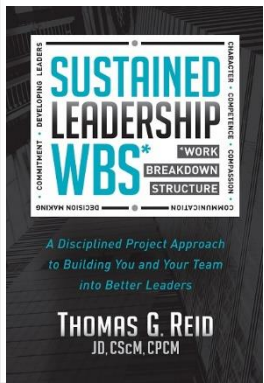




Deciphering Government Contracts

A Simplified Guide for
Practitioners and Lawyers

Session 4



Schedule

TUESDAYS FROM MAY 23, 2023 TO JUNE 27, 2023

10:00 AM - 11:30 AM (EST)

Session 1 - 10 Basic Rules

Session 2 – Say what you mean; mean what you say

**Session 3 – What is the contract? Putting the right things in
and leaving the wrong things out.**

Session 4 – Punctuate this!

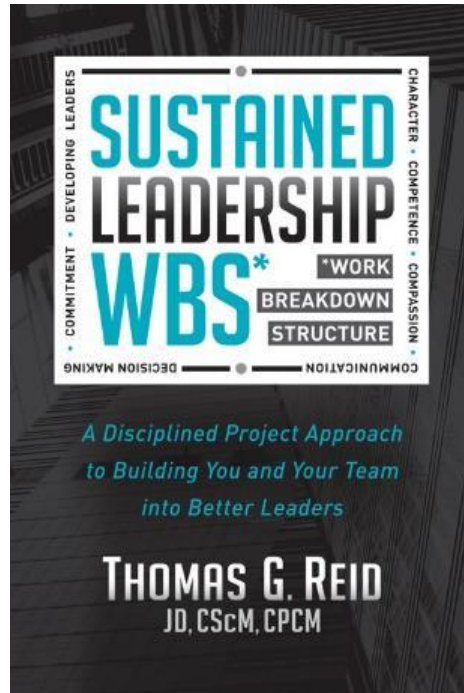
**Session 5 – Word Usage; misused words, grammar,
references**

Session 6 – How do you know when it is done?

Who am I?

- Thomas Reid, JD, MPA, CPCM,
- Chief Problem Solver, CCS
- Over 40 years in government contracting
- Have served in government, large businesses, small businesses, 8(a), non-profit, and start-up
- Speaker, author, trainer, attorney, expert witness, and contract manager

Latest Publication



- Reveals 229 elements of leadership
- Provides a lexicon of leadership by defining each element
- Uses project management tools to help you build yourself into a sustained leader
- Covers the Professional Competencies defined by OPM

New learning platform at www.TalkingHeadAcademy.Thinkific.com provides CPEs for NCMA certification for all classes on the platform.

Summary

- In a series of 6 weekly 90-minute sessions, you will gain deep insight on how contracts, both government and commercial, are interpreted by boards and courts. The rules are not always the same for them! We will also spend some time discussing good contract drafting that will avoid interpretation disputes. Filled with both legal theory for the legally inclined and practical application, you will develop a deeper appreciation for contract formatting, drafting quality contracts, and avoiding disputes, ambiguities, and misunderstandings.

All Sessions, 2:00pm-3:30pm (ET)

Review of Session #1 – Ten Rules

1. A contract is read in its entirety
2. Order of Precedence
3. Patent ambiguities must be clarified
4. Trade and custom usage
5. Course of dealing and performance
6. Parol evidence
7. Plain meaning
8. Rule of sameness
9. Ejusdem generis
10. Contra preferentem

Review of Session #2 – Say What you Mean

- A reasonable person is defined by the context of the situation; it is not an absolute and a person is required only to act “within the zone of reasonableness” under the circumstances
- Ordinary/Plain meaning, while falling into disfavor apart from context, it is still the majority view, especially in government contracting
- Parol evidence rule excludes extrinsic evidence in a complete integrated agreement; draft the contract to carry your intent
- Ejusdem generis tells us that lists contain only similar things

Summary Session #3 – What is the contract?

- A contract should represent a “meeting of the minds” among the contracting parties
- To properly interpret a contract, you must first know what the contract is
- Good faith and fair dealing are part of every contract
- The legal context of a contract is automatically incorporated
- Careful drafting, great attention to detail, and improving your knowledge of contracting matters will enhance the quality of your contract.

