

# 1

## Drafting Is Rule Creation

### § 1.1 Drafting is Different from Legal Writing

Law is made up of rules together with the ideas that surround them, such as the policy or goals that rules are intended to accomplish. Rules govern behavior.

**Drafting is creating and expressing legal rules.** All drafted documents that govern people — including statutes, contracts, administrative regulations, court rules, bylaws, local ordinances, injunctions — are collections of rules.

A *public rule* governs everyone within its scope. A legislature, for example, enacts a statute requiring every person who drives on a public road or street to get a driver's license. When enacting a statute, the legislature chooses goals. Legislative drafters, typically staff attorneys, find the words to express rules that will accomplish those goals.

Or rules can be *private* in a contract, governing only the parties to that contract. A contract is a set of rules that the parties have agreed to be governed by during their transaction. By agreeing to the contract, the parties have created the equivalent of their own private statute. A lawyer, or two lawyers (one for each party), translate that agreement into rules and find words that express those rules.

Statutory rules and contract rules are similar but not identical in structure. If you know how to draft a statute, you know most of the skills needed to draft a contract. The reverse is also true. If you know how to draft a contract, you are close to knowing how to draft a statute. The differences are explained in later chapters.

**How legal drafting differs from legal writing.** Legal drafting is rule *creation*. Legal writing is rule *explanation*. Here are some examples of the documents in each category:

Legal Writing	Legal Drafting
office memoranda motion memoranda appellate briefs judicial opinions client letters demand letters other <i>analytical</i> or <i>persuasive</i> documents	contracts statutes local ordinances administrative regulations court rules organizational bylaws other <i>governing</i> documents

*Legal writing explains* rules that the writer did *not* create. An office memo, for example, explains how a court would interpret a governing document such as a statute or contract. An appellate brief persuades a court to interpret the statute or contract favorably to the writer’s client. Legal writing does not craft the rules that appear in the statute or contract. Instead, legal writing explains how these rules govern.

*Legal drafting creates* legal rules. A statute or contract is drafted. The legal drafter constructs the rules, while other lawyers might later write memos or briefs to explain those rules.

Drafting is difficult to learn because most law students have never created a rule. Legal education has traditionally focused on legal writing rather than legal drafting, even though drafting is an essential skill for all lawyers. Indeed, “[l]egal drafting is a form of preventive medicine.”<sup>1</sup>

## § 1.2 What is a Rule?

**Definition.** Speaking generally, a *rule* is an idea or concept. While rules can be expressed in various ways in different disciplines, legal rules are almost always expressed in words. More specifically, a legal rule is a linguistic expression commanding behavior, granting authority, defining a term, or declaring something. A rule can take the form of a contract term, a corporate bylaw, a statute, a regulation, a jury instruction, a judicial order, or an appellate court’s mandate to a trial court or administrative tribunal.

When lawyers write, they generally think about communicating information to someone else in written form. But a legal rule, as this book uses that term, is neither predictive nor persuasive. Rather, a rule is a directive that tells the audience what to do and how to do it. Or a rule can tell those it governs what *not* to do, or what might happen if a rule is violated.

1. Brian Mattis, *Reed Dickerson’s Contribution to SIU’s School of Law*, 16 S. ILL. U. L.J. 585, 587 (1992).

We use the term *legal drafting* to mean the specialized skill of creating legal rules. While many lawyers use the term in its broadest sense to describe legal writing generally, including rhetoric and narrative, we use the term in the narrower sense defined by *Black's Law Dictionary*: “The practice, technique, or skill involved in preparing legal documents — such as statutes, rules, regulations, contracts, and wills — that set forth the rights, duties, liabilities, and entitlements of persons and legal entities.”<sup>2</sup>

**Function.** Rules take many forms and have many functions. For example, legal rules establish agencies or other organizations, authorize action, define terms, create obligations or duties, prohibit conduct, guide decisions, or impose sanctions. In contracts, rules establish and govern voluntary relationships between or among parties. In statutes, rules often represent compromises between competing public policies that result in regulating conduct or imposing affirmative duties. Statutes obligate taxpayers, appropriate public revenues, regulate commerce, impose consequences, or prohibit certain behavior. A government agency’s administrative regulations, if issued according to specified procedures, govern conduct by entities within the scope of the agency’s regulatory jurisdiction. In turn, the agency’s jurisdiction is defined by the organic statute that establishes the agency and delimits its authority. Courts issue rules that govern civil litigation, criminal procedure, admission of evidence, and court records. Wills and trusts are specialized rules that govern the distribution, investment, and management of testators’ or settlors’ property. For a will or trust to give proper effect to a testator or settlor’s intent, the document must be drafted, verified, and witnessed according to statutory formalities.

