INTRODUCTION

WHY A MANUAL OF STYLE?

A manual of style serves as a resource for anyone seeking to write more clearly and any organization seeking greater consistency in written usages. That's the case regardless of the kind of writing involved, but a manual of style should prove especially valuable to those who draft, review, negotiate, or interpret contracts.

For one thing, a contract serves to regulate future conduct. Parties to a contract can't predict the future, so any shortcoming in contract language that isn't spotted before signing has the potential to cause a problem down the road, when performance under the contract brings it to light. Furthermore, if after a contract has been signed a party discovers a mistake that works to its disadvantage, it doesn't have the power to unilaterally fix that mistake. Writing that seeks to explain or persuade rather than regulate doesn't pose those sorts of risk.

But another factor is the state of contract drafting. 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. Witness *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007), a case that arose in the wake of an abortive \$6.6 billion transaction because the parties disagreed whether a key contract provision had been entirely supplanted by another provision.

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.

DISPELLING SOME MYTHS

The problems afflicting contract prose and the contract process could be due to whatever factors have resulted in derision being heaped on legal writing as a whole. But among commentators on legal writing, there's a sense that corporate lawyers are particularly complacent about their drafting. And indeed, one can identify entrenched assumptions held by many who draft and review contracts, at both law firms and company law departments. For the reasons explained below, this manual disregards those assumptions.

Standard English Versus Legalese

Given that it's standard practice for contracts to be constructed using the deficient usages that make up legalese, it's fair to assume that drafters regard legalese as superior to the alternative—standard English, in other words English as used by educated native speakers.

But legalese does nothing to further a client's interests. To the contrary—the murk of legalese makes it harder for the drafter to articulate what the parties intend and makes it harder for the reader to decipher the end result. This manual provides plentiful evidence of that. Those who think that legalese is somehow more precise are fighting a battle that was lost years ago.

Using standard English has nothing to do with dumbing-down contract prose to make it accessible to the nonlawyer—an impossible notion, given that a contract is necessarily as complex as the transaction it embodies. Instead, standard English simply allows the drafter to articulate a transaction without recourse to usages that interfere gratuitously with the ability of any reader—lawyer or nonlawyer—to understand a contract. To avoid suggesting otherwise, this manual doesn't use the term "plain English," which can be understood, or misunderstood, as applying only to the simplified language of consumer contracts.

The Myth of "Tested" Contract Language

A popular rationale for retaining legalese in contracts is that although contract prose could certainly be improved, change would be risky—traditional contract language has been litigated, or "tested," and so has a clearly established, or "settled," meaning. This excuse suffers from three fatal weaknesses:

- First, it defends some of the vocabulary of legalese, but nothing else, so in effect it concedes most of the debate.
- Second, the notion of reliance on "tested" contract language suggests that courts, with one voice, endorse a given usage and ascribe a set meaning to it. That's not so—how courts approach a given usage depends on the circumstances of the case, not to mention the semantic acuity of the judge, and can vary widely over time and among jurisdictions.
- And third, if a given contract provision came to be litigated, that's because it failed to clearly state the intent of the parties. Why rely on language that resulted in litigation? Instead, express any given concept clearly, so you don't have to gamble on caselaw breathing into it the desired meaning.

So although lawyers will continue to invoke the notion of "tested" contract language as an obstacle to improving contract language, it's a lazy platitude that doesn't survive scrutiny.

Contract Drafting Isn't a Craft

It's commonplace to hear lawyers refer to someone's drafting "style." The implication is that contract drafting involves craft rather than industry—that drafting involves an element of self-expression, with the drafter drawing on a palette of alternative yet equally valid usages. The prevalence of this view helps to explain why lawyers are often so reluctant to acknowledge deficiencies in their drafting.

But to think in terms of drafting styles is to misconstrue the nature of contract drafting. Contract prose is limited and highly stylized—it's analogous to computer code. It serves no purpose other than to regulate the conduct of the contract parties, so any sort of writerly "voice" would be out of place. As a result, the only criterion by which to judge contract prose is how efficiently it communicates information. Out of the alternative usages available to accomplish a given drafting goal, one will generally be more efficient than the others. It would make sense for all drafters to employ only those usages that are most efficient, and it would facilitate the contract process if they were to do so. Such uniformity is the opposite of craft.

So there are no drafting styles, only drafting that is clear and efficient and drafting that is less so.

"Wordsmithing"

"Wordsmithing" is a term that's popular among red-meat–eating deal makers. It refers to minions working out, away from the negotiating table, the language needed to express a given deal point. It's also used dismissively of someone whose pedanticism is getting in the way of the deal. Either way, the term "wordsmithing" suggests that once you reach agreement on a given point, coming up with the wording to express it is something of a formality.

