



## Five common canons of interpretations

Isaac Newton's Third Law of Motion posits that for every action, there is an equal and opposite reaction. The same is generally true for the canons of interpretation. These unwritten rules have been passed down through the common law as a means of bridging the divide between what lawmakers, transactional attorneys, and their clients intend when they write legal documents and how judges, trial lawyers, and disgruntled clients read those documents when things go awry.

But the division in meaning is great, and these canons are not perfect. For every canon favoring one meaning, there is usually another favoring a different meaning. Still, they are all we have for divining intent. Litigators and transactional attorneys need to know the canons, understand them, and have them on hand whenever litigating or drafting legal documents.

This article summarizes my five favorite canons and their counter-canons. This is, of course, not an exhaustive list. For more comprehensive discussions, I recommend Antonin Scalia & Byran A. Garner's *Reading the Law: The Interpretation of Legal Texts* (West 2012); 11 Fla. Jur 2d Contracts 139-174 (2018); and 48A Fla. Jur. 2d Statutes 108-196 (2018).

### 1. The plain language controls—almost always.

No canon is more important than this one: a legal text's plain language is the first—and often final—source of a drafter's intent. *Rollins v. Pizzarelli*, 761 So. 2d 294, 297-98 (Fla. 2000). After all, we, as readers, can never truly know what a drafter subjectively intended because we are not mind readers. See *Gendzier v. Bielecki*, 97 So. 2d 604, 608 (Fla. 1957). The written text is the only objective manifestation of the drafter's intent. *Id.* at 608-09.

Thus, courts will generally use the literal meaning of a legal text's words. *Alligood v. Florida Real Estate Comm'n*, 156 So. 2d 705, 707 (Fla. 2d DCA 1963). Unless specially defined by the text, courts will give the drafter's words their dictionary meanings. *Gordon v. Regier*, 839 So. 2d 715, 718 (Fla. 2d DCA 2003). Drafters should have both *Black's Law Dictionary* and a standard dictionary on hand to ensure the words accurately convey the drafters' intended meanings. See *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 791 (Fla. 2d DCA 2005) (presuming drafters know the meaning of the words they use).

This plain-language canon is the gateway to all other interpretative canons because if the drafter conveyed a clear and definite meaning through unambiguous language, then a reader need not interpret anything: he or she merely applies the text as explicitly written. *Rollins*, 761 So. 2d at 297. Courts can only resort to other canons when the legal text is ambiguous. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992).

Litigators cry ambiguity at every turn. Although most English sentences contain some level of uncertainty, the interpretative canons are reserved for when a fair reading of the text leaves genuine doubt. *Fajardo v. State*, 805 So. 2d 961, 963-64 (Fla. 2d DCA 2001). Failing to define a term or anticipate a particular situation does not, standing alone, make a text ambiguous. *Gov't Employees Ins. Co. v. Macedo*, 228 So. 3d 1111, 1113 (Fla. 2017); *Forsythe*, 604 So. 2d at 456. Ambiguity exists only when a provision can reasonably be read in two different ways. *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007) (illustrating this).

The counter to this plain-language canon is the absurdity doctrine, which allows using the other interpretative canons to discern intent when a literal reading would lead to an absurd or ridiculous result. *Green v. Dep't of Highway Safety & Motor Vehicles*, 905 So. 2d 922, 923 (Fla. 1st DCA 2005). For example, literal readings that render a statute unconstitutional trigger this doctrine. *Id.*

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But this doctrine should be used cautiously. *Nassau County v. Willis*, 41 So. 3d 270, 279 (Fla. 1st DCA 2010). Otherwise, a court may override the parties' right to make contracts (even improvident ones) or override the legislature's will in violation of the separation-of-powers doctrine. *Id.*; *Gibney v. Pillifant*, 32 So. 3d 784, 785 (Fla. 2d DCA 2010). As one court explained, the "absurd result" must be "so clear as to be obvious to most anyone." *Nassau*, 41 So. 3d at 279. That's a tough standard. Typically, the plain language will control despite the result.

### 2. Texts must be read together as a whole.

Another canon cherished by litigators is the *in pari materie* canon, which requires reading all parts of a legal text as a whole to achieve a consistent objective. *Forsythe*, 604 So. 2d at 454-55. This canon ensures that all provisions in a text are given meaning. *Id.* at 455-56. It is bottomed on the assumption that drafters do not intend to include useless terms or provisions. *Heart*, 963 So. 2d at 198-99.

