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PREFACE

THE FUNCTION OF THIS MANUAL
In general English writing, the function of a manual of style is to serve as an aid to the individual writer and to encourage organization-wide consistency in written usages. This manual aims to serve those same functions, but in the context of contract drafting. Understanding how it might do so requires that one consider the state of contract prose and how law firms approach contract drafting.

CONTRACTS AS PROSE
The prose of business contracts is in need of a significant overhaul.

If you were to select a contract at random, the odds are good that it would be riddled with archaisms, redundancies, obsolete provisions, turgidities, and other inefficiencies.

And each dysfunctional contract is dysfunctional in its own way, due to the diversity of usages on display in contract prose. In this context, choice is a detriment: of the various usages available to accomplish a given purpose, generally one will be more efficient than the others. Some lawyers attribute to differences in drafting “style” the diversity of usages on display in contracts. That suggests that drafters are free to help themselves at a buffet of drafting usages. But in that regard, there is really no such thing as drafting style, only efficient or less efficient drafting. (The title of this manual is not intended to suggest otherwise.)

Deficient drafting has significant costs. It can deprive a party of an anticipated benefit under a contract. It can sour the relationship between contract parties. It is the cause of countless lawsuits. It acts as sand in the deal-making machinery, making contracts more time-consuming to read, negotiate, and interpret. And it alienates the non-lawyer.

THE ARTISANAL APPROACH TO CONTRACT DRAFTING
The shortcomings of contract prose are due to the fact that while the scale of contract drafting is entirely industrial, for the most part the approach remains artisanal, with the inconsistent flair of the craftsman taking precedence over the regimented consistency of the production line.

Instead of working from form documents that represent the collective experience of a firm’s lawyers, at most law firms a drafter will generally...
reinvent the wheel by rummaging for precedent in form files, the firm’s
document-management system, or the Securities and Exchange Commis-
sion’s Edgar system. Such precedent is of uncertain relevance and qual-
ity, and usually it incorporates negotiated provisions. Often enough, the
drafter then spends a significant amount of time revising the selected
precedent.

Another symptom of the artisanal approach is the way junior lawyers
have traditionally been expected to learn to draft by drafting—a system that
is analogous to teaching someone to swim by throwing them into the deep
end of the pool. The result is that junior lawyers acquire the habit of regur-
gitating the defective language of precedent contracts.

A POSSIBLE EXPLANATION

The deficiencies of contract prose could be due to whatever factors have
resulted in derision being heaped on legal writing as a whole. Among com-
mentators on legal writing there is, however, a sense that corporate lawyers
are particularly complacent about their drafting.

One can discern a possible reason for this. The illusion that one writes
well is a powerful one, and many lawyers are under its sway. The surest
cure is writing for a critical audience; it might even prompt some remedial
study. If litigators are at the forefront of efforts to improve legal writing, it
is likely due to their having to write for an exacting audience—judges. By
contrast, until such time as a problem arises, a contract’s only readers are
likely to be the lawyers who drafted and negotiated it and, to a varying
degree, their clients. That does not constitute a critical audience.

Even if a contract is ultimately exposed to a broader readership in the
course of litigation, the only drafting flaws at issue would be those few that
happened to result in a significant dispute. And behaviorism would suggest
that the lag between the offending conduct (flawed drafting) and the repri-
mand (litigation) reduces the likelihood of anyone—the lawyers responsi-
ble for the drafting or the corporate bar as a whole—being prompted to
change their drafting by the limited public airing that drafting flaws do
receive.

The lack of a rigorous yet concise guide to contract-drafting usages is a
symptom of the artisanal approach and also helps to perpetuate it: in the
absence of a readily accessible critique of current drafting usages, corporate
lawyers have no way to gauge how effectively they draft. Given the limited
and stylized nature of contract prose, the lessons of such a guide could be
absorbed more readily than those offered by books on general legal writing.
This manual aspires to be such a guide.
KNOWLEDGE MANAGEMENT AND CONTRACT DRAFTING

While one hopes that individual lawyers will find this manual helpful, the battle for efficient contract prose is unlikely to be won a lawyer at a time. It would be unrealistic to expect an associate to overhaul, manual in hand, every contract that he or she uses as a model. And a junior lawyer bold enough to dispense with the recital of consideration or some other piece of contract debris runs the risk of encountering resistance from more senior lawyers.

Instead, progress is going to require that institutions—the major law firms and their clients—recognize the potential benefits of a centralized approach to drafting: improved quality, increased productivity, greater speed in responding to client needs, and, ultimately, increased profitability.

That most law firms have periodically undertaken form-contract initiatives indicates that they have long recognized that there are benefits to centralized control over contract drafting. Most such initiatives ultimately fall by the wayside for one or more of a number of possible reasons: the quality of the forms is inconsistent; partners resent contributing firm resources to the initiative; skewed incentives mean that lawyers are rewarded more for billable hours than they are for working to enhance the firm’s practice in other ways; and having squads of associates drafting away inefficiently provides the firm with an essential source of revenue.

Developments in technology in recent years have made much more efficient, and much less expensive, the process of compiling, annotating, customizing, and updating form documents and making them available to lawyers throughout a firm. As a result, some law firms in what used to be referred to as the British Commonwealth have made significant efforts toward applying “knowledge management” principles to drafting.