Communication

- ***Many contract disputes arise because different people attach different meanings to the same words and conduct.***

**Restatement (Second) of Contracts, §2 (1981), comment b,
Manifestation of Intention**

Session 4 - June 13 - Punctuate this!

Punctuation conveys important information for the reader. Miss-using or omitting those tiny dots and dashes can turn a contract into something one of the parties might have never intended. Courts and boards are often asked to review the rules of basic English to determine what the parties were thinking. Many basic, but important, conventions are applied to determine intent, even if that is not what you meant! Covered topics include order of precedence, express terms, course of performance, and course of dealing.

Punctuation

- Punctuation is the system of signs or symbols given to a reader to show how a sentence is constructed and how it should be read.
- Sentences are the building blocks used to construct written accounts. They are complete statements containing a subject and a verb. Punctuation shows how the sentence should be read and makes the meaning clear.
- Every sentence should include at least a capital letter at the start, and a full stop, exclamation mark or question mark at the end. This basic system indicates that the sentence is complete.

<https://www.skillsyouneed.com/write/punctuation1.html#:~:text=Punctuation%20is%20the%20system%20of,and%20makes%20the%20meaning%20clear>

Punctuation

- These little dots and dashes are not designed to be artistic
- They are designed to be meaningful
- They facilitate understanding the writer's intent
- They assist in oral presentations

QUESTION:

Should any contract ever contain a sentence that ends in anything OTHER THAN a period (full stop)?

Punctuation and the Law

- In law suits there needs to be one “winner;” shades of grey typically need to be resolved
- Think in terms of software code. A single typo or punctuation error can crash the entire process
- In both cases it **MUST** be correct
- Recall our comments on finding certainty in business transactions

Sentence Structure

- How would you punctuate:

my mother said the dog is dead

There are at least five alternative ways to punctuate this sentence

Sentence Structure – another example

“I’m giving up eating chocolate for a month.”

or

“I’m giving up. Eating chocolate for a month.”

Modifiers - Clarity

- **“Seller shall ship oranges and grapefruit from Florida.”**
- Do the oranges have to be from Florida?
 - Seller shall provide oranges and grapefruit, both from Florida
- Do EITHER the oranges or grapefruit need to be grown in Florida?
 - Seller shall provide only Florida-grown produce.
- Does this clause require shipment only from Florida?
 - Shipment of all deliverables must originate in Florida.
- Seller shall ship: (1) Oranges, and (2) Grapefruit from Florida.

Semi-colon (;)

- The semi-colon is perhaps the most difficult sign of punctuation to use accurately. If in doubt, avoid using it and convert the added material into a new sentence.
- As a general rule, the semi-colon is used in the following ways:
 - When joining two connected sentences.

Assertive behaviour concerns being able to express feelings, wants and desires appropriately; passive behaviour means complying with the wishes of others.

- The semi-colon can also be used to assemble detailed lists.

The conference was attended by delegates from Paris, France; Paris, Texas; London, UK; Stockholm, Sweden; Colombo, Sri Lanka; and Mumbai, India.

<https://www.skillsyouneed.com/write/punctuation1.html#:~:text=Punctuation%20is%20the%20system%20of,and%20makes%20the%20meaning%20clear>

The Common Comma

- Let's eat Grandpa.
- Let's eat, Grandpa.
- Your turn:

a woman without her man is nothing

The Oxford Comma

- Also called the “serial comma,” it is used before the connector (often “and” or “or”) to the last word in the series.
- Probably the most argued punctuation point in the English language.
- Probably the most litigated rule of grammar

The Oxford Comma

- Style guides differ as to its use
 - AP does not require it
 - Chicago Manual of Style does
 - *The New Yorker* style guide does
 - It has been part of Oxford University Press style for more than a century.
 - The UK National Curriculum warns that "the mark [grade] will not be awarded if a serial comma is used in a list of simple items".

Should legal matters turn on style or only on substance?

