THINKING AND WRITING LIKE A LAWYER: WHAT DO WE BRING TO THE TABLE?

I. What others involved in the drafting process bring to the table

II. What the professional drafter is expected to bring to the table

“When you are writing laws, you are testing words to find their utmost power. Like spells, they have to make things happen in the real world, and like spells, they only work if people believe in them.”

-- Thoughts of Thomas Cromwell, in *Wolf Hall*, by Hilary Mantel

WHERE YOU NEED HELP FROM OTHERS

First, understand the job!

It’s important because you want to:
- Satisfy your client (The bill sponsor/A committee/The legislature)
- Make the law as easy as possible for statute users to understand and apply
- Assure that judges will interpret the law in accordance with legislative intent

The bill sponsor gets to define what the bill is going to do, not the drafter. But the drafter needs to understand the sponsor’s purpose if the bill is going to be accurate.

How does the drafter figure out purpose?

Through the process of taking the request
Drafts provided by others
Feedback on your drafts
Information provided by those with whom the drafter is authorized or directed to work
• “Purpose” and “intent” are often used interchangeably
  – Purpose: To solve a current problem that can be articulated
  – Intent: What we mean to do – “Aim, ambition, aspiration, dream, ideal, objective, goal”
• Intent statements – problems of scope
• Intent statements – may or may not coincide with the body of the bill
• Intent statements – problems of the sales pitch

• Judges believe their job is to give effect to the legislature’s intent
• Judges would like the law to indicate what the purpose is
• Judges and legislators think purpose clauses are helpful
• Judges and legislators assume the drafter knows what the purpose is

Source: Colorado Office of Legislative Legal Services, panel of judges and legislators on statutory interpretation

The single most important thing a drafter can ask:

Tell me about the problem you’re trying to solve.

Subject matter expertise

• The drafter probably isn’t the expert.
• The drafter is expected to become knowledgeable.
• Almost anything can be interesting.

What kind of drafting group works best?

Things to consider:

• Confidentiality
• Expertise
• Need for buy-in
• Time constraints

Other questions:

1. Who brought this problem to your attention?
2. Who do you regard as being an expert in this area?
3. Can I contact these people?
4. Have the media covered this issue?
Reviewing preliminary drafts

• Avoid embarrassing mistakes
• Establish a schedule and deadlines
• Share the drafting manual
• Be willing to review the drafts of others

**Takeaways**

• Don’t be intimidated; it’s okay to ask questions.
• Be confident about what you know; be honest about what you don’t know.
• People love to be asked for advice. People don’t like to feel as if you’re asking them to do your job.

**Clarity**

“A good writer is one you can read without breaking a sweat. . . . Yet we’re brainwashed to believe that the more brilliant the writer, the tougher the going.

“The truth is that the reader is always right. Chances are, if something you’re reading doesn’t make sense, it’s not your fault – it’s the writer’s. And if something you write doesn’t get your point across, it’s probably not the reader’s fault – it’s yours. Too many readers are intimidated and humbled by what they can’t understand, and in some cases that’s precisely the effect the writer is after. But confusion is not complexity; it’s just confusion.

“...A venerable tradition, dating back to the ancient Greek orators, teaches that if you don’t know what you’re talking about, just ratchet up the level of difficulty and no one will ever know.

“Don’t confuse simplicity, though, with simplen mindedness. A good writer can express an extremely complicated idea clearly and make the job look effortless. But such simplicity is a difficult thing to achieve, because to be clear in your writing you have to be clear in your thinking.”

Patricia T. O’Conner, Woe Is I
(emphasis supplied)

WHAT THE DRAFTER BRINGS

1. Writing skills

Perfect spelling, grammar, and punctuation (of course)

• Most drafting is thinking, not writing.
• If the thinking is done well, great writing isn’t needed. But if the thinking is not done well, great writing won’t help.

Toby Dorsey, Presentation on Legal Thinking for Bill Drafters, October 2012
Thinking about what?

– Subject matter
– Statutory and constitutional framework (the legal stuff)
– Organization
– How the law will work
– Does this make sense?