But it's commonplace for contract parties to find themselves at loggerheads when, after signing, someone goes back and looks closely at the contract language. That's because the deal is what the contract says it is, rather than some abstraction—how you articulate a provision will affect its meaning. Precise contract language should be a priority, not an afterthought.

Teaching Versus Learning by Osmosis

The lack of objective standards for contract drafting has meant that lawyers have traditionally had to learn to draft by doing, not by being taught. It's an unpromising system—you start by regurgitating, on a wing and a prayer, precedent contracts of questionable quality and relevance, and in due course what's dysfunctional starts to appear normal. You acquire, along with any expertise, plenty of bad habits. You traffic in the conventional wisdom.

Until recently, formal instruction had largely been limited to once-a-year law-firm training programs that mostly would address the nuts and bolts of transactional practice rather than the language of contracts more generally. But both companies and law firms are increasingly willing to bring people in to provide more focused and concerted training. And in recent years, the number of U.S. law schools offering courses in contract drafting has increased markedly, as has scholarship on contract drafting. These are signs that it's coming to be accepted that if you want to learn how to draft, it would make sense for you to include an element of formal instruction. And objective standards go hand in hand with formal instruction.

Perception Versus Reality

One gets the sense that many lawyers who draft contracts think they're accomplished drafters. But that's at odds with the indifferent quality of mainstream contract drafting. This discrepancy should come as no surprise—the delusion that one writes well is easy to catch and hard to shake.

That's particularly the case with lawyers. Writing is touted as "thinking on paper"—if you're a good writer, it's generally assumed that you have a good mind, too. Given that putting your smarts to the service of a client is the essence of being a lawyer, and given that lawyers are by reputation competitive and ego-driven, it's not surprising that lawyers are prone to assuming that they write well—and, in the case of transactional lawyers, prone to assuming that they're good at drafting contracts.

In the case of drafting, this disconnect between perception and reality has been aggravated by the historical lack of objective standards. Lawyers have been limited to assessing the quality of a given piece of drafting—their own or someone else's—by comparing its usages to those that they've picked up haphazardly over the years, many of them indefensible.

A further problem is lack of a critical audience. If litigators are at the forefront of efforts to improve legal writing, it's 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 may well be the lawyers who drafted and negotiated it and, to a varying degree, their clients. That doesn't constitute a critical audience.

It's humility, not blithe confidence, that's an essential part of the makeup of a good drafter. You become proficient only if you're shown, dismayingly often, the shortcomings in drafts you've slaved over. Thereafter, humility comes easily—you know that the next embarrassing mistake is just around the corner.

USING DOCUMENT AUTOMATION TO DRAFT CONTRACTS

In addition to serving as a resource for lawyers who draft contracts the usual way, this manual could help make even more efficient the process of drafting contracts by document automation.

The Pitfalls of Uncritical Copying

Obviously, lawyers draft contracts by copying contract models. That's at the heart of the problems that afflict contract language. Uncritical copying is expedient, but it invariably results in your including in any new contract all sorts of deficient usages. You also might end up inadvertently including inappropriate substance, such as provisions that were negotiated in a previous transaction but have no place in a first draft.

Given the constraints of transactional practice, uncritical copying is inevitable—lawyers don't have the time and expertise to scrutinize and retool every contract model. And a junior lawyer bold enough to dispense with the recital of consideration or some other unhelpful usage runs the risk of being reprimanded by lawyers higher up the food chain. The rationalization that lawyers engage in to explain away the deficiencies in contract language would seem geared to making lawyers feel better about the stark tradeoff involved in copying contract models.

It's long been standard for practice groups in law firms to conduct, from time to time, contract-template initiatives. By doing so, they in effect acknowledge 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 templates 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 boosts the firm's profits. So traditional template initiatives aren't the solution to the problems posed by uncritical copying.

The Benefits of Document Automation

But the precedent-driven nature of contract drafting could be used to put the process on a more rational footing, in that it would allow a law firm or law department to use document automation in drafting its contracts. Developments in technology have made much more efficient, and much less expensive, the process of compiling, annotating, customizing, and updating templates and making them available to users throughout an organization. Technology is no longer an obstacle to document automation; sophisticated solutions are now available to suit different needs and budgets.

