal which sets the defaults and baselines for negotiations among the lawyers (and their clients).[15]

The widespread use of precedent-based drafting means that the first draft of the terms of virtually every deal are based upon and adapted from a prior deal—its "precedent."[16] This approach mitigates some of the inherent uncertainties by leveraging past experience and saves time and money compared to drafting from scratch.[17] In each case, the precedent document must be adapted to the present transaction, which involves decustomizing the terms specifically crafted for the last transaction and recustomizing the terms specifically crafted for the present transaction.[18] Although some decustomization is obvi-

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13 *See* Scott J. Burnham, Drafting and Analyzing Contracts: A Guide to the Practical Application of the Principles of Contract Law 5–6 (3d ed. 2003) (discussing how attorneys "rarely start to draft on a blank slate. . . . [and generally] start with an existing contract or form").

14 *See* Stark, *supra* note 6, at 335–36 (discussing the benefits of heightened efficiency and legal certainty from precedent-based legal drafting).

15 *See* Scott Austin, *Acquirers Back in the Game, but VCs Advised to Tread Carefully*, Wall St. J. (Apr. 29, 2009, 4:36 PM), http://blogs.wsj.com/venturecapital/2009/04/29/acquirers-back-in-the-game-but-vcs-advised-to-tread-carefully/ (discussing norm for acquirers to make the first draft of the merger agreement).

16 *See* Fiona Boyle, Deveral Capps, Philip Plowden & Clare Sandford, A Practical Guide to Lawyering Skills 153–54 (Cavendish 3d ed. 2005) (discussing the role of precedents in legal drafting).

17 *See* Stark, *supra* note 6, at 335–36*;* Claire A. Hill, *Why Contracts Are Written in "Legalese"*, 77 Chi.-Kent L. Rev. 59, 63 (2001) (explaining why drafting from a prior agreement speeds the drafting process, increases certainty, and decreases cost).

18 *See* Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 Wash. U. L.Q. 347, 354–55 (1996) (discussing the tradeoffs from customizing agreements rather than relying on standard terms).

ous (such as names and dates), other terms in a precedent document may appear generic but were actually specifically crafted for the particular situation of the precedent deal.

C. *Studying Public Company Merger Agreements*

The precedent-based drafting approach makes it possible to systematically study transactional practice. If the precedent for each deal is known, then it is possible to study the changes made from deal to deal, as well as the overall evolution of the deal terms. The ability to compare a document to its precedent exposes edits made during the drafting process, offering an unparalleled view into the work that transactional lawyers do. The barrier to conducting this type of research is the difficulty of finding a complete corpus of documents and their precedents, as well as the ability to trace the ancestry of individual documents in such a corpus.

We surmount this obstacle by using documents from the one segment of transactional practice where almost all precedents are publicly available—public company mergers. Public company merger agreements offer a unique opportunity to study the evolution of transactional documents for three reasons. First, public company merger agreements are among the most visible and high-profile documents in all of transactional legal practice, and therefore reflect the investment of considerable legal time and attention.[19] Second, we are able to construct an almost complete genealogy of these documents, as virtually all public company merger documents are based on other publicly available merger documents. Securities and Exchange Commission ("SEC") disclosure rules provide access to over 12,000 merger agreements from 1994 to 2014, allowing for the creation of a comprehensive picture of the evolution of merger agreements.[20] Third, these documents almost always identify the law firms and lawyers who generated them, making it possible to trace their connection to specific firms and individuals who may serve as the catalysts for innovation (or for standardization). These features allow for an examination of the draft-

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19 *See Researching Public Companies Through EDGAR: A Guide for Investors*, SEC, https://www.sec.gov/investor/pubs/edgarguide.htm#P402_38498 [https://perma.cc/QF3G-C7UX] (last modified July 18, 2007) (noting that certain mergers and acquisitions must be disclosed when at least one of the companies is subject to SEC disclosure rules); *see also* Gilson, *Value Creation*, *supra* note 5, at 243 (observing that corporate acquisition agreements are "among the highest forms of the business lawyer's craft").

20 *See* SEC, Form 8-K, Item 1.01, at 4, https://www.sec.gov/about/forms/form8-k.pdf (requiring companies to disclose material definitive agreements outside of the ordinary course of business including merger agreements).

ing work performed by transactional lawyers from one deal to the next and an analysis of the evolution of documents within and across law firms.

In this precedent-based drafting process, the choice of precedent becomes significant in setting the defaults and baselines for the negotiating process. Generally, lawyers believe that the ability to create the first draft offers an advantage by giving lawyers the chance to choose the precedent and shape it to meet the needs of the new deal.[21] The acquirer's counsel then forwards the draft to the target's counsel who will propose a set of changes. The target's counsel rarely rewrites the agreement, and instead generally seeks to work within the basic framework of the document to meet the client's objectives,[22] as it is considered a breach of deal etiquette for the target's counsel to change the "form" of the agreement.[23]

Although the end product of a deal document is often quite different from the original precedent, the "DNA" of the original document is never fully erased. This is because much of the idiosyncratic wording of the precedent document is retained in the final product, even after heavy editing. This fact allows a recreation of the entire "family tree" of public company merger agreements by comparing the text of the documents word-for-word and linking precedents to their antecedents. Because of SEC disclosure rules, it is possible to acquire each public company merger agreement over a twenty-year period and put together a comprehensive picture of the evolution of merger agreements.[24]

Public company acquisition agreements illustrate the role of precedents. Acquisition agreements have a relatively standardized outline and categories of provisions,[25] but are also products of exten-

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21 *See* Robert A. Feldman & Raymond T. Nimmer, Drafting Effective Contracts: A Practitioner's Guide 1–20 (2d ed. 2005) (discussing basic strategies in drafting contracts); James C. Freund, Anatomy of a Merger: Strategies and Techniques for Negotiating Corporate Acquisitions 26–27 (1975) (discussing how the power to make the first draft gives the drafter leverage over other parties).

22 *See* Thomas E. Tyner, *Mechanics of Document Drafting*, *in* Drafting Business Contracts: Principles, Techniques & Forms 1-1, 1-16 (2015) (discussing the limitations lawyers face in suggesting revisions to a draft).

23 *See* Freund, *supra* note 21, at 28 ("Typically, the seller should live with the purchaser's *form* of agreement, without being precluded in any way from negotiating any and all substantive matters.").

24 *See* SEC, *supra* note 20.

25 *See* Freund, *supra* note 21, at 140 ("[M]ost agreements utilized in the merger and acquisition field . . . [include] abundant instances of nearly identical words, phrases and clauses, suggesting that respectful plagiarism is indeed the order of the day."); *see also* Ronald J. Gil-

sive negotiations tailored to the particulars of the transaction.[26] Transaction-specific provisions identify the transaction's structure and the timing and location of the closing, as well as the price and payment formula for converting or buying shares.[27]

The more generic provisions include representations and warranties, contractual constraints on the target company during the pre-closing period, and conditions to closing. These provisions combine standardized provisions and highly negotiated terms.[28] Representations and warranties contain assertions about the target company's business, balance sheets, and potential liabilities to address uncertainties uncovered in the pre-signing due diligence review of the target.[29] Covenants and closing conditions define the rights and responsibilities of the parties during the pre-closing period and the extent of the parties' obligations to close the transaction.[30] These contractual constraints delineate how breach of warranties and representations, failures to satisfy conditions, or other circumstances that the parties agree upon can trigger walk-away rights or termination fees.[31] The

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son & Bernard S. Black, The Law and Finance of Corporate Acquisitions 1563–67 (2d ed. 1995) (providing a broad overview of acquisition agreements).

26 *See* Gilson, *Value Creation*, *supra* note 5, at 257–62, 257 n.45 (outlining specific categories negotiated over in acquisition agreements); *see generally* Evan L. Greebel, *Key Priorities for Buyers and Sellers in Acquisitions of Public and Private Companies*, *in* Strategies for Negotiating Mergers and Acquisitions: Leading Lawyers on Understanding Clients' Needs and Successfully Negotiating M&A Transactions 31 (2011) (discussing lawyers' focal points in negotiating merger agreements).

27 *See* Therese H. Maynard, Mergers and Acquisitions: Cases, Materials, and Problems 317 (2d ed. 2009) (discussing how "the basic architecture of any acquisition agreement follows a certain convention regardless of deal structure"); Gilson, *Value Creation*, *supra* note 5, at 258–59; Lou R. Kling et al., *Summary of Acquisition Agreements*, 51 U. Miami L. Rev. 779, 781–82 (1997) (providing an overview of typical acquisition agreements).

