

ANNEXURE II

REED DICKERSON -BASIC STEPS OF DRAFTING- SUBSTANCE AND STYLE¹

According to Prof. Reed Dickerson, a noted authority on legal writing and statutory interpretation/construction, “lawyers in general do not understand the role of the draftsman and that many draftsmen don’t understand it either. He recommends the basic steps of drafting which every drafter should meticulously observe as follow:.

Substance

1. Find out what you intend to accomplish and what specific problems it involves:

- at this stage you “pump the client”
- think of an architect in designing a house

2. Examine the current law

- amend— add— repeal?

3. Develop a concrete plan of organization and arrangement.

- fitting all of the pieces together
- cover the intended area
- avoid gaps
- do not duplicate or overlap
- don’t contradict

Style:

Clear, crisp, concise, and consistent.

Prepare draft,

Revise draft,

Check for duplication and inconsistency,

Ask others to read draft,

Redraft,

Polish

¹ Excerpts from Reed Dickerson Basic Steps of Drafting- Substance and Style : How to Write A Law 31 Notre Dame Law Review 14 (1955).

Twenty Basic Rules

1. Use the singular. A traditional principle of drafting legislation is to make the subject of a sentence single rather than plural
2. Identify the actor and action
The actor is who; the action and the object are the what—the “who”—the person on whom a legal burden is imposed or benefit is conferred, and the “what”—the burden imposed or the benefit conferred.
3. Use Article as Modifiers (use a or an rather than an indefinite adjective such as any, each, every, or no.
4. Use “the, that, these”, rather than such or said.
5. Limit the use of pronouns: example:
“The governor shall file a copy of the State plan with the administrator. If he or she determines that the plan does not meet the requirements, he or she shall adopt a temporary plan for the State.”
In the second sentence, there are two “he or she.”
To whom does the drafter refer?
6. Save the negative for action.
Do not use “no” as an adjective for the actor.
For example:
“A drafter may not use no as an adjective to express a prohibition.”
rather than:
“No drafter shall use no as an adjective to express a prohibition.”
7. Use the active voice.
It identifies the actor, forces the drafter to consider carefully the verb of the sentence that creates the benefit or burden, and usually requires fewer words.
For example:
“A taxpayer shall file a return” rather than “a return must be filed by a taxpayer”
8. Use base verbs
The use of nominalization in place of a verb is a disease common to modern writers. The nominalization of the verb consider is consideration, decide is decision determine is determination, etc.
Avoid nominalization, it makes for longer sentences
For example:
“the official shall consider the application” rather than “the official shall give consideration to the application”

- 9. Use the present tense and indicative mood.
 - A verb can be past tense (a court had jurisdiction)
 - A verb can be present tense (a court has jurisdiction)
 - A verb can be future tense (a court shall have jurisdiction)
 - Temptation to use the future tense- avoid temptation, use the present, it is easier to to read/uses fewer words
 - For example: “A person convicted of a felony is ineligible to apply for a grant” rather than “If a person has been convicted of a felony, the person shall be ineligible to apply for a grant”
- 10. Use Shall to impose a duty to act
- 11. Use May to grant discretion or authority to act.
- 12. Use may not to prohibit an action
- 13. Use the positive rather than the negative
 - For example: “the official shall grant” rather than “the official may not deny a grant”
- 14. Avoid compound constructions or expressions:
 - For example:

<ul style="list-style-type: none"> a person is prohibited from adequate number of at such time enter into an agreement with in a prompt manner in the case of, in the event that/of in the nature of is applicable to is authorized to 	<ul style="list-style-type: none"> a person may not enough when to agree with promptly if like applies may
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- 15. Avoid redundant legal phrases
 - For example:
 - advise and consent, alter or amend,
 - cease and desist, for and during,
 - force and effect, fully and complete,
 - good and sufficient, make and enter into,
 - null and void, true and correct,
 - to have and to hold, unless and until
- 16. Avoid lawyerisms
 - For example:
 - said, such, whereas,
 - further provided that,
 - herein above mentioned,

party of the first part,
thereafter, therein hereby, hereinafter

17. Use common words
18. Use only necessary words
19. Use short sentences, with carefully arranged words and proper punctuation.
20. Be consistent.

Ten Points on Bill Drafting- #1

1. Know the Policy Objective of the Client

“A statute is the formal and legal expression of a legislative policy and it follows that before a statute can be drafted the policy sought to be implemented by it must be determined.” (Driedger, “The Preparation of Legislation, 31 Canadian Bar Review 36).

