Legal Thinking for Bill Drafters

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The Legislative Drafter’s Deskbook (2006)

“Junk Drafting”
(Why I Wrote the Book)
demand for bills that can be drafted quickly
HOLC and SLC not able to meet this demand
Outside amateur drafting meets the demand
I investigated ... and got asked
The Key Takeaways

1. Drafting is for lawyers ...
   But even a lawyer needs a lot of specialized training and knowledge.
2. Most of drafting is thinking, not writing.
3. If the thinking is done well, great writing isn’t needed ...
   But if the thinking is not done well, great writing won’t help.

The Two Kinds of Failures

Failures of Communication — generally, can be seen on the page and can be cured by sensible editing
Failures of Imagination — generally, can’t be seen on the page and can be cured only by thinking through the policy

Quotes

“The difficulties of so-called interpretation arise when the legislature has had no meaning at all: when the question which is raised on the statute never occurred to it.”--John Chipman Gray (1909)

“Now what do the courts concern themselves with most? They concern themselves most with problems that the legislature has failed to address itself to.”--Judge Harold Leventhal (1973)
“Intellectually, the draftsman’s skills are the highest in the practice of law. Judges need merely reach decisions; counselors can be bags of wind...

“But the documents survive, and to draw them up well requires an extraordinary understanding of everything they are supposed to accomplish...

“Probably the greatest compliment a lawyer can receive from his profession (a compliment never publicized) is an assignment to draft a major law.”
—Martin Mayer, The Lawyers 50-51 (1966)

“Procedural” Thinking

0. Adopt a posture of skepticism
1. Engage the client
2. Figure out the problem and the objective
3. Research facts and law
4. Ask for details
5. Analyze alternatives
6. Develop a coherent solution
7. Conduct a reality check
“Substantive” Thinking

The statute book
The legislative process
Parliamentary issues
Budget issues
Statutory interpretation
Federal Constitution
State constitution

Statutory Interpretation
For Bill Drafters

A crucial topic ...
But one not covered in training or in drafting books
I spend a chapter on it
Thought it would be easy to find material ... but it wasn’t

Your draft is intended to be read.

It will be read by—
Legislators
Lobbyists
Public officials
Citizens, business people, reporters, scholars.
Courts: the most important audience

Each reader wants to know the effect of the draft.
Each recognizes that the effect is ultimately determined by the courts.

Is Dickerson Right?

“For the draftsman, many rules of interpretation are simply irrelevant... They are irrelevant because the draftsman who tries to write a healthy instrument does not and should not pay attention to the principles that the court will apply if he fails.”
—Reed Dickerson, The Fundamentals of Legal Drafting 54 (1965)

Rules of Interpretation are Important

“It is of paramount importance that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”
—Finley, 490 U.S. 545, 556 (1989)
Rules of Interpretation are Presumed

“It is presumable that Congress legislates with knowledge of our basic rules of statutory construction.”

The Court also presumes that Congress is aware of—

How the courts have interpreted a statute — U.S. v. Alaska, 521 U.S. 1 (1997)
How agencies have interpreted a statute — Lorillard, 434 U.S. 575 (1978)
Scholarly writing about a statute — Holloway, 526 U.S. 1 (1999)

What else does the Court consider?

Text
Legislative context
Social and historical context
Public policy
Dictionaries
Poetry and literature (!)
... really, just about anything they want.
Let’s Recap So Far

The Court presumes that you know ... pretty much everything.

drafting conventions

Oddly, the Court traditionally has not presumed you know anything about your own drafting conventions and drafting manuals. Generally, courts do not consider drafting conventions.

(See, e.g., Jack Stark (1999))

But ... the Court does use its own “drafting generalizations”

“Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.”

—CoBank, 531 U.S. 316, 323 (2001)

“If Congress had meant to set a counterintuitive limit ..., it would have said more than it did.”

drafting generalizations (cont’d)

“When Congress intends to refer to ownership in other than the formal sense, it knows how to do so.” —Dole, 538 U.S. 468 (2001)
“When Congress has wished to create such an addition to the law .... it has done so with much more specificity.” —Dastar, 539 U.S. 23 (2003)

But some generalizations are a trap for the unwary

“Ratification doctrine” or “reenactment doctrine”: If Congress makes a change to one part of a section but leaves other parts alone, there is a presumption that Congress has “ratified” any settled court or agency interpretation of those other parts.