28 *See* Alyssa A. Grikscheit & Gavin D. Solotar, *Key Issues in Drafting and Negotiating Acquisition Agreements*, *in* Drafting and Negotiating Corporate Agreements 2012 181, 181–89 (2012) (detailing the types of contractual constraints that parties face in mergers).

29 *See* Gilson, *Value Creation*, *supra* note 5, at 259–60; Kling et al., *supra* note 27, at 782–95.

30 *See* William J. Carney, Mergers and Acquisitions: The Essentials 106–09 (2009). MAC (or MAE) clauses specify which events entitle an acquirer to call off a deal if events occur between signing and closing that make the deal less advantageous than expected. *See* Schwartz, *Standard Clause*, *supra* note 4, at 817–23. Deal Protection provisions are designed to reduce the likelihood that the target board will walk away from the agreement or require the target to compensate the acquiring company if the target does walk away in favor of a third-party bidder. *See* Stephen M. Bainbridge, *Exclusive Merger Agreements and Lock-Ups in Negotiated Corporate Acquisitions*, 75 Minn. L. Rev. 239, 242–46 (1990).

31 *See* Afsharipour, *supra* note 4, at 1163–64, 1179–83 (discussing MAC/MAE termination fees paid for by either the purchaser or seller depending on the terms of the acquisition agreement); Kling et al., *supra* note 27, at 783; *see also* Choi, *supra* note 4, at 892.

tension in covenant and closing condition negotiations is that target company lawyers generally seek to heighten the certainty of closing,[32] while the acquirer's lawyers seek to preserve flexibility to withdraw or rework the deal if the expectations are not met.[33]

Law firms have traditionally emphasized the distinctiveness of their acquisition agreement precedents as a virtue. This study shows how this alleged virtue is a potential vice for clients, as firms have failed to put together standardized agreements, and instead rely on labor-intensive edits that churn billable hours rather than add value to clients. This study offers a first look at the significant degree of divergence in acquisition agreement provisions, as well as the degree to which merger negotiations lead to extraneous changes from deal to deal.

D. The Merger Agreement Dataset

This study's dataset consists of 12,407 merger agreements filed with the SEC between 1994 and 2014. This data was obtained from the Archive Indices of the SEC EDGAR Database.[34] A computer script was used to visit each URL contained in these indices and to determine which filings contained exhibits labeled Exhibit 2, which is where acquisition agreements are typically filed.[35] The computer script collected the full text of each agreement for analysis.

This initial set of agreements was refined by including only agreements whose titles contained the terms "merger" or "reorganization." This refines the focus to the narrow category of merger agreements that are reliably filed on the EDGAR system, and excludes other agreement types also filed under Exhibit 2.[36] The data were further

32 *See* Brian JM Quinn, *Bulletproof: Mandatory Rules for Deal Protection*, 32 J. Corp. L. 865, 876, 881–84 (2007) (explaining the presumed objectives of sellers' counsel in acquisition agreement negotiations).

33 *See* Choi, *supra* note 4, at 857–65 (arguing that in negotiations, acquirers aim to preserve as great a degree of flexibility as possible in order "to terminate, cancel, or be excused from [their] obligations").

34 *See Archive Indices of the SEC EDGAR Database*, SEC, http://www.sec.gov/cgi-bin/edgar_archive_indices [https://perma.cc/USL4-V94J] (last modified Apr. 28, 2014).

35 Exhibit 2 is the exhibit where merger agreements are filed, along with any other "plan of acquisition, reorganization, arrangement, liquidation or succession." *See* 17 C.F.R. § 229.601(b)(2) (1995). Such agreements can also be filed under Exhibit 10, but primarily when they relate to other companies, such as subsidiaries.

36 This approach eliminates agreement types that may overlap such as "Contribution Agreement," "Stock Purchase Agreement," "Asset Purchase Agreement," "Transaction Agreement," "Share Exchange Agreement," "Arrangement Agreement," and the like. Although these agreements certainly contain overlapping language, this study focused on documents that were clearly public company acquisition agreements. Very short documents that are less than 15,000

curated to eliminate exact and near duplicates, as well as very short agreements that were intra-firm reorganizations such as mergers to reincorporate from one state to another.[37] In addition to public company agreements, the data contained a number of private company acquisitions, typically filed as material contracts in a public company's disclosure documents.

With a dataset of agreements thus compiled, a combination of computer scripts and hand coding was used to identify the law firms representing the acquiring company and the target company in a subset of the transactions.[38] In addition, the Standard Industrial Classification ("SIC") codes for the company filing the agreement and the dates of the filings were collected.

The heart of this study's analysis is a word-for-word comparison of each agreement to every other agreement by using the "edit distance" (also called Levenshtein distance) between each pair of agreements.[39] When one document is copied from another, it retains substantial word-for-word similarity to its precedent even after significant editing. This similarity is not present among documents that were not copied directly or indirectly from one another, even when the documents deal with identical subject matter. The techniques used are similar to those used to detect plagiarism in writing, which can detect common ancestry of texts even after significant editing.[40]

To determine the similarity of the merger agreements, this study used a computer program to compute the "edit distance" between

characters were also eliminated because these agreements likely did not address the complex issues raised in larger public company acquisitions. Mutual holding company conversions were also excluded.

37 Near duplicates were defined as those documents filed within 100 days of each other and having 97% or more similarity to one another. Most of these were the identical document, but some were amended and restated versions of the same document. Many of the documents contained extraneous text such as attachments to the main merger agreement. To remove this text, this study disregarded text following the first occurrence (if any) of "In witness whereof," which typically signals the end of a merger agreement.

38 Cost considerations prevented us from identifying the law firms in all transactions, so that the analysis of law firms contained below is based on a sample of the 12,407 total transactions. In some cases, there truly was no "acquiring" and "target" company, as in some "merger of equals" transactions in which a holding company structure is used. *See* LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS 1-13–1-15 (2005) (describing such a structure). In such cases, the first company listed in the notice provision was arbitrarily treated as the acquiring company.

39 *See* DAN GUSFIELD, ALGORITHMS ON STRINGS, TREES, AND SEQUENCES: COMPUTER SCIENCE AND COMPUTATIONAL BIOLOGY 215–16 (1997) (discussing the Levenshtein distance).

40 *See, e.g.*, Zhan Su et al., *Plagiarism Detection Using the Levenshtein Distance and Smith-Waterman Algorithm*, 2008 INNOVATIVE COMPUTING INFO. & CONTROL 569, 569–72.

each pair of agreements. Edit distance is an inexact or "fuzzy" matching approach for measuring textual similarity or dissimilarity based on the number of insertions and deletions (i.e., edits) necessary to transform one document into the other.[41] The concept is very similar to what is displayed when one document is "blacklined" or "redlined" against another document. Thus, this process is similar to blacklining documents against one another (about seventy-seven million times) and looking for those blacklines with the fewest edits for each document. The computer program identified the precedent document for each merger agreement in the database by determining which document had the smallest length-normalized pairwise edit distance (among those with earlier dates than the given document). The word-for-word comparisons of seventy-seven million pairs of documents requires substantial computing resources and certain techniques to speed the comparisons, namely the use of "compressed" documents that omit common words.[42] The computer program only used compressed version of the documents to match documents to their precedents, and the full versions of documents were used for all analysis (other than the descriptive statistics in Table I, *infra*, and accompanying text). In all of our analysis, all capitalization, punctuation, and formatting is removed from the documents and does not contribute to the edit distance between documents.

This study's analysis focuses on pairs of documents with an edit distance of less than 75% (i.e., pairs that are more than 25% similar to each other). Although 25% similarity may not sound very similar, in fact it is quite unusual to find two merger agreements with greater similarity under the edit distance measure. The number of matches for any given agreement increases dramatically below 25% similarity, so similarity below this level is generally not meaningful.

II. Results from Comparing Public Company Merger Agreements

A. *Descriptive Statistics of the Merger Agreement Comparisons*

In contrast to the degree of standardization expected, there is an incredible degree of variety in the agreements studied. The most strik-

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41 *See* Gusfield, *supra* note 39, at 215–16.