Before beginning to craft a legislative proposal, the drafter must clearly understand the policy objectives of the person requesting the legislation. It is helpful to have an understanding of the problem the legislation seeks to address.

2. Know Law/Placement of Legislation/Resources

Law

The value the legal drafter adds to the process of reducing a person’s desire into a bill is several fold:

The drafter determines:

Whether the goal is achievable,

Whether there are limitations or barriers to reaching the goal, and

The approach need to accomplish the achievable result.

Placement

“A statute drafted without sufficient attention to legislation already on the books and to the state of the relevant judge-made law inevitably raises vexing problems of interpretation. Issues of federal and state constitutional law have a way of popping up in connection with the simplest sounding statutory proposal.” (Driedger, *supra*)

The drafter must also know the specific substantive law and its framework as it relates to the drafting assignment and where the legislative proposal fits into the existing structure of law. As Driedger explains, the drafter “must consider a statute in its relation to other statutes and the law generally, ... [, and should regard the] statute as one fragment of a much greater

whole and any new law must of course be in harmony with existing law.” Finally, the drafter must be knowledgeable about the administrative and decisional law adopted in the drafter’s jurisdiction that might affect the interpretation of the language used in crafting the legislation.

The drafter must consider broad constitutional issues such as equal protection and due process, as well as issues such as preemption or the legislative body’s authority to act.

The drafter must be aware of the constitutional provisions that govern the enactment of statutes in the drafter’s jurisdiction, such as title and enacting clause requirements, and single subject and other content restrictions.

Resources

In most instances it is not necessary for a legislative drafter to “start from scratch” with each new drafting assignment. Fortunately, legislatures keep records of previously introduced legislation and few ideas are truly new but are simply a variation on an idea that was not successful in an earlier attempt. A seasoned bill drafter generally finds a legislative proposal has been introduced in at least one prior session.

Legislative indexes and tables of sections affected are invaluable tools to finding previously introduced legislation and are helpful in providing guidance when drafting the new proposal because they guide the drafter to related legislation and current law.

3. Know the Audience/ Understand the Political Nature of the Task

With respect to drafting legislation and rules, knowing the audience is a bit more complex because of the political nature of the task, and the bifurcated life of legislation, first as a bill, subject to amendment, and then, as a statute with an entirely different audience.

The first audience is the legislature, the next the Governor, and ultimate audience is the court.

The legislative process is a political process and drafting legislation cannot be separated from its political nature.

Role of the legislative drafter to present the political choices presented for resolution by the client.

Important to know the initial audience of the legislation, generally the member of the legislature who requested the bill, but often a special interest on whose behalf the request was made.

It is also important to know the legislature both as a whole, and its component parts— each house and the committees of each house.

The drafter must also consider legislative rules that may affect the introduction or consideration of the legislation.

Part of the drafting process may be determining the best house for bill introduction, and the form in which the bill should be introduced.

The draft of the bill will often dictate the committee to which it is assigned. One committee may be preferable to another. How the bill is drafted can impact the bill assignment and its success.

The legal drafter needs to be knowledgeable about other parties with an interest in the subject matter, such as lobbyists representing special interests and governmental agencies that may have a role in implementation should the legislation be enacted. The drafter should also be aware of the views and preferences of the chief executive who will make the ultimate decision about the legislation after it passes the legislature.

If the bill becomes a statute, the audience will change, and this must also be anticipated at the drafting stage. Will disputes over the language of the statute be resolved in a judicial forum? Have terms used in the legislation been construed by a court? Is that construction helpful or harmful to the intent of the client? Are there alternative terms that may be used to avoid that construction?

Of equal importance is the determination whether the statute will make an intermediate stop at an administrative agency to be further “clarified” by way of administrative regulation. Are there other regulations in existence that may affect the construction of the newly enacted statute?

The legislature drafter should be knowledgeable about these matters and should educate the client. The legislation should be drafted so that if the bill becomes a statute it will express the intent of the proponents and be construed by the administrative agency and the court in a manner consistent with that intent.

4. A legislative drafter is more than a scribe.

How much more than a scribe the legislative drafter will be is determined by the nature of the client-drafter relationship, the degree of experience each possesses, and the drafting assignment

David Marcello points out that at all stages of the drafting process—determining the client’s intent, setting drafting priorities, evaluating alternatives, selecting the legislative instrument, and allocating discretion—all involve value laden choices.

