

Commonwealth of Pennsylvania
Legislative Reference Bureau

Drafting Seminar for
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I. Basic Considerations.

1. Getting the concept, the objective and critical verbalization, and the practical result.

(a) Basketball rules.

(1) In High School Basketball Rules, the term "try" is defined as "An attempt by a player to score two or three points by throwing the ball into the basket of the player's team, beginning with the motion preceding release of the ball and ending when the attempt is successful or certainly unsuccessful, when the ball touches the ground, or when the ball becomes dead."

(2) Under High School Basketball Rules, "A goal is made when a live ball enters the basket."

(3) Under High School Basketball Rules, "The ball becomes alive on a jump ball when the ball leaves the official's hand."

(4) Under High School Basketball Rules:

"(i) Except as set forth in subparagraph (ii) the ball becomes dead when:

* * *

(F) a foul occurs;

* * *

(ii) If subparagraph (i)(E), (F), or (G) occurs during a try, the ball does not become dead until the try ends."

(5) Resolve the following problem.

After a jump ball is tapped, Player A1 becomes confused and attempts to shoot at the basket of Team B. Player B1 is also confused, and, in attempting to block the shot of Player A1, fouls Player A1. The ball continues into the basket of Team B.

Has a goal been scored?

(6) This is not a trick question.

(b) Bearer paper.

(1) An earlier version of Article 3 of the Uniform Commercial Code provided:

"An instrument is payable to bearer when by its terms it is payable to

- (a) bearer or the order of bearer; or
- (b) a specified person or bearer; or
- (c) 'cash' or the order of 'cash'...."

(2) How many options do we have here?

(i) Three options:

- (A) Bearer or the order of bearer.
- (B) A specified person or bearer.
- (C) Cash or the order of cash.

(ii) Six options:

- (A) Bearer.
- (B) Order of Bearer.
- (C) A specified person.
- (D) Bearer.
- (E) Cash.
- (F) Order of Cash.

(3) This is a trick question. Compare paragraph (2)(ii)(A) and (D).

(c) The taxing and spending power.

(1) Article I § 8 of the United States Constitution provides, in pertinent part:

“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare ...”

(2) What kind of authority do we have here?

(i) As advocated by Madison, two powers:

(A) An unqualified power to tax.

(B) A limited power to spend to:

(I) pay debts;

(II) provide for common defense; and

(III) provide for general welfare.

(ii) As advocated by Hamilton, a single qualified power to tax only in order to:

(A) pay debts;

(B) provide for common defense; and

(C) provide for general welfare.

(3) This is not a trick question.

2. What to consider.

(a) Policy declarations.

(b) Applicable definitions in the following hierarchy:

(1) The unit (section and down).

(2) The larger unit (subchapter and up).

(3) The statutory construction provision.

(4) A legal dictionary for a term which has been judicially interpreted. 2A N. Singer *Statutes and Statutory Construction* (2000 Revision) § 47:30.

(5) A standard dictionary.

(c) Administration.

(1) State agency.
Select or establish.

(2) Fund.
(i) Select or establish.
(ii) To establish:
(A) Purpose.
(B) Source.
(I) Appropriations.
(II) Fees and Penalties.
(III) Return.
(C) Administration.
(D) Nonlapse.

(d) Enforcement.

(1) Penalties.
(i) Civil.
(ii) Administrative.
(iii) Criminal.

(2) Remedies.

(3) Immunity.

(e) End matter. Done in technical sections.

(1) Appropriation.

(2) Nonseverability.

(3) Repeals.

(4) Applicability.

(5) Effective date.

II. Canons of Construction.

1. Three types.

(a) Textual canons. Intrinsic to the statute being construed.

(b) Substantive canons. Related to common law, statutes, or the constitution.

(c) Reference canons. Legislative landscape.

2. For our discussion, we will be limited to:

(a) Textual canons:

(1) Meaning and association.

(2) Grammar and punctuation.

(b) Reference canons:

(1) Legislative history.

(2) Contemporaneous history.

3. Textual canons.

(a) For meaning and association, we will concern ourselves with five basic canons:

(1) Construe in accordance with ordinary or common meaning. Singer § 47:28. There are exceptions:

(i) Construe terms of art in accordance with the following definition hierarchy:

(A) The unit (section and down).

(B) The larger unit (subchapter and up).

(C) The statutory construction provision.

(D) A legal dictionary for a term which has been judicially interpreted. *Id.*, § 47:30.

(E) A standard dictionary.

(ii) Construe technical terms in accordance with expert evidence. *Id.*, § 49.29.

(2) Use of different language in similar statutory provisions requires different construction. Examples:

(i) *Osborn v. Bank of the United States*, 22 U.S. 738 (1824).

Original statutory provision allowed suit in "courts of record."

Construction against Federal question jurisdiction.

Reenacted statutory provision specifically allowed suit in "courts of competent jurisdiction and Federal Circuit Courts."

Construction in favor of Federal question jurisdiction.

(ii) *Lindh v. Murphy*, 521 U.S. 320 (1997).

Procedural statute had two chapters.

Chapter on capital cases specified applicability to pending cases.

