
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, it's overwhelmingly likely that you're copy-and-pasting, relying on flimsy conventional wisdom, or improvising.

If you draft contracts and follow the recommendations in this manual, your contracts will be clearer and shorter and will express the transaction more accurately. That will allow 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 sensibly 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 ascertain meaning and determine what's causing any confusion.

This manual should be useful for 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 their company's template sales contracts; a paralegal reviewing confidentiality agreements their company is being asked to sign; a judge considering how to interpret a contested contract provision.

No other work addresses in comparable detail the words and phrases that make up contract provisions. And other works—including some by prominent commentators—offer analysis that too often doesn't withstand scrutiny. This manual isn't squeamish about citing examples: the marketplace of ideas requires that you not only develop your own ideas but also challenge those offered by others.

Why a Manual of Style?

A manual of style can be used as a resource by any person or organization seeking to write more clearly and consistently. For three reasons, a manual of style would be 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 2.129), it only regulates conduct, states facts, and allocates risk. That's why this manual can attempt to be comprehensive in scope.

Second, it's best to be precise in contracts—the stakes are often high enough to justify disputes over nuances (see 1.33). Using this manual would help you be precise.

And third, contracts benefit from consistency of usages, because differences in wording can unexpectedly affect meaning (see 1.63). Using this manual would help you be consistent.

What This Manual Covers

One way to think of this manual is that it doesn't cover what you say in a contract, it covers how to say it. But that's an oversimplification, because meaning doesn't arise in a vacuum, independent of usages. Instead, how you say something can affect meaning in unexpected ways. So this manual inevitably includes plenty of the what-to-say with the how-to-say-it.

Like any book about how to write clearly, this manual covers a broad range of topics. But it doesn't cover all of them exhaustively. For example, it can offer only some examples of redundancy (see 1.37)—it's not a legal dictionary. It also doesn't discuss entire provisions, although it does consider terminology used in, for example, indemnification provisions.

This manual doesn't deal with consumer contracts—contracts between businesses and individual consumers—although much of what it says could be applied to such contracts. Instead, it's intended for those who draft, review, negotiate, or interpret business contracts—contracts between businesses that either are experienced in handling transactions or are represented by legal counsel.

This manual doesn't limit itself to standard contract usages. Instead, it recommends the clearest and most concise usages over those with nothing but tradition going for them. If a recommendation departs markedly from what is traditional, that's noted.

To keep this manual practical, it dispenses with footnotes, it cites authorities sparingly, and it limits some explication. It does without a bibliography, because it attempts to offer the most authoritative treatment, from the perspective of the contract drafter, of the topics it covers.

The appendix contains two versions of a contract: the "Before" version, annotated with footnotes to explain its drafting shortcomings; and the "After" version, redrafted to comply with the recommendations 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 allow them to locate quickly those parts of this manual that discuss a given topic.

To illustrate the analysis, this manual contains many examples of contract language. Except as indicated, they're not presented as models. Indented examples of contract language are in a sans serif typeface; indented quotations from caselaw or commentary use the same typeface as the rest of the text.

Using this Manual Internationally

English is used in contracts around the world, not just contracts between companies from English-speaking countries. English has become the lingua franca of international business. A Swedish company and a Japanese company might opt to have contracts between them be in English, rather than Swedish or Japanese. And a German company in an international group might require that its contracts with other German companies be in English.

But for anyone working with English-language contracts who isn't a native English speaker, there's no such thing as a beginner's level in English-language contracting. A contract must address what's required for the transaction; no one

would accept as a valid excuse that the English of a drafter, reviewer, or negotiator was limited. And the stakes are high.

On the other hand, because contracts prose is limited and stylized, it's likely to be less encumbered with peculiarities of English than are other kinds of writing. Those who aren't native English speakers should find it easier to gain command of contracts prose. This manual will help.

Anyone drafting contracts in English can safely use this manual. In the prose used, contracts drafted in the United States, the United Kingdom, Australia, and Canada share the same features. Differences in terminology exist, but are trivial. For example, whereas Commonwealth drafters use *completion*, U.S. drafters prefer *closing*. This manual recommends eliminating some of those differences in terminology by dispensing with the Commonwealth usages *amongst* and *whilst* (see 13.23), *clause* (see 4.9), *endeavours* (see 8.91), *forthwith* (see 10.126), and *procure* (see 3.145).

