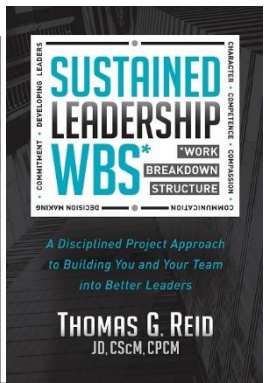




# Deciphering Government Contracts

A Simplified Guide for  
Practitioners and Lawyers



# Schedule

**TUESDAYS FROM MAY 23, 2023 TO JUNE 27, 2023  
(NO CLASS SEPTEMBER 6 FOR LABOR DAY HOLIDAY)**

**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**

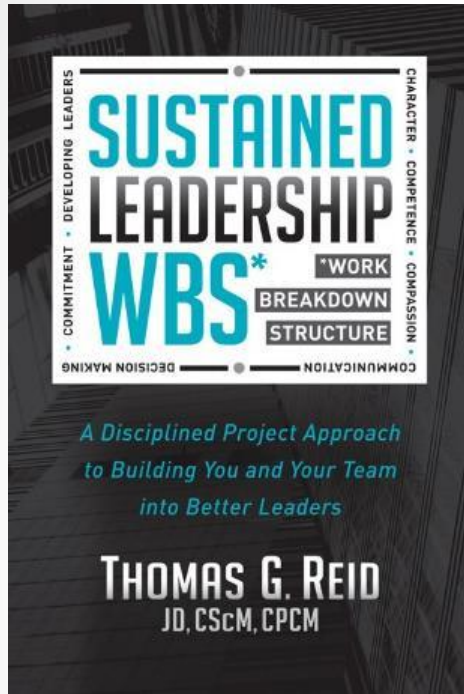
**Session 6 – How do you know when it is done?**

# 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), and start-up
- Speaker, author, trainer, attorney, expert witness, and contract manager

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# 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 DAU

***Stop calling non-leaders “leaders” because of the position they hold.  
Demand more!***

***Start using leadership development that actually works.***

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# Course 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 among the interpreters! We will spend 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, 10:00AM-11:30AM (ET)

# Six-Week Series

- May 23 - 10 Basic Rules
- May 30- Say What you Mean; Mean What you Say
- June 6- What IS the Contract? Putting the right things in and leaving the wrong things out
- June 13- Punctuate this!
- June 20- Word usage – misused words; grammar; references
- June 27 – How do You Know When it is Done?

# 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**

***The central issue in this appeal involves a question of contract interpretation. ... In resolving such a dispute, we turn to the “time honored rules” of contract interpretation.***

***Jane Mobley Associates v. General Services Administration* (CBCA, 2016)**



## August 2 - 10 Basic Rules

- Interpreting contracts has been a challenge for as long as contracts have existed. Courts and boards have structured many rules to guide contract interpretation, and sometimes provided conflicting guidance. Legislation governing contracts has also taken different approaches. It is important to know which set of standards will apply to your contract. This introductory class will review ten of the most common rules and provide a foundation for the more detailed discussions in the remaining classes.

***This dispute involves contract interpretation. ... Resolving this dispute calls for us to follow the basic rules of contract interpretation.***

**DNT Environmental Services v. Environmental Protection Agency, Civilian BCA (2015)**

# Interpretation is a Fundamental Skill

**Business prefers certainty**

**As contracting professionals we must seek certainty**

**Contracts that are unclear risk considerable  
uncertainty**

**There are rules for contract interpretation that are  
applied in a “reasonable” manner**

**Contract interpretation is, in large measure, an  
exercise in mind reading.**

**Thus: Outcomes are often uncertain**

# Government versus Commercial Contracts

- **Government contracts and commercial contracts are governed by different bodies of law**
- **Government disputes are governed by the Contract Disputes Act (CDA); commercial contracts governed by state law (UCC)**