Chapter on noncapital cases was silent on applicability.

Construction:

Chapter on noncapital cases not applicable to pending cases.

(3) *Noscitur a sociis.*

A statutory term derives its construction from the other terms surrounding it. Singer § 47:16. Example:

Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961).

Federal tax statute allocated for other tax years "income resulting from exploration, discovery, or prospecting."

The term, "discovery," was construed:

to be limited to discovery of mineral resources; and not to extend to discovery of patented inventions.

(4) *Ejusdem generis.*

A general expression in a statutory provision is restricted to terms similar to those enumerated in surrounding language; the surrounding language effectively establishes a class into which the general expression is placed. Singer § 47:17. Example:

Heathman v. Giles, 374 P.2d 839 (Utah 1962).

Statute required bond in personal action against "sheriff, constable, peace officer, State road officer, or any other person charged with ... enforcement of ... criminal laws"

The phrase, "other person charged with ... enforcement of ... criminal laws," was construed to exclude State prosecutors as nonuniformed individuals.

(5) *Expressio unius est exclusio alterius.*

Statutory designation of specific terms implies exclusion of nondesignated similar terms. Singer § 47:23. Example:

Statute conditions ineligibility on designated offenses.

A nondesignated offense is not construed to be a condition for ineligibility.

(b) Applicability of rules of grammar and punctuation.

(1) Rule. Singer § 47:15:

Punctuation:

Part of statutory provision.

May be considered in interpretation

May not be considered to:

create doubt; or

defeat legislative intent.

(2) Exception. Rule of the Last Antecedent.

(i) Unless plainly meant otherwise, a modifier operates only upon the term preceding it. *Id.* § 47:33.

Example: *Equitable Gas Company v. City of Pittsburgh*, 488 A.2d 270 (Pa. 1985).

Setoff provided "for taxes, liens, and debts reduced to judgment."

This means all taxes, all liens, and only debts reduced to judgment.

(ii) The last antecedent is the last term which can be made an antecedent without impairing the meaning of a sentence. Singer *id.*

Example:

Setoff provided "for taxes, liens, and debts of instrumentalities reduced to judgment."

The last antecedent is:

debts; **not**

instrumentalities.

(iii) Unless plainly meant otherwise. How can the drafter **plainly mean otherwise?**

(A) Sense of entire statute suggests a modifier applicable as much to all terms. *Id.*

Example:

Statute with agency and subagency regulating fruit, provides for inspection and waiver:

"The department will waive inspection on apples, bananas, and pears which are certified by the bureau."

(B) Force an ungrammatical comma:

"A fee shall be paid for apples, bananas, and pears, which are shipped."

- (3) Conjunctive versus Disjunctive.
- (i) To designate conjunctive:
 - (A) Use **and** preceding the last item.
 - (B) Use **all of the following** preceding a colon and a list.
 - (ii) To designate disjunctive:
 - (A) Use **or** preceding the last item.
 - (B) Use **any of the following** preceding a colon and a list.
- (4) Mandatory versus Discretionary.
- (i) Mandatory designated by **shall**.
 - (ii) Discretionary designated by **may**.
- (5) Inclusions.
- (i) Singular includes plural, and plural includes singular. Singer § 47:34.
 - (ii) Masculine includes feminine, and feminine includes masculine. *Id.* § 47:32.
- (6) Scrivener's errors.
Court can substitute words. *Id.* § 47:36.
Note: Arkansas does not allow this. *Heinemann v. Sweatt*, 130 Ark. 70, 196 S.W. 931 (1917).
Examples:
Contract **substituted for** contact.
Subsection **substituted for** paragraph.

4. Reference Canons.

(a) Legislative history is what happens in the chambers of the legislature as the bill is enacted. Legislative history includes:

(1) Executive statements entered into journal or published prior to legislative consideration. Singer § 48:05.

(2) Sponsor statements. *Id.* § 48:15.

(3) Reports of committees. *Id.* § 48:06; 73 *Am Jur 2d*, Statutes, § 91 (2001).

Example: *Blanchard v. Bergeron*, 489 U.S. 87 (1989).

In construing "reasonable attorney fee," Court relied on Senate reports referring to a 12-factor test in an earlier case.

(4) Reports of drafting commissions published or entered into journal prior to legislative consideration. Singer § 48:11.

Example:

UCC provision refers to "bill of lading."

Court cases in **affected states** construe "bill of lading":

to include negotiable bill of lading;

but

to exclude nonnegotiable bill of lading.

There are no court cases in **unaffected states**.

UCC provision amended to refer to "document of title."

Consider the effect of official comments by:

Uniform Law Commission; and

state bar associations or drafting commissions.

Uniform Law Commission Comment can take one of three approaches:

-Specifically state that amendment is intended to overrule the cited cases.

Such a comment should be construed to mean that negotiability is immaterial.

Such a comment requires no **State Comment** in:

an **unaffected state**; and
an **affected state** which desires negotiability to **now become** immaterial.

Such a comment requires a **State Comment** in an **affected state** which desires negotiability to **remain** material. The **State Comment** should declare that the amendment is not intended to affect the decision in the cited case.

