Drafting Durable Constitutional Amendments

National Conference of State Legislatures
Atlanta, Georgia, August 14, 2013

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Drafting constitutional amendments is drafting for the ages. This session will focus on how constitutional drafting differs from statutory drafting and will offer techniques to aid drafting amendments that have continuing effectiveness. The session will also discuss the ballot question and the importance of readability by the general public.

I. Overview, history, and purpose of constitutions

a. State constitutions are not miniature federal constitutions

b. Core functions of state constitutions.

c. The constitution establishes the state government and balances power among groups.


e. Judicial doctrines used to interpret statutes that implement the constitution. For example: The enrolled bill rule, the contemporaneous construction rule, and Expressio Unius Est Exclusio Alterius.

II. How drafting constitutional amendments differs from amending statutes

a. Achieving the proper degree of abstraction. The constitution is more abstract than statutes, meaning more removed than statutes from the behavior that it governs. Avoid statutory detail (Amendment-begetting amendments). Unlike statutory drafting, use
general rather than specific language. [Brevity is the key to longevity (McCulloch v. Maryland).] [“Sentences should be long enough to perform their functions.”-J.Stark]

b. Carve it in stone: constitutional amendments must take the long view. You are drafting for the ages. Although technology and social mores change, good constitutional language should work for generations. One trick for testing whether certain language might work 50 years from now is to think about how that language would have worked 50 years ago.

c. Is the constitutional amendment self-executing? You should know how future state governments will carry out the amendment.

d. Effective dates and applicability.

e. Unlike statutory drafting, do not do “clean up.” Leave archaic words in place. Leave the structure alone.

f. While statutes are arranged topically, the constitution contains interrelated threads throughout the document.

g. Questions you should ask the requester.

III. The ballot question and voter readability

a. The ballot question and the brief description must be complete, accurate, and not misleading. Failure to draft the question correctly can vitiate the amendment, State Ex. Rel. Graves v. Brown, 247 N.E.2d 463 (Ohio 1969).

b. Is there a single-subject rule? When to use multiple ballot questions.

c. We all understand the Ramseyer Rule (underscored text is new and stricken text is deleted) but the public might not. Because voter understanding is important, Hawaii prints the text of the amendment on the ballot with stricken and underscored text. Hawaii’s ballots include an explanation of the Ramseyer printing convention.

d. Ballot questions should be written at the 8th grade level—an impossible goal? How to use the Flesch-Kincaid readability test in Microsoft Word.