42 Specifically, the documents were compressed by eliminating the 500 most common words in the dataset from each agreement. This approach reduced the total amount of text in the average agreement by approximately 50%, but had almost no effect on the accuracy of the computations. This "compressed scale" version of the document comparisons produced pairwise distance comparisons that correlated at 0.953 with the original documents in the range of distances examined (greater than 25% similarity).

ing feature from an initial analysis of merger agreements is the high degree of diversity among them, both in terms of their textual provisions and their antecedent merger templates. Although merger agreements are thought to have a great deal of substantive similarity, textually, the vast majority of merger agreements have very little in common. Table I underscores the small degree of commonalities across merger agreements. The mean degree of similarity among documents is 19.5% (7.4% on the compressed scale), and the median degree of similarity is 19.9% (7.8% on the compressed scale). Thus, only a tiny fraction of agreements "match" with a similarity of 25% or more on the compressed scale. Indeed, 99.76% of individual pairs of agreements are less than 25% similar on the compressed scale. This fact suggests that there is remarkable heterogeneity in merger agreements, despite the fact that all of these agreements deal with the same general type of transaction and each agreement begins with a precedent acquisition agreement from an earlier deal.

TABLE I. SIMILARITY DISTRIBUTION OF THE DATA

	Full Documents	**Compressed Documents**
More than 30% Similar	0.5%	<0.1%
25–30% Similar	3.8%	0.1%
20–25% Similar	44.7%	0.2%
15–20% Similar	40.3%	1.4%
10–15% Similar	7.4%	15.3%
Less than 10% Similar	3.4%	83%
Median	19.9%	7.4%
Mean	19.5%	7.8%

*Based on a sample of 50,000 random comparisons drawn from the documents. The correlation between the compressed distances and the full document distances was 0.953 in the range of our analysis (greater than 25% similarity).

B. *An Empirical Take on Transactional Practice*

This study was able to identify a clear precedent deal for most of the agreements in the dataset. This means that most merger agreements were copied from another merger agreement (or possibly more than one merger agreement) that served as a template. Because the sources of merger agreements are identifiable, it is possible to observe the changes that were made in the drafting process (something previously only known to the drafters themselves). This data thus can empirically derive systematic conclusions about transactional legal practice that were previously based only on extrapolation of lawyers' personal experiences.

This information is useful to address three main questions. First, how are precedent documents chosen by lawyers; what are the factors that lead toward the decision to use a particular agreement as a model rather than another? Second, what are the changes that are made from the precedent to the draft; how many edits are made and why are certain types of edits made; is text that was contained in the precedent document inadvertently retained in the new draft? And third, how do these documents evolve over time?

Conventional wisdom suggests four principal criteria based upon which law firms are likely to choose precedents. First, law firms are more likely to choose precedents from past deals in which the same firm was involved.[43] Second, law firms are more likely to choose precedents from past deals in the same or a related industry.[44] Third, law firms are more likely to prefer more recent precedents to older ones.[45] Fourth, law firms are more likely to prefer precedents from similar deal structures (e.g., cash versus stock consideration, merger of equals versus acquisition, strategic versus financial acquisition, et cetera).[46] The first three of these assumptions is investigated empirically below. We did not collect data on the deal structure involved in each transaction.

First, we examined the identity of law firms involved in the precedent deal and compared each law firm's role in the precedent transaction to their identities and roles in the current transaction. Table II illustrates the counts for each category. The totals are less than the 12,407 total data points because we collected firm identity for a sample of transactions.

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43 *See* Gur Huberman, *Familiarity Breeds Investment*, 14 REV. FIN. STUD. 659, 659–60 (2001) (discussing "familiarity bias," which tilts decisionmaking in favor of contexts of existing knowledge, rather than exploring what is optimal).

44 *See* Geoffrey C. Friesen et al., *Price Trends and Patterns in Technical Analysis: A Theoretical and Empirical Examination*, 33 J. BANKING & FIN. 1089, 1090–92 (2009) (discussing "confirmation bias," the tendency to choose related samples as representative).

45 *See* MICHAEL M. POMPIAN, BEHAVIORAL FINANCE AND WEALTH MANAGEMENT 216–26 (2006) (discussing "recency bias," the tendency to emphasize more recent contexts than those that occurred during earlier periods).

46 *See* MAYNARD, *supra* note 27, at 9–11 (discussing the differences in design of a range of types of merger and acquisition deal structures).

TABLE II. ROLE OF EACH LAW FIRM IN PRECEDENT DEAL

	Represented Acquirer in Precedent Deal	Represented Target in Precedent Deal	Not Involved in Precedent Deal
Acquirer Firm's Role in Precedent Deal	1488	171	1132
Target Firm's Role in Precedent Deal	174	499	2046

The results provide strong empirical confirmation of the conventional wisdom among deal lawyers. The largest number of precedents are ones in which the same law firm represented an acquirer in both deals. The conventional wisdom suggests that the acquirer's counsel chooses the precedent and the acquirer's counsel prefers a precedent in which they represented the acquirer. The data confirms this pattern of behavior. One reason for this is that acquirers' counsel are frequently repeat players for the same acquirer client, in which case they heavily borrow both substantive and firm-specific provisions related to their client from an earlier precedent. This pattern of selecting precedents for the representation of an acquirer is evident even when repeat acquirers are excluded, however, suggesting other reasons for the strong correlation.

Second, we examined the industry of the company that filed the precedent document compared to the industry of the company that filed the current document. The industry is given by the (three-digit) SIC codes attached to the party that filed the agreement.[47]

TABLE III. INDUSTRY IN PRECEDENT DEAL

	All 3 Digit SIC Codes	Non-Banking 3 Digit SIC Codes	Banking 3 Digit SIC Codes
Same SIC Code	3407 (32.7%)	2675 (28.3%)	732 (75%)
Different SIC Code	7010 (67.3%)	6768 (71.7%)	242 (24.8%)

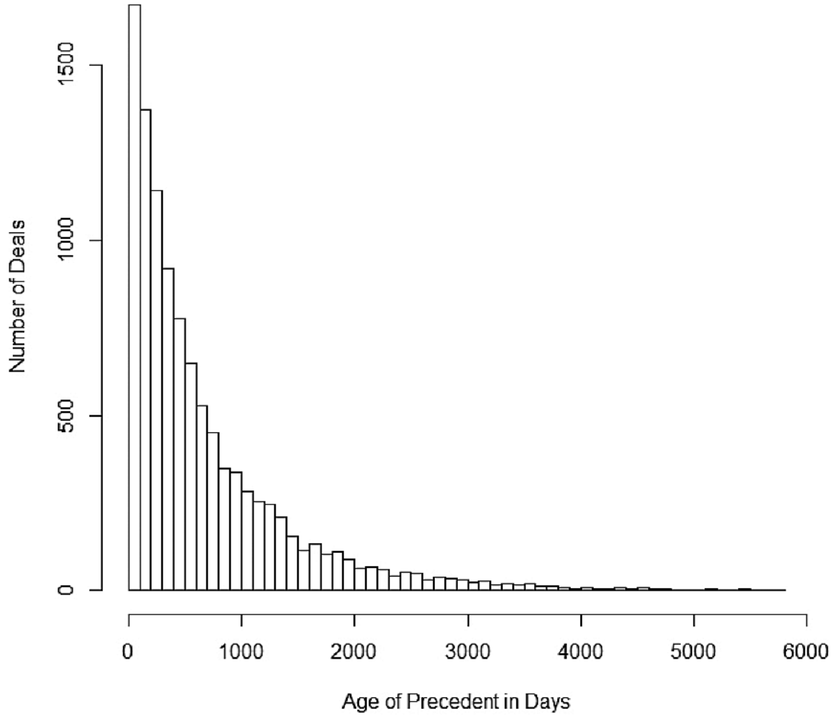
The "All 3 Digit SIC Codes" column of Table III reveals that although there is some preference for drawing a precedent from the same SIC code, agreements are often (even usually) copied from precedent documents from other industries. When commercial banking deals are excluded (SIC codes beginning with 602), the preference for the same industry is even weaker, at only 28%. The "Banking" column reveals, however, that this pattern is flipped in commercial banking, where the vast majority (75%) of precedents are drawn from within commercial banking. It appears that the industry of the prece-

47 In some cases, the filer is the acquiring company and in some cases it is the target company.

dent document is highly relevant for the banking industry, but not as relevant for precedent selection in other industries.[48] Although we do not have conclusive evidence to explain the higher degree of same-industry precedents for commercial banking deals, the most plausible explanation is the high degree of regulation of the financial industry which requires more specialized, industry-specific provisions.[49]

Third, we investigated the age of the precedents that firms use by using the dates on which the agreements were filed. It would be expected that firms favor precedent documents drafted more recently than those drafted longer in the past. The age of precedent documents used gives some indication of how quickly language obsolesces. Figure 1 shows the distribution of how old the precedents are relative to the resulting document.