The client or drafter’s goals determine a rule’s function. To solve a client’s problem, an effective lawyer must understand how to identify the client’s goals, and how to properly structure a rule that most effectively accomplishes what the client wants. Sometimes rules appear to grant discretion but in fact impose an obligation. Rules that appear to be merely declarations can actually prohibit certain kinds of conduct. A lawyer must be able to identify not only a rule’s structure, but also what the rule does and how it operates. Rules can be structured in different ways to accomplish a variety of functions, depending upon the client’s needs and the specific circumstances.

Knowing how to draft a rule well requires a deep understanding of the power and meaning of words. Drafting rules effectively requires precise thinking, careful word choice, impeccable judgment, and analytical accuracy.

## § 1.3 Legal Drafting: A Specialized Skill

Rule drafting is a specialized skill, distinct from general legal writing skills. While the differences in the function and operation of various kinds of legal

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2. BLACK’S LAW DICTIONARY 508 (Bryan A. Garner ed., 7th ed. 1999).

rules are significant, the drafting techniques for all legal rules are surprisingly similar. And those drafting techniques differ in important ways from the techniques lawyers use in objective and persuasive legal writing.

The traditional law school curriculum included few if any courses in drafting. But in the last two decades, drafting courses have taken an increasingly important place in most law school curricula. A recent survey of law schools undertaken by the American Bar Association demonstrates that between 2002 and 2010, legal drafting courses grew in number more than any other category of law school course.<sup>3</sup> Students and alumni alike value courses that teach fundamental skills, including drafting, that most practicing lawyers use on a daily basis.

## § 1.4 Rule Sources and Categories

Rules are everywhere. Parents issue rules to govern a household. They set curfews and bedtimes, and they impose rules on where and when teenagers in the family can drive the family car. Road signs give rules of the road to protect the safety of travelers and pedestrians. Recipes list the ingredients and give the sequential instructions for preparing food. Board games come with rules that players read and follow when playing the game and keeping score. Model car and airplane kits come with instructions that explain how to build scale models. Knitting and sewing patterns are composed of rules the reader follows to reach the desired outcome.

Everyone learns to live with rules. But where do all those rules come from? We all live with many rules that nobody thinks of as legal rules. But the rules that govern daily living have the same function and underlying structure as legal rules. The drafting principles we explain in this book can be applied to analyze any kind of rule.

Legal rules can be divided into two major categories based on their origin, effect, and audience: public rules and private rules. Public rules are the products of governmental entities, and they generally reflect important public policies. Private rules, on the other hand, are the product of negotiations and agreements among private parties. Some private rules operate more like public rules than others. For example, a non-profit corporation's bylaws govern a private organization's internal operations, much like state statutes govern every corporation that conducts business in that state.

While the differences between public and private legal rules are significant, the drafting techniques for each category are surprisingly similar. Because both categories have much in common structurally, this book explains the general drafting skills that apply to both categories and their many variations.

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3. AM. BAR ASS'N, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010, Executive Summary 16 (Catherine L. Carpenter ed., 2012) In 1992, only 31 law schools taught courses in contract or transactional drafting. By 2010, that number had nearly quadrupled to 122. AM. BAR. ASS'N, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010, at 78 & fig.64 (Catherine L. Carpenter ed., 2012).

### § 1.4.1 Public Rules

Public rules are enacted or issued by public entities. They include state and federal constitutions, statutes, local ordinances, administrative regulations, court rules, and similar rules. Public rules, by their very nature, must be enacted or adopted by authorized public bodies or entities. Most public rules operate both generally and prospectively.

Public rules are necessarily general in scope and application. While public rules sometimes represent ideas or concerns that originate in particular circumstances, often they reflect broad public policy preferences or goals. For example, if a state values its agricultural heritage and seeks to preserve the traditional way of life of small family farmers, the state legislature might enact a tax preference to reduce the property tax burden on small family-owned farms. Another state whose economy depends heavily on manufacturing and commerce might do something similar to encourage businesses to build manufacturing plants in the state and to create new jobs.

