THE SCOPE AND ORGANIZATION OF THIS MANUAL

This manual offers guidelines for clear and concise contract language. If you draft contracts, this manual will help you ensure that they're clearer and shorter and that they express the transaction more accurately, allowing you and your organization to save time and money, reduce risk, and compete more effectively. If you review or negotiate contracts, this manual will help you determine whether deal points are articulated in a way that makes sense and will help you spot and address potential sources of uncertainty. If you interpret contracts—for example, if you're involved in dispute resolution—this manual will help you assess meaning and determine what is causing any confusion.

This manual should be of use to readers in every contract ecosystem—a solo or small-firm general practitioner handling a broad range of contracts, from leases to separation agreements; a contract-management professional responsible for negotiating contracts with customers; a big-law associate drafting mergers-and-acquisitions contracts; an in-house lawyer overhauling the company's template sales contracts; a paralegal reviewing confidentiality agreements a company is asked to sign; a judge trying to make sense of a confusing contract provision.

There are some things this manual doesn't do. It doesn't address what you should say in a contract. Instead, it addresses how to say clearly and effectively whatever you want to say.

It doesn't address contracts between businesses and individual consumers. Instead, it's intended for those who draft, review, negotiate, or interpret contracts between parties who are sophisticated or are represented by legal counsel. For simplicity, this manual refers to such contracts as "business contracts."

It doesn't attempt a synthesis of current contract usages. Instead, it recommends the clearest and most concise usages over those that have nothing but tradition going for them. If a recommendation departs markedly from what is traditional, that fact is noted.

To keep this manual concise, it doesn't contain footnotes, it cites authorities sparingly, and it cuts short some explication. It doesn't offer a bibliography, because it attempts to address, in sufficient detail for those seeking practical guidance, the full range of issues relating to the language and layout of contracts.

The final chapter deals with corporate resolutions. They aren't contracts, but lawyers who draft contracts are often called on to draft corporate resolutions, which present issues analogous to those that arise in drafting contracts.

Appendix 1 contains three versions of a contract: the "Before" version; the "Before" version, annotated with footnotes to show its drafting shortcomings; and the "After" version, redrafted consistent with the recommendations contained in this manual. The difference between the "Before" version and the "After" version shows the cumulative effect of a rigorous approach to drafting usages, big and small. Readers might find that the footnotes in the annotated "Before" version provide a quick way to find those parts of this manual that discuss issues of particular interest

to them. And the "After" version shows what a contract would look like if the drafter were to follow the recommendations in this manual.

To illustrate the analyis, this manual contains many examples of contract language. Except as indicated, they're not offered as models.

WHY A MANUAL OF STYLE?

A manual of style serves as a resource for any person or organization seeking greater clarity and consistency in written usages. That's the case for any kind of writing, but for the following three reasons a manual of style should prove especially useful to those who draft, review, negotiate, or interpret contracts.

First, compared to other kinds of writing (expository, narrative, and persuasive), contract prose is limited and stylized—except for recitals (see 2.127), it serves only to regulate conduct and state facts. This limited scope makes it feasible for a manual of style to be comprehensive.

Second, contracts benefit from precise use of language—the stakes are often high enough to justify disputes over nuances (see 1.37). Using a manual of style is the best way to promote precision.

And third, contracts benefit from consistency of usages, because differences in wording can result in unintended differences in meaning (see 1.63). Using a manual of style is the best way to promote consistency.

But a manual of style is more than useful—it's necessary. That's because traditional contract language needs a thorough overhaul. In the eight years since the first edition of this manual, we've certainly seen progress—for one thing, interest in clear drafting has been sufficient to warrant a second edition and this third edition. Nevertheless, what the second edition had to say about the state of contract drafting remains true:

> All might seem well—the wheels of industry keep turning, and deals keep getting done. But take a closer look and you'll find dysfunction. Any given business contract may appear to address the deal points adequately, and perhaps it does. But it will almost certainly be cluttered with deficient usages that, collectively, turn prose into "legalese"—flagrant archaisms, meaningless boilerplate, redundant synonyms, use of *shall* to mean anything other than "has a duty to," inefficient layout, and so forth. That's the case no matter how exalted the law firm, or how substantial the company, that was responsible for drafting the contract.
>
> Legalese renders a contract a chore to read, negotiate, interpret, and use as a model. As a result, companies waste vast amounts of money and time that, increasingly, they can ill afford, and lawyers are coming to be seen as impediments to business rather than facilitators.
>
> And the fog of legalese makes it more likely that a contract will contain a flaw that leads to a dispute or deprives a client of an anticipated benefit. Much litigation has its roots in mishandled contract language, even when the lawyers had every incentive to draft carefully. . . .
>
> So given the very nature of contract drafting and the dysfunctional language of mainstream contract drafting, it's doubly clear that a rigorous and comprehensive manual of style would be invaluable to

> those who would like to put their contract drafting on a more rational footing. This manual aspires to serve that function.
>
> In the topics it addresses, and in the detail in which it addresses them, this manual goes beyond simply tackling legalese. But a starting point to clear drafting has to be a willingness to rid contracts of that which is unclear, archaic, redundant, or otherwise inefficient.