# *The Principles of Contract Interpretation*



***"The general rules of contract interpretation apply to contracts to which the Government is a party."***

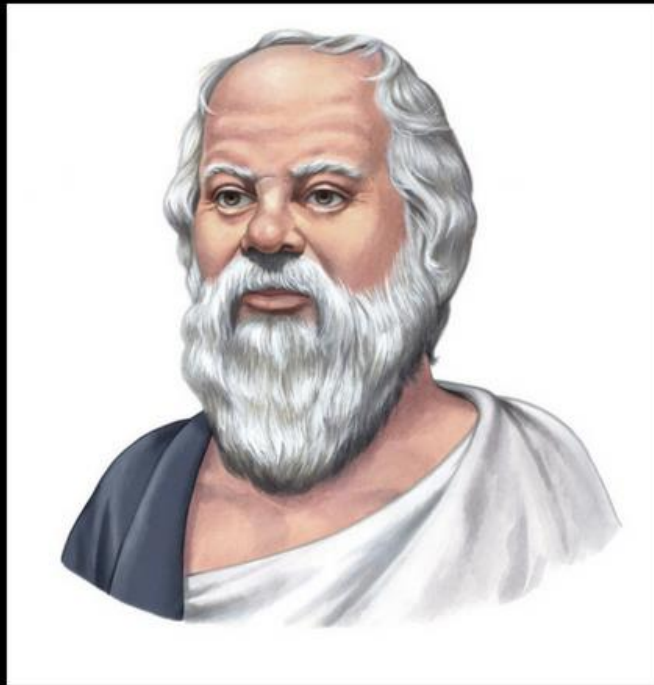
**Lockheed Martin IR Imaging Systems v. West, Ct. Appeals Fed. Cir. (1997)**

# Introduction

## Restatement (Second) of Contracts, §200 (1981) Interpretation of Promise or Agreement

**Interpretation of a promise or agreement, or a term thereof, is the ascertainment of its meaning.**

# Wisdom of Socrates



“The Beginning of Wisdom is the Definition of Terms” – Socrates

# The Intent of the Parties

***“The purpose of interpreting a contract is, of course, to ‘accomplish the intentions of the parties.’”***

**Tecom, Inc. v. U.S., Ct. Federal Claims (2005)**

***“The question of the interpretation of language, the conduct, and the intent of the parties, [is] the question of what is the meaning that should be given by a court to the words of a contract.”*** **Crown**

**Laundry & Dry Cleaners, Inc. v. U.S., Ct. Federal Claims (1993)**



# Fashioning Judicial Interpretation

***"Judicial opinions on contract interpretation sometimes resemble bouquets of rationalization, plucked from many and arranged so as to harmonize with the result. Indeed, a court can often select from among pairs of opposing or countervailing rules that seem to conflict."*** E. A. Farnsworth, Farnsworth on Contracts, §7:11 (3rd ed.)

# Context is Always Relevant

**Contract interpretation considers words and facts objectively in light of the all the circumstances.**

**Restatement (Second) of Contracts, §202  
(1981) Rules in Aid of Interpretation**

**(1). Words and other conduct are interpreted in the light of all the circumstances, ...**

# The Starting Point – The Contract Language

## Restatement (Second) of Contracts, §203 (1981) Standards of Preference in Interpretation

In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable: ...

(b). express terms are given greater weight than course of performance, course of dealing, and usage of trade.

# And in the Final Analysis....

**The Contract Language is Paramount**

**Restatement (Second) of Contracts, §212**  
**(1981) Interpretation of Integrated**  
**Agreement**

**Comment b. ...But after the transaction has been shown in all its length and breath, the words of an integrated agreement remain the most important evidence of intention.**

# **We Have All Been There**

**Friend: Oh, You know what I mean!**

**Me: No, I only know what you said; I must often guess at your meaning.**

**Friend: You are so pedantic and irritating!**

**Me: Yes, I am. Thank you.**

# Principle Purpose – Why Does the Contract Exist?

## Restatement (Second) of Contracts, §202 (1981) Rules in Aid of Interpretation

**(1) If the principal purpose of the parties is ascertainable, it is given great weight.**

# Irreconcilable Conflict

***“Although, in general, a contract should be interpreted so as to avoid conflict in its provisions, there is a clear conflict .... We must, therefore, determine which of the conflicting terms controls.”***

**Abraham v. Rockwell International Corp., Court of Appeals Federal Circuit (2003)**

# Reasonable, Lawful, and With Purpose

**Restatement (Second) of Contracts,**  
**§203 (1981) Standards of Preference in**  
**Interpretation** ...the following standards  
of preference are generally applicable:  
(a). an interpretation which gives a  
reasonable, lawful, and effective  
meaning to all the terms, is preferred to  
an interpretation which leaves a part  
unreasonable, unlawful, or of no effect.