Examples

Consider this particularly spectacular example, supposedly from a TV listing in The Times:

- "By train, plane and sedan chair, Peter Ustinov retraces a journey made by Mark Twain a century ago. The highlights of his global tour include encounters with Nelson Mandela, an 800-year-old demigod and a dildo collector.

More Examples

Among those interviewed were Merle Haggard's two ex wives, Kris Kristofferson and Robert Duvall.

This book is dedicated to my parents, Ayn Rand and God.

Case Study

- Three dairy-truck drivers sued Oakhurst Dairy in 2014 for four years of unpaid overtime wages.
- The case hinged on the missing comma after "packing for shipment" in the following clause of Maine state law, which lists exemptions from overtime:
- The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:
 - **1.** Agricultural produce
 - **2.** Meat and fish products; and
 - **3.** Perishable foods
- The missing comma, in this case, would have separated "packing for shipment" and "distribution" into distinct activities, both exempt from overtime.
- Without the comma, the drivers argued, the law referred only to the act of packing, for the purpose of either shipping or distributing.
- [https://www.abc.net.au/news/2017-03-21/the-case-of-the-\\$13-million-comma/8372956](https://www.abc.net.au/news/2017-03-21/the-case-of-the-$13-million-comma/8372956)

Case Study – Lorry Drivers

- The irony in this ruling is, there are actual state guidelines on how Maine lawmakers draw up their documents. And they do NOT include Oxford commas!

<https://www.bbc.com/worklife/article/20180723-the-commas-that-cost-companies-millions>

But the appellate judge was obviously a fan, saying: "We would be remiss not to note the clarifying virtues of serial commas that other jurisdictions recognise". He [the judge] elaborated by stating that both chambers of the federal Congress warned against omitting the serial comma "to prevent any misreading that the last item is part of the preceding one", and said that only seven of the American states (including Maine) "either did not require or expressly prohibited the use of the serial comma".

[https://www.abc.net.au/news/2017-03-21/the-case-of-the-\\$13-million-comma/8372956](https://www.abc.net.au/news/2017-03-21/the-case-of-the-$13-million-comma/8372956)

Oxford Comma Passions

- People are very passionate about their positions on the Oxford comma
- A 2014 survey of 1,129 Americans by FiveThirtyEight and SurveyMonkey Audience found 57 percent in favor of the comma and 43 percent opposed.

<https://www.ncsl.org/bookstore/state-legislatures-magazine/oxford-comma-lawsuit-maine.aspx>

- Many who say to not use it suggest that it is only needed in poor writing; confusion should be clarified without the comma.

Passions

FANS OF THE OXFORD COMMA:



- **The U.S. Government Printing Office**
- ***The Chicago Manual of Style***
- ***MLA Style Manual***

HATERS OF THE OXFORD COMMA:

- ***The New York Times* stylebook**
- ***The AP Stylebook***
- ***The Economist* style manual**



Passions



FANBOY Connectors

- **For**
- **And**
- **Nor**
- **But**
- **Or**
- **Yet**

When you see one of these connecting words and there are two complete thoughts in the sentence, you should always insert a comma before FANBOYS. If there aren't two subjects and two verbs separated by FANBOYS, you don't need a comma.

Generally a comma appears **AHEAD** of these connectors

Special note on “but”

- The word “but” indicates a negation of whatever appeared before it.
- It’s use can be offensive without intending to do so.
- Better to either:
 - Use “and”
 - Place a period and start a new sentence (indicating a new thought).

Course of Performance

Principle: “Course of Performance”-- How People Carry Out Their Contract Reflects Their Interpretation of the Contract

“In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves, is entitled to great, if not controlling, influence.” City of Chicago v. Sheldon, U.S. Supreme Court (1869)

Course of Dealing

Restatement (Second) of Contracts, § 223 (1981) Course of Dealing

- (1). A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and conduct.**
- (2). Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.**

Why are we Reviewing COP and COD Again?

- Both course of dealing and course of performance reflect how the parties understood the agreement before any dispute arose
- Punctuation errors are more likely to give way to COP and COD than the other way around
- Some punctuation errors can STILL arise
 - Consider oranges and grapefruits example
 - COULD the seller have said, “Yes, I have always provided oranges from Florida. They grow a lot of oranges. But they had a freeze so I was always ALLOWED to deliver non-Florida-grown oranges; I simply never did.”