Things to establish, maintain, and reemphasize:

• Editing process
• Legal review
• Writing training for drafters and editors
• The importance of the practical dimension

2. Specific legislative drafting skills

• Knowledge of the statutes

  What is current law
  How the new law will fit into current law
  Standard language, and when to use it
  Statute-wide definitions

• Knowledge of drafting conventions

  Required elements of bills
  How bills are organized
  Amending clauses
  Appropriation clauses
  The art of drafting titles
  Drafting Manual

3. Knowledge of state government

  The organization chart
  Budget process and timetable
  Standard procedures (e.g., administrative procedures act, criminal penalties)

4. Knowledge about the history of an issue in the legislature

  Differences from prior bills
  Why prior bills failed
5. Knowledge of the legislative process

- Constitutional requirements
- Legislative rules
- Legislative deadlines
- Customs and traditions

6. Legal skills

- Identify state and federal constitutional issues

Statutes are presumed constitutional.
If possible, courts will construe a statute in a manner which is consistent with the constitution.

- Take into account existing case law interpreting the statute

Courts presume the legislature (read: the drafter) knows how current law has been interpreted.

“... when interpreting legislative amendments we assume the General Assembly is apprised of existing case law.”
Montez v. People, P.3d (Colo. 2012)

- Be aware of how the rules of statutory construction will be applied to the law

- If the meaning is plain, there is no need to apply the rules of statutory construction.
- When the legislature amends a statute, it is presumed that change was intended.
- Read everything together.
- If there is an apparent conflict, read the specific as an exception to the general.
- In case of conflict, the later statute prevails.
- Avoid absurd results.

There are problems with the canons of statutory construction:

- For every canon, there’s an equal and opposite canon.
- Prof. Paul Campos, University of Colorado School of Law: There’s really only one canon: In interpreting statutes, try not to do anything really stupid.

Richard A. Posner, 50 University of Chicago Law Review 800, Spring 1983:

“... There is no evidence that members of Congress, or their assistants who do the actual drafting, know the code or that if they know, they pay attention to it. Nor, in truth, is there any evidence that they do not. ... Probably, though, legislators do not pay attention to it, if only because ... the code is internally inconsistent. We should demand evidence that statutory draftsmen follow the code before we erect a method of interpreting statutes on the improbable assumption that they do.”
• Despite the opinions from academia, the cases are replete with references to the rules of statutory construction and to the presumption that laws are drafted against a background of those rules.

— Courts tend to cite case law about the rules of statutory construction, not statutes that codify the rules.

• Understand how courts apply legislative history

  The “belt and suspenders” approach to statutory interpretation

  — Writing clearly isn’t always enough
  — The legislature (and the drafter) can’t anticipate everything

• Legislative history helps determine legislative purpose/intent.

  — Bill analysis
  — Versions of the bill
  — Members’ statements on the record
  — Testimony at hearings
  — Drafter’s statements??
  — NOT post-enactment statements

“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.”

  Justice Frankfurter,
  Greenwood v. United States,
  350 U.S. 366, 374 (1956)

7. Make the bill work in the real world

  — Timing
  — Implementation
  — Financing
  — Procedures
  — Good judgment
What steps must be taken to implement the bill?

- Who will take these steps?
- When are steps to be taken?
- In any particular sequence? How long will each step take?
- What information is needed before a step is possible?

- What appropriations are required? Is new staff required?
- Can all parts of the bill take effect at the same time? Will a phase-in be required?
- Are there any issues of retrospectivity?

Common problem areas:
- Licensing a new profession or occupation
- Toughening licensure requirements
- Imposing a new tax (or increasing an existing tax) and dedicating the new revenues to a specified purpose
- Imposing new regulatory measures
- Changes that affect people with contract or permit rights
- Enhanced criminal penalties triggered by multiple convictions
- Income tax modifications enacted mid-year
- Imposing new requirements on a certain age group

- Draw a timeline:

<table>
<thead>
<tr>
<th>New program enacted</th>
<th>Appropriations become available</th>
<th>Board approved - staff hired</th>
<th>Bill adopted</th>
<th>License applications accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>5/15/13</td>
<td>7/1/13</td>
<td>9/15/13</td>
<td>12/1/13</td>
<td>1/1/14</td>
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</tbody>
</table>

On and after xxxx, 2014, no person shall practice yyyy without a license.

Effective date and applicability clauses

- **Effective date:** This act takes effect July 1, 2013.
- **Applicability:** This act applies to applications for new licenses or for license renewal filed on or after January 1, 2014.
- **Combination:** This act takes effect July 1, 2013, and applies to applications for licenses filed on or after January 1, 2014.

Thomas Cromwell drafts the statute defining the line of succession to the throne, from *Wolf Hall*