Lawmakers cannot anticipate every possible future circumstance to which a statute or ordinance might apply. Once enacted, public rules are almost always forward-looking — they apply prospectively to future circumstances rather than retroactively. And those governed by a public rule might or might not be consciously aware of the rule that governs their conduct; yet the law generally presumes that everyone is on constructive notice of the law.<sup>4</sup>

In one sense, public rules also include common law judicial rulings. A court is a public entity that has jurisdiction or power to adopt common law rules, as long as they are consistent with relevant constitutional and statutory provisions. But judge-made common law rules are formulated to resolve disputes involving the litigating parties' particular facts and circumstances. At least in the sense we define the terms, American courts do not draft rules that govern conduct prospectively. Instead, judicial decisions resolve disputes in particular facts and circumstances, and common law rules evolve over time as a result of the process used by lawyers and judges to synthesize rules from a pattern of judicial holdings in factually analogous cases.

While lawyers regularly debate the meaning and applicability of common law rules, judicial precedents are the result of inductive reasoning about the law as it evolves from litigating disputes involving particular parties and specific facts. But legal drafting is a deliberative process lawyers use to create generally applicable rules by identifying current problems, anticipating future problems, and resolving those problems without resorting to litigation. The specific individuals to whom a public rule will apply in the future are unknowable at the time the rule is drafted. Once circumstances occur that trigger the rule's application, deductive reasoning best describes how it will operate.

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4. *Parker v. Levy*, 417 U.S. 733, 751 (1974) (referring to "the ancient doctrine that everyone is presumed to know the law").

### § 1.4.2 Private Rules

Contracts, corporate and association bylaws, wills, and trusts are all governing documents based on private rules.

A contract requires a party to do certain things and empowers that party to do other things. A legislature, on the other hand, enacts statutes to govern everyone and gains that authority through elections. Two contract parties can agree to private rules to govern their transaction, and they gain that authority through a meeting of the minds (often via offer and acceptance) combined with a trade that the law calls mutual consideration. A contract governs only its parties with the sole exception that some contracts confer rights on third-party beneficiaries. A contract cannot impose requirements on anyone who is not one of the contract's parties. A contract rule looks very much like a statutory rule, and the two operate similarly. The few differences are explained later in this book.

Corporate and association bylaws govern an organization's internal operations. A corporation or association is controlled by three collections of rules. One is public law: federal and state statutes and regulations that govern all corporations, together with common law rules that govern everyone, including legal entities. The second is the corporation's own bylaws that govern its internal operations. The third is the transaction-specific contracts that result from negotiations between the corporation and other parties.

A will is a set of rules that govern the conduct of an estate's executor or administrator as well as the distribution of the estate's assets to heirs. A trust is a set of rules that govern the conduct of the trustee for the benefit of the named beneficiaries. The rules are created unilaterally by the person whose property will enter the estate or trust. That person has authority to adopt those rules because anyone can dispose of her property in any way she pleases. But for the rules to be enforceable, the will or trust must follow statutory formalities and other legal requirements.

## § 1.5 Three Types of Rules

A comprehensive, rule-based approach to drafting legal rules requires that we first define the basic building blocks for all rules, whether public or private.

### § 1.5.1 Duties (and Rights)

**Duties.** A duty requires someone to do something or to refrain from doing it. Lawyers and judges sometimes use the terms *obligation* or *mandate* to describe a duty. The following phrases all impose a duty on the actor to do X:

Actor shall do X.  
Actor is required to do X.

Actor is obligated to do X.  
 Actor is mandated to do X.

The most concise way to express the duty is with *shall*. (Drafters have differing opinions about *shall*, which Chapters 10 and 14 explain.)

A duty can be *affirmative* (someone is required to do something) or *negative* (someone is required *not* to do something). A negative duty can be expressed by adding the word *not*: “shall not do X.” This is a prohibition.

Duties are expressed by using modal verbs<sup>5</sup> of command, such as *shall*, combined with another verb that specifies the action required or prohibited. In this book, modal verbs are considered operative terms. They make the rule operate.

A duty is completely expressed only if a reader knows exactly *who* has the duty and exactly *what* that person is required to do or not do. To impose a duty properly, the legal rule must identify the actor who has the duty as well as the action required. You can create a duty using this basic formula:

Duty = Actor + Operative Term + Action Commanded

**Rights.** If a duty is for someone else’s benefit, that person often (but not always) has a right to have the duty performed.