Differences in spelling are likewise trivial. For example, in American English, *license* is both a noun and a verb, whereas in other varieties of English, *licence* is the noun and *license* is the verb.

The Significance of Caselaw

This manual cites caselaw as part of its analysis of different usages—mostly opinions by federal and state courts in the United States, but also opinions by English, Canadian, and Australian courts, along with, it so happens, one opinion from each of Ireland, Singapore, and South Africa.

Court opinions tell us which usages risk causing disputes and how judges misinterpret contract language. Because the prose of English-language contracts is so similar the world over, the lessons from caselaw are universal. An Illinois case involving syntactic ambiguity is as relevant to drafters in Australia as it is to those in the United States.

This manual doesn't cite caselaw to support attributing a specific meaning to a particular usage. For one thing, courts tend to be overly confident of their understanding of how English works. But more to the point, a contract should speak directly to the reader, in standard English (see 1.28), without relying on caselaw to breathe meaning into it. (See p. xxxvii regarding the notion of "tested" contract language.)

Readers have asked how the recommendations in this manual have fared in the courts. That's like assessing how law-abiding someone is by how often juries acquit them. Contracts drafted consistent with this manual shouldn't end up in court because of a fight over confusing contract language.

But sometimes contract parties pick fights for no good reason. And sometimes judges make bad decisions to achieve a desired outcome, or they make mistakes. A court might give a usage a meaning different from what this manual says you can expect, or it might attribute significance to a usage this manual says is pointless. For example, see 3.73 (regarding caselaw holding that *shall* can mean *should*) and 2.176–.178 (regarding caselaw attributing significance to a backstop recital of consideration).

Both the law and the English language are intricate, sprawling things, so you can expect this sort of caselaw glitch occasionally. An errant court opinion is no reason for this manual to retreat from any of its recommendations.

TRADITIONAL CONTRACT LANGUAGE IS DYSFUNCTIONAL

The Scale of the Dysfunction

The notion that the prose of contracts can and should 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 modest example: ten years ago the concluding clause this manual recommends (see 5.4) started appearing in contracts filed on the U.S. Securities and Exchange Commission's EDGAR system, where public companies file their "material" contracts.

But have no illusions. Contracts drafted without the benefit of rigorous guidelines—most contracts—remain awash in dysfunction. The details differ, but the effect is consistent: readers must wade through a slurry of archaisms, redundancy, chaotic verb structures, overlong sentences, and confusing terminology. In short, traditional contract language.

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

It doesn't matter how exalted the law firm, company, or trade group—they mostly churn out dysfunction. The poor quality of their contracts is at odds with the aura of proficiency and dependability that such organizations seek to foster.

The Primary Cause of Dysfunction

A defining characteristic of contract drafting is that each new transaction inevitably resembles previous transactions. It makes sense to copy contracts used in those other transactions, adjusting them as needed to reflect the new transaction.

That should 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 perhaps the expertise to reassess precedent contracts and templates, so you copy them, on faith, assuming that they worked before and so will work again.
- 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 modern contract language.
- You're trained in how to draft and review contracts consistent with those guidelines.
- You copy from only templates and precedent contracts that comply with those guidelines.

RESISTANCE TO CHANGING TRADITIONAL LANGUAGE

Claiming That Traditional Language "Works"

Those who want to improve contract language face obstacles. For one thing, you encounter the claim that traditional contract language "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),

<http://www.adamsdrafting.com/where-are-the-data/>. That notion assumes a binary world in which contracts work or don't work. In fact, contracts are clear or less clear, working with them is less time-consuming or more time-consuming, and they present less risk of dispute over confusing prose or more risk. And caselaw is full of instances of confusing traditional usages causing a dispute.

Claiming That Traditional Language Has Been “Tested”

A more nuanced argument against changing traditional contract language is that doing so would be risky—traditional contract language has been litigated, or “tested,” so it has an established, or “settled,” meaning.

Here's how one commentator expressed it: “[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*, *Journal of Legal Education* 585, 625 (May 2012).