Marcello recommends that legislative “drafters be aware of the many points at which their personal and political views may be influential in the

drafting process and that they take steps to minimize such influence,” but not deny that there are “opportunities to inject personal judgments into the process.” (Marcello, *The Ethics and Politics of Legislative Drafting* 70 *Tulane Law Review* 2437)

When drafting legislation, the drafter may identify policy disagreements that must be resolved.

The drafter may be in the best position to draw together the various interests to resolve these policy differences.

In identifying issues and conferring with the various interests, the drafter necessarily becomes involved in the policy discussion.

The drafter also contributes to policy determinations through the discretion exercised in addressing the numerous minor details that need to be resolved.

Often, the client is not available or does not have an interest in the level of detail the drafter must achieve to produce a comprehensive draft.

In the final analysis, whether the legislative drafter has avoided interjecting personal policy judgment into the assignment will be apparent to the client when the client reviews the work product.

5. Deliberate Vagueness and Generality

While some forms of ambiguity often result from poor drafting, vagueness and generality in legislation are often deliberate due to the political nature of the legislative process.

Sometimes the perfect legislative resolution of a particular issue is not politically possible. Yet, the participants in the legislative process do not easily concede defeat and prefer to declare partial victory.

For political reasons, a client may either refuse to address vagueness or generality in a draft to which the legislative drafter draws the client’s attention or may ask the drafter to insert vague or overly general language in the draft as a way of glossing over controversies for which consensus is not reached.

Failing to address adequately issues raised by the legislation or avoiding points of controversy can result in the enactment of a statute that is incomplete, vague, or overly general, and delegates to an administrative agency or a court, or both, the ability to ultimately decide its full meaning. The meaning may not be the meaning intended by the legislature. This outcome can occur despite a drafter’s best intention to draft a measure in a comprehensive manner.

6. Time Pressure

“It may be supposed from my description that the drafting of legislation is a leisurely process, but unfortunately it is not. Rarely is a bill prepared under ideal conditions; usually the work must be done in a hurry and under pressure. One of the main reasons is that few people realize how much is involved in the preparation of legislation, with the result that insufficient time is allowed.” (Driedger, *supra*)

It is typical for the majority of bills to be heard on the floor of the houses during the last days of the session. While these legislative deadlines were intended to evenly spread out the hearing and consideration of bills throughout the entire session, in reality they result in additional logjam.

During deadline periods it is not unusual for a professional legislative drafter to have multiple requests due at the same time.

When a bill is heard on the floor and is in jeopardy of failing passage, there is often a last minute effort to amend the bill.

There is no other time pressure quite like the experience of having the speaker of the house or the president pro tempore of the senate standing over the drafter’s shoulder and imploring the drafter to complete the task because the house is in session, the members are on the floor, and the process has ground to a halt awaiting the amendments.

7. Prepare a Plan, Use a Checklist, and write and Annotate a Digest

Plan

Once the goal of the client has been clarified, it is often helpful to develop what Dickerson calls a “plan of organization,” that is a very detailed outline to assist the legal drafter in first establishing an inventory of what is needed in the document and to provide a framework for the final product. Many drafters use the checklist created for the client interview in tandem with, or as a basis for, the plan for the legal document.

The plan should be a road map that considers all aspects of the drafting task. Once again, there is no uniform format. The plan will be dictated by the nature of legal document and the particulars of the client’s goal.

Check List

Once satisfied with the first draft and its revisions, the legislative drafter should develop a checklist to determine if the formal requirement of the bill necessary to introduce the bill and have it go into effect if enacted, have

been satisfied. The checklist might include some of the following.

__Does the title include all of the provisions of the bill and accurately describe how the bill changes existing law (amendment, addition, and repeal)?

__Does the relating clause encompass the entire contents of the bill?

__If applicable, do the entire contents of the bill fall within a single subject?

__Does the draft include an enacting clause?

__If amending an existing statute, did the drafter use the last amended form of that statute?

__Are there terms used in the bill that should be defined?

__Are the statutory references accurate and do they use the most current form of the statute?

__Are cross references in the bill accurate?

__Did the drafter follow the principles of writing in plain English so that the language that clearly states the legislation's intent?

__Do the contents of the bill follow in logical sequence?

__Does the bill need a provision regarding its operation, such as an emergency (or urgency) clause that will cause the bill to take immediate effect upon enactment?

Digest

The legislative drafter should also check the substance of the bill for completeness and accuracy.

Preparing a digest of the legislation may be helpful in accomplishing this goal.