FIGURE 1. AGE OF PRECEDENT DOCUMENTS



48 This figure may reflect some bias in favor of finding differences between banking and other industries because almost all banking combinations are between banking companies. The SIC code thus will be a banking SIC code whether the filer is the acquiring company or the target company.

49 *See* Nicholas Economides et al., *The Political Economy of Branching Restrictions and Deposit Insurance: A Model of Monopolistic Competition Among Small and Large Banks*, 39 J.L. & ECON. 667, 668–69 (1996) (discussing how commercial banks are subject to a high degree of regulation in "virtually all countries").

The median number of days between a document and its precedent is 423.5, meaning that the median precedent document is just over a year old. This reflects a fairly strong preference for more recent precedents. Precedents more than three-years old are very unusual, suggesting a high perceived rate of obsolescence of contract text.

Fourth, we examined the number of edits drafters made between the precedent document and the resulting document. Figure 2 shows the percentage of textual similarity between documents and their precedents.

FIGURE 2. SIMILARITY OF DOCUMENTS TO PRECEDENTS

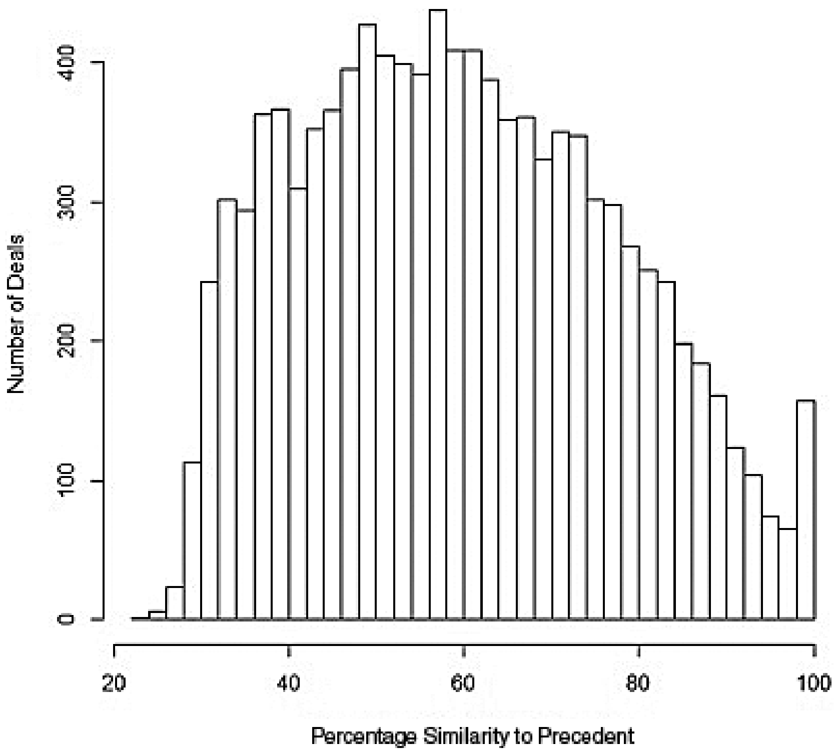


Figure 2 reveals that documents are quite heavily edited during the drafting process. While the degree of editing from precedent to final document varies widely, the largest number of documents share about 50% textual similarity to their precedents. Although there are a handful of documents with more than 80% similarity to the underlying precedents, most of those documents are repeat acquisitions for the same acquiring company.

These figures allow us to make a rough estimate of the time lawyers invest in making edits throughout the drafting and negotiation process. The median number of word edits between a precedent and a document is 21,866, meaning that in the typical drafting process, approximately 22,000 words are deleted or inserted in documents that are typically about 27,000 words in length. This suggests that a remarkable level of editorial churning takes place throughout the drafting process and underscores the lack of standardization even within a given firm.[50] It is also interesting to note that although the "typical" length of a merger agreement over the 1994 to 2014 period was about 27,000 words, the median word count increased substantially in a linear fashion between 1994 and 2014. In 1994, the median document had only about 21,000 words. By 2004, that number had increased to about 27,000 words, and by 2014, it had increased to about 39,000 words. These figures suggest a substantial "accretion effect" as the added text in edits tended to accumulate over time.

The results suggest the possibility of excessive editing between the precedent and final document. It is possible that heavy editing is necessary between documents because of relevant differences between the two deals, but it is also possible that the heavy editing results from inefficient precedent selection and document design. These topics are explored in more detail below, first by building "family trees" of merger agreement lineages in Section II.C., then by examining the relationships among these family lineages in Section II.D.

C. *A Phylogenetic Tree of Merger Agreements*

The analysis above suggests that drafts diverge significantly from their precedent documents, with approximately 50% of the text edited. This fact does not fully answer the question of whether these agreements are based off standard forms because it is possible for documents based off of the same standard form to differ significantly if the forms have a large amount of variable text or "blanks." To answer the question of whether standard forms underlie these documents, therefore, it is necessary to examine the network of precedent documents.

Because new agreements are created by duplicating "parent" agreements with edits, a genetic evolutionary analogy offers the best

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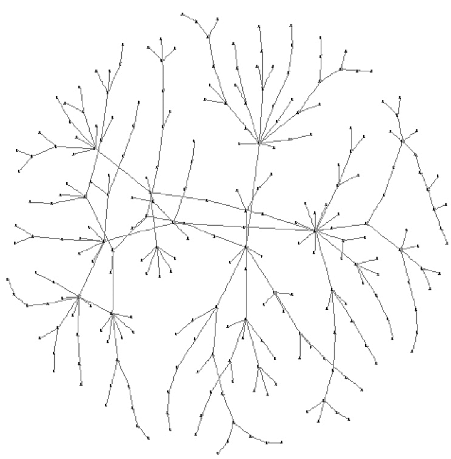
50 It is possible that our estimates of the number of edits are too low because a number of deals involving serial acquirers are included in the data. It is also possible our estimates are too high because counsel for the acquirer will often start with the first tendered draft from a prior transaction, rather than the final product from the prior transaction. Because we measure relative to the final product, this may inflate the number of edits. We are grateful to Harry Bryans for this insight.

way to understand the creation and dispersion of legal language in transactional documents. Envisioning legal language as a form of "DNA" of transactions, we used computer textual analysis to identify the likely ancestors and descendants of each agreement to construct the equivalent of a phylogenetic tree of thousands of agreements.[51]

The fact that we can identify the likely precedent documents means that we can answer several questions that were previously difficult to analyze. For example, how many "lines" or "versions" of agreement forms are there? To what extent do we observe evolutionary dead-ends in terms of precedent lineage through a selection process? To what extent is there convergent evolution among different lines of precedents as they incorporate standardized provisions? To what extent is there speciation as precedent lines split or evolve into different versions?

The network of relationships of the agreements shows that there is no one "ancestor" of all agreements, but rather a series of "lineages" that are clustered largely by law firm. The following three illustrative figures show precedent relationships for clusters of agreements dominated by particular law firms.

FIGURE 3. DAVIS POLK CLUSTER



51 A phylogenetic tree is a statistical reconstruction of evolutionary relationships among organisms based on their genetic code. *See* MASATOSHI NEI & SUDHIR KUMAR, MOLECULAR EVOLUTION AND PHYLOGENETICS 73 (2000). Techniques originally developed for analyzing genetic sequences have been applied in a variety of textual contexts such as in the analysis of historical manuscripts copied by scribes. Applying phylogenetic methods to text is an example of "phylomemetics," which applies evolutionary theory to explain other processes that incorporate aspects of both path development and change over time. *See* Christopher J. Howe & Heather F. Windram, *Phylomemetics—Evolutionary Analysis Beyond the Gene*, 9 PLOS BIOLOGY 1, 1 (2011).

