ABOUT THIS MANUAL

The Purpose of this Manual

This manual offers guidelines for clear and concise contract language. If you're making decisions regarding contract language without consulting it, the odds are that you're copy-and-pasting, relying on flimsy conventional wisdom, or improvising.

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 uncertain meaning. If you interpret contracts—for example, if you're involved in dispute resolution—this manual will help you assess meaning and determine what's 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 manager responsible for negotiating contracts with customers; a BigLaw associate preparing 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.

No other work addresses the building blocks of contract language in anything like the detail offered in this manual. Furthermore, those resources that are available—including works by prominent commentators—offer analyses that don't stand up to scrutiny. This manual doesn't hesitate to offer examples: making headway in the marketplace ideas requires that you not only promote your own ideas but also challenge conflicting ideas offered by those prominent enough to matter.

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 **Error! Reference source not found.**), it serves only to regulate conduct and state facts. This limited scope makes it feasible for a manual of style to attempt to be comprehensive.

Second, contracts benefit from precise use of language—the stakes are often high enough to justify disputes over nuances (see **Error! Reference source not found.**). 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 unexpectedly affect meaning (see **Error! Reference source not found.**). Using a manual of style is the best way to promote consistency.

What this Manual Covers

Like any book about how to write clearly, this manual addresses a broad range of topics, but with a relatively narrow focus. It considers the implications of many words and phrases, but many others were omitted—it's not a legal dictionary, and it's not a work on general English usage. It's also not the place to

discuss entire provisions, although it does consider terminology used in, for example, indemnification provisions.

One way to think of it is that this manual doesn't cover what you say in a contract. Instead, it covers how to say it. That's broadly accurate, but it's also simplistic. Meaning doesn't arise in a vacuum, independent of usages. Instead, what you say is a function of the usages you employ, and what usages you choose can have unexpected implications. So this manual inevitably includes plenty of what-you-say along with the how-to-say-it.

This manual doesn't deal with 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 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 is on 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.

The appendix 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 locate 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 analysis, this manual contains many examples of contract language. Except as indicated, they're not offered as models.

Using 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 use essentially the same language. The differences in terminology are trivial. For example, Commonwealth drafters tend to use the word *completion* where U.S. drafters would use *closing*. This manual recommends eliminating some of those differences in terminology by dispensing with the Commonwealth usages *endeavours* (see **Error! Reference source not found.**), *forthwith* (see **Error! Reference source not found.**), and *procure* (see **Error! Reference source not found.**).

This manual cites caselaw as part of its discussion of some usages. It mostly cites opinions by federal or state courts in the United States, but it also cites opinions by English, Canadian, and Australian courts, along with an Irish opinion and a Singapore opinion. 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.

TRADITIONAL CONTRACT LANGUAGE IS DYSFUNCTIONAL

The Scale of the Dysfunction

The notion that the prose of contracts can be clear and modern is catching on. One sign is that this manual is now in its fourth edition. And people evidently do consult this manual. A trivial example—ten years go the concluding clause this manual recommends (see **Error! Reference source not found.**) started showing up in contracts filed on the U.S. Securities and Exchange Commission's EDGAR system, where public companies file their "material" contracts.

But one shouldn't have any illusions. Contracts drafted without the benefit of a comprehensive set of guidelines—that would be most contracts—remain awash in dysfunction. The details differ, but the effect is consistent: the reader is forced to wade through a slurry of archaisms, redundancy, chaotic verb structures, overlong sentences, and confusing terminology. In other words, traditional contract language.

It's not as if a matter of traditional contract language is a problem only for nonlawyers. Everyone is in the same fog, it's just that some are in denial.

And it doesn't matter how exalted the law firm, company, or trade group—for the most part, they still can be counted on to churn out dysfunction. There's a disconnect between the aura of "excellence" that such organizations seek to foster and the poor quality of their contracts.

The Primary Cause of Dysfunction

The defining characteristic of contract drafting is that each new transaction will closely resemble other transactions. It makes sense to copy contracts used in those other transactions, making only whatever adjustments are necessary to reflect the new transaction.

That could be a source of efficiency, but if you're using word processing, the result is a pathology this manual calls "passive drafting":

- You don't have the time or, in all likelihood, the expertise to reassess the language of precedent contracts and templates, so you copy it, on faith, assuming that because it was thought suitable for other comparable transactions it will work for yours.
- Because you're copying, you don't need guidelines.
- Because you're copying, no one needs to be trained.