Advocates of clearer contract language should remain undaunted. In a field as conservative as contract drafting, progress was always bound to be slow and hard to gauge.

USE OF A STYLE GUIDE

It's unlikely that the drafters in an organization would each opt for the same usages, so the only way to achieve consistency would be to impose a style guide.

For an organization to prepare a comprehensive style guide from scratch would be challenging, considering the expertise and time required. It could instead compile a short style guide of a dozen or more pages, but that wouldn't come close to covering the territory adequately. This manual is as long as it is for a reason.

An alternative would be for an organization to customize and adopt as its own the model "statement of style for contract drafting" included as appendix 2. Such a statement of style would allow an organization to say that it's accepting this manual's recommendations regarding contract language and layout, explain why it's doing so, and highlight some key points. It's called a statement of style rather than a style guide because it doesn't go into any detail. The model statement of style is worded as if it were adopted by a company, but it would be a simple matter to revise it for a law firm. An organization could elect to supplement its statement of style by adding simplified versions of guidelines from this manual.

SURRENDERING AUTONOMY

Perhaps the greatest obstacle to acceptance of this manual or use of a style guide within an organization is that lawyers generally resist efforts to standardize their work. Individual autonomy has long been an integral part of being a lawyer.

In particular, it's commonplace to hear lawyers refer to their own or someone else's drafting "style." The implication is that contract drafting is a craft, with each drafter drawing on a palette of alternative yet equally valid usages.

But that notion is inconsistent with what's required for optimal contract language. (The word "style" in the title of this manual conveys a different meaning and isn't an endorsement of the notion of drafting styles.) The only criterion for judging contract prose is how clear it is. When a drafter has several alternative usages available to accomplish a drafting goal, one will generally be clearer than the others. It would make sense for all drafters to employ only the clearest usages.

Even if those alternative usages are equally clear, having all the members of an organization employ the same usage would eliminate confusion and make it easier to move blocks of text from one contract to another.

Resistance to standardized contract usages also comes from the difficulty of objectively assessing drafting skills. The delusion that one drafts well is easy to catch and hard to shake, particularly in the absence of proper training, rigorous

guidelines, and a critical readership. If more attention has been paid to litigation writing than to the language of contracts, it's likely because litigators write for an outside audience—judges. Unless a problem arises, a contract's only readers might well be the lawyers who drafted and negotiated it and, to a greater or lesser extent, their clients. That's not a critical readership.

Lawyers should consider surrendering autonomy over the building blocks of contract language. The freedom to recycle a grab-bag of usages based on some combination of limited research, uncertain conventional wisdom, and expediency isn't freedom worth preserving. Just as use of standardized, high-quality brick, stone, and steel doesn't prevent architects and builders from being creative, use of standardized contract usages doesn't stifle creativity in articulating the terms of a transaction. In fact, it enhances creativity, because it leaves you more time to focus on substance and makes you more confident that you're being clear and concise.

SPECIALIZATION

As the heft of this manual suggests, acquiring a command of the full range of issues lurking in contract language takes time. That investment certainly pays off, but perhaps not for everyone. Generally, in larger organizations, greater complexity leads to greater specialization—it doesn't make economic sense for everyone in the organization to be a specialist, and not everyone will have the necessary aptitude.

So the realities of the contract-drafting process suggest that for a substantial organization to achieve high quality and maximum efficiency, what's required is not only standardization but also specialization. For an organization with a sufficient volume of contracts requiring some measure of customization, specialization can readily be achieved through document-assembly software. With document assembly, you create contracts not by copying-and-pasting from precedent contracts but by completing an annotated online questionnaire and selecting from among the options offered. The task of drafting the contract language used in a document-assembly system necessarily falls to a limited number of specialists.