“Notwithstanding”

- Designed to build an order of precedence in the clause itself
- Conflicting use of “notwithstanding” clauses

CONTRACT DOCUMENTATION

How many ways can we confuse contract performance by using bad punctuation?

The Bad Habits of “Text-Speak”

- “A form of written language as used in text messages and other digital communications, characterized by many abbreviations and typically not following standard grammar, spelling, punctuation, and style.”
(Dictionary.com)

- UR
- TTYL
- L8tr
- B4
- Bc =>coz=>cz
- FTW
- G2g
- IMHO
- IRMC
- JK
- MTF

Intentionally Introducing Ambiguity

- Of course, in some circumstances, those drafting contracts may want to introduce ambiguities. Getting different countries to sign up to the same principles can be challenging, particularly for climate change agreements.
- Early climate change conventions included this line:
 - ***“The Parties have a right to, and should, promote sustainable development.”***
- The sentence ensures those signing the agreement have the ability to promote sustainable development – and should do so.

Intentionally Introducing Ambiguity

- But in its original draft, the second comma was placed after “promote”, not before it:
- ***“The Parties have a right to, and should promote, sustainable development.”***
- Some countries weren’t happy with the original wording because they didn’t necessarily want to be locked into promoting sustainable development. Moving the comma kept the naysayers happy while placating those who wanted stronger action.
- **“By being slightly creative with punctuation, countries can feel like their interests have been addressed,”** explains Stephen Cornelius, chief advisor on climate change with the WWF, who has represented the UK and EU at UN climate change negotiations. **“You’re trying to get an agreement that people can substantially agree with.”**

<https://www.bbc.com/worklife/article/20180723-the-commas-that-cost-companies-millions>

Different Language Versions? Or Just a Comma?

- One of the biggest cases battled over a comma was a dispute between two Canadian telecommunications companies. Rogers Communications and Bell Aliant fought a legal battle worth CAD\$1m (\$760,000) over a contract to replace utility poles across the country.

- The argument stemmed from a single sentence:

“This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.”

Different Language Versions? Or Just a Comma?

- The two sides argued that the comma after “five (5) year terms” meant something different: Bell Aliant said that the single year’s notice of termination applied at any time, Rogers that it only applied after the first five-year term ended.
- This was important as Rogers had struck a great deal under their reading of the contract: when they signed a contract to lease the poles from Bell Aliant in 2002, they were paying just CAD\$9.60 per pole. By 2004, the cost had nearly doubled. Bell Aliant, understandably, wanted to terminate the contract and renegotiate at the new, higher price. Rogers didn’t.

Different Language Versions? Or just a Comma?

- Successive courts were equally uncertain about the agreement: Canada's Radio-Television and Telecommunications Commission first declared in favour of Bell Aliant in 2006; a year later, it changed its mind after consulting the French language version of the contract, which didn't include the same ambiguity.
- This dispute wasn't brought about by willful ignorance, reckons Kemp. "Sometimes there are genuinely different understandings," she explains. "That little comma was put in a place that you would put in a place for a breath if you're reading it out loud."

<https://www.bbc.com/worklife/article/20180723-the-commas-that-cost-companies-millions>

The Death Comma

- In one extreme example, a misplaced comma was at the heart of a death-penalty trial.
- Roger Casement, an Irish nationalist, was hanged in 1916 under the 1351 Treason Act. He had incited Irish prisoners of war being held in Germany to band together to fight against the British. The debate over whether Casement was guilty hinged on the wording of the 14th Century Treason Act and the use of a comma: with it, Casement's actions in Germany were illegal; without it, he would get away with it.
- Despite Casement's lead counsel's assertion that "crimes should not depend on the significance of breaks or of commas", and "if a crime depended on a comma, the matter should be determined in favour of the accused, and not of the Crown", the court ruled that the comma mattered. Casement was found guilty and executed.

