

Crafting Communication Clarity

A six session course on drafting and negotiating better contracts and file documentation

A Guide for Practitioners and Lawyers

Technical writing for contracts, negotiations, and file documentation

Crafting Communication Clarity: Mastering Business Writing for Influence and Compliance

Session 6

Crafting contracts for clarity and compliance - Draft contracts that meet legal standards and also resonate with insight and clarity to ensure compliance and program success.

Scope of Course

This is a six-week (9 hours) course to help writers to craft language in contracts and supporting documentation for clarity and defense of the reasonableness of their decisions.

It will cover material relevant to contract administrators at both the prime and subcontract levels for better persuasion and certainty in the business transaction.

Limitations

This class cannot cover everything you should have learned in high school English or several semesters of College composition classes. Thus the brevity of this material is, at best, an attempt to refresh what you learned or provide a framework within which your contracts and file documentation will stand up to scrutiny or audit.

Additional, continual study of effective communication skills is highly recommended

Course Learning Objectives

- Using Grammar and Punctuation for clarity
- Understanding audience and message
- Using the right words
- Understanding that Business writing is technical writing intended to explain, persuade, sell, or provide documentation related to decisions
- Understanding that all writing must stand on its own and be clear, complete, concise, and convincing
- Crafting Contracts to achieve business certainty

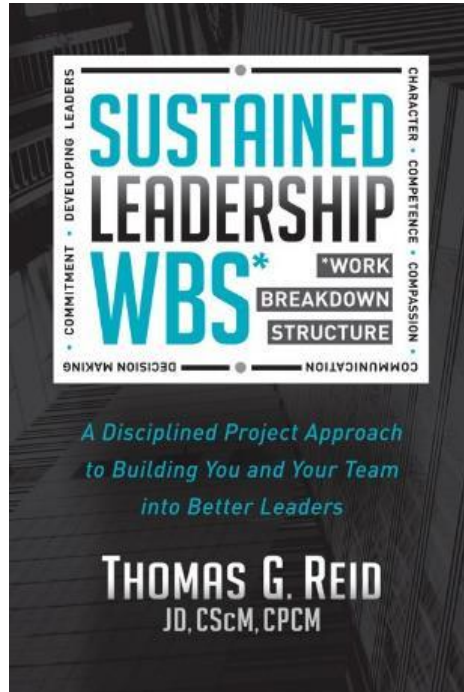
Expected Transformational Experience

"Enhanced Professional Prestige and Advancement Opportunity: Developing greater writing proficiency opens doors to advanced leadership roles and consulting opportunities within contract management disciplines. Clear and compelling communication becomes a hallmark of your professional identity, positioning you for success in a competitive business landscape."

Who am I?

- Thomas Reid, JD, MPA, CPCM,
- Chief Problem Solver, CCS
- Decades in government contracting
- 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.

The Communication of a Sustained Leader

4 Communication

4.1 Style

4.1.1 Speak

4.1.2 Teach

4.1.3 Mentor and Coach

4.1.4 Criticism

4.1.5 Meetings

4.1.6 Write

4.2 Content and Audience

4.2.1 Values and Mission

4.2.2 Positions and Persuasion

4.2.3 Proposals

4.2.4 Clarity

4.2.5 Conviction

4.2.6 Consistency Of Message

4.2.7 Credible

4.2.8 Feedback

4.2.9 Tact

4.2.10 Negotiations

4.2.10.1 Concessions and Compromise

4.2.10.2 Alliances

4.2.11 Enthusiasm

4.2.12 Deals with:

4.2.12.1 Employees or Those You Lead

4.2.12.2 Press

4.2.12.3 Other Stakeholders

4.2.12.4 Regulators

4.2.12.5 Customers and Beneficiaries

4.2.12.6 Problems

4.2.13 Diplomatic

4.2.14 Understands

Importance Of Sound Bite

4.2.15 Saying “Sorry” and “Thanks”

4.3 Charisma

4.3.1 Personable Warmth

4.3.2 Direct

4.3.3 Socially Adept

4.4 Techniques

4.4.1 Good Questions

4.4.2 Good Story Teller

4.4.3 Able to Adjust

Message to Audience Level

4.4.4 Able to Simplify

4.4.5 Body Language

Summary

- Session 1 Using Grammar and Punctuation for clarity
- Session 2 Understanding audience and message
- Session 3 Explaining, persuading, selling, and proving reasonableness of decisions through business writing
- Session 4 Creating clarity in file documentation
- Session 5 Understanding and presenting data – technical, financial, statistics
- **Session 6 Crafting clear contracts for business certainty**

Summary

- **Session 6 Crafting clear contracts for business certainty**
- **Purpose and Objectives**
- **Contract Structure**
- **Contract Meaning**
- **Aligning Agreement and Contract**
- **Business Certainty**

POLLING QUESTION

In this class I have developed a greater appreciation for the importance of crafting business certainty in my contracts through communication clarity.