Aside from the question of whether an organization is able to achieve the necessary economies of scale to warrant implementing a bespoke document-assembly system, the obstacles to specialization are cultural. They're the same as those that impede standardization, except that specialization involves not just surrendering autonomy but also, for some, relinquishing any role in contract drafting. For those organizations that are able to shake off the shackles of inertia, the potential rewards are clear.

THE MARKETPLACE OF IDEAS

Much of what is new and improved about this edition is due to reader comments, so I welcome your input. Some of those who've expressed to me how useful they've found previous editions of this manual have prefaced their remarks with, "Although I don't always agree with you . . . ," but they don't go on to explain what they disagree with, and why. If you think I'm mistaken, please let me know, explaining why I'm mistaken. Let's have it out in the marketplace of ideas. May the best ideas win!

COUNTERING PUSHBACK

Anyone contemplating switching from traditional contract language to the approaches recommended in this manual might worry about encountering resistance from senior colleagues, from clients, or from those on the other side of a deal.

That concern is largely unwarranted. If the recommendations in this manual were unduly challenging, it wouldn't be as widely used as it is. (Those recommendations markedly at odds with convention are noted as such.)

Nevertheless, you can expect occasional resistance. Because resistance can lead to fruitless discussion of pointless changes requested by a traditionalist, it makes sense to preempt resistance by alerting those to whom you send a draft contract that it complies with the guidelines in this manual. To do so, you could use the proposed text for an e-mail cover note included in the model statement of style in appendix 2. If your organization has adopted a style guide, adjust the cover note to refer to it.

A NECESSARY INGREDIENT FOR CHANGE

The world of contract drafting has experienced some of the turbulence that has visited the legal profession in recent years. More specifically, information technology now offers alternative ways to compile contract language.

Utopians see potential in crowdsourcing, with individuals collaborating to create contracts that reflect collective wisdom. That notion has died aborning, as contract drafting is different from Wikipedia—it involves greater complexity, and more is at stake.

Others maintain free online repositories of a motley range of contracts, offering enthusiasm but next to nothing in the way of quality control, consistency, customization, or guidance.

Others hawk the snake oil of artificial intelligence with little or no editorial control—let the machines figure out what contract language works best!

Still others offer the mass market, for a fee, business contracts of embarrassingly poor quality. The best that can be said for these products is that they're no worse than much of what one can find for free online.

One feature common to each of these dead-end approaches is a disregard for the consistency and rigor in contract language that comes only with using a manual of style. To be plausible, any venture seeking to replace the traditional copy-and-paste process of contract drafting will have to offer contract language that complies with a manual of style. (In full disclosure, the author of this manual has dipped his toe in these waters with his venture Koncision Contract Automation.)

USE OF THIS MANUAL INTERNATIONALLY

English is used in contracts around the world, and not only in contracts between companies from English-speaking countries. English has become the lingua franca of international business. A Swedish company and a Brazilian company might elect to have any contracts between them be in English, rather than Swedish or

Portuguese. And a German company that's part of an international group might prefer that its contracts with other German companies be in English.

Anyone drafting contracts in English can safely use this manual. Contracts drafted in English by lawyers from the United States, the United Kingdom, Australia, Canada, and elsewhere share the same basic contract concepts and use essentially the same language, although this manual notes some minor differences.

This manual cites caselaw as part of its discussion of some usages. Most of the cited opinions are by federal or state courts in the United States, but some are by English, Canadian, and Australian courts. Because court opinions reveal usages that cause disputes and the ways in which judges can misinterpret contract language, they provide clues as to how drafters can avoid creating confusion. Because the language of contracts in English is so similar the world over, the lessons derived from caselaw are universal—what an Illinois case has to say about, for example, the potential for syntactic ambiguity to give rise to a dispute is as relevant to Australian drafters as it is to drafters in the United States.

This manual doesn't cite court opinions as support for attributing a specific meaning to a particular usage. A principle underlying the recommendations in this manual is that a contract should speak directly to the reader without any need for caselaw to breathe meaning into it (see 1.30).

CULTURAL DIFFERENCES

To generalize broadly, drafters in different parts of the world seem to bring different approaches to bear. Those in the United States are particularly willing to recycle dense verbiage (for example, see 4.57). English lawyers and judges seem particularly susceptible to improvised and misapplied terms of art (for example, see 3.286 and 8.32–33). Australia has made great progress in weeding out ludicrous usages, but there's room for improvement (for example, see 3.74 and 5.48). And based on the experience of the author of this manual, Canadians are particularly willing to consider what's required to make contracts clearer.

It's reasonable to expect that with continued cross-border transactions, the prose of English-language contracts will become even more consistent the world over, but you can assume that cultural differences will remain.