# Unreasonable Interpretation

***“If adopted, [the contractor's] interpretation would render superfluous sheet after drawing sheet that clearly require extensive corrosion-related work, the specification's unequivocal instruction to perform that work, and the Government-furnished material list that includes materials to be incorporated into that work.”***

**Grinnell Fire Protection Systems, Co., VA BCA (1999)**

# Avoiding Redundancy and Surplus

***"It is a fundamental rule of contract interpretation that the provisions are viewed in a way that ... avoids ... redundancy and surplus among contract provisions."***

**Reliable Contracting v. Department of Veterans Affairs , Court of Appeals for the Federal Circuit (2015)**

# **RULE #1 A Contract is Read in its Entirety**

- All parts of a contract have meaning
- Read the contract in a way that allows each word of the contract to have meaning
- DO NOT treat any part of a contract as superfluous or even redundant
- No part of a contract gets to “stand alone”
- References and attachments or exhibits are there for a reason.

# Read in its Entirety

- No term, clause, or provision of a contract can be treated as meaningless.
- Interpretations will be given, even if strained, to harmonize contract language
- Beware using forms, formats, online forms, and old versions
- Cut and paste at your own risk

**“Self-deleting clauses are simply sloppy contract drafting.”**

# The Contract is a Whole Within Itself

**Restatement (Second) of Contracts, §202 (1981)  
Rules in Aid of Interpretation (2). A writing is  
interpreted as a whole, and all writings that are  
part of the same transaction are interpreted  
together**

***“In construing Item 10 in conjunction with Item  
22, the intention of the parties must be gathered  
from the whole instrument.”***

**Hol-Gar Mfg. Corp. v. U.S., (Ct. Cl., 1965)**

# Interpret the Contract as a Whole

***“What is indicated in the contract is a matter of contract interpretation. ... However, we do not read this sentence in isolation; instead, contract interpretation involves reading the contract as a whole and giving reasonable meaning to all of its parts.”***

**Columbia State Bank, ASBCA (2016)**

## **RULE #2** - Order of Precedence

- **Absent a specific order of precedence clause, specific controls over the general and later drafted parts control over prior drafted parts.**
- **An Order of Precedence clause should prevent the conflict or resolve the conflict. It should not CREATE the conflict!**
- **It should determine the intent of the parties such that there is no conflict or ambiguity that requires an inquiry – at least as a matter of contract law.**

# Order Of Precedence (Government)

**Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:**

- 1 - The Schedule (excluding the specifications);**
- 2 - Representations and other instructions;**
- 3 - Contract clauses;**
- 4 - Other documents, exhibits, and attachments; and**
- 5 - The Specifications**

**CLAUSE AT: 52.215-8 ORDER OF PRECEDENCE**



# The Uniform Commercial Code

## ORDER OF PRECEDENCE IN CONTRACT INTERPRETATION

- (1) The express terms of the agreement**
- (2) Course of performance**
- (3) Course of Dealing**
- (4) Usage of Trade**

# Sample Language

**“In case of a conflict or inconsistency between this Agreement and any other contract documents, this Agreement shall control.” City of Benkelman, NB v. Baseline Engineering Corp., 2016 WL 1092476 (D. Neb. 2016)**

**“The language and terms set forth in this Exhibit shall prevail in the event of a conflict between this Exhibit and the foregoing printed Lease.” Home Magnolia Point Minerals, LLC v. Chesapeake Louisiana, LP, 2013 WL 39897(W.D. La. 2013)**

# “Notwithstanding”

- When a potential conflict is identified during contract formation, the usual remedy is to make the document clear within itself.

“Notwithstanding any other provision in this contract, and specifically the limitations of cost provisions, the contractor shall take the necessary steps for the preservation of life and property in an emergency.”

# **RULE #3** - Patent Ambiguities Must be Clarified

- Clear or obvious errors give rise to a duty to enquire
- If the ambiguity is latent (not obvious), the non-drafting party must show that it relied on its reasonable understanding

# Contra Proferentem's Duty of Inquiry

***“A patent or obvious conflict or inconsistency in specifications which exists in the solicitation phase of a procurement gives rise to a bidder’s legal duty to clarify before it chooses to rely upon its own interpretation. Failure to fulfill that legal duty results in the bidder bearing the burden of the alleged conflict or inconsistency.”***

**P.J. Dick v. Department of Veterans Affairs, CBCA (2016)**

# Duty of Inquiry

*“... where a bidder faced with a ‘patent and glaring discrepancy’ fails to seek clarification from the Contracting Officer, the discrepancy should be construed against him.”*

Brezina Construction Company, Inc. v. U.S.,  
Court of Federal Claims (1972)