In a contract, every duty has a corresponding right because contract parties mutually agree on rules for each other’s benefit. For example, in a lease for an apartment, a tenant has a duty to pay rent to the landlord no later than the first day of the month. And the landlord has a right to receive the money by that date each month. In return, the landlord has a duty to keep the hallways safe and to maintain kitchen appliances in good working order. And the tenant has a right to safe hallways and a functioning stove and refrigerator.

But not all statutory duties create corresponding rights. For example, statutes generally require homeowners to pay property taxes every year to help finance public schools. The homeowner has a duty to pay property taxes, even if no school-age children live in the household. But the homeowner’s duty to pay taxes does not give her a correlative right to attend public school. Nor does it give schoolchildren a right to the homeowner’s tax payments. To give another example, a criminal statute might prohibit a pedestrian from crossing a street against a red light. But that negative duty does not give a driver the right to proceed into the intersection without taking precautions to avoid hitting someone who happens to step into the crosswalk against the red light.

In general, the best way to draft a rule creating a right is to impose a duty on someone else. A rule that simply creates a right for someone cannot be enforced unless the rule has identified an actor who must do something for the person the drafter intends to benefit. The rule need not express the right nor identify a

5. Modal auxiliary verbs, also known as “helping” verbs, join with basic verbs “to add specific shades of meaning” that indicate mood or tense. *Altizer v. Commonwealth*, 757 S.E.2d 565, 568 (Va. Ct. App. 2014) (citing MARY BARNARD RAY & JILL J. RAMSFIELD, *LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN* 452 (2010)).

specific beneficiary as long as the rule properly imposes the duty on an appropriate actor whom a court can hold liable if the duty is not performed.

### § 1.5.2 Discretionary Authority

Authority is the power to act, but without the duty to act. Discretion is the power to decide whether to act or not. The combined term *discretionary authority* is the power to decide whether or not to do something, but without an obligation either way. Discretionary authority is sometimes expressed as permission. The clearest and most concise way to grant discretionary authority is with the operative term *may*.

You can create discretionary authority using the following formula:

$$\text{Discretionary Authority} = \text{Actor} + \text{Operative Term} \\ + \text{Action Authorized}$$

Suppose you drive 63 miles per hour on a highway with a posted speed limit of 55. A police car comes up behind you, lights flashing. You pull over and stop at the roadside. A police officer walks up to your car window, and you anxiously await the consequences. If police officers have a duty to issue a speeding ticket to any driver who exceeds the posted speed limit, this officer has a duty to give you a ticket, and you will definitely receive one.

But if police officers have discretionary authority about issuing speeding tickets, you might receive a ticket — or you might not. This police officer (*the actor*) may (*operative term*) issue a ticket (*action authorized*). Her discretionary authority also allows her *not* to give you a ticket. She has the power to decide what to do and to act on her decision either way. The officer might say, “I’m giving you a warning rather than a ticket this time. But don’t do it again. We’re tough on speeders in this county.” If she says that, you will be relieved by the way she exercised her discretionary authority. But that does not give you a right not to be ticketed. The discretion rests with her alone.

In drafting discretionary authority, you would not write that police have a right to choose between issuing or not issuing speeding tickets. Discretionary authority is not the same as a legal right in the sense that drafters use that term. Authority is power or permission to do something or not; it conveys neither a right nor a duty to anyone. A right is the counterpart of a duty. Drafting a rule that creates a right necessarily means that someone else must have a duty to give effect to the right. Giving someone discretionary authority does not give anyone a right — not even the person who has the discretionary authority.

### § 1.5.3 Declarations

A declaration is a statement declaring that something is true. Declarations can take several forms. One example is a definition — a rule that expresses the



meaning of a legal term. Another is a rule specifying the minimum or maximum prison term a judge must impose on someone who has been convicted of a crime. While the concept of a declaration appears straightforward, a declaration in the form of a legal rule can have a powerful effect when used in conjunction with other rule structures.

For example, in most criminal statutes, declarations are used to create crimes. Those declarations are accompanied by other statutes, also declarations, that specify penalties for those convicted of certain crimes. And other statutes grant discretionary authority and duties to police, prosecutors, judges, juries, and parole and prison officials to act when evidence proves that someone's behavior matches the declaration that created a crime.

