

THE EVOLVING ROLE OF THE DRAFTING ATTORNEY

AFTER A BILL HAS BEEN INTRODUCED

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TEXAS LEGISLATIVE COUNCIL



TEXAS
LEGISLATIVE
COUNCIL



WHO ARE WE?

AGENCY FACTS

- Created by the Texas Legislature in 1949
- Governed by Chapter 323, Texas Government Code
- Nonpartisan
- Composed of 14 members:
 - The lieutenant governor
 - The speaker of the House of Representatives
 - The chair of the House Administration Committee
 - 6 senators
 - 5 members of the House of Representatives
- Divided into 4 divisions:
 - Document Production
 - Information Systems
 - Research
 - Legal

AGENCY FACTS, CONTINUED

- During the 84th Regular Legislative Session, the Council had about 375 permanent employees and 80 sessional employees.
- Each session, the Council prepares more than 20,000 documents for consideration and use by the Texas Legislature.
- During the 83rd Regular Legislative Session, the Council's printing department printed nearly 24 million pages of text.
- The Council operates with the goal of each document being as near to perfect as humanly possible.



WHAT DOES THE LEGAL DIVISION DO?

LEGAL DIVISION FACTS

- The Legal Division of the Council provides professional, nonpartisan legal services for all members of the Texas Legislature and the lieutenant governor.
- The Legal Division is composed of approximately:
 - 50 attorneys
 - 15 legal editors
 - 3 legal assistants
 - 4 administrative assistants
 - 2 legal receptionists

LEGAL DIVISION FACTS, CONTINUED

- Legislative draft requests are assigned by subject area.
- Each attorney works in three to five of about 45 subject areas.
- We use a teamwork approach to drafting.
- Each legislative document is reviewed by one or two other attorneys and two legal editors.
- We draft most of the legislative documents prepared by the Council.
- Members are not required to use our services, and Council drafts are not required at any stage of the legislative process.

OUR THEME



MEMBERS

STAFF OF MEMBERS

LOBBYISTS

STAKEHOLDERS

PUBLIC





HOW IS OUR ACCESS TO THE DOCUMENT DETERMINED?

THE IDEAL SITUATION

- What stage of the legislative process is the bill in?
- Amount of time we have to devote to the request

HOW IS OUR ACCESS TO THE DOCUMENT DETERMINED?
THE MORE CHALLENGING SITUATION

- Do we have a request for our services? (Or are we offering our services for some other reason?)
- Purpose of request or the client's goal (Is request made to help or hinder the passage of a particular bill? Has anything changed since the last time we spoke to the client?)
- Relationship and rapport with the individual member's office
- Member's familiarity with the function of TLC (We may need to educate.)

HOW IS OUR ACCESS TO THE DOCUMENT DETERMINED?
THE MORE CHALLENGING SITUATION

- Expectation of member with regard to how quickly language will be turned around
- Expectation of member with regard to how the wording of the bill will be handled ("light touch")
- Interaction with invested third parties ("Don't touch our language!")
- Did we draft every word of the original filed bill? Some of it? None of it?



EGYPTIAN SCRIBE



LEGISLATIVE BRAINSTORM

WHERE ARE WE IN THE LEGISLATIVE PROCESS?

**COMMITTEE SUBSTITUTES
IN THE HOUSE OF ORIGIN**



TIME FOR DEEP RESEARCH
HAS PASSED



HELLO INTERNET SEARCH ENGINES!