By contrast, American firms, while ostensibly embracing the concept of knowledge management, have not followed suit. While some firms have made modest steps, for instance by engaging a “practice support lawyer” to draft contracts, most have limited themselves to traditional forms initiatives.

Several reasons account for the reluctance of American law firms to embrace knowledge-management contracts initiatives. One is the prevalence of the artisanal approach. A second is an understandable reluctance to invest significant resources in the manpower and infrastructure required to set up a system of uncertain utility. And a third is the absence of guidelines that would allow a firm to be confident that the drafting usages in its form contracts are effective, modern, and used consistently.

Any firm considering a knowledge-management contracts initiative might want to produce such guidelines internally, despite the cost involved and the specialized expertise required. For those that are unwilling or unable to do so, this manual might offer an alternative.
THE SCOPE OF THIS MANUAL

This manual is intended for those who draft or are required to review contracts between ostensibly sophisticated parties represented by legal counsel. It does not address the drafting of consumer contracts. Consistent with the author's experience in private practice, virtually all examples in this manual come from what are commonly called “corporate agreements”—merger agreements, licensing agreements, credit agreements, and the like, many of them material contracts filed with the Securities and Exchange Commission. The recommendations in this manual could nevertheless equally well be applied to contracts from other legal fields, such as real-estate contracts.

This manual does not represent a synthesis of current contract usages. Instead, in any given context it recommends the most efficient usage among the various alternatives, and sometimes that means recommending a novel approach. Many readers would likely not notice any difference between a traditional contract and one that follows the recommendations contained in this manual—one does not have to notice the improvement in order to benefit from it.

Since this is a manual of style, it does not discuss issues relating to the process of drafting, such as how to determine the client’s objectives. Such issues are addressed adequately in other works, some of which are mentioned in the bibliography at the end of this manual. And this manual does not address what you should say in any contract, only how you should go about saying it, although it is a recurring theme of this manual that inefficiencies in how you say something can affect its meaning in unintended ways.

One of the challenges facing the author of any book on English usage is how to create meaningful order out of a welter of information. Setting in a coherent context a recommendation regarding a particular usage increases the chances of that recommendation being understood and retained. To that end, the opening chapters of this manual consider the parts of a contract, from front to back, as well as contract-wide issues of language and layout. The chapters that follow address discrete topics. The final chapter, on how to draft corporate resolutions, does not, strictly speaking, fall within the ostensible scope of this manual, but it was thought to be a topic of sufficient interest to contract drafters to be worth including.

A manual of style is not the place to build a scholarly edifice. Consequently, this manual does not contain footnotes and cuts short some explanation. It also is mostly devoid of discussions of case law—while this manual is concerned with the general, individual cases relate to the particular. This concision is what distinguishes this manual from the author's earlier book on the subject of drafting, *Legal Usage in Drafting Corporate Agreements.*
(This manual also covers significant topics that were not included in the earlier book.) Readers who wish to investigate a topic further should consult the suggestions for further reading found at the end of this manual.

In addition, a manual of style does not have the luxury of sitting on the fence. That is why this manual is generally more clear-cut in its recommendations, and a little less indulgent of dysfunctional usages, than is Legal Usage in Drafting Corporate Agreements.

A NOTE TO READERS FROM COMMONWEALTH COUNTRIES

If you compare contracts drafted by American lawyers with ones drafted by lawyers from Commonwealth countries, it is easy to spot differing drafting usages. For example, English drafters seem to use the hanging-indent format and sans serif typefaces more than American drafters do, and they are partial to breaking out the constituent components of the introductory clause rather than treating it as a regular sentence. And it seems that Canada is something of a sanctuary for that dying species, \textit{party of the first part}. But just as the differences between British and American English are trivial, contracts drafted in the U.S., the United Kingdom, Australia, and Canada share the same basic contract concepts, use essentially the same language, and exhibit comparable layout.

What this means for readers from Commonwealth countries is that they can safely use this manual. For example, the recommendations regarding how best to express the various categories of contract language apply no matter what variety of English you speak. When this manual considers the case law relating to a particular word or phrase—such as \textit{material adverse change}—the case law in question is that of the various American states, and so is of limited relevance to those drafting contracts governed by the law of other jurisdictions. But in such instances the recommendations in this manual are aimed at allowing the drafter to express a concept in such a way that one does not have to resort to case law to ascribe meaning to it. And in terms of formatting, this manual is guided by principles of document design that are independent of language.

ACKNOWLEDGMENTS

In writing this manual, I received valuable and generous assistance from outside the legal profession. Professor Alan S. Kaye of California State University, Fullerton, commented on drafts of chapter 8 (Ambiguity), while Dr. Colin Sparrow of the Mathematics Institute of the University of Warwick, England, commented on drafts of chapter 10 (Numbers and Formulas).
Since I am manifestly neither a linguist nor a mathematician, I would not have dared to include those chapters in this manual without their help. I am responsible for any shortcomings that remain.

As described in “Bibliography and Further Reading,” parts of this manual began life as articles in legal periodicals. I would like to thank again those who commented on drafts of those articles.

Finally, special thanks to my wife, Joanne, and her parents, Steve and Toni Kourepinos, for their patience as I pursued my unlikely zeal for legal drafting.