- A) True (Thank you for ruining my life!)
- B) False (I will continue to write and speak with a lack of clarity)

Purpose and Objectives

SECTION 1

The Prime Directive:

Crafting Business

Certainty

SECTION 1

Contract Defined

A *Contract* is both a relationship and an agreement.

As a *relationship*, it is defined by the agreement between or among the parties. The relationship specifies the rights, duties, obligations and responsibilities of the parties.

As an *agreement* the parties have reached a “meeting of the minds” that describes the relationship.

In any jurisdiction, a contract is “*an agreement governed and restricted by law,*” and the applicable law shapes the nature of the contract.

“An agreement for which the law provides a remedy for its breach.”

Meeting of the Minds

- There are five essential elements under common law before a contract will be found to exist
 - Offer
 - Acceptance
 - Consideration
 - Lawful purpose
 - Capacity of the parties
- The first two represent the “meeting of the minds.”
Keddie v. Beneficial Ins. Inc. 580 P.2d 955,957 (Nev. 1978).

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.

The FAR

- **Contract says what it says**
- **Omitted clauses may be included through the Christian Doctrine**
- **Contracts in all amounts must be in writing; required to expend funds from the US Treasury**
- **The contract must contain all the material terms (PDQ²)**

The Government Contract Starting Point

- The written government contract is the primary source of evidence; unless ambiguous, it is the ONLY source.
- The discussion on any government contract dispute starts with the contract
 - This is why it is IMPERATIVE that you get the contract document “right”
 - Document your file with whatever extrinsic evidence might be useful; just remember that a Board or Court might never see or consider it.

Program & Construction Management Group v. GSA, 246 F.3d 1363 (Fed. Cir. 2001)

<https://law.justia.com/cases/federal/appellate-courts/F3/246/1363/469052/>

Principles of the FAR

- Competition
- Fair and Reasonable Pricing
- Low Bid/ Best Value
- Sociological Preferences
- Detailed Specifications
- Equal Opportunity for All Participants
- Formal Structure to Control Expenditure of Public Funds

Differing Perspectives: What SHOULD be Included

- The government operates within a strong public policy/
public accountability environment
 - It controls the contracting process
 - It is entitled to strict performance
 - Sovereign immunity issues
- General commerce is to be encouraged
 - Freedom of contract among individuals/entities is entitled to much greater freedom

The Uniform Commercial Code

- The UCC has been adopted by all the states and has universal applications to the relationship between:
 - (1) A prime contractor and its subcontractors, and
 - (2) Between the subcontractors and lower tier subcontractors.
- The UCC permits informality in contracting and establishes special conditions for dealings between merchants.
- The “CONTRACT” is the total obligation which results from the parties’ agreement *and conduct* as affected by the UCC and any other applicable rule of law.

Purposes & Construction of UCC

- The Code Is To Be Liberally Construed And Applied To Promote Its Underlying Purposes And Policies, Which Are:
 - To Simplify, Clarify And Modernize The Law Governing Commercial Transactions
 - To Permit The Continued Expansion Of Commercial Practices Through Custom, Usage, And Agreement Of The Parties
 - To Make Uniform The Law Among The Various Jurisdictions

Construction of Contracts - UCC

§ 2-302 Unconscionability

§ 2-304 Price Payable in Money, Goods, Realty,
or Otherwise

§ 2-305 Open Price Term

§ 2-309 Absence of Specific Time Provisions

Contract Structure

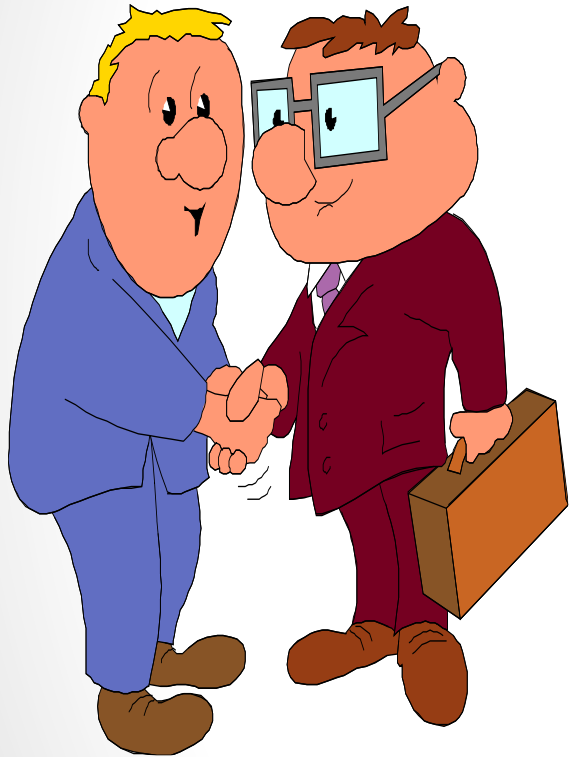
SECTION 2

DRAFTING ERROR #1

Poor Formatting and Organization:

- **Error:** Using a disorganized structure that makes the contract difficult to read and understand.
- **Drafting Tip:** Use clear headings, numbered sections, and a logical flow. Consider creating a table of contents for longer contracts.