# Duty of Inquiry

***"Ambiguities fall under two categories - patent or latent. The general rule of contra proferentem is to construe the ambiguous contract language against the drafter. However, a patent ambiguity is an exception, which is "sufficiently glaring to trigger" a contractor to inquire before a bid is submitted. The patent ambiguity is construed against the contractor. If an ambiguity is latent, the general rule may be applied, but the contractor's interpretation must be determined to be reasonable."***

**Certified Construction Company of Kentucky, ASBCA (2016)**

# Obvious

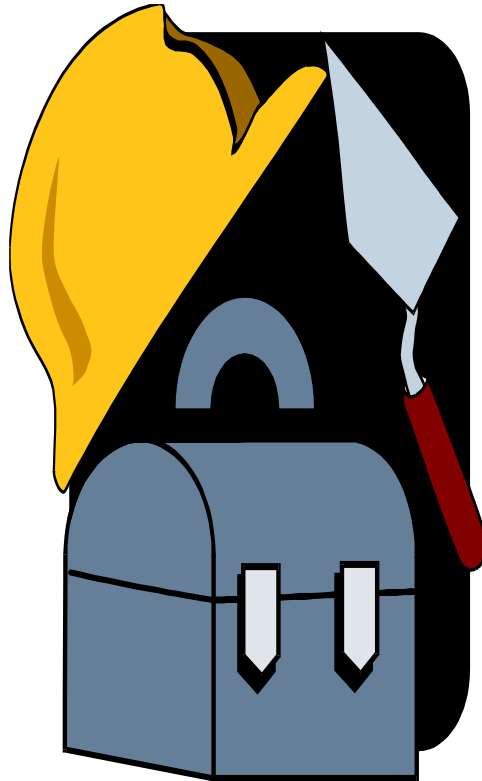
- **What is obvious to one may not be obvious to another**
- **Reasonable people can, and do, disagree.**
- **These cases depend on the specific facts in each circumstance**
- **A review of case law suggests there is no standard beyond what the judge had for lunch**



# **RULE #4 - Trade and Custom Usage**

- **Technical jargon will be given its accepted technical meaning**
- **Inexact nomenclature will be honored for how it is treated within the trade**
- **Technically this is extrinsic evidence, but treated as intrinsic definitional evidence and incorporated by reference to the trade**

# Trade Usage



**Trade Usage: The usage or customs commonly observed by persons conversant in, or connected with, a particular trade. A usage of trade is any practice or method of dealing having such with a particular trade. Black's Law Dictionary (Abridged 5th ed. 1983)**

# Evidence of Trade Usage

## Restatement (Second) of Contracts, §220 comment d (1981)



**...usage relevant to interpretation is treated as a part of the context of an agreement in determining whether there is ambiguity or contradiction...**

# Trade and Custom Usage

## Restatement (Second) of Contracts, §202(3)(1981) Rules in Aid of Interpretation

**(3). Unless a different intention is manifested,**

...

**(b). technical terms and words of art are given their technical meaning when used in a transaction within their technical field.**

# Evidence of Trade Usage

## Restatement (Second) of Contracts, §222 (1981) Usage of Trade

**(3). Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged, or a usage of trade of which they know or have reason to know, gives meaning to or supplements or qualifies their agreement.**

# The Uniform Commercial Code

**Evidence of “*Course of Performance*”, “*Course of Dealing*” or “*Use of Trade*” may be used to explain or supplement the terms of the contract in order that the true understanding of the parties as to the agreement may be reached.**

**The required contract need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated.**

# The Uniform Commercial Code

## ORDER OF PRECEDENCE IN CONTRACT INTERPRETATION

- (1) The express terms of the agreement
- (2) Course of Performance
- (3) Course of Dealing
- (4) Usage of Trade

**NOTE: Under the UCC, “agreement” and “contract”  
have different meanings.**

# **RULE #5** - Course of Dealing and Performance

- Past dealings of the parties will determine interpretive intent
- Actions taken prior to the dispute arising will carry heavier weight as evidence
- Two forms of extrinsic evidence



# Key Forms of Extrinsic Evidence

- **Course of Performance, or Contemporaneous Interpretation.** How the parties carried out their contract before the dispute arose reflects what they interpret the contract to require.
- **Course of Dealing.** This is when the parties had/have other contract(s) with the same language that they now dispute. The theory is that when parties use the same language, they mean the same thing.