FIGURE 4. SULLIVAN & CROMWELL CLUSTER

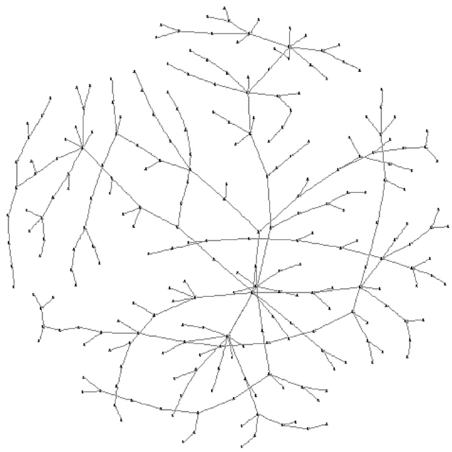
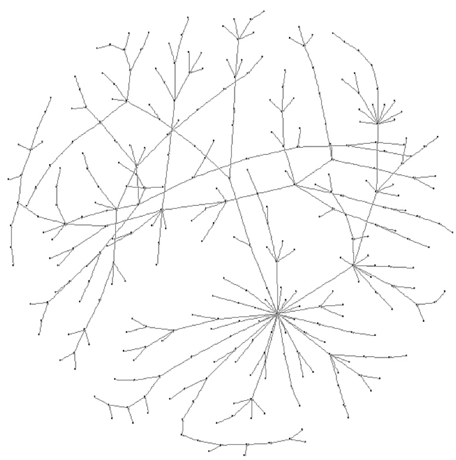


FIGURE 5. COOLEY LLP CLUSTER



Figures 3, 4, and 5 represent Davis Polk, Sullivan & Cromwell, and Cooley LLP clusters, respectively. In each figure, documents are represented by the points while the lines connect the documents to their precedents. All three figures serve as evidence of many "lineages" of merger agreements, rather than clusters of agreements based off a form. Figures 3 and 4, however, have different characteristics from Figure 5, which suggests the firms may have very different approaches to deal document standardization. Most agreements have one or two descendants, with only a handful having more than two. In Figures 3 and 4, there are no "hubs" that account for a large portion of the total number of documents. In contrast, the Cooley cluster has one very important hub that has dozens of descendants within a few generations.

The Davis Polk and Sullivan & Cromwell networks suggest that standardized forms are not widely used within those firms, and that pattern is true of most firms analyzed in this study. Even in the Cooley example, where forms do appear to be used, most of the agreements do not appear to stem from the form. The merger agreements appear to form precedent "lineages" in which agreements strongly resemble other individual agreements, rather than any apparent attempts to standardize acquisition agreements based on a standardized form. The result is that the text of each agreement reflects a somewhat idiosyncratic, path-dependent process of evolution rather than a standardized design from an industry-wide or even firm-specific standard form.

Most firms appear to recycle precedent from a given client, but otherwise there is little consistency in the exact textual form of acquisition agreements, even within a given firm. Instead, there are "lineages" of acquisition agreements that bear the fingerprints of their earlier progenitor precedents. The lack of standardization of form agreements even within firms suggests that there are systematic inefficiencies to the precedent selection and acquisition agreement drafting process.

This practice is illustrated rather dramatically with the case of the ABA's Model Merger Agreement for the Acquisition of a Public Company which was published in 2011.[52] This model agreement, drafted by the ABA's Mergers and Acquisitions Committee's Subcommittee on the Acquisition of Public Companies, took over fifteen years to produce and was based on the contributions of hundreds of attorneys.[53] If any industry-wide model could have the potential to standardize text in the public company market, the ABA's Model Merger Agreement would be it. This study's analysis reveals, however, that the text of the Model Merger Agreement has not been used as the basis for many negotiated merger agreements. Indeed, only one public company merger agreement filed after the 2011 date appears to have more than a 50% resemblance to the model.

The problem is likely not with the Model Merger Agreement itself (as it is hard to imagine a more in-depth attempt at standardization), but with the culture and practice of mergers and acquisitions. A model agreement, no matter how carefully drafted, is not as appealing to practitioners as a negotiated document.

52 MERGERS & ACQUISITIONS COMM., ABA, MODEL MERGER AGREEMENT FOR THE ACQUISITION OF A PUBLIC COMPANY (Diane Holt Frankle ed., 2011).

53 *Id.* at v.

This study's analysis suggests the possibility of suboptimal precedent selection and inefficiently high levels of editing. One caveat to this conclusion is that each merger agreement is the product of the union of two or more law firms' visions for the acquisition agreement. Each document therefore reflects at least a partial cross-fertilization of law firms' approaches to drafting.[54] While the acquirer's counsel takes the lead and chooses the precedent, provisions or changes that the target's counsel believes are integral will shape the evolution of the agreement. It is possible, therefore, that a significant percentage of agreements reflect the melding of multiple "parent" sources into one. This possibility and its implications are addressed further in Part III.

D. *The Geometry of Merger Agreements*

The trends observed in merger agreement drafting can be thought of geometrically by imagining a spectrum of drafting that ranges from a completely standardized form on one end to a completely artisanal "craft" document on the other. One end of the spectrum is the pure fillable form that consists of fixed text (boilerplate) and variable text (blanks). Such pure forms (often referred to as adhesion contracts) are ubiquitous in small transactions in everyday commerce.[55] In such cases, the pure form's tenth descendant will not be much more distant from the original than will the ninth, eighth, or even the second. This is because each time the document is reproduced, the variable text is changed and the fixed text remains intact, meaning that the text overall does not drift much from the original. Although such forms are perhaps most often associated with consumer transactions,[56] they are not limited to that context. The International Swaps and Derivatives Association's ("ISDA") Master Agreement serves as an example of how a standardized set of terms can serve as a basic framework for hundreds of trillions of dollars of credit risk.[57]

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54 There is a rough analogy in the context of molecular evolution with the concept of horizontal gene transfer in which genes are transferred not from parent to offspring but from one fully developed organism to another. *See* Carlos F. Amábile-Cuevas & Marina E. Chicurel, *Horizontal Gene Transfer*, 81 AM. SCIENTIST 332, 332 (1993).

55 *See* E. ALLAN FARNSWORTH, CONTRACTS 296–97 (3d ed. 1999) (explaining that "in routine transactions the typical agreement consists of a standard printed form that has been prepared by one party and assented to by the other with little or no opportunity for negotiation").

56 *See id.* at 296.

57 *See* ROY GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 286 (4th ed. 2011) (discussing how the ISDA Master Agreement is one of the most broadly used standardized agreements); Norman Menachem Feder, *Deconstructing Over-the-Counter Derivatives*, 2002 COLUM.

On the other end of the spectrum is the "artisanal" model where there is no distinction between "fixed" and "variable" text—everything is negotiable.[58] Although documents are created by copying precedents and therefore immediate descendants will bear a resemblance to their immediate ancestor, remote ancestors quickly become distant from even relatively recent ancestors. When virtually all text in the agreement is negotiable, it tends to drift quite far from its original moorings after several generations. Much more legal drafting falls into this category than the "fill-in-the-blanks" category.[59] This type of random selection fosters rapid "speciation" of agreements, but also makes it very difficult for any degree of standardization to develop.

In theory, the degree of editing of variable text and the degree of standardization of the "fixed" text are separate. One could have a preprinted boilerplate form with many blanks but otherwise fixed text. Or one could have a free-form agreement where there is no fixed text, but that hews closely to its precedent document. In practice, however, the number of edits and the percentage of fixed text is likely closely connected. Documents that are heavily edited from their precedents are likely to be completely negotiable, and documents that are lightly edited are likely to be mostly nonnegotiable.