NO TIME FOR CONSULTATION



ONLY GET ONE SHOT



LEGAL CHANGES



- One-subject problem or other problems with the constitutionality of the proposed law
- Problems the bill could cause in relation to other state or federal laws
- Alert member to possible issues with germaneness of the proposed committee substitute to the filed bill



INTERNAL MECHANICS



1. Review technical requirements for bill setup, such as:
 - Are we drafting the caption to conform to legislative rules?
 - Does caption accurately reflect content of document?
 - Is existing law set out accurately?
 - Does bill recital language reflect what is being set out?
2. Verify the application of definitions and the accuracy of agency names
3. Check cross-references to sections amended and sections cited
4. Review the impact of transition language and effective dates
5. Effect of statutory construction acts



STYLISTIC CHANGES / READABILITY CHANGES



COMMUNICATION AT THIS STAGE = HIGHLY ROBUST

THE MORE CHALLENGING SITUATION





SHELL, NEW PROGRAMS, LIMITED TURNAROUND TIME



WHERE ARE WE IN THE LEGISLATIVE PROCESS?

FLOOR AMENDMENTS IN THE HOUSE OF ORIGIN



WHAT'S THE SITUATION?

- A bill is voted out of a committee in the first house
- A committee report is printed
- A calendar date may be set for floor debate on the bill
- A member submits a floor amendment request

IMPORTANT POINT: Any member of the house where the floor debate is to occur may request a floor amendment on a bill.





The hour at which a floor amendment request is received may greatly impact our role as attorneys for our clients.

WHEN ARE FLOOR AMENDMENT REQUESTS RECEIVED?

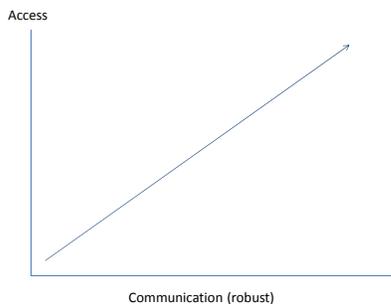
1. Prior to floor debate date
2. Day of floor debate
3. During floor debate

THE IDEAL SITUATION



- When is the situation ideal?
- Why is this the ideal situation?

HOW DOES ACCESS AFFECT COMMUNICATION WITH CLIENT?



THE IDEAL SITUATION



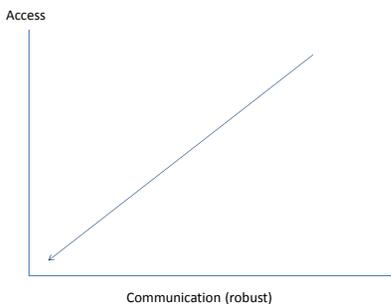
- Collaborative Communication
- Address **LEGAL ISSUES** with the amendment
 - Germaneness – procedural issue
 - Constitutional Concerns– separation of powers issues; one-subject rule
- Address **INTERNAL MECHANICS** of the amendment (i.e., technicalities)
- Make **STYLISTIC CHANGES** to enhance readability

THE MORE CHALLENGING SITUATIONS



- When is the situation more challenging?
- Why are these situations more challenging?

HOW DOES ACCESS AFFECT COMMUNICATION WITH CLIENT?



WHAT'S OUR BASELINE DUTY?

- Baseline Communication
- Address **LEGAL ISSUES** with the Amendment
- Address **INTERNAL MECHANICS** of the Amendment (i.e., technicalities)

DRAFTING DURING FLOOR DEBATE



DRAFTING ON THE FLOOR

- Access at the lowest ebb
- Attorney drafting floor amendment request may be at a disadvantage
- Massive time constraints
- Balance struck between time and quality

How do we fulfill our duty to our client when access to the underlying bill and knowledge about the bill are at their lowest?



We're Waiting!



CONFIDENTIALITY



- Confidentiality is a major concern, particularly when drafting on the floor
- Conversations with members must be kept separate and confidential

WHAT'S OUR BASELINE DUTY?

- Address LEGAL ISSUES
- Address INTERNAL MECHANICS, which are in the most jeopardy at this stage in the process
 - Review amendment, advise client on language, and provide assurances

WHERE ARE WE IN THE LEGISLATIVE PROCESS?

COMMITTEE SUBSTITUTES
IN THE SECOND HOUSE



- **REGAIN** access to entire contents of bill
- Players and stakeholders are **MORE** invested
- Have **SHORT** amount of time to draft

WHAT'S THE SITUATION?

WHAT'S OUR APPROACH?