This argument suffers from three weaknesses, each fatal. 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 and 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 wording that created confusion? Instead, express meaning clearly, so you needn't gamble on a court attributing the desired meaning to a contract. Courts have to clean up whatever messes they're presented with, but this manual is free to recommend ways to avoid confusion. The Delaware Chancery Court has acknowledged as much, noting “the difference between the roles served by courts and judges, on the one hand, and commentators like Adams, on the other.” *GRT, Inc. v. Marathon GTF Technology, Ltd.*, No. CIV.A. 5571-CS, 2011 WL 2682898, at *14 n.79 (Del. Ch. 11 July 2011).

So although some lawyers will continue to claim that “tested” contract language is safer than expressing meaning clearly, it's a lazy platitude.

The Dead Hand of Inertia

The arguments that traditional language “works” and that it has been “tested” are advanced by those who seem disinclined to do the hard work of considering, usage by usage, what is clearest and most concise. Instead, it seems likely that what motivates these objections is a basic urge: inertia.

People are wary of creative thinking, preferring instead to tackle a task by using what they already know, even if the result is inferior. This instinct is universal: you can find examples in medicine, in sports, and in cooking. Because contract drafting is inherently precedent-driven, it's particularly prone to inertia. (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 in debate over individual usages, one can attribute to inertia the way some commentators invoke obscurantist rationalizations to explain confusing terminology.

Inertia can operate through several mechanisms. One is “learned helplessness”—if you copy-and-paste traditional contract language for long enough, you might find it difficult to accept that there’s an alternative. Another is “cognitive dissonance”—if you have no alternative to copy-and-pasting, that could lead you to idealize traditional contract language. A third is peer pressure—you see the merit of a modern alternative to a traditional usage, but you’re reluctant to draw attention to yourself by making the change. And a fourth could be described as the no-smoke-without-fire school of contract interpretation—the notion that if enough people who work with contracts ascribe to a particular view, that view must have merit.

Underestimating Complexity

Another factor impeding change is that many lawyers aren’t equipped to assess the quality of contract drafting. 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 writing contracts clearly, it’s likely because litigators write for an outside audience—judges. Unless a problem arises, a contract’s only readers are likely to be the lawyers who drafted and negotiated it and, to a greater or lesser extent, their clients. Usually that’s not a critical readership.

Even those inclined to improve contracts underestimate what’s involved. For example, law firms often assign the task of preparing templates to those who are perhaps least qualified for the task—junior lawyers with time on their hands. And some company lawyers newly converted to the cause of “plain English” contracts assume that all that’s required is common sense and a copy of *Plain English for Lawyers* from law school.

Lawyers are also prone to assuming that they can figure out the implications of individual usages based on their own understanding—usually limited—of English and what sounds right. But in contracts, where the stakes are often high and prose can be subjected to extraordinary scrutiny, things are not always as they seem. To get a sense of that, you only have to skim chapter 11 (Ambiguity of the Part Versus the Whole).

Judges share this overconfidence: you will find in this manual many examples of judges considering the implications of a contract usage and reaching a conclusion that make no sense. Although courts mostly don’t accept expert testimony on ambiguity, except as to technical terms, courts would benefit from admitting testimony of experts in contract language.

Legalistic Hairsplitting

And it doesn’t help to bring to contract drafting and interpretation a hairsplitting legalistic mindset. If you read into contract usages a meaning that isn’t established or that’s at odds with how the English language works, you confuse matters and risk straying into nonsense. Three prime examples of that are legalistic interpretations of *represents and warrants* (see 3.374), *efforts* standards (see 8.15), and *indemnify and hold harmless* (see 13.419).

CHANGE AT THE LEVEL OF THE INDIVIDUAL

The Other Side's Draft

Using a manual of style when considering a draft contract involves selling change. What that requires depends on which side prepared the draft.

If you're reviewing the other side's draft, a certain etiquette applies. Your task isn't to turn their draft into a thing of beauty. You look only for whatever doesn't reflect the deal as you understand it and whatever 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 2.166), benign overuse of *shall* (see 3.85), and archaisms in the front and back of the contract. Asking the other side to change such things risks needlessly antagonizing them.