To create a declaration, use *is* or *are*, or some other form of the verb *to be*, as an operative term. For example: "Fracking *is* a misdemeanor in this state." If the declaration defines a legal term, the operative term can be *means*.

You can create a declaration with this formula:

Declaration = Subject  
                   + Operative Term (a form of the verb *to be* or *means*)  
                   + Predicate Noun (the thing declared)

Here is an example: Fracking (*subject*) *is* (*operative term*) a misdemeanor (*predicate noun*).

## § 1.6 Adding Tests, Conditions, and Exceptions

Tests and conditions are two names for the same concept: a contingency — or group of contingencies — that must be true or must occur to activate a rule.

Many tests and conditions are expressed as clauses beginning with the word *if*. The following terms all mean the same thing: *conditioned on*, *conditional on*, and *subject to* a test or condition (or group of conditions). In a contract, contingencies are called conditions; they are not called tests, even though the two words mean essentially the same thing. In other legal fields, both words are used to describe the same concept. If the test or condition is not met, the rule does not operate. Another way of saying the same thing is that the test or condition is a prerequisite for the rule to apply.

An exception operates as a reverse condition. It deactivates the rule. If the facts satisfy an exception, the rule does not apply. Many exceptions are expressed by adding a clause beginning with *unless* or *except* to the general rule.

Think of tests, conditions, and exceptions as on/off switches attached to rules. Satisfying a test or condition turns a rule on. Satisfying an exception turns a rule off.

A rule can be subject to *both* a test or condition *and* an exception. If a rule has both, satisfying the test or condition would turn the rule on. But satisfying the exception would turn it off again, and it will stay off.

Let's go back to the police officer who stopped you for speeding in § 1.5.2. Suppose she says, "I can give you a warning because you exceeded the speed limit by less than 15 miles per hour. If you had been driving 70 miles an hour where the posted limit is 55, I'd have to give you a ticket because yesterday we got a departmental policy directive saying that."

Here's the translation: The departmental policy imposes on the officer a duty to issue a ticket, but only if a condition is met. *If* a driver exceeds the speed limit by 15 miles per hour or more (*a condition*), the officer is *required* to issue a speeding ticket (*a duty to act*). But the same departmental policy allows her to skip giving a ticket if another condition is met. *If* a driver exceeds the speed limit by less than 15 miles per hour (*a condition*), the officer *may* issue a speeding ticket (*discretionary authority — the power but not the obligation to act*).

A test or condition can be rewritten to become an exception to a rule. For example, a departmental directive might generally require a police officer to issue a speeding ticket (*a duty*) if a driver exceeds the speed limit (*a condition*), unless the driver exceeded the posted speed limit by less than 15 miles per hour (*an exception*).

At first, it might seem that conditions and exceptions have the same effect, but the distinction between them is important in legal drafting. For example, assume a statute authorizes a civil claim for injunctive relief if a plaintiff's facts satisfy a list of elements. Each element would be a *condition* for securing the injunction. If any element is not satisfied, the statute authorizing the court to grant an injunction never operates, so the plaintiff cannot obtain the desired injunction. That means a defendant could challenge the plaintiff's entire claim simply by arguing that one of the elements cannot be satisfied. Each element acts as a condition for stating a claim for injunctive relief.

But now consider the statute of limitations for the civil claim. The plaintiff does not need to demonstrate that her claim was filed within the statute of limitations to state a claim for injunctive relief. All she must do is allege facts to support each element — each *condition* — for stating the claim. The statute of limitations has the same effect as an *exception* to the statutory rule. The exception deactivates the statutory rule giving the plaintiff a claim for injunctive relief. In this example, the statute of limitations is an affirmative defense because the defendant must assert and prove each element of the exception.

As a general rule, a condition in a rule must be satisfied by the party who wants the rule to operate. An exception must be satisfied by the party who wants to prevent the rule's operation.

## § 1.7 Do Not Confuse a Duty with a Condition

Duties and conditions both put pressure on someone regarding action. But they are entirely different. The difference is in the consequences of not complying.

**Consequences of breaching a duty.** If a duty is imposed on you, and if you do not comply with it, something bad will happen. The consequences differ from one duty to another, but you already know some of the most basic ones.