The alternative to passive drafting is "active drafting":

- You follow a comprehensive set of guidelines for clear and concise contract language.
- You get trained in how to draft and review contracts consistent with those guidelines.
- You copy only from templates and precedent contracts that are consistent with those guidelines.

RESISTANCE TO CHANGING TRADITIONAL LANGUAGE

Traditional Language "Works"?

Those who want to improve contract language face obstacles. For one thing, one encounters the claim that traditional contract language simply "works." See, e.g., Kenneth A. Adams, *Where Are the Data Showing that Traditional Contract Language Is Dysfunctional?*, Adams on Contract Drafting (20 Feb. 2017),

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http://www.adamsdrafting.com/where-are-the-data/. But that's a bizarre notion. Contract drafting isn't a binary world in which contracts work or don't work. Instead, contracts can be more clear or less clear; working with them can require less time or more time; and you can be exposed to less risk of dispute over confusing contract language or more risk.

Traditional Language Has Been "Tested"?

A more nuanced, and more prevalent, argument against changing traditional contract language is that although contract prose could certainly be improved, change would be risky—traditional contract language has been litigated, or "tested," so it has a clearly established, or "settled," meaning, and replacing it would be rash.

Here's how one commentator expressed this concept: "[C]areful writing can even be counterproductive if the result is to re-draft language that has been previously interpreted by a court as having a particular meaning. Ironically, in such a case, changing the words—even for the better—can only increase uncertainty." Robert C. Illig, *A Business Lawyer's Bibliography: Books Every Dealmaker Should Read*, J. Legal Educ., 585, 625 (May 2012).

This excuse for not using clearer language suffers from three fatal weaknesses:

First, because courts have scrutinized some traditional contract terminology but not the full range of contract usages, the notion of "tested" contract language applies only narrowly.

Second, the notion of "tested" contract language suggests that all courts ascribe the same set meaning to individual usages. That's not so. How courts interpret usages depends on the circumstances of each case, not to mention the semantic acuity of the judge, and can vary over time and among jurisdictions.

And third, if parties to a contract had to ask a court to determine the meaning of a particular provision, that's because the contract failed to state clearly the intent of the parties. Why rely on language that created confusion? Instead, express meaning clearly, so you needn't gamble on a court's breathing the desired meaning into the contract.

So although some lawyers will continue to claim that "tested" contract language is safer than expressing meaning clearly, it's a lazy platitude that doesn't survive scrutiny.

That's why this manual doesn't cite court opinions as support for attributing a specific meaning to a particular usage. A contract should speak directly to the reader without any need for caselaw to breathe meaning into it.

Inertia

What unites the argument that traditional language "works" and the argument that it has been "tested" is that those who advance them don't seem inclined to do the hard work of considering, usage by usage, what is clearest and most concise. Instead, it seems likely that each objection is motivated by a more basic urge—inertia.

People tend to be biased against creative thinking. Instead, they prefer to tackle a given task by making use of what they already know, no matter if the result is less than optimal. This instinct is universal: you can find examples in medicine, in sports, in cooking. It stands to reason that inertia should be particularly powerful in contract drafting, an inherently precedent-driven activity. (For more on the role of inertia in contract drafting, see the "Inertia" category of the Adams on Contract Drafting blog, http://www.adamsdrafting.com/category/inertia/.)

Even when debate shifts to the level of individual usages, one can detect the dead hand of inertia in the way some commentators, without offering reasonable arguments or counterarguments, promote as meaningful distinctions between contract usages what are in fact obscurantist rationalizations. Two concepts in psychology might be relevant. One is "learned helplessness"—copy-and-paste traditional contract language enough and you might find it difficult to accept that there's an alternative. The other is "cognitive

dissonance"—if you have no alternative to copy-and-pasting dysfunctional contract language, it's not surprising that you should come to regard the dysfunctional language as in fact ideal.

CHANGE AT THE LEVEL OF THE INDIVIDUAL

The Other Side's Draft

Using a manual of style in discussing a given draft involves selling change. What that involves depends on whether the other side or your side prepared the draft.

If the other side drafted, your task isn't to turn their draft into a thing of beauty. Instead, you look for anything that doesn't reflect the deal as you understand it and anything that could create confusion. You give a pass to those features of traditional contract language that don't make sense but aren't confusing. Examples include use of a traditional recital of consideration (see **Error! Reference source not found.**), benign overuse of *shall* (see **Error! Reference source not found.**), and archaisms in the front and back of the contract. Asking the other side to change such things risks antagonizing them unnecessarily.