-Be silent.

Such a noncomment has no value in construction.

Such a noncomment requires no **State Comment** in:

an **unaffected state**; and
an **affected state** which desires negotiability to **remain** material.

Such a noncomment requires a **State Comment** in an **affected state** which desires negotiability to **now become** immaterial. The **State Comment** should declare that the amendment is intended to overrule the cited case.

-Specifically state that there is no opinion as to the effect of the amendment on the cases.

Such a comment should be construed to:

--Validate the court cases in **affected states**: negotiability is still material.

An **affected state** which desires negotiability to **remain** material should not issue a **State Comment**.

An affected state which desires negotiability to **now become** immaterial should issue a **State Comment** declaring that the amendment is intended to overrule the cited case.

--Leave open interpretation in **unaffected states**: negotiability is {material} {immaterial}.

Each **unaffected state** should issue a comment based on whether negotiability is material or immaterial.

(5) Amendments of a bill which are adopted and rejected. Sutherland § 48:18.

Examples:

Adoption of amendment.

Health insurance bill silent or ambiguous on application to prenatal care.

Executive would like to make the bill **applicable** to prenatal care.

Insurance Department proposes amendment:

Makes bill **applicable** to prenatal care.

Amendment passes.

Proper construction:

Enacted law is **applicable** to prenatal care.

Rejection of amendment.

Health insurance bill silent or ambiguous on application to prenatal care.

Insurance Industry would like to make bill **inapplicable** to prenatal care and:

is sure of votes in upper chamber; **but** is unsure of votes in lower chamber.

Insurance Industry proposes {fakes} amendment in upper chamber:

Makes bill **applicable** to prenatal care.

Amendment fails.

Proper construction:

Bill is **inapplicable** to prenatal care.

(6) Veto messages.

(i) Veto message in overridden veto is part of legislative history. Singer § 48:06

(ii) Not helpful unless there is subsequent history during override vote. If veto is overridden without subsequent history, construction can be:

(A) legislature disagreed with executive construction in message; **or**

(B) legislature agreed with executive construction in message but wanted legislation anyway.

(b) Contemporaneous history is:

(1) What happens outside the chambers of the legislature prior to and during enactment.

(2) Debates and speeches on the floor.

III. Drafting Principles

1. Mood.

Use indicative mood.

Examples:

Correct:

"Taxes are due on April 15."

Incorrect:

"Taxes should be paid by April 15."

2. Person.

Use the third person.

3. Number.

Singular is preferred.

4. Voice.

Use active voice.

Examples:

Correct:

"An applicant shall pay a fee of \$20."

Incorrect:

"A fee of \$20 shall be paid by applicants."

5. Tense.

Use present tense unless the action is to take place at a later time.

Examples:

Correct:

"The department has the following powers:"

Incorrect:

"The department shall have the following powers:"

Correct:

"The department shall institute suits for collection of delinquent accounts."

6. Sentences.

(a) Sentences should be short:

- (1) One or two subjects.
- (2) One predicate.
- (3) One or two objects.
- (4) One adjective per noun.
- (5) Minimal use of adverbs.

(b) Anything beyond this requires more sentences and possible subdivision.

7. Commands/Conditions/Prohibitions:

(a) Use **shall** for directive statements.

(b) Use **may** for permissive statements.

(c) Use **must** for conditions.

(d) Use **may not** for prohibitions.

(e) **Examples:**

"A taxpayer shall file a return by April 15."

"A taxpayer may ask for an extension of time."

"A taxpayer must have a legitimate reason for an extension of time."

"A taxpayer may not omit categories of income."

8. Words.

(a) Avoid meaningless words and phrases.

Examples:

All.

Every.

Duly.

Legally.

In accordance with law.

(b) Avoid overkill.

Examples:

Incorrect:

"The department maintains, possesses, and retains each and every one of the following powers, duties, obligations, and responsibilities:"

Correct:

"The department has the following powers and

duties:"

(c) Use legal terms.

Terms such as "statute," "regulation," "equity," "bequest," and "consideration" have accepted legal meanings. Use these terms and avoid redefining every term.

(d) Define terms of art.

(e) Do not define commonly understood terms.

(f) Do not make substantive rules in definitions.

Examples:

Correct:

"'Facility.' A plant which treats toxic waste."

Incorrect:

"'Facility.' A plant which treats toxic waste. A facility may not treat toxic waste without a permit from the Department of Environmental Protection."

(g) Avoid absurd words.

Examples:

Such as an adjective.

Said as an adjective.

Hereinafter.

Hereinbefore.

Aforesaid.

9. Structure.

(a) Use subdivisions as opposed to long paragraphs. Subdivisions are easier to see, understand, and cite.

(b) Use tabular format as opposed to prose. Tabular format is easier to understand, cite, and amend.

(c) Use short captions. Short captions aid in indexing and cross-referencing.

(d) Lead with the rule. Separate exceptions and conditions.

Example:

§ 304. Prohibition.

(a) General rule.--Except as set forth in subsection (b),

(b) Exception.--Subsection (a) does not apply to any of the following:

....

