# Contracts

## Should you sign it?
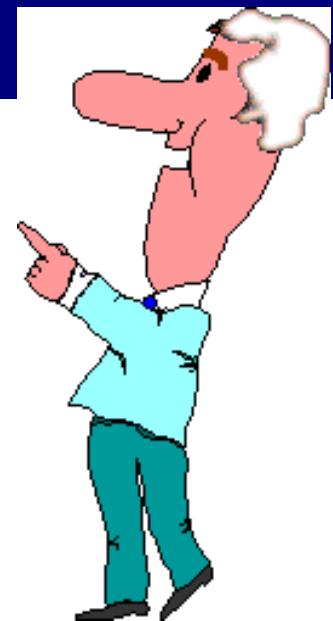
# What are you trying to accomplish?

- Buy a product, thing, supply?
- Buy a service?
- What's the existing relationship? New? Old? Good? Problems? Bid Award?
- Is the contractor an "independent contractor"?  Sophisticated? A newbie? An academic???
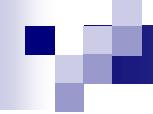
# How Many Contractors Have You Sued For Breach of Contract?

Not many?

Then regard the relationship more important than the agreement!

# RELATIONSHIP

- Make sure the agreement includes:

  - <span style="color:red">management tools</span>

  - <span style="color:red">remedies</span>.

# When Relationships Might Not Matter as Much as Contract

- Collective Bargaining Contract

- Insurance Contract or MOC (memorandum of coverage)

- Construction Contract
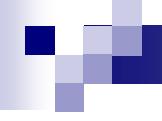
# Do you have the authority to sign a contract for the District?

- Authority from the Board of Trustees
- Designation by President / Chancellor
- Within authority of Code
- Does it need to be approved or ratified by the Board of Trustees?

# What if you sign it and you're not authorized?

- Is the contract void? Or is the contract voidable? The issue is one of "capacity" to enter into a contract.
  - Legal answer
  - Practical answer
  - Political answer

# Who created the contract?

- Contracts are rarely drafted from scratch.
- If contract is district's
  - Are you using the right "form"?
- If contract is contractor's
  - Does it conflict with the governing law or format?
  - Look at ALL parts carefully
- Does it have all its parts?
- Is it even a contract?  MOU????
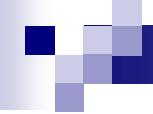
# Does it need changing?

- Rare is the contract that cannot be improved.

- Even the best contracts may need to be revised to meet specific need or address current issues and concerns.

- Most would benefit from an analysis of both _substance_ and _style_

# When working with a "form"

- Compare the facts of EACH situation
- Understand the <u>substance</u> of the transaction
- Update the law (e.g., prof. liability)
- Update the language
  - Make it simple, consistent, plain language
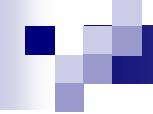
# Structure of a Contract

- Description
- Caption
- Transition (language of agreement)
- Recitals
- Definitions
- Operative language
- Boilerplate language
- Closing

# Description

- Another word for <u>Title</u> of Agreement
  - □ "Agreement" doesn't tell you much
  - □ Be more descriptive
    - "An Agreement to Lease Reprographic Wizard Machine"
  - □ Number Agreements
    - Or tie to Purchase Order Agreement

# Caption

- **Names of parties and legal action**
  - ☐ Are the parties correctly identified?
    - Multi-college districts
      - ☐ The District is the legal entity not the college or department (federal financial aid or accreditation agreements???)
      - ☐ Is the name of the entity correctly worded?
      - ☐ Example:
        - San Mateo Community College District *No*
        - San Mateo County Community College District *Yes*

# Extra non-important language

- From the beginning….ask yourself what <u>purpose</u> the language serves.  If it serves no purpose it can be discarded.

- Examples:

- Made and entered                                …made
  This 1st day of October, 2003         …October 1, 2003
  by and between                             …between
  hereinafter referred to as "Buyer"    …"Buyer"
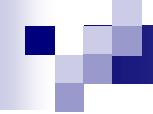
# Avoid Archaic Language

- Witnesseth

- Known by all men by these presents

- Parties of the first part

# Recitals

- Recitals can provide useful <u>background</u> for <u>why</u> you're entering into the contract and what <u>legal authority</u> there is for it.

- The use of "whereas" to introduce each recital has only tradition going for it.

- A modern drafter might enumerate the recitals after introducing them with a word such as "Background" or "Premises"

# In the event of ambiguity

What the #$%^ does that mean?

- If the recitals are clear and the operative part is ambiguous, the recitals govern
- If the recitals are ambiguous, and the operative part is clear, the operative part prevails
- If both the recitals and the operative part are clear, but they are inconsistent, the operative part is favored.