Features that can cause confusion and so are worth flagging include, for example, anything that should be a condition that's expressed as an obligation (see **Error! Reference source not found.**), inherently confusing usages (for example, *indemnify and hold harmless*), and instances of ambiguity. Even seemingly minor glitches are worth flagging if they've given rise to disputes. Examples include throat-clearing verb structures (see **Error! Reference source not found.**) and use of *may* in restrictive relative clauses (see **Error! Reference source not found.**).

If those who prepared the other side's draft are traditionalists, you might have to explain to them what prompted a given change. Citing this manual might help bring that discussion to a successful conclusion, and more quickly than might be the case otherwise, as it would reinforce that the proposed change not simply based on your notion of the conventional wisdom.

Your Draft

If you're drafting, the first bit of selling you might have to do is to someone senior to you at your organization. Assess what they expect. Are they a traditionalist? If so, are they open minded? If they are, you might mention this manual to them and see whether it starts a conversation. If instead they're a committed traditionalist, then give them what they expect, making strategic concessions with respect to usages that don't affect meaning but being gently persistent with respect to stuff that matters.

Then there's the task of selling a draft with modern usages to those on the other side of a transaction. There's no reason why it should be some ordeal. For one thing, previous editions of this manual have sold tens of thousands of copies, so it's fair to say that that contracts community considers it a legitimate resource.

Furthermore, with only a few exceptions, contract language that complies with the recommendations in this manual shouldn't attract attention to itself. Instead, it simply eliminates the stumbling blocks, the repetition, the redundancy, the obscure legalisms, the archaisms, the inconsistency. What's left is the deal, which is what people will focus on. That means you might not get patted on the back for your drafting prowess, but readers get to the substance with less delay and confusion and your job will be easier as a result. That by itself is plenty to be thankful for.

But contract drafting is a precedent-driven part of a notoriously conservative profession, so you shouldn't be surprised if you get some pushback. People are prone to attacking what they don't understand, so to limit pushback consider explaining to the other side what's behind the usages you employ in the draft. That could be accomplished by an email cover note along the following lines:

> The language used in the attached draft complies with the recommendations contained in Kenneth A. Adams, *A Manual of Style for Contract Drafting* (ABA 4th ed. 2017).

That book explains that many traditional drafting usages are inconsistent with clear, modern, and effective drafting, and it recommends alternatives. Consequently, you might find that some usages you use routinely in your contracts aren't present in this draft.

Before you ask that any traditional usages be restored to this draft, please consider whether restoring them would change the meaning of any contract provisions or make them clearer. If it wouldn't, making those changes would serve no purpose.

And please consult *A Manual of Style for Contract Drafting* to see what it has to say about any usage that you seek to restore—it might be problematic in ways you hadn't considered.

It's in the interests of both sides not to spend time making, or even discussing, changes that have no bearing on the deal or that risk creating confusion or making the contract harder to read.

Let's say you get pushback anyway. The level of pushback, and how persistent it is, is likely to be in proportion to the bargaining leverage the other side feels it has. Your resistance to the pushback would presumably depend on the circumstances. If it's a one-off deal, you might find mildly annoying requested changes that pointlessly aim to restore traditional usages, but you might not make much of a fuss.

It might feel differently if the draft in question is one of your core commercial templates, as the whole point of templates is to limit the changes you make from deal to deal. You might want to take a firm stance even when it comes to, say, your use of a small *a* in references to *this agreement* (see **Error! Reference source not found.**). Although it's a usage that has no deal significance and tends to befuddle traditionalists, little is gained by throwing it to the wolves. Anyone who is so dogmatic as to get worked up about *this agreement* is likely to have a problem with other modern usages, so you're likely to find yourself discussing those usages.

Using *this agreement* can actually work to your advantage, as it offers a convenient way to set ground rules for negotiations over contract wording. It appears early in the contract, and the explanation for it is simple. Getting the other side to accept *this agreement* might well pave the way for their accepting other novel usages. On the other hand, if someone nevertheless insists on your using a capital *A*, you'll know that you're dealing with a reactionary jerk who is willing to ignore the convention that you don't mess with the other side's draft without good reason. It's best to know that early on, so you can adjust accordingly.