Using document automation would allow an organization to ensure that its contracts contain only pre-approved contract language. But it's likely that what would prompt an organization to adopt document automation isn't the promise of improved quality but rather the compelling efficiencies it would offer. Lawyers would be able to create drafts of higher quality in a fraction of the time it would take using traditional methods; in fact, at companies much of the work could safely be delegated to businesspeople. As a result, document automation could allow companies to save considerable amounts of money and close transactions more quickly. And it could offer law firms a route to increased profitability by allowing them to charge premium rates for work performed much more quickly; they could then use the time saved to perform additional work, potentially at the same premium rates.

Contract Drafting as a Commodity

The principal obstacle to document automation is cultural. Lawyers have gulled themselves into thinking that document automation would somehow deprive the client of a lawyer's expertise. That's not the case. Any given transaction resembles closely countless others, so it would make more sense to treat the process as if one were operating a production line rather than an artist's workshop. A lawyer adds value by helping structure and negotiate a transaction. By contrast, the process of reflecting deal terms in a draft contract is a ministerial task.

But to implement and maintain a document-automation initiative, an organization has to be willing to devote sufficient resources not only to the required technology but also to rigorously developing and maintaining approved contract language. And unless all lawyers in the organization use the document-automation system—something easier to accomplish at a company than at a law firm—the system would be doomed to failure, as lawyers will always be tempted to demonstrate their autonomy.

To increase the odds of its lawyers accepting a document-automation initiative, an organization should emphasize to its lawyers that the autonomy to waste time and money, and increase risk, by drafting deficient contracts is a phony and damaging autonomy, compared with what document automation offers—the freedom to dispense with scrivening and instead focus on the essentials of a transaction. And the organization should use contract language that complies with objective standards, rather than subverting the efficiencies of document automation by adopting the haphazard usages of any given lawyer or, even worse, attempting to draft by committee. In that regard, a rigorous and comprehensive manual of style could serve to establish parameters for the language used in a document-automation initiative.

THE SCOPE AND ORGANIZATION OF THIS MANUAL

This manual doesn't address what concepts you should include in a given contract, only how you should express them. And it doesn't discuss issues relating to the process of drafting, such as how to determine the client's objectives or how to review the other side's draft.

It's intended for those who draft, review, negotiate, or interpret contracts between ostensibly sophisticated parties represented by legal counsel, whatever the subject matter. It doesn't address the drafting of consumer contracts.

This manual doesn't attempt a synthesis of current contract usages. Instead, in any given context it recommends the most efficient usage among the various alternatives. Often that requires recommending an approach that's at variance with usages that might be firmly entrenched in mainstream contract drafting but are nevertheless inefficient or misguided. But readers shouldn't notice any jarring difference between a contract containing traditional usages and one drafted consistent with the recommendations in this manual—this manual seeks to work within the prevailing idiom.

The final chapter deals with corporate resolutions. That's an appropriate topic for this manual, even though corporate resolutions aren't contracts—lawyers who draft contracts are often called on to draft corporate resolutions, and issues that arise in drafting corporate resolutions are analogous to issues 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 serves to demonstrate the cumulative effect of a rigorous approach to drafting usages big and small.

A manual of style isn't the place to build a scholarly edifice, so this manual doesn't contain footnotes, cites authorities sparingly, and cuts short some explication. And it doesn't offer a bibliography, because it attempts to address, in sufficient detail for those looking for practical guidance, the full range of issues relating to the language and layout of contracts.

A NOTE TO READERS OUTSIDE THE UNITED STATES

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—if, say, a Swedish company and a Brazilian company do business together, they might well elect to have any contracts between them be in English, rather than Swedish or Portuguese.

Anyone drafting contracts in English, wherever they may be, could safely use this manual. Just as the differences between British and American English are trivial, contracts drafted in the U.S., the United Kingdom, Australia, Canada, and other English-speaking countries share the same basic contract concepts, use essentially the same language, and exhibit comparable layout. Any differences are for the most part a function of loose custom and could be disregarded in favor of whatever usages are most efficient.

It follows that anyone from a non–English-speaking country who elects to draft a contract in English would also be able to use this manual. Note that questions of terminology may arise—for instance, does *warranty* mean the same thing in English as it does in, say, Czech? But those are issues to be resolved by translators rather than a manual of style.

This manual occasionally considers caselaw relating to a particular word or phrase, such as *material adverse change*. With a few exceptions, the opinions in question were issued by federal or state courts in the United States, so they have no direct bearing on contracts governed by the law of other jurisdictions. But the language of contracts should speak directly to the reader without relying on caselaw to breathe meaning into it, and recommendations in this manual are based on that principle. Any discussion of caselaw is by way of background and doesn't interfere with that principle.