But even this canon has its limitations. For example, like most interpretative canons, the *in pari materia* canon is only proper when the legal text is ambiguous. *Heine v. Lee Cnty.*, 221 So. 3d 1254, 1258 (Fla. 2d DCA 2017). The canon applies only when the different provisions "deal with the same specific subject or with subjects so connected that the meaning of the one informs the other." *Brown v. State*, 848 So. 2d 361 (Fla. 4th DCA 2003). Finally, the canon also does not authorize grafting elements from one subsection into a different subsection even if the sections are related. *State v. Bradford*, 787 So. 2d 811, 819 (Fla. 2001).

### 3. The expression of one thing implies the exclusion of another.

Also known as "*expressio unius est exclusio alterius*," this canon draws a negative inference between what was said and what was not said. If the text mentions a certain scenario or remedy, then readers can infer that the drafter intended to cover only the mentioned scenario or remedy, but no others.

For example, if an arbitration clause allows parties to sue for injunctive relief to prevent unauthorized disclosure or use of proprietary information—but no other claims are mentioned—then a court will assume that the parties intended injunctions to maintain the status quo during an arbitration for only the two specified claims, but no others. *Sprint Corp. v. Telimagine, Inc.*, 923 So. 2d 525, 527 (Fla. 2d DCA 2005).

The canon rests on the theory discussed in the first section: the written text reflects the objective manifestation of the draft's intent. See *Gendzier*, 97 So. 2d at 608. It assumes that competent people know how to express themselves—as illustrated by what the text specifically said. *Rollins*, 761 So. 2d at 298. Omissions are assumed intentional because readers cannot know the drafter's secret, unexpressed intent. *Gendzier*, 97 So. 2d at 608-09; *Peterman v. Floriland Farms, Inc.*, 131 So. 2d at 479, 480 (Fla. 1961).

There is, however, case law cautioning against the strict use of this canon because often the exclusion results from "inadvertence or accident" or would "lead[ ] to inconsistency or injus-

tice." *E.g.*, *Smalley Transp. Co. v. Moed's Transfer Co.*, 373 So. 2d 55, 56-57 (Fla. 1st DCA 1979). For example, if a beachside restaurant had a sign that said, "No shoes, no shirt, no service," it would be unreasonable to assume that the restaurant would still serve you if you had shoes and a shirt on, but no pants. See *Scalia & Garner, supra* ¶ 3, at 108. The vast majority of cases though will assume omissions were intentional, leaving the legislature to remedy the omission and refusing to save parties from the unintended consequences of their bad bargains.

### 4. Words, words, words: what do they all mean?

Besides using a dictionary, there are three other related canons for determining the meaning of particular words or phrases. Of course, all three apply only when the plain language is ambiguous; they cannot be used to create ambiguity. See *State v. Hobbs*, 974 So. 2d 1119, 1121 (Fla. 5th DCA 2008).

The first subcanon is *noscitur a sociis*, which means that a word is known by the company it keeps. This canon looks to other words used in a string of concepts to determine the drafter's overall intent. *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 205 (Fla. 2003). For example, if a statute strings together concepts like "fraud, concealment, or intentional misrepresentation of fact," then courts may broadly include other intentional acts, but read the statute as excluding negligent acts since the expressed concepts involve some level of knowledge or intent. *Id.* This canon typically tempers one term's potentially broad meaning to ensure it remains consistent with its accompanying words. See *Chancellor Media Whiteco Outdoor v. Dep't of Transp.*, 795 So. 2d 991, 998 (Fla. 5th DCA 2001).

The next subcanon is *ejusdem generis*, which means "of the same kind, class, or nature." This canon states that when a general phrase follows a list of specific items, then the general phrase is read to include only items similar in kind or class as the specifically listed terms. *State v. Hearn*, 961 So. 2d 211, 219 (Fla. 2007). If this canon sounds similar to the last canon, it is. This canon is derived from the *nascitur a sociis* canon. *Hobbs*, 974 So. 2d at 1122. But the *ejusdem generis* canon only applies when the text contains a list that culminates into general, catch-all phrase. *Id.* For example, if a statute states that a "confession may be used when the victim is incapacitated, disabled, under the age of twelve, or otherwise unavailable to testify," then courts may temper the latter phrase as including only instances of unavailability similar to those listed—such as if the victim is incompetent—but not unavailability such as the witness taking a vacation. See *id.*

The final subcanon concerning the meaning of words states that using different words in different portions of the same text presumes that the drafter intended different meanings. *Rollins*, 761 So. 2d at 299. In contrast, using the same words in different portions presumes that the drafter intended the same meaning to apply. *Hearn*, 961 So. 2d at 217. This canon does not have a formal name. I call it the consistency canon because it shows the importance for being consistent and using different words only when intending to express different meanings.