The Duty of Good Faith and Fair Dealing



In every contract, there exists an implied covenant of good faith and fair dealing.

13 Williston on Contracts, §38:15

Uniform Contract Format

FAR has a Uniform Contract Format

If not awarded under FAR Part 15, various forms perform the same function (FAR Part 53)

FAR prescriptions and matrix of FAR clauses (FAR Part 52)

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Uniform Contract Format	
Part I – The Schedule	
Section	Title
A	Solicitation / Contract Form
B	Supplies / Services and Prices /Costs
C	Description / Specifications / SOW
D	Packaging and Marking
E	Inspection and Acceptance
F	Deliveries or performance
G	Contract Administration Data
H	Special Contract Requirements
Part II -- Contract Clauses	
I	Contract Clauses
Part III -- List of Documents, Exhibits, and Other Attachments	
J	List of Attachments
Part IV-- Representations and Instructions	
K	Representations, certifications, and other statements of offerors or respondents
L	Instructions, conditions, and notices to offerors or respondents
M	Evaluation Factors for award

Order Of Precedence

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

DRAFTING ERROR #2a

Failure to Specify Obligations:

- **Error:** Not clearly outlining the duties and responsibilities of each party.
- **Drafting Tip:** Clearly define each party's obligations, including what, when, and how tasks should be performed. Use detailed descriptions and deadlines.

DRAFTING ERROR #2b

Ambiguity:

- **Error:** Using vague or unclear language that can be interpreted in multiple ways.
- **Drafting Tip:** Use precise and unambiguous language. Define key terms clearly at the beginning of the contract. Avoid using jargon or terms that can be misunderstood.

How to confuse the other party

What is in and what is out:

SCHEDULES, EXHIBITS, ATTACHMENTS

- Assign parts to multiple drafts writers
- Include lots of schedules of reference material as part of the contract
- Don't include things that should be directly included – like warranties, indemnifications, etc.

DO use schedules (etc.) when:

- Schedules are not released to the public (some SEC filings)
- The material is not readily available/might not exist at time contract is drafted

What is In and What is Out - Exhibits

- Schedule
- Exhibit
- Annex
- Supplement
- Appendix
- Incorporated by reference

Occasionally the words are given different meanings culturally. Especially problematic in treaties and certain other “standard” foreign contracts.

Drafting Tips- Exhibits

- Generally pick one term to avoid confusion
- Alternatively, be consistent in naming documents of similar impact
- Sometimes it makes sense to create a document for which one party has absolute right to change (Payment offices, ordering offices, customer service offices)
- Generally stay away from saying “Schedules” in government contracts since the UCF designates a part of the contract as a schedule already, and GSA uses it in the FSS (Federal Supply Schedule)
- Sometimes you need to provide definitions for each, especially if they have different orders of precedence (or specific cultural meaning.)

Caution when Incorporating “things”

- Applicable dates
- Requirement versus guidance
- Referring to “attached” (or mislabeled) that is not attached
- Making (sometimes vague) reference to, but never incorporating a document
- Incorporating via a bad (or dead) hyperlink
- Incorporating documents that incorporate other documents (DOD specs and DOE Orders)

Outdated/Mis-identified Clauses

- Use of Hyperlinks
 - Updated;
 - Dead
 - Double secret probation
- Clause matrix
 - A must-have from proposal to closeout
 - A must-have for multi-contract operations
 - A must-have for the new contractor learning government acquisition.

Drafting Points

- If you are not using the UCF, draft an appropriate Order of Precedence clause
- Add the Order of Precedence to your negotiation checklist; make sure it is discussed
- Run an independent check on ALL references to exhibits, attachments, or other documents and make sure:
 - They exist and are accessible to the parties
 - The proper version is cited
 - They are assigned the right precedence

Cut and Paste

- From the internet – DON'T
- From any source that you either:
 - Do not have reason to trust it
 - On any topic you do not understand (e.g. Arbitration or other Alternative Dispute Resolution)
- From a prior contract
 - ONLY to prevent extensive retyping of boilerplate
 - HOWEVER; read it carefully to avoid issues we've discussed in this class.