Features that are worth flagging include anything that should be a condition that's instead expressed as an obligation (see 3.359), inherently confusing usages (for example, *indemnify and hold harmless*; see 13.419), and instances of ambiguity. If they've caused disputes, it's worth flagging even seemingly minor glitches, for example throat-clearing verb structures (see 3.25) and use of *may* in restrictive relative clauses (see 3.459).

If whoever prepared the other side's draft is a traditionalist, you might have to explain to them what prompted you to request a change. Citing this manual might facilitate that discussion by demonstrating that your proposed change is based on an internationally recognized set of guidelines.

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 their expectations. Are they a traditionalist? If so, are they open-minded? You might mention this manual to them and see whether that starts a conversation. If they're not receptive to modern drafting, then give them what they expect, making strategic concessions on usages that don't affect meaning but being gently persistent if something matters.

Then there's the task of selling a clear and modern draft to those on the other side of the transaction. It shouldn't be an ordeal. With only a few exceptions, contract language that complies with the recommendations in this manual doesn't draw attention to itself. It simply eliminates the stumbling blocks, the repetition, the redundancy, the obscure legalisms, the archaisms, and the inconsistencies. What's left is the deal, which is what readers will focus on. That means you might not get a pat on the back for your drafting prowess, but readers will get to the substance with less delay and confusion, so your job will be easier. That should be sufficient reward.

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

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

That book recommends replacing many traditional drafting usages with clearer alternatives, so some usages you see routinely might be absent from this draft. Please don't ask that traditional usages be added to this draft unless that would make the contract clearer or would better reflect what the parties have agreed on.

And please check what *A Manual of Style for Contract Drafting* has to say about any usage you're inclined to add to this draft. 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 are unrelated to the deal and changes that risk creating confusion or making the contract harder to read.

Any pushback 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 be willing to indulge the other side by making changes that pointlessly add traditional usages.

You might react differently if the draft is one of your core commercial templates, as the whole point of templates is to limit the changes you make from deal to deal. Consider taking a firm stance even when it comes to, say, your use of a lowercase *a* in *this agreement* (see 2.125). 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 too.

Using *this agreement* could 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. If someone nevertheless insists on your using a capital *A*, you'll know that you're dealing with a reactionary who is willing to ignore the convention that you don't meddle with the other side's draft without good reason. It's best to know that early on, so you can adjust.

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 an organization's traditional templates or standard industry contracts, 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 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 Foundation

If you want your organization's contracts to be clear and consistent, your first step should be to adopt a style guide.

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 choose the same usages, so the only way to achieve consistency would be to impose consistency through a style guide. The idea of using a style guide is catching on. A good example is how in 2015, Adobe Systems Incorporated disseminated publicly the 30-page *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 to be used by all contracts personnel in your organization. Instead, this manual would likely be appropriate for those who work extensively with contract language.

But it's suitable as a foundation for a style guide. That's why the author of this manual expects to publish with the American Bar Association a shorter work entitled *Drafting Clearer Contracts: A Concise Style Guide for Organizations*. 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 general publishing. Time will tell if *Drafting Clearer Contracts* serves that function for contract drafting.

Training and Templates

Once you have a style guide, the next step is 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. 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, usually based on whatever conventional wisdom they've picked up.

Surrendering Autonomy

Besides 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's inconsistent with what's required for optimal contract language. (The word "style" in the title of this manual isn't an endorsement of the notion of drafting styles. Instead, the title was loosely intended to invoke the ambition of *The Chicago Manual of Style*.) 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.

Lawyers should be willing to surrender 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 a transaction. Instead, 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

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 pays off, but perhaps not for everyone. In larger organizations, greater complexity generally 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 aptitude.

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 customization, specialization can readily be achieved through automated contract drafting. Information technology allows you to create contracts not by copy-and-pasting from precedent contracts but by completing an annotated online questionnaire and selecting from among the options offered. A few specialists prepare the text used in an automated system.

Aside from whether an organization can achieve economies of scale to justify 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 can 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 being paid.

Free online repositories of contracts have come and gone, offering little or no quality control, consistency, customization, guidance, or credibility. 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's unrelated to whether a 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 <http://www.adamscontracts.com/nda>.)