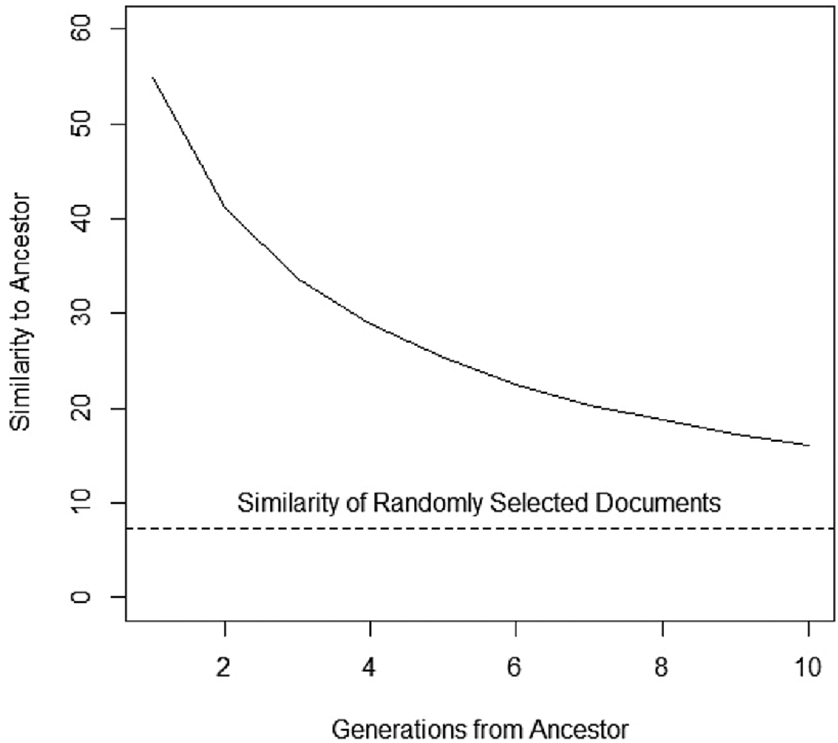
The empirical reality observed in this dataset is far closer to the "artisanal" model than the "standardized form" model. Figure 6 shows the distance from the original "ancestor" agreement in lineages that span ten or more generations.

BUS. L. REV. 677, 737 (discussing how the ISDA Master Agreement was the first widely used template for swaps).

58 *See* Jacob M. Carpenter, *Unique Problems and Creative Solutions to Assessing Learning Outcomes in Transactional Drafting Courses: Overcoming "The Form Book Problem"*, 38 U. DAYTON L. REV. 195, 199–200 (2012) (discussing the practical difficulties of starting off completely from scratch in drafting legal agreements).

59 *See* SUSAN L. BRODY ET AL., LEGAL DRAFTING 3–5 (1994) (discussing "the myth that drafting is merely a fill-in-the-blank activity" and explaining the context-specific nature of legal drafting).

FIGURE 6. GENERATION DRIFT OF MERGER DOCUMENTS



The slope of the line shows that the edits from one generation to another tend to accumulate, meaning that within a few generations, the descendant bears much less similarity to its ancestor. The horizontal dashed line is the median similarity of randomly selected documents (ones that are not related to one-another). Although after ten generations the median similarity to the ancestor remains slightly higher than that of random documents, Figure 6 shows that a document is not much more similar to its ancestor after ten generations than is a random document from the dataset.

The data therefore shows that lawyers not only make a significant number of changes while editing a document, but that those changes tend to persist in later generations of the document, resulting in a marked degree of "drift" from the original text. The high degree of changes from one generation of precedent to the next and the persistence of those changes over time suggests that lawyers are making little effort to standardize their agreements.

The excessive editing, together with the other observations made above, reflects a further pathology in drafting—the precedent selection process. It appears that lawyers engage in little effort to identify agreements whose terms are most applicable to the challenges of a particular deal. Instead, lawyers tend to choose very recent precedents from their own firms rather than more applicable precedents that may be older or drafted by another firm. The haphazard precedent selection process thus appears to engender excessive editing because an ill-fitting precedent will need substantial reworking to suit the needs of the transaction.

The likely reason for the precedent selection pathology is one that most transactional lawyers are familiar with: being tasked by a partner or senior associate to find an example from a firm's database of a past deal documents, and randomly selecting one of those deal documents to serve as a template. But if a firm had some standardization to its agreements, the firm's standardized terms would still rise to the surface even from randomly selected agreement templates.

The one exception to this rule is that lawyers appear to use merger agreement templates that involve the same client if the client is a repeat player. In such cases, the average similarity is generally over 70% from one transaction to another. But this finding only highlights the randomness present in other cases. The fact that the same precedent can be adapted with relatively few changes from one target company to another suggests that the extensive edits are not necessary in other agreements. The key difference is that in such cases, it is likely client pressure that drives the drafting process and keeps the draft document from differing markedly from its precedent. Whether this repeat-player client pressure comes from in-house counsel expecting their earlier deals to serve as templates because of familiarity or demands for greater efficiency to keep costs low, the effect is the same in that it leads to a greater degree of repeat-player client standardization.

The irony is that indiscriminate copying from past mergers actually leads to a large divergence in deal documents over time, both because extraneous artifacts live on from one deal to another and because lawyers have to make more changes that may lead to a greater risk of error or poor drafting that raises risks for clients. Both of these points underscore the desirability of a greater move toward standardization of acquisition agreements. This Article explores facets of this analysis in greater detail in Part III.

III. Proposed Solutions Based on the Study's Findings

A. *Implications of the Study*

This study represents a first step in understanding the role of precedents in the dealmaking process. The data analysis gives a clear picture of how precedents set the defaults for merger agreement negotiations as well as the extensive deal-specific editing that occurs. The high degree of divergence of the final products from their precedent agreements highlights how the absence of standardization imposes a high cost on clients, both in terms of higher billable hours from extensive edits and of greater legal uncertainties stemming from the absence of uniform language.

We identify four costs that arise from the system of precedent selection that contribute to the inefficiencies of the drafting process. First, there is the cost of expending efforts to become familiar with deal documents.[60] Paradoxically, the very cost of familiarity with a multiplicity of agreement forms is what sustains the multiplicity of agreement forms in the first place and thwarts standardization.[61] Senior associate and junior partner deal lawyers do not have the luxury of time to determine which precedent is best, and instead are likely to start off looking at their own firm's database of past deals. Even to the extent more senior lawyers are involved in the selection of deal documents, they are likely to choose deal templates they are familiar with rather than invest the time and energy to determine which previous agreement would be best suited for the needs of their clients.[62] The precedent selection process therefore inhibits the ability to standardize agreements.

This cost should not be understated, as lawyers are understandably focused on time-sensitive tasks and do not have the luxury of becoming familiar with the diverse array of acquisition agreements that are publicly available. Transactional lawyers frequently scramble to start a deal on short notice and lack incentives to do more than the bare minimum to select a plausible precedent from their firm's database.[63] Whenever possible, they would likely start and end their

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60 *Cf.* Brian J. Broughman & Darian M. Ibrahim, *Delaware's Familiarity*, 52 San Diego L. Rev. 273, 278–79 (2015) (discussing how familiarity with Delaware law reduces transaction costs and conversely how switching to another state governance regime would significantly raise transaction costs).

61 *See* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 Va. L. Rev. 713, 727–29 (1997) (discussing the significant impact of "switching costs" on corporate contracting).

62 *See* Huberman, *supra* note 43, at 659–60.

63 *See* Hill, *supra* note 17, at 63.

search with precedents that relate to their acquirer client. Their search also would be limited to deal documents within their law firm. While each merger agreement reflects a degree of cross-fertilization between firms through the back-and-forth of drafting edits, this focus on a law firm's own agreements also hinders the potential for standardized deal documents to emerge.[64]

Second, because lawyers choose documents they are familiar with, they likely expend more resources than necessary to adapt a familiar draft to a new situation. Simply put, lawyers may have the natural tendency to choose past deals they have worked on for a precedent, rather than choosing a precedent that is more on point for the industry or particular challenges of a given deal. This results in increased drafting efforts for both sides of the transaction and leads to higher costs for the client. These costs could be mitigated through the selection of precedent more on point for the situation.

Third, there are a host of residual costs from imperfect familiarity. Lawyers replicate the same type of precedent selection inefficiencies from deal to deal, which thwarts any move toward standardization even within firms. This point raises the concern that agreement lineages within a given firm may reflect the default choices of the partner or senior associate in charge of the initial template selection, rather than any more cogent selection process.[65]

Lastly, there is the residual cost of an "estopped" bargaining position. The absence of standardized acquisition agreements means the acquirer's counsel have incentives to use precedent selection as a tool to create leverage vis-à-vis the target's counsel. Because the target's counsel cannot easily push back and demand sweeping changes in negotiations, acquirer's counsel have incentives to use non-standardized terms that stack the deck in favor of their clients.[66] But target counsel can use past agreements against acquirer counsel, attempting to "estop" them into target-favorable provisions. The net result is that deal terms are highly path dependent, tied to historical drafting histories in ways that thwart standardization and heighten the inefficiencies of the M&A process.

The irony of the strategic value of framing the negotiations is that individual law firms may not have standardized firm-specific merger agreements to gain a greater advantage over the counsel of target

64 *See supra* note 54 and accompanying text.