Conflicting Provisions

- Often a function of cut and paste
- Sometimes a lack of understanding between legal concepts
 - Jurisdiction and venue
 - Arbitration rules versus forum
 - Indemnification versus hold harmless
 - Insurance versus assumption of risk
- More commonly a result of:

Sloppy Drafting

Force Majeure

- Impossible to be all inclusive
- Expressio unius est exclusion alterius
- Do not use the term without a definition
- Is excuse temporary or permanent?
- “Unforeseen” and “beyond the control”?
- Also beyond the control of subcontractor (at any tier)?
- Notice and mitigation requirements?
- Ultimate right to terminate?

Modifications - UCC

- An agreement modifying the contract under the UCC needs no consideration to be binding. § 2-209(1)
- This negates the common law rule
 - Pre-existing duty
 - Course of performance

Modifications and Waivers - Clause

This contract cannot be modified, except in writing signed by both parties. The parties may not modify this provision orally or by their conduct. No waiver of this provision is valid unless in a writing signed by both parties.

DRAFTING ERROR #3

- **Missing/ Wrong Clauses**
 - **Lack of Contingency Plans:**
 - **Error:** Failing to include provisions for unforeseen circumstances or changes.
 - **Missing Termination Clauses:**
 - **Error:** Not specifying how and under what conditions the contract can be terminated.
 - **Inadequate Dispute Resolution Mechanisms:**
 - **Error:** Not including clear procedures for resolving disputes.

Contract Meaning

SECTION 3

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

Contract Hermeneutics– 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

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.

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.**

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

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**

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

RULE #6 - Parol Evidence

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

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

RULE #8 - Doctrine of Sameness

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

DRAFTING ERROR #4

Inconsistent Terminology:

- **Error:** Using different terms interchangeably for the same concept, causing confusion.
- **Drafting Tip:** Consistently use the same terms throughout the contract. Create a glossary of defined terms to ensure consistency *then make sure you adhere to those definitions.*

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?

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)

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**

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.)

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.

Signing Agreement with Contract

SECTION 4

The FAR

The AGREEMENT is what appears within the “four corners” of the document – nothing more, nothing less, nothing else.

The applicable law is the Federal common law of contracts

Highly controlled by Federal statutes

Highly regulated by the FAR Council

UCC § 1-201. General Definitions.

- (3) "**Agreement**", as distinguished from "contract", means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1-303.
- (12) "**Contract**", as distinguished from "agreement", means the total legal obligation that results from the parties' agreement as determined by the Uniform Commercial Code as supplemented by any other applicable laws.

Business Certainty

SECTION 5

DRAFTING ERROR #5

Failure to Address Governing Law:

- **Error:** Not specifying which jurisdiction's laws will govern the contract.
- **Drafting Tip:** Include a governing law clause that clearly states which jurisdiction's laws will apply to the contract. Watch for automatic inclusion such as the UN Convention for the International Sale of Goods.

DRAFTING ERROR #6

Unrealistic or Impractical Terms:

- **Error:** Including terms that are difficult or impossible to meet.
- **Drafting Tip:** Ensure that all terms and conditions are realistic, practical, and achievable. Consult with relevant experts to validate feasibility.

DRAFTING ERROR #7

Ignoring Regulatory Requirements:

- **Error:** Overlooking relevant laws, regulations, or industry standards.
- **Drafting Tip:** Stay informed about applicable laws and regulations. Include compliance clauses that mandate adherence to all relevant legal requirements.

Course Summary

- Session 1 Using Grammar and Punctuation for clarity
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POLLING QUESTION

I have begun my journey of being a better contract drafter and will continue my studies and professional practices to transform myself into a recognized professional in outstanding contract drafting.

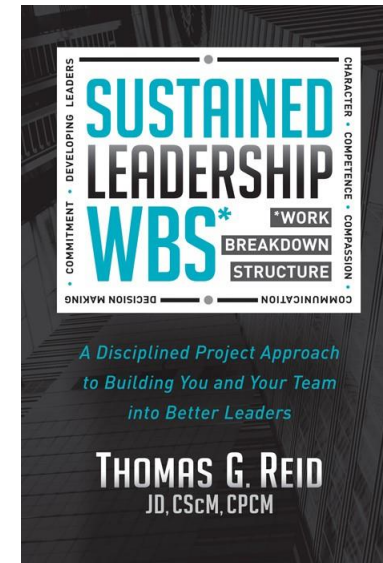
- A) True
- B) False



PCI Instructor, Tom Reid

www.certifiedKsolutions.com

www.TalkingHeadAcademy.Thinkific.com
(Free class there provides 1 CPE credit)



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

Max DePree
Author & Business Executive

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