<https://www.bbc.com/worklife/article/20180723-the-commas-that-cost-companies-millions>

The Will of Semi-colon

In 1966 Ohio, one semi-colon posed a problem in this clause:

- **All of the residue and remainder of my property I give and devise in equal shares to Albert Wilson of Toronto, Canada, son of my late husband's niece Jean Wilson; The Little Sisters of the Poor of Cleveland, Ohio and Our Lady of Peace Church of Cleveland, Ohio.**

What was the split meant to be?

Albert Wilson: $1/3$

The Little Sisters of the Poor:
 $1/3$

Our Lady of Peace Church: $1/3$

or

Albert Wilson: $1/2$

The Little Sisters of the Poor: $1/4$
Our Lady of Peace Church: $1/4$

The Will of Semi-colon

- Semi-colons aren't easy. They should be used to separate two full sentences that closely relate to one another. But they can also be used in a list where the things in the list are long or have multiple clauses.
- In this case, it could be argued that if the deceased had wanted all three parties to receive equal shares, she should have put a semi-colon between The Little Sisters of the Poor and Our Lady of Peace Church....
- In the end, the judge decided to ignore the missing semi-colon and said the estate should be divided into three equal parts.

<https://qz.com/957196/serial-comma-and-semicolons-in-wills-keep-leading-to-lawsuits/>

Even Correct Use Creates Problems

In a 1951 Kentucky will, the testator used semi-colons correctly, which itself unexpectedly presented a problem:

- **I bequeath and devise my entire estate, both personal and real, which may remain after the satisfaction of the above special bequest and the payment of my debts, funeral expenses, and the costs and expenses of the administration of my estate, in equal shares, absolutely and in fee, to my cousin, the said Walter Cassidy; Robert Jamison and William Stivers, tenants on my farm; George E. Smith, who rents my property on Bland Avenue, Shelbyville, Kentucky; and the Kentucky Society for Crippled Children, of Louisville, Kentucky; Baptist Ministers Aid Society, of Owensboro, Kentucky; Baptist Orphans' Home of Louisville, Kentucky; King's Daughters' Hospital, of Shelbyville, Kentucky; and the Clayvillage Baptist Church, of Clayvillage, Shelby County, Kentucky."**

Even Correct Use Creates Problems

- In this will, each group of beneficiaries in the list was correctly separated by semi-colons. But two of the people in the will disagreed over whether that meant there were nine equal shares or eight. Did farm tenants Robert Jamison and William Stivers, who were together between two semi-colons, count for one share together, or one share each?
- A judge ruled there should be nine shares, and that the missing semi-colon didn't do enough to deny Jamison and Stivers two separate shares. Perhaps hoping to get slightly more, one of the other beneficiaries appealed the case, but was turned down.

<https://qz.com/957196/serial-comma-and-semicolons-in-wills-keep-leading-to-lawsuits/>

Handwritten Will

- In 1949 California, a handwritten will with ambiguous word choice and the utter abuse of a period really confused its beneficiaries:
- **Fourth: I give, devise and bequeath all my property, real and personal, wherever situated, to be equeally divided between Luella Martin at Perris California. And Stanley Keller, Roy C. Keller and James L. Keller. All three live at Willowbrook California.**
- “Between” usually means split between two things.

Handwritten Will

Martin argued:

Luella Martin: 1/2
Stanley Keller: 1/6
Roy C. Keller: 1/6
James L. Keller: 1/6

The Kellers argued:

Luella Martin: 1/4
Stanley Keller: 1/4
Roy C. Keller: 1/4
James L. Keller: 1/4

The punctuation made it all the more confusing. But the judge considered the poor grammar and spelling of the will overall, and decided that the deceased man probably meant “among,” not “between.” The four parties split the property equally.

<https://qz.com/957196/serial-comma-and-semicolons-in-wills-keep-leading-to-lawsuits/>

Was this even a serial comma?

- The mother of all comma cases was from 171 years ago, in New York. It was an estate and punctuation issue that bitterly divided the Court...

The passage in question:

Second. I give and bequeath unto my beloved wife, Mary, all my real estate, one clock, and the interest of five hundred dollars during her lifetime.