More generally, be realistic about the extent to which you as an individual can follow the recommendations in this manual. If you're working with traditional templates, you might have little opportunity. Even if you have control over your drafting, retooling traditional contract language takes time. It might be best to take an incremental approach, starting first with those provisions that you get the most use out of, so you get a quicker return on the time invested.

CHANGE AT THE LEVEL OF THE ORGANIZATION

A Style Guide as the Foundation

Even if all contracts personnel at an organization are informed consumers of modern contract language, that doesn't make for an efficient contract process, as too much would be at the whim of individuals with different experience, aptitudes, and training. What's needed is centralized initiatives.

The foundation for an efficient contract process is a style guide for contract usages. It's unlikely that the drafters in an organization would independently opt for the same usages, so the only way to achieve consistency would be to impose consistency through a style guide. The idea of a style guide is catching on—witness how in 2015, Adobe Systems Incorporated disseminated a 30-page document called *The Adobe Legal Department Style Guide*.

For an organization to prepare a suitably comprehensive style guide from scratch would be challenging, considering the expertise and time required. Even 30 pages wouldn't cover the territory adequately.

This manual might seem like a style guide, but it's too lengthy and too detailed. It wouldn't be realistic to give a copy of this manual to all personnel in your organization who work with contracts and tell them, "Do what this says." Instead, this manual would likely be appropriate for those who work extensively with contract language.

It's also suitable as a foundation for a style guide. That's why the author of this manual expects to publish in 2018 with the American Bar Association a shorter work intended to be used as a style guide, entitled *Drafting Clearer Contracts: A Concise Style Guide*. It makes sense for one style guide to become the accepted standard, in the manner of *The Chicago Manual of Style*, which is widely used in the United States for purposes of general publishing. Time will tell if *Drafting Clearer Contracts* serves that function for contract drafting.

Training and Templates

Once you have a style guide, you have to train your contracts personnel to draft and review contracts consistent with the style guide. But that isn't enough. People draft contracts by copying, so if you want clear and modern contracts, you need clear and modern templates.

That sounds like a lot of work, but it isn't, if you go about it sensibly. In other words, enlist suitable contract-language expertise and, if required, subject-matter expertise. And don't indulge in "drafting by committee," with those involved angling to include in templates their pet contract usages, based on flimsy conventional wisdom.

Surrendering Autonomy

Apart from inertia, an 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 each drafter draws 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.

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Specialization

But an efficient contract process can involve more than individual lawyers surrendering autonomy. 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 automated contract drafting. Information technology allows you to 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 an automated 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 an automated system for creating contracts, 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 overcome those obstacles, the potential rewards are clear.

CHANGE AT THE LEVEL OF THE INDUSTRY

Just as within an organization it doesn't make sense to leave individuals to draft contracts entirely as they see fit, it also doesn't make sense to have each company create its own templates for standard commercial contracts. Information technology now offers alternative ways to compile contract language, but each has shortcomings.

Utopians see potential in crowdsourcing, with individuals collaborating to create contracts that reflect collective wisdom, but nothing useful has been created using that approach. Given how complicated contracts are, and given what's at stake, you need strong editorial control, but that's antithetical to the notion of crowdsourcing. And it's hard to imagine someone with appropriate expertise volunteering to spearhead a crowdsourcing initiative without be paid.

Free online repositories of contracts have come and gone, offering nothing or next to nothing in the way of quality control, consistency, customization, or guidance. And there's always the U.S. Securities and Exchange Commission's EDGAR system. It's free, and you get what you pay for.

Some services use information technology to parse EDGAR and other repositories of contracts, displaying the different ways that contracts address particular issues. You get to see exactly what's in the contracts, but that has no bearing on whether a given provision is drafted clearly, accurately reflects the deal or the law, or is even relevant to the user's needs.

Some vendors offer curated templates. At the bottom end of the market, they offer rubbish for free or for a nominal amount. The top end of the market offers you traditional BigLaw drafting, with all its shortcomings.

Real progress would require automated templates that comply with a style guide and are created with strong editorial control and suitable subject-matter expertise. An example of what that might look like is a highly customized confidentiality-agreement template created by the author of this manual, using the software Contract Express. (For more information, go to _____.) But given that the market consists mostly of ill-informed consumers weaned on the dysfunction of traditional contract language, and given the ready availability of mountains of free precedent contracts of indeterminate quality, it's not clear that there's a demand for quality, whatever the price.