- Address **LEGAL** problems with the bill
- Smooth out the **INTERNAL MECHANICS** of the bill
- Tread carefully with **STYLISTIC AND READABILITY** changes to the bill





PRO-TIP: When addressing legal problems with the bill, keep in mind that the client is unlikely to be the original requestor of the bill.



WHAT'S OUR APPROACH?

- Address LEGAL problems with the bill
- Smooth out the INTERNAL MECHANICS of the bill
- Tread carefully with STYLISTIC AND READABILITY changes to the bill





PRO-TIP: When smoothing out the internal mechanics of the bill, guard against "document fatigue."



WHAT'S OUR APPROACH?

- Address LEGAL problems with the bill
- Smooth out the INTERNAL MECHANICS of the bill
- Tread carefully with STYLISTIC AND READABILITY changes to the bill



WHAT CAN COMPLICATE THE SITUATION?

- The committee substitute is requested hours before the committee hearing
- This is the first time that a Council draft of the bill has been requested
- The client does not want us to touch language that was voted out of the first house

it's
Complicated

WHAT'S OUR BASELINE DUTY?

- To advise the client about legal problems with the bill
- To smooth out the internal mechanics of the bill, to the extent possible
- To discuss with the client any major problems created by not being able to touch certain language of the bill



WHERE ARE WE IN THE LEGISLATIVE PROCESS?

FLOOR AMENDMENTS
IN THE SECOND HOUSE



- **Lose** access to entire contents of bill
- Players and stakeholders are **MOST** invested
- Have **VERY SHORT** amount of time to draft

WHAT'S THE SITUATION?



Plus, everyone is tired and frantic

WHAT'S OUR APPROACH?

- Address LEGAL problems with the bill
- Maintain the INTERNAL MECHANICS of the bill, to the extent possible
- Make minimal STYLISTIC AND READABILITY changes to the bill





PRO-TIP: When addressing legal problems with the bill, pay particular attention if the amendment is “rolling in” a dying bill into the bill.





PRO-TIP: When addressing legal problems with the bill, pay particular attention if the bill has become a “Christmas tree” for numerous amendments.





PRO-TIP: When addressing legal problems with the bill, be on high alert for drafting instructions that suggest a disconnect between what the client thinks that the bill or proposed amendment does and what is actually happening legally.



WHAT'S OUR APPROACH?

- Address LEGAL problems with the bill
- Maintain the INTERNAL MECHANICS of the bill, to the extent possible
- Make minimal STYLISTIC AND READABILITY changes to the bill





PRO-TIP: Always communicate with the client before addressing an internal mechanics or stylistic/readability issue with the bill that is outside the scope of the amendment.



WHAT CAN COMPLICATE THE SITUATION?

- The amendment is requested on the floor
- The client has very little prior knowledge about the bill
- In order for the amendment to be acceptable to the author, the client does not want us to touch any language in the bill

it's
Complicated

WHAT'S OUR BASELINE DUTY?

- To advise the client about legal problems with the bill
- To ensure that the amendment does not upset the internal mechanics of the bill
- To inform the client about any major problems created by not being able to touch certain language of the bill



WHERE ARE WE IN THE LEGISLATIVE PROCESS?

CONFERENCE COMMITTEE
REPORTS



- Much of the bill is bound by the legislative process and cannot be changed



- What can be changed is generally carefully negotiated and agreed upon

WHAT'S THE SITUATION?

WHAT'S OUR BASELINE DUTY?

- To advise the client about legal problems with the bill, especially violations of the one-subject rule and other flaws that are not shielded by the enrolled bill rule



SUMMARY

The role of the drafting attorney changes as a bill moves through the legislative process because:

- our access to the bill changes
- the time we have to draft committee substitutes and floor amendments is limited
- there are almost always complications that prevent us from discharging our duty in an ideal way

But, at each stage of the process, we still fulfill our baseline duty of providing sound legal advice to, and producing a workable legislative document for, the client.

Questions?

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