65 *See* Hill, *supra* note 17, at 64.

66 *See* Tyner, *supra* note 22, at 1-1–1-16 (discussing the limitations lawyers face in suggesting revisions to a draft).

companies. The logic may be that too high a degree of standardization would make it easier for repeat-player target counsel to anticipate and blunt key provisions of firm-specific agreements. Standardization also would reduce barriers to entry to competitors that could erode the market share of leading firms,[67] as there is no intellectual property barrier to copying another firm's merger agreement template. As important, even though greater firm-specific standardization might improve firms' bargaining positions, the foregone billable hours might pose too stark a tradeoff.[68] Here, industry-wide standardization could help to resolve the prisoner's dilemma faced by the acquirer's counsel.

The fact that precedents appear to be chosen primarily for familiarity to the acquirer's counsel underscores the significant costs to becoming familiar with a precedent.[69] Because precedents appear to be chosen primarily for familiarity rather than deal isomorphism, there is a strong case to be made for creating a *lingua franca* among deal lawyers by developing a model acquisition agreement form. This approach would dramatically reduce the costs of becoming familiar with precedents and allow lawyers to focus on deal-specific issues, rather than being caught up in a game of path development and wasteful haggling among firms.

This is possible, in part, because the legal details of merger agreements do not appear to have much, if any, salience to financial markets.[70] Instead, markets appear to value the reputational intermediary role and the due diligence role that transactional lawyers provide.[71] This reinforces the case for standardization, as there does not appear to be any significant market value to law firms' idiosyncratic process of selecting and tweaking precedents. The use of a standardized master agreement would also have the added value of facilitating the creation of a body of precedent to build up interpreting standard agreements as a whole. Courts in Delaware and elsewhere could more easily scrutinize deviations from a standard form, which over time would lead to greater legal certainty and reduced transaction costs.

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67 *See* Dolmans, *supra* note 10, at 166.

68 *See* Leslie Larkin Cooney, *Walking the Legal Tightrope: Solutions for Achieving a Balanced Life in Law*, 47 San Diego L. Rev. 421, 435–36 (2010) (discussing how the billable hour rewards inefficiency by creating a conflict of interest between attorneys who are compensated based on time and clients who are solution oriented).

69 *See* Broughman & Ibrahim, *supra* note 60, at 278–79.

70 *See* Manns & Anderson, *supra* note 11, at 1146–47.

71 *See id.* at 1173–74.

B. Steering Law Firms or Their Clients Toward Standardization

The goal of this Article is to point out the inefficiencies of the deal design process to motivate lawyers to move toward either firm-specific standardization or the broader development of industry-standard deal agreements. Greater standardization would help clients by reducing the costs of transactions, as well as by reducing the uncertainties created by a myriad of ad hoc edits by lawyers.[72] Moves toward greater standardization would help lawyers by creating a *lingua franca* of default provisions that could be authoritatively interpreted by courts.[73] Even if leading firms developed firm-specific standard agreements, it would still foster greater fluency than that present in current practice.[74] Law firms would be better positioned to negotiate on behalf of their clients by focusing on the substantively distinct issues to each deal rather than repeatedly redrafting the same provisions.

The principal barriers to standardization are not merely the obvious ones of upfront costs to form creation. It is true that assembling a standardized merger agreement form for a particular firm entails a substantial investment of upfront unbillable time and energy, and would produce work product that other firms could easily mimic. But there is strong anecdotal evidence that such "form initiatives" are common within law firms despite these obstacles.[75] The problem appears to be that such form initiatives are generally unsuccessful because lawyers tend not to use the forms. The attorney creating a document under time pressure tends to start with the precedent that is most familiar rather than the one that is most standardized. The result is that the documents drift farther and farther apart over time as edits accumulate across generations.

The individual habits of precedent selection could be overcome by strong pressure from law firm leaders, but they have little incentive

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72 *See* Kahan & Klausner, *supra* note 61, at 719–29 (discussing how standardization enhances efficiency, reduces uncertainty, and lowers costs); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 759–66 (1995) (describing how shifts toward greater standardization reduces both legal and uncertainty costs).

73 *See* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 286–88 (1985) (discussing the range of benefits from broad familiarity and use of standardized terms).

74 *See generally* Abraham L. Wickelgren, *Standardization as a Solution to the Reading Costs of Form Contracts*, 167 J. INSTITUTIONAL & THEORETICAL ECON. 30 (2011) (explaining how moves toward greater use of standard form documents reduces reading costs and enhances fluency among users).

75 Many law firms have collected sample forms for transactional drafting which are available on their intranet sites, and therefore are not accessible for citation.

to undertake the expense of such initiatives. Although the long-term benefits to clients and the lawyers themselves may be significant, lawyers would likely suffer from the same short-term myopia that leads to increased complexity of computer programs in the software context.[76] Risking the economic model of transactional law for speculative long-term gains from a standardized merger agreement template would likely represent an unacceptable tradeoff. The lack of industry-wide standards has the indirect effect of creating barriers to entry into the merger and acquisition legal practice because a small number of law firms dominate the market.[77] The costs of creating standards would be borne by firms undertaking the initiatives, while the benefits to standardization would be a public good.

The reluctance to use industry-wide precedents is a strong cultural norm within law firms. Many large firms believe their own work product is superior to that of other firms, leading to distrust of forms drafted by others. The data illustrates this point dramatically through the fact that the ABA Model Merger Agreement, which is the product of many years of work by prominent specialists, has been almost completely ignored as a source of precedent.[78] It would be naïve not to note, however, that this cultural norm serves to further the self-interest of the incumbents in large law firm practice. Deal lawyers benefit from inefficiency in the drafting process, which generates billable hours, and therefore they would not have an economic incentive to invest non-billable hours into creating templates for deal agreements.[79]

Because the law firm industry itself may not have the appropriate incentives to create standardized text, the next best strategy would be to seek to shame deal lawyers into addressing the inefficiencies of the drafting process. Shaming is a challenging strategy because lawyers are notorious both for their dearth of shame and the zeal with which they point to technicalities to justify their actions.[80] For this reason,

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76 Many concepts in software development are analogous to this problem. *See* L. A. Belady & M. M. Lehman, *A Model of Large Program Development*, 3 IBM SYST. J. 225, 228 (1976) (proposing the "law of increasing entropy" as applied to software).

77 *See* Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93, 111 (1994) (arguing that firms with good reputations or large existing networks tend to oppose standardization even if it benefits the firm, while firms with smaller networks or weaker reputations tend to favor moves toward [standardization] to level the playing field).

78 *See supra* notes 52–53 and accompanying text.

79 *See* Cooney, *supra* note 68, at 435.

80 *Cf.* JONATHAN R. MACEY, THE DEATH OF CORPORATE REPUTATION: HOW INTEGRITY HAS BEEN DESTROYED ON WALL STREET 7–11 (2013) (discussing the decline in reputational constraints on Wall Street actors and financial intermediaries).

highlighting the shortcomings of M&A lawyers as a group for fostering inefficiency in deal drafting would have little chance of shaming lawyers into moving toward standardization. Lawyers may be quick to point to the intangibles of the drafting process, or they may pin the blame on the intrinsic challenges of negotiating across firms that require back-and-forth nitpicking. Either way, lawyers are remarkably skilled at externalizing responsibility or coming up with excuses for problems that they dismiss as systemic.

This Article anticipates the ability of lawyers to deflect collective blame. For this reason, the goal should be to highlight the degree to which individual law firms have failed to develop standardized templates for deals, as well as to focus shaming efforts on firms who have more to lose from scrutiny. This strategy rests on sounder footing because the leading M&A firms act as reputational intermediaries. The value of their advice and above-market pricing for services turns on their reputation as gold standards in the dealmaking industry. Because M&A advising is a significant part of law firms' overall rankings, leading firms may be particularly vulnerable to transparency that highlights their inefficiencies in drafting. This study's approach would allow for a ranking of law firms based on the degree to which they appear to be engaging in editorial churning, creating the potential to highlight the relative dysfunction of the drafting process.