The Court has begun to consider drafting manuals

Koons v. Nigh, 543 U.S. 50 (2004): The Court consulted the House and Senate drafting manuals and other drafting guides for the first time in history. The Court used them to determine that federal drafters conventionally give “subparagraph” a particular meaning, and it applied that meaning.
Drafting manuals considered more than 20 times since Koons

(both Federal Courts)

SCOTUS, twice (Alito & Ginsburg)
1st, 7th (x3), 9th, 11th, DC, Federal Circuits
California (x3), Idaho, Illinois, Indiana (x2),
New York (x2), Ohio, Pennsylvania (x3),
Virginia

What have they found there?

Hierarchy of subdivisions (subparagraph)
Subdivide lengthy provisions
Use the present tense
Write in the singular
Parentheticals can be equivalent of commas
A bill has one title and titles should not be amended (Hawaii)
To create an exception, use “Notwithstanding” (Arizona)

The moral of this story

Justice Breyer, 1992, doubted whether the Court could invent or adopt new techniques of statutory interpretation. Any new technique would “lack the legitimacy provided by continuous judicial use over many years.”

But Court now seems to be creating techniques from continuous drafting use.
The moral of this story

Maybe you should review what’s in your drafting manual — evaluate what it says and how it might be used (or misused).

The Plain Meaning Rule (old)

“Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.”
—Camineti, 242 U.S. 470, 485 (1917)
... unless the plain meaning led to an “absurd result.”—Holy Trinity, 143 U.S. 457 (1892)

The Plain Meaning Rule (modern)

“The plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.”
**The Whole Act Rule**

“Statutory construction ... is a holistic endeavor.”

Look to “the provisions of the whole law” and also to its “object and policy,” “structure,” and “subject matter.”


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**Assume Words Are Used Consistently**

If Congress uses the same term in more than one place, the Court presumes it has the same meaning in each place. *Ratzlaf*, 510 U.S. 135, 143 (1994)

If Congress uses one term in one place and a different term in a different place, the Court presumes that each term has a distinct meaning. *Bailey*, 516 U.S. 137, 146 (1995)

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**Assume Each Word Is Used for a Reason**

The Court’s duty is “to give effect, if possible, to every clause and word of a statute.” *Menasche*, 348 U.S. 528, 538-39 (1955)

A statute “should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Hibbs*, 542 U.S. 88 (2004)
**Assume Provisions Form A Coherent Whole**

When Congress uses particular language in one place but does not use it in another place, the Court presumes the omission was intentional. *Keene*, 508 U.S. 200, 208 (1993)

Specific provisions and general provisions should both be given meaning, with the specific qualifying the general. *Fourco Glass*, 353 U.S. 222, 228 (1957)

**Structural Features**

Purposes, findings, titles, headings: Generally are not used as a guide to meaning unless the rest of the text is ambiguous.

Grammar and punctuation: Generally are used

Organization and arrangement: Generally are used ... but some statutes prohibit (but courts may not be applying those prohibitions)

**Related Statutes**

If statutes relate to the same thing, “they ought all to be taken into consideration in construing any one of them.” *Branch*, 538 U.S. 254 (2003)

The Rest of the Statute Book

“Dictionary Act” — yes
Other laws on interpretation — hit or miss
Consider 15 U.S.C. 2403 — It is the policy of the U.S. to stimulate a high rate of productivity growth, and U.S. laws “shall be so interpreted as to give full force and effect to this policy.”