# Definitions

- Parties may begin agreements with a series of definitions in order to achieve clarity without repetition
- For Examples:
  - In this agreement, the word *structure* shall mean a classroom building of no less than twenty classrooms.
  - A "project" is…..
- Write them in the **present tense**

# Changing language

- <u>Never</u> change your language UNLESS you wish to change your meaning

- <u>Always</u> change your language if you wish to change your meaning

- Examples: "reasonable efforts" and "best efforts" may not be the same thing. "Project" and "Building" and "Structure" may not be the same things.

# Operative Language

- The term "operative language" refers to the language <u>that affects legal relationships</u>
- Promises
- Conditions
- Damages
- Remedies
- Termination

# Promises

- When an agreement recites a promise, a representation, or a warranty, ask:
  - What if the promise is not kept?
  - What if the fact is not as represented?
  - What remedies are contemplated?
- Provide the legal consequence with <u>PRECISE</u> language whenever possible.
  - Otherwise all you have is a "<u>breach</u>" of contract.  What do you do with that????

# Condition Precedent (must)

- If a condition precedent is not satisfied then the related obligation need not be performed.
- Example:
  - District's obligation to perform and to complete the transaction is conditional upon:
    - (a) Seller's performance, on or before the October 1, 2003.
    - (b) Acceptance of performance as satisfactory by Joe Inspector
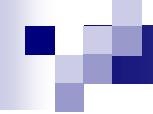
# Predict, Provide, and Protect

- PREDICT what <u>may</u> happen

- PROVIDE for that contingency in the contract with precise language

- PROTECT the district with a remedy clearly stated in the contract

# Language

- XYZ Co. will construct a stairway

- XYZ shall construct a stairway as specified in document A, and XYZ Co. shall construct stairway on or before October 30, 2007.

- XYZ shall construct a stairway as specified in document A, and XYZ shall complete construction of stairway on or before October 30, 2007.  If the stairway is not constructed in the time and manner specified, then District may terminate contract and need not pay for any work completed.

# More Basics

- Draft in the present tense
- Use the active voice
- Use gender-neutral language
- State obligations with the word "shall"
- State authorization with the word "may"
- State condition precedent with the word "must"
- Constantly ask "What if…."
- If you state an obligation, ask "What happens if the <u>obligor</u> doesn't do it"?
  - State a remedy in the contract

# Shall
# "has the duty to"

- Language of a promise is best communicated with the word SHALL
- "If either party hereto shall believe that…
- Here, "shall" is not meant to communicate an obligation.
    - Delete and use the present tense:
        - If either party believes
- <u>Test the word by substituting with "has the duty to."</u> If it doesn't make sense then you've used the word "shall" incorrectly.
- <u>"Will" is not the same as "shall."</u> "Will" can denote the future without obligation.

# More Basics

- To create a right, say "is entitled to."
- To negate a right, say "is not entitled to."
- To create discretionary authority, say "may"
- To create a duty, say "shall"
- To negate a duty, say "is not required to."
- To create a duty not to act, say "shall not."
- To create a condition, say "must"

# More Basics

- Do not use "shall" when stating declarations.

  - If weather, fire or an act of God <u>shall</u> render the premises uninhabitable, this lease <u>shall</u> terminate.

- Delete "shall" and use <u>present active voice</u>

  - If weather, fire or an act of God <u>renders</u> the premises uninhabitable, this lease <u>terminates.</u>

# Active Voice

- ## The Seller <u>shall be paid</u>
  - ☐ The Buyer <u>shall pay</u> the Seller
- ## The Buyer <u>shall be notified</u>
  - ☐ The Seller <u>shall notify</u> the Buyer
- ## The amount to be paid by buyer <u>shall be determined</u> by Joe
  - ☐ <u>Joe shall determine</u> the amount that <u>Buyer shall pay</u> to Seller

# Boilerplate Language

- The word "boilerplate" is often used to describe the all-purpose language that is found in every contract.
  - Headings
  - Choice of law (important???)
  - Choice of forum
  - Notice
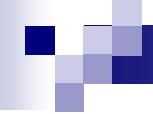
# Sloppy Language

- **Drafters pay a heavy price for sloppy language.**

- It is good preventative management to take the time to improve the language during the drafting stage rather than struggle with the meaning later.

# Issues to always review:

- Parties
- Terms
  - Automatic renewals?
  - Term length
    - Match language with applicable law
  - Amount clearly stated
- Indemnity
  - Mutual ? Vicarious Liability?

# Issues to always review:

- Insurance
  - Limits, certificates, coverage
- Choice of Law
- Choice of Venue
- Contacts
- Appropriate signatories
- DATE
  - Is it back dated
  - Has the event already started or occurred?