- This serial comma created major ambiguity: Did “during her lifetime” apply to the \$500 interest alone, or to the real estate, clock, and the interest? Normally a serial, or Oxford, comma is used in a list of more than two things, before the final coordinating conjunction. Style guides differ on whether you ought to use a serial comma, but here there appears to be one. That implied that the real estate, clock, and interest were all part of one list of things, and that “during her lifetime” applied to all three.

Was this even a serial comma?

- Mary herself died the year after her husband. Those left behind wanted to know whether the real estate she inherited belonged to her estate, or whether its ownership reverted to her husband's heirs once her life was over.
- A lower court ruled that the limit “during her lifetime” applied only to the \$500 interest, and that the land and the clock were Mary's forever. But then the case went to the errors court. In a decision that came down to 11-10 in favor of reversing the lower court's decision, the error court judges were bitterly split not only on what the grammar implied, but also whether grammar should matter at all.

Was this even a serial comma?

Of the judges who wrote opinions for the case, they varied widely:

Judge	Mary's inheritance is hers only during her lifetime?	Does grammar matter?	Reverse the lower court's decision?
Barlow	yes	no	yes
Hard	yes	yes	yes
Spencer	yes	yes	yes
Wright	yes	yes	yes
Johnson	not sure	no	yes
Porter	yes	no	no
Van Schoonhoven	no	yes	no

Was this even a serial comma?

- Said one judge, if the testator wanted “lifetime” to count only for the \$500 interest, the sentence above should read, “I give to my wife all my real estate and one clock, and the interest of five hundred dollars during her lifetime.” He also argued that the sentence would be much clearer without that serial comma.
- Still, “Punctuation determines nothing,” he wrote. “Intent is everything; and very little reliance should be placed upon the capricious rules of grammar.” He loathed to group together “profound jurists of former and present ages” and “grammarians and critics of the present day.”
- Things got pretty heated. Another judge criticized the lower court judge, writing, “I think he does violence not only to the plainest rules of grammar, but to the common rules of construction.”

<https://qz.com/957196/serial-comma-and-semicolons-in-wills-keep-leading-to-lawsuits/>

Can Serial Comma Shift Modifiers?

- It said that "in no event shall either party be liable for any loss or damage to revenues, profits, or goodwill or other special, incidental, indirect, or consequential damages of any kind, resulting from its performance or failure to perform under this agreement. . . ." Op. ¶22.
- Defendant's contention was that the comma before "or goodwill" is an Oxford, or serial, comma that sets apart three independent categories of damages barred by the agreement. . . . [U]nder this interpretation, lost revenues are barred.

Medfusion, Inc. v. Allscripts Healthcare Solutions, Inc., 2015 NCBC 31 (2015).

Can Serial Comma Shift Modifiers?

- In support of the Motion to Dismiss, Defendant contends that this limitation of liability provision ("LOL Provision") contained in Section 10.1 of the Agreement is valid, enforceable, and unambiguously excludes damages for lost revenue and lost profits, regardless of whether the same are considered direct or consequential damages.
- Second, Plaintiff argues that, even if the LOL Provision is enforceable, it does not cover the damages Plaintiff seeks to recover in this action. Specifically, Plaintiff argues the phrase "or other special, incidental, indirect, or consequential damages of any kind" qualifies "loss or damage to revenues, profits, or goodwill" such that those damages are only excluded to the extent they are considered consequential damages.

Medfusion, Inc. v. Allscripts Healthcare Solutions, Inc., 2015 NCBC 31 (2015).

Summary Session #4

- Punctuation counts
- ALL writing requires clarity; proper use of punctuation helps
- When judges get involved, outcomes can become crapshoots
- Lack of clarity creates lack of certainty on the outcome
- Refresh yourself periodically on the basic rules of grammar and punctuation
- Pay attention to detail and particularly to punctuation

PCI Instructor, Tom Reid

www.CertifiedContractSolutions.com

www.Ask-Tom-Reid.com

www.SustainedLeadershipWBS.com

<https://TalkingHeadAcademy.Thinkific.com>

www.ContractOverlord.com

“The first responsibility of a leader is to define reality. The last is to say thank you.”

Max DePree

Author & Business Executive

