



Avoiding Disputes by Drafting Understandable and Enforceable Contracts

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TRANSPORTATION RESEARCH BOARD

Panel

- **Doug Gransberg** – Gransberg & Associates, Inc.
- **Isidro Jimenez** – City and County of San Francisco
- **Christine Ryan** – Nossaman LLP
- **Sid Scott** – HKA
- **Nancy Smith** – Nossaman LLP (moderator)

Public Contracts in General

- Different contract models
 - Form documents--project-specific signature document, special provisions
 - Project-specific comprehensive agreement (commercial terms/conditions, scope/technical provisions attached/referenced)
 - “Short form” documents
 - Urgent/emergency projects
- Alternative delivery contracts
 - CM/GC
 - Design-Build
 - P3
 - Job Order Contracts

Contract Interpretation and Ambiguities



One morning, I shot an elephant in my pajamas. How he got in my pajamas, I don't know.

Groucho Marx, *Animal Crackers*

Ambiguities and Conflicting Provisions

- Rules of contract interpretation
- How to avoid problems
 - Careful drafting
 - Use lists to make documents less complex
 - Internal document review process
 - review of entire set of documents
 - review “plain language” revisions to avoid errors
 - Industry reviews
- Examples of disputed interpretations/resolution

Ambiguities and Conflicting Provisions

- Rely on:
 - Rules of interpretation (common law / statutory / contractual)
 - general vs. specific
 - every word has meaning
 - more stringent provisions govern
 - order of precedence
 - Including proposal/RFP/Q&A in contract
 - etc.
 - “Subject to” and “notwithstanding” clauses
 - Severability and integration clauses
- Best not to have ambiguities/conflicts

Grammar Problems

- For example:
 - Serial comma
 - Parallel structure
 - Placement of verbs, modifiers
 - Punctuation
 - Subject/verb agreement
 - Complex sentences
- Specific issues faced by panel members



Losing track of who you are talking about

Bugs [talking to Elmer]: Okay. Would you like to shoot me now, or wait till you get home?

Daffy: Shoot him now, shoot him now!

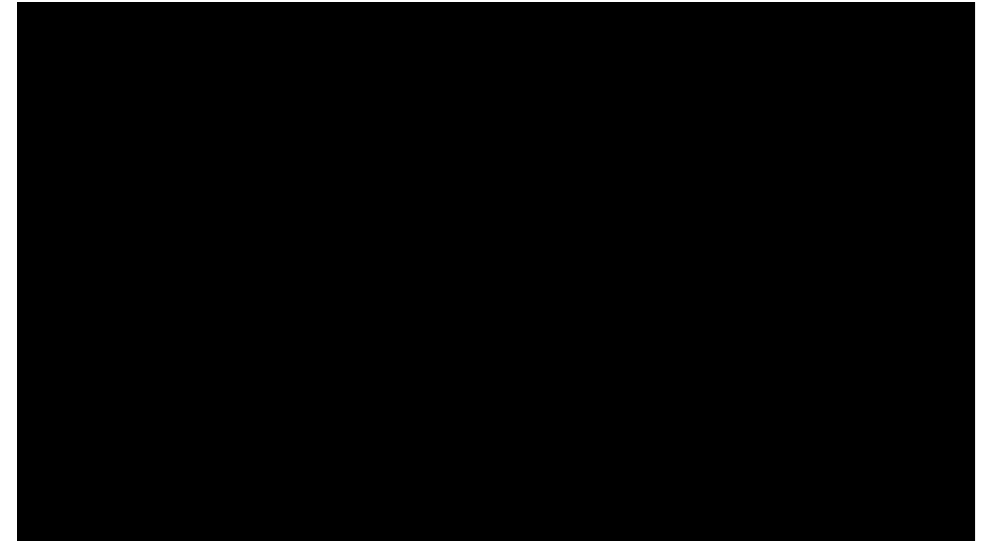
Bugs: You keep out of this, he doesn't have to shoot you now.


Daffy: Ha! That's it! Hold it right there! Pronoun trouble. It's not "he doesn't have to shoot 'you' now", it's "he doesn't have to shoot 'me' now." Well, I say he does have to shoot me now! So shoot me now!