“Clear Statement” Rules

When “weighty and constant” values (usually constitutional values) are at stake
The Court presumes that Congress does not intend to run roughshod over these values
So it requires a “clear statement” to ensure that Congress “has in fact faced” the issue

“Clear Statement” Rules and States’ Rights

When a law would—
Abrogate state sovereign immunity
Allow a state to be sued for damages
Tell a state how to hire its judges
Impose a condition on a state’s receipt of a federal grant
Preempt state law
Other “Clear Statement” Rules

When a law would—
Waive federal sovereign immunity
Apply extraterritorially
Apply retroactively
Apply without the possibility of judicial review
Apply to the President

Statutes that are to be read “Broadly” or “Liberally”

“Remedial” legislation
Statutes providing benefits to a class of people should be interpreted broadly in favor of the beneficiaries
Statutes that are intended to fill a void in local law enforcement should be interpreted broadly

Statutes that are to be read “Narrowly” or “Strictly”

Statutes establishing evidentiary privileges
Statutory procedures for removal from state to federal court
Laws relating to crime and criminal procedure (rule of lenity) — resolve ambiguity in favor of defendant
Other Legal Issues
For Bill Drafters
There are many. Here are a few.
- Severability
- Reenactment
- Binding a Future Legislature
- Statutory Default Rules (Dictionary Act, etc.)
- What is Positive Law and What is Not
- “Shall” vs. “Must,” and Commands that are Mandatory, Directory, Precatory, or Hortatory

Legislative History:
What Is It?
Reports by legislative committees
Statements on the record by members
Testimony at legislative hearings
Different versions of a bill’s text

Legislative History:
Why Is It Problematic?
The view of only some, not all, members
Tends to be generated not to aid lawmakers but to influence judges, which subverts the process
To drafters—it generally is created after we’ve drafted and is out of our control
**Legislative History:**

**The Rationale**

It may be relevant if it was before the members at the time of the vote and may have influenced their vote.

So ... post-enactment statements are never relevant.

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**OK, so when can it be used?**

- Never!
- Always!

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**The Scalia view**

“I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law.” (p. 31)

“When I was head of [OLC], I estimated that 60 percent of the time of the lawyers on my staff was expended finding, and poring over, the incunabula of legislative history. What a waste.” (p. 36-37)
The Stevens view

“In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’ true intent when interpreting its work product.” (Koons Buick Pontiac GMC v. Nigh, 543 U.S. 50 (2004) (concurring opinion))

Have the courts gone overboard?

“This is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute.”
--Frankfurter in Greenwood, 350 U.S. 366 (1956) [he was being sarcastic]

“The legislative history … is ambiguous. … Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.”
--Marshall in Volpe, 401 U.S. 402 (1971) [he wasn’t]

The practical view

Courts do use legislative history. generally, only when there is more than one plausible meaning.
But sometimes, when there seems to be only one plausible meaning.
So you need to advise your clients accordingly.
“Silence in the Legislative History”
Sometimes relevant!
“Common sense suggests, by analogy to Sir Arthur Conan Doyle’s ‘dog that didn’t bark,’ that an amendment having the effect petitioner ascribes to it would have been differently described by the sponsor.”
—Church of Scientology, 484 U.S. 9, 17-18 (1987)

The drafter’s own opinion about what the statute means
In construing a statute, “it seems to us senseless to ignore entirely the views of its draftsman.”

Justice Stevens, dissenting
“We should be guided by the sensible statement that ‘in construing a statute ... the worst person to construe it is the person responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed.’ ... if the draftsman of the language in question intended it to cover such cases as this one, he failed.”
What does this all mean?

1. It is not enough to make the text plain and clear. The Court does not look solely at the text — so neither can you.
2. You need to have a handle on the legal rules that are in play — and you need to think about how they may operate in your situation.
3. Some of this is outside of your control.

Frank Horack’s Lament (1949)

Courts “have given legislative draftsmen poor guides for future action.”
For the drafter, “the rules of statutory construction are at best, meaningless; at worst, they are unseen and ‘extraconstitutional obstacles’ that he must avoid if possible.”
—Frank Edward Horack Jr. (1949)

Closing Thoughts

Much of this is within your control. But it requires more than plain writing — it also requires legal analysis and legal judgment.

Remember: If the legal and policy issues are thought through properly, great writing isn’t needed; but if they are not thought through properly, great writing won’t help.
Any questions?