One problem with this more focused shaming strategy is that leading M&A firms benefit from the elastic nature of reputation.[81] Because leading M&A firms are trusted advisors with longstanding reputations in the field, it would be difficult to erode the faith that clients place in their services, even in the face of evidence of editorial churning, which increases billable hours. For that reason, this Article seeks to appeal to the self-interest of clients to move toward standardization. Clients who are involved in only occasional mergers and acquisitions may have every reason to look past the bills and focus on the reputational imprimatur that a leading law firm conveys. They may wrongfully believe in the overstatement that each deal has to be carefully tailored to meet the specifics of the clients. Although deal-specific provisions are important, lawyers can stretch the deal-specific dimension of deals into a justification for billable efforts that could easily be supplanted by standardized terms.

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81 *See* Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 367–68 (1985) (discussing law firms' institutional reputations).

The hope is that clients who are repeat players in the M&A context would have the economic incentive and ability to scrutinize their lawyers' work product, and to overcome the self-interest and lack of shame of deal lawyers.[82] Large institutional clients, such as the Carlyle Group or other private equity firms, have the leverage and economic incentive to push for standardized acquisition agreements to reduce their overhead costs. The in-house counsel at private equity firms are in the position to appreciate the inefficiencies of the process (because they generally have started out on the other side of the process as associates or partners for outside counsel). Because private equity firms are repeat players, their in-house counsel could at minimum demand client-specific standardization, which could form a building block toward greater standardization across deals.

The problem may be that even though the costs of M&A lawyers appear high, legal bills still constitute only a small fraction of the cost of M&A transactions.[83] This may explain why in-house counsel for institutional clients have not invested energy and time in pushing for greater acquisition agreement standardization (or have not sought transaction-based pricing which could create similar incentives for standardization within a given firm). A related challenge is that because in-house counsel at private equity firms are generally trained by elite law firms, they may accept inefficient drafting as a natural part of the process because that is what they (likely) did when they were partners and senior associates. The in-house counsel of private equity firms likely choose their outside counsel based on preexisting company-specific or individual relationships, and may not have the economic interest to extract greater value from their law firms by pushing for intrafirm standardization of deal documents. But highlighting the inefficiencies of the drafting process may give in-house counsel the tools they need to push for standardized deal templates that reduce the risk that law firms will reinvent the wheel for each transaction. The fact that merger agreements for repeat-player clients have a significantly higher degree of similarity to their precedents (approximately 70%) suggests the plausibility of this strategy. If repeat-player private equity firms were presented with clearer evidence of the degree of editorial churning, it would give them a powerful tool to push

82 *See generally* Jeffrey Manns, *Insuring Against a Derivative Disaster: The Case for Decentralized Risk Management*, 98 Iowa L. Rev. 1575 (2013) (discussing the greater monitoring potential of repeat players).

83 *See* Gilson, *Value Creation*, *supra* note 5, at 241–42 (discussing how businesspeople often view lawyering costs as a transaction cost).

for greater firm-specific standardization and efficiency in the drafting process.

The push for a standardized agreement may be difficult given that a small coterie of law firms dominates the M&A market and may enjoy their lucratively inefficient ways.[84] But it is not unprecedented for standardized agreements to arise when there is broad consensus and desirability in standardized terms and legal certainty, despite the practice of ad hoc drafting. For example, credit agreements with banks typically follow a standardized form that reduces risk and uncertainty in the banking industry.[85]

What may be missing is a trade association or other standard-setting organization that could represent the interests of corporate clients in having standardized forms. This type of standard-setting organization has arisen in other contexts where all parties involved would benefit from standardization.[86] Although the ABA's Model Merger Agreement ostensibly represents the work product and interests of American lawyers as a whole, it does not represent the interests of the clients of lawyers who are far more likely to have an economic interest in standardization. This may help explain why the ABA's Model Merger Agreement has been largely ignored, as the primary beneficiaries did not direct its drafting and have failed to pressure their lawyers to adopt this template. The leading law firms that dominate M&A activity therefore have little interest in embracing the Model Merger Agreement in their drafting.

In contrast, ISDA is a clear example of how self-interest can fuel standardization. ISDA's membership does not consist solely of service providers, but rather represents a cross-section of end users of derivatives, such as financial institutions, which has much to gain financially from reduced transaction costs and greater legal uncertainty from the standardization of derivatives.[87] As a result, standardized swaps and derivatives agreements offer a clear template which has become the

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84 *See* BLOOMBERG, GLOBAL M&A MARKET REVIEW: LEGAL RANKINGS 4–5 (2015), http://www.bloomberg.com/professional/content/uploads/sites/4/Bloomberg-1H-2015-MA-Legal-League-Tables.pdf (detailing the dominance of the M&A market by a small number of elite law firms).

85 *See* KATHLEEN E. KEEST & ELIZABETH RENUART, THE COST OF CREDIT: REGULATION AND LEGAL CHALLENGES 59–60 (2d ed. 2000) (discussing the standardization of disclosure statements).

86 *See, e.g.*, Tamar Frankel, *Cross-Border Securitization: Without Law, but Not Lawless*, 8 DUKE J. COMP. & INT'L L. 255, 280–82 (1998) (using the example of the development of cross-border securitizations as an illustration of how private sector firms can have convergent incentives both to innovate and standardize).

87 *See Member Types*, INT'L SWAPS & DERIVATIVES ASS'N, https://www2.isda.org/member-

staple for the industry, but also provides for flexibility to adjust the terms to meet the needs of the counterparties in each swap or derivative transaction.[88] Private equity firms could similarly band together to champion standardized acquisition agreements that would mitigate the inefficiencies of the M&A process.

Similarly, industry groups and trade associations may have both the economic interest and collective interest to push for greater standardization of other types of transactional documents. Document standardization has emerged on a large scale in the low end of the transactional world,[89] and the key would be identifying and motivating industry groups with the stakes and leverage to bring standardization to the higher end of the transactional legal drafting process. The development of new technologies may play the largest role. For example, the approach used in this study, which allows lawyers (and their clients) to see the evolutionary history of a particular document, may have the ability to discipline drafting.

The critique of this approach is that it may be too much to hope that self-interest could erode an entrenched practice of inefficient precedent selection and dealmaking. Trade associations and other industry groups are most effective when the stakes for their industry are high and the industry is united in pushing for statutory or regulatory changes. While all companies, and in particular private equity companies, would benefit from greater standardization of deal documentation, the benefit may be too small to motivate industry groups to pressure law firms to change their inefficient ways.

The more modest strategy would be to seek to reinvigorate the ABA's Model Merger Agreement or to enlist another legal body to forge a model acquisition agreement that could serve as a reference point amidst the current sea of distinctive acquisition agreements. The textual analysis used in this study can serve as a tool toward this end. It would be plausible to identify substantive provisions that are consistent with a large cross-section of acquisition agreements that could form a foundation for a model agreement. The logic of this approach is that it may be difficult to induce leading law firms to work together to forge a standardized merger agreement (that they are likely to em-

ship/member-types/ [https://perma.cc/XL2M-DUM4] (last visited Oct. 15, 2016) (providing an overview of the membership of ISDA).

88 *See supra* note 57; *see also* Goode, *supra* note 57, at 286.

89 *See* Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 Wm. & Mary L. Rev. 327, 331–34 (2010) (discussing the development of standard forms and contracts for low-end transactions).

brace) either through shame or external pressure. But it may be easier to work backward from existing merger agreements to put together a standardized merger agreement that reflects both common terms and the best practices of the industry. A synthesis of the best practices from existing merger agreements would not necessarily change the drafting process at law firms. But it would equip clients with a greater tool to push back against editorial churning and to demand explanations for why the terms of an agreement differ from those of the model agreement.

Conclusion

By constructing lineages of acquisition agreements, this study seeks to capture for the first time a picture of the complexity and opaqueness of the transactional drafting process. This study has shown the role of path dependency in the evolution of merger agreements and highlighted the resulting inefficiencies from the precedent-selection and drafting processes. The result is that the acquisition agreement a client ends up with depends heavily on the path the agreement took to get there.

These idiosyncratic processes and results highlight the need for greater standardization of acquisition agreements. The nature of merger negotiations necessarily entails extensive edits to an agreement to resolve deal-specific issues and uncertainties involving the target and acquirer. But creating standardized acquisition agreement templates would facilitate a focus on deal-specific issues. It would also reduce the often wasteful process of firms haggling over the use of precedents and tinkering with legal provisions whose meanings have been conclusively established through past legal and judicial interpretations. Standardized forms would not inhibit innovation, but rather would focus the energy of lawyers on justifying departures from standard provisions and explaining how such changes would add value to their client or to both parties in a transaction.