[Elmer shoots Daffy]

-From *Rabbit Seasoning*

<https://www.youtube.com/watch?v=6e1hZGDaqlw>





Issues Relating to Specific Terms

- And / or
- Relating to / arising under / etc.
- Shall / will / must / may
- Imperative mood (AASHTO)
- Acronyms, jargon
- Defined terms
- Other

Considering State Law in Contract Drafting

- Statutes and regulations
 - Anti-indemnity laws
 - Differing site conditions
 - Requirements for public works contracts
 - Licensing / standards for performance
 - Etc.
- Case law
 - Sole discretion

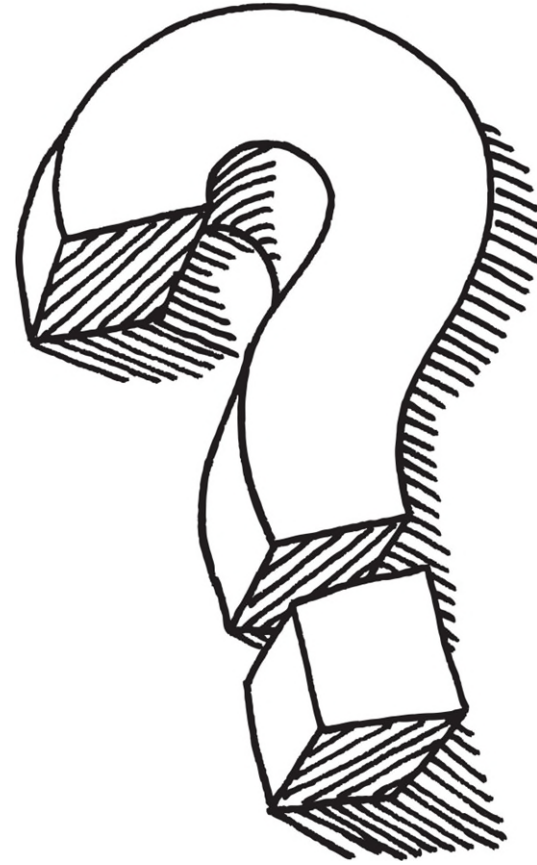
Performance Requirements Issues

- Overly broad or ambiguous scope or performance criteria
 - *“Conduct the work in a manner and sequence that ensures minimal interference to traffic.”*
 - *XXX.XX Rubble-Stone Riprap (Plain). Construct rubble-stone riprap upon a prepared foundation. Place the stones as close together as practicable in order to reduce the voids to a minimum.*
- Performance requirements in conflict with referenced design standards
- Mixture of method and performance specs for the same work item
- When performance requirements open to multiple interpretations, solution may not be practical, economical, or meet the desired standard

Additional Issues to Consider

- Practical ability to enforce unconventional risk transfers
- Drafting provisions to address issues such as:
 - Supply chain issues
 - Labor shortages
 - High prices
- Termination provisions
- Liquidated damages / penalties

Questions?



Links

Case Law:

- <https://cases.justia.com/federal/appellate-courts/ca1/16-1901/16-1901-2017-03-13.pdf?ts=1489437006> (interpretation based on rules of grammar)
- <https://casetext.com/case/condon-johnson-a-v-sacramento-mun-ut-d> (jury instructions properly exclude contract disclaimers that conflict with statute)

NCHRP Reports:

- <https://www.trb.org/Publications/Blurbs/168132.aspx> (Expedited Procurement Procedures for Emergency Construction Services)
- <https://www.trb.org/Publications/Blurbs/169109.aspx> (Strategies for Implementing Performance Specifications: Guide for Executives and Project Managers)

Bryan Garner articles (ABA Journal):

- [Shall We Abandon Shall? \(abajournal.com\)](#)
- [Contract 'busts': Trying to decipher provisions that literally make no sense \(abajournal.com\)](#)
- [Every lawyer a lexicographer: Defining words with clarity, brevity and practicality \(abajournal.com\)](#)
- [Of lists and tabs: Transforming transactional drafts to make sense \(abajournal.com\)](#)
- [How are your punctuation skills? Try this comparison exercise to find out \(abajournal.com\)](#)