# 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.**

# Course of Performance

**What you DO carries more weight than what you SAY**

***"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 Performance

***“It is true that, if a contractor performs a contract without protesting or objecting to the Government’s erroneous interpretation of contract requirements, it may be barred from later recovering for alleged changes or extra work.”***

**A-Son’s Construction, CBCA (2015).**

# Course of Performance

***“Moreover, the conduct of the parties prior to the dispute is especially strong evidence of the contract’s true meaning. ‘It is a familiar principle of contract law that the parties’ contemporaneous construction of a contract, before it has become the subject of a dispute, is entitled great weight in its interpretation.’”***

**Jane Mobley Associates v. GSA, CBCA (2016)**

# **RULE #6 - Parol Evidence**

- **Absent an ambiguity or an obvious gap, external oral testimony cannot alter the agreement**
- **Merger clauses**
- **Four corners doctrine**

# Parol Evidence Rule

- **The Parol Evidence Rule.** This rule prohibits changing a contract that the parties agreed would be the final and exclusive expression of their agreement.
- **Objective and Subjective Interpretation.** Objective focuses on the words of the contract; subjective takes into account the parties' personal intentions.

# Parol Evidence Rule – One View

***"Meet the Parol Evidence Rule--an ancient, arthritic, sanctimonious precept of English substantive law masquerading as a rule of evidence. It haunts both the federal and the state courts. ... With the consistency of pluff mud, the Parol Evidence Rule has been a pebble in the Common Law's shoe for centuries."***

Warren Moise, [A Primer on the Parol Evidence Rule](#), South Carolina Lawyer, March 2004



# Effect of Discharge

## Restatement (Second) of Contracts, §213 (1981) Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)

**(2). A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.**

**All prior or contemporaneous agreements  
are discharged.**

# Case Law

“In the absence of allegations of fraud, accident, or mistake in the formation of the contract, parol evidence may not be admitted to add to, subtract from, vary, contradict, change, or modify an unambiguous integrated contract.” Boyer v. Karahenian, 915 P.2d 1295 (Colo. 1996).

The terms of a contract intended to represent a final and complete integration of the parties’ agreement are enforceable and parol evidence offered to establish the existence of prior or contemporaneous agreements is inadmissible to vary the terms of such contract. Sentinel Acceptance Corp. v. Colgate, 424 P.2d 380 (Colo. 1975).

# Not Evidence

**“I know you think you understood what you thought I said, but what you don’t understand is that what you heard is not what I meant to say.”**

# Merger Clause

**Entire Agreement:** This Agreement contains the complete understanding of the parties. There are no promises, representations, or other terms beyond those contained in this agreement.

# Merger Clause - Purpose

- The purpose of a merger or integration clause is to show that the written contract is the complete (or “integrated”) final agreement of the parties to exclude parol evidence
- In negotiations, many things might be discussed or considered. Even promises or representations made earlier are of no consequence if not reduced to writing in the contract.
- Only what shows up within the “four corners of the contract” document counts.

# **RULE #7 - Plain Meaning Rule**

- Basic English and rules of grammar and construction will have their usual and accepted meaning
- Legalese and terms of art or trade custom
- Defined terms
- Governing language clause
- Punctuation counts

# Plain Meaning

**Restatement (Second) of Contracts,  
§202(3)(1981) Rules in Aid of Interpretation**

**(3) Unless a different intention is manifested,  
(a) where language has a generally prevailing  
meaning, it is interpreted in accordance with  
that meaning.**

# Plain Meaning

- The plain language of the contract controls when it is unambiguous
- “Unambiguous” means that it is “amenable to only one reasonable construction” Dana Corp. v. US 470 F.2d 1032 (Ct. Cl. 1972).
- Extrinsic evidence is NOT used when the plain meaning of the words is clear.



# Using Legalese

- Using fancy words is not a plus and does not prove how smart you are.
- Courts will consider unequal bargaining power and the parties' ability to comprehend
- Some contractual terms ARE legal terms, but for most, the need for them expired hundreds of years ago.

# Legalese Example

- *“In witness whereof the parties hereunto have set their hands to these presents as a deed on the day month and year hereinbefore mentioned.”*
- *The parties agree to this contract on [DATE]*
  - *Contracts are not generally witnessed (any more)*
  - *“hereunto [etc.]” archaic redundancy*
  - *Too often there IS no date mentioned previously*

# Alternatives

- Many state laws require consumer contracts to remove the fine print and make certain things abundantly clear.
  - Capitalizing
  - Bolding
  - Italicizing
  - Underlining
  - Coloring

# Defined Terms

- **Words defined in the contract are given the meaning assigned to them**
- **Standard dictionaries are considered authoritative**
- **FAR 2.101 provides definitions used throughout the regulations (including the clauses)**
- **Terms of art or custom and trade usage are given their accepted meaning *in the trade***

# Defined Terms

**1.108** (a) *Words and terms.* Definitions in [part 2](#) apply to the entire regulation unless specifically defined in another part, subpart, section, provision, or clause. Words or terms defined in a specific part, subpart, section, provision, or clause have that meaning when used in that part, subpart, section, provision, or clause. Undefined words retain their common dictionary meaning.