A digest is a brief summary of existing law and an explanation of changes the legislation would make to that law.

The digest should start with a general statement of the existing law followed by a point by point summary of the specific provisions of existing law and the changes the bill would make to that law.

The digest, once written, should be annotated with specific citations to existing law (following the statement of existing law) and a specific citation to each section of the bill (following the statement of what the bill would do).

8. First Draft and its Revisions

Drafting a bill is not a one step process even after the legal drafter has all the information necessary to start writing. Except for the most simple bill and the most experienced drafter, the first draft is just what its designation

implies, a first attempt at crafting the bill.

There is no simple formula on how to draft. The drafter must simply begin to write, keeping in mind the principles set forth and following the plan that the drafter has developed.

It is through the process of actually writing that the drafter either validates the plan of organization or determines that the plan has flaws. The drafter should never be unwilling to revise the plan if the need arises.

The drafter should be prepared to write and rewrite the “first draft” several times.

A dozen revisions of the “first draft” are not uncommon before the drafter has a “first draft” suitable to submit to the next step in the process.

The drafter may find it useful to prepare an overall first draft that covers the entire document, but is not a detailed draft, to determine if the plan is coherent and complete, and then, to work back through the document filling in the details.

Many drafters find it helpful, after working through a rough draft from beginning to end, to subdivide the document into logical parts and work on perfecting the component parts as separate mini-tasks. This approach is especially helpful in drafting a complex document because it divides what may seem like a daunting job into smaller, more manageable parts.

Once the document is complete, the drafter should review it several times in to ensure that proper grammar is used and the other principles of this book are observed. It is also useful to refine the language in the document.

A very helpful suggestion made by Richard Wydick is to review the draft to omit surplus words. He recounts a story from the time he was a young lawyer, about a more senior attorney who “hated verbosity” and would take what was considered a finished product and “strike out whole lines, turn clauses into phrases, and turn phrases into single words.”

As the drafter works through the document with the goal of eliminating verbosity, the product that emerges is a cleaner, crisper version of the initial draft.

It is often helpful, if time permits, to set the document aside once the drafter is satisfied that a first draft is acceptable and to work on other projects.

This breather from the drafting assignment can range from a few hours to a day or two.

Setting the draft aside gives the drafter the ability to read it again with a fresh perspective.

It is generally surprising how a document prepared on one day and thought of as acceptable will have problems when read at a later time.

Before the drafter is satisfied with the first draft, it should be checked to make sure that it satisfies four criteria: the document is clear, consistent, non-duplicative, and contains all necessary components.

9. Show the Draft to Colleagues

Perhaps the greatest “sin” associated with all forms of writing, but especially critical to avoid in legal drafting, is the sin of pride.

There should be little, if any, pride of authorship concerning the first draft of a legal document.

With over 30 years of legal drafting experience, I have never prepared a bill that was not improved by having it reviewed by colleagues.

Having at least one other set of eyes look at the first draft and suggest ways in which it can be improved is an indispensable step in the drafting process.

The colleague who reviews the draft should be an individual with comparable, if not greater, drafting experience.

Colleague need not know the law or even what the client has requested, although that information may be provided to the reviewer.

Role of the person who reviews the document is to draw attention to errors in the draft, such as grammatical problems, missing words, problematic organization, the omission of necessary provisions, gaps in logic, and verbosity.

Reviewer should convey to the drafter what the draft means to the reviewer and whether the intent is clear to the reviewer.

There is no better way of determining whether the draft achieves its goal of stating the client’s desire.

If the reviewer has to ask the question, “What did you intend?” or “Did you mean this or did you mean that?” in any part of the draft, the drafter must revisit the provision and clarify it.

10. The Final Draft

The term “final draft” is not synonymous with “final document.” It simply denotes that the drafter is satisfied with the document and it is ready to be shown to the client.

The final draft may be the final document. The final draft may require half a dozen or more revisions. The true test of the final draft is when the client reads and agrees with the product.

The greater the sophistication of the client, the more likely the draft may need further refinement. This need for further refinement is not necessarily a negative outcome. As mentioned early, the legal drafting process is a

collaborative one. The client and the drafter share the same goal.

It is always satisfying to have the client simply smile and say, “This is exactly what I wanted.”

However, it is sometimes more helpful if the client raises questions and informs the drafter that one aspect or another of the bill is not really what was intended and identifies aspects of the bill that do not meet the client’s goals. It is much better to have this feedback before the writing becomes a statute, goes into effect, and a dispute subsequently arises.