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"Let me think about that."

"Well, actually, this is what happened."

"I'm really not sure about that."

"I don't understand why you asked that question."

Second, look at the manner in which the witness answers the questions. Of course, a witness may be truthful, yet exhibit signs of uneasiness and may just be scared or anxious by having to testify before a group of strangers in a courtroom.

But here are some clues to look for:

1. Does the witness make eye contact with the jury or the attorney asking the questions?
2. Does the witness appear to be looking to someone else for an answer?
3. Does the witness hesitate in answering the questions?
4. Does the witness stutter or stumble in answering the questions?
5. Does the witness pause too long before answering?
6. Does the witness evade the question?
7. Does the witness give an unresponsive answer?
8. Does the witness try to blame someone or something else for what happened?
9. Does the witness change the question asked?
10. Does the witness refuse to answer "yes" or "no"?
11. Does the witness "change the subject" in answering the question.
12. Is the witness withdrawn or combative in answering the question?
13. Is there a change in the rate of speech, tone of voice, posture, or gestures?
14. Does the witness express disgust at the question? "How dare you suggest I did that?"

Finally, look at physical body language:

1. Does the witness cross his/her arms?
2. Does the witness cover his/her mouth with their hands?
3. Does the witness blink his/her eyes excessively?
4. Does the witness back away from the microphone?
5. Does the witness touch his/her mouth, rub his/her head or face, rub his/her hands on the knees or otherwise fidget.

Of course, there is no "magic answer" in determining if a witness is being truthful, but all of these factors may help in judging the credibility of the witness.

I hope you find this brief article helpful in your next trial. And in preparing your client or a witness to testify at a deposition or trial.

Prior to becoming a Circuit Judge in 2004, Judge Hardt's law practice was concentrated in the areas of personal injury, commercial and probate litigation. He was board certified by The Florida Bar as a Civil Trial Lawyer and as a Business Litigation Attorney. He was also certified by the Florida Supreme Court as a Circuit Court Civil Mediator and Circuit Court Arbitrator. He received an 'AV' Preeminent rating from Martindale Hubbell. Judge Hardt was an adjunct professor of law at Hodges University where he instructed courses in Civil Procedure, Torts, Criminal Law and Procedure, Evidence, Trial Practice, Alternative Dispute Resolution and Constitutional Law. He is a graduate of the University Of Wisconsin Law School where he was a member of the Wisconsin Law Review. Judge Hardt currently serves in the Felony Division in Collier County.

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## Five common canons

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### **5. Finally, a specific provision generally controls over a more general provision dealing with the same subject.**

The final most common canon is the general/specific canon, which is also known as *generalia specialibus non derogant*. Scalia & Garner, *supra* ¶ 3, at 183. This canon provides that "a specific provision dealing with a particular subject will control over a different provision dealing only generally with that same subject." *Kel Homes, LLC v. Burriss*, 933 So. 2d 699, 703 (Fla. 2d DCA 2006). For example, a statute addressing the mandatory minimum sentence for committing a crime with a firearm would control over a statute generally addressing mandatory minimum sentences for all crimes. *McDonald v. State*, 957 So. 2d 605, 611 (Fla. 2007).

This canon only applies, however, when the general and specific provision covering the same subject are in hopeless conflict. *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1073 (Fla. 2006). If they are not in conflict, then they should be applied in harmony as written. But if they are in conflict, then the specific serves as an exception or qualification of the more general to the extent of the conflict. *Freeman v. State*, 969 So. 2d 473, 477 (Fla. 5th DCA 2007)

This sums up my top five canons of interpretation. Given the disconnect between what people say and what people hear, there are many other canons and counter-canons that can shift meaning to favor one side or the other. The paramount canon is always: what does the text say? If that can be reasonably understood by using a dictionary, then the drafter's subjective intent doesn't matter; the text should simply be applied as written.

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*Chris is Florida Bar Board Certified in Appellate Practice and a partner at Roetzel & Andress. His practice focuses solely on appellate and original jurisdiction proceedings. Follow him on Twitter at @AppellateGuru.*