# Governing Language & Punctuation

- When the parties have different native languages, the contract should identify which translation is the “official” language
- The rules of grammar for that language will control
- Punctuation can alter meanings
  - Can create an ambiguity
  - Can be crystal clear, but not what was intended

# RULE #8 - Doctrine of Sameness

- If you mean the same thing, say the same thing
- Creative writing does not count

# Using Different Words Means Different Things

- In the primary section of the clause we see the words **“Shareholder may not sell, transfer, assign, pledge, encumber, or otherwise dispose of shares in the corporation.”**
- And later says **“If a shareholder intends to transfer shares, and dies before the transfer is complete....”**

Why does the subsidiary clause only say “transfer”?



# Nomenclature

**Vendor**

**Contractor**

**Supplier**

**Subcontractor**

**Seller**

**Dealer**

**Service provider**

**Buyer**

**Subcontract Administrator**

**Supply Manager**

**Vendor Manager**

# Using Consistent Language

- Cutting and pasting can create problems
- Creativity is not a goal
- Consistency and reducing uncertainty is the goal
- If you define a term, use (and capitalize) the term
- Consistency in grammar and punctuation also counts
- Consistency reduces confusion

# RULE #9 - Eiusdem Generis

- Lists will be interpreted to include only like items
- “Similar” items are included; dissimilar items are excluded
- Does a list of “bicycles, motorcycles, and scooters” include:
  - Tricycles?
  - Motorized skates/shoes?
  - Cars? Trucks? Busses?

# Ejusdem Generis

**The most consistent articulation of for the application of Ejusdem Generis is where a generic categorization has been attached to a specific enumeration. In this case, the specific words can give meaning to the generic language, which is sometimes referred to as a “catchall” phrase.**

# Avoid Confusion in Drafting

- **Do not confuse readers by including dissimilar items**
- **“Including but not limited to” language**
- **Avoid mixing clause subjects**
- **Avoid “hiding” items in a contract**
  - **Insurance contract that put exclusions within unrelated clauses**
  - **Classic “fine print” trope**

# Ejusdem Generis in Practice

***"The canon of ejusdem generis teaches that where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specially enumerated."***

**Hymas v. United States, Court of Appeals for the Federal Circuit (2016)**

# Ejusdem Generis

***“The Homeowners’ Association is responsible for the utilities, including water, electric, and gas.”***

**Is the Association responsible for trash collection?**

**Cable TV?**

**Snow removal?**

**Lawn maintenance?**

# RULE #10 - Contra Preferentem

- Ambiguous provisions unamenable to reasonable construction via any other use of intrinsic or extrinsic evidence will be construed against the drafter
- Rule of last resort

***As between two reasonable and practical constructions of an ambiguous provision ... the provision should be construed less favorably to that party which selected the contractual language. U.S. v. Seckinger, U.S. Supreme Ct, (1970)***



# ***Contra Proferentem***

**Contra Proferentem is a Rule of Last Resort**

***"The rule of contra preferentem is the last to be resorted to."* Sir Francis Bacon, A Collection of Some Principal Rules and Maximes of the Common Law (1597)**

***"... often denigrated as a rule of last resort."* E. A. Farnsworth, Farnsworth on Contracts, §7:11 (3rd ed. 2004)**

# Summary

- Understanding how to interpret contracts, whether you are reading or writing, will make you a better contracting professional
- Contract interpretation is a critical skill for contracting professionals
- There are rules to follow, tempered by a sense of reasonableness
- Clarity of communication should always be a goal – writing, negotiating, talking, everywhere!

# PCI Instructor, Tom Reid

[www.CertifiedContractSolutions.com](http://www.CertifiedContractSolutions.com)

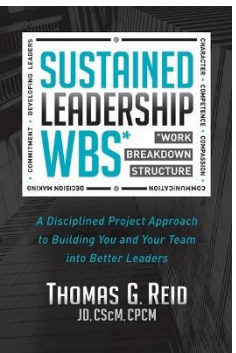
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“The first responsibility of a leader is to define reality. The last is to say thank you.”

**Max DePree**

*Author & Business Executive*