You have a common law duty to behave with reasonable care. If you breach that duty, you will owe damages for negligence to anyone proximately injured by your breach. (You learned this in Torts.)

Suppose you contract with someone. The contract includes a duty for you to do X by a certain date. If you do not do X, you will owe damages to the other party. (You learned this in Contracts.)

Suppose you earn taxable income. You have a duty to pay the tax no later than April 15 of the following year. If you breach this duty, you will owe interest and penalties to the Internal Revenue Service. (You knew this before you came to law school.)

**Consequences of not satisfying a condition.** If a rule is conditioned, failure to satisfy the condition means the rule is not activated. For example:

To obtain a parade permit, an applicant must pay a \$300 fee to the city clerk.

If you want to hold a parade, you *feel* obligated to pay the fee. But regardless of how you feel about it, you have no duty here.

The fee is a condition. If you fail to pay it, you will not be in trouble the way you would if you had not performed the duty to pay your taxes. The city clerk will not sue you or attach your assets to collect the fee. Instead, you will not get what you want — a parade permit.

In your own mind, you might put both paying IRS and paying the city clerk in the category of *must do*, or in this instance, “must pay somebody.” You feel obligated to pay, and you might worry about what happens if you do not. Similar acts — writing a check and mailing it — might be involved.

But there is a fundamental difference. You owe tax to IRS because you have a *duty* to pay it, and if you do not perform that duty, bad things will happen. But you do not “owe” money to the city clerk.

In fact, the city clerk is the one with the duty — not you. And the city clerk *owes that duty to you*. If you pay the fee, the city clerk is legally required to issue a permit to you. A statute or local ordinance would contain a sentence like this:

The city clerk shall issue a permit, license, public record, or other document to which a person is entitled if that person has paid the fee.

When you pay the fee, you satisfy a condition and activate the clerk’s duty. If the clerk does not perform it, you can get a court to order the clerk to issue the permit.

To distinguish a duty from a condition or test, consider the consequences if the actor does not comply. Failure to perform a *condition* — for example,

the condition that you pay a fee—means that the rule subject to the condition is not activated and remains dormant. Failure to perform a *duty*—such as the clerk’s duty to issue a permit—makes the person who has the duty legally liable for the failure and subject to action by a court or other authority.

## § 1.8 The Four Things You Can Do in a Statute

A statute can do any of the following:

1. Impose a *duty* on someone
2. Give someone *discretionary authority*
3. Make something true with a *declaration*
4. Attach a *test, condition, or exception* to a duty, discretionary authority, or declaration

When asked to draft a statute, you will translate everything legislators want to accomplish into one or more of these four things. Each is a tool for accomplishing legislative goals. They are your legislative toolkit.

Each type of rule is represented in statutes. For example, if you want to drive on a public street, a statute requires you to obey the speed limit (a *duty*). A public street is defined as a government-owned passageway for vehicles that is open to the public (a *declaration*). You are allowed to park your car on a public street (*discretionary authority*). But on certain public streets, parking is limited to drivers who pay in advance at a meter (a *condition*).

Each rule type is also represented in the common law. Every case you read in law school involves some combination of duties, discretionary authority, declarations, and conditions or tests. Any single case might not include them all, but every case involves at least one rule type, and often more.

Statutes are drafted, but the common law is not. Common law is the sum of all the relevant cases, written by judges acting in different years and sometimes different centuries. On the other hand, a statute is a single document drafted by one or more people working together in one effort, and ultimately enacted by a legislature. The statute might be amended later, but each amendment would be a single drafting effort.

In the process of drafting a statute, legislators explain what they hope to accomplish, and the drafter uses a combination of duties, discretionary authority, declarations, and tests or conditions to create a document—the statute—that does what they want. A statute drafter solves all legislative problems with these four tools and no others. The limited number of available rule types can make statute drafting seem deceptively easy because the drafter must master only four tools. But that actually makes statute drafting more difficult because

learning how to apply each one effectively is both strategically and analytically challenging.

A drafter must use the four tools wisely and express them perfectly. Otherwise the statute can misfire. For example, if the statute imposes a statutory duty when it should have imposed a condition on discretionary authority, fewer people will probably comply with what the legislature wanted them to do. Or if the statute expresses a rule ambiguously, litigation is likely between those who think the statute's words mean one thing and others who think the same words mean something else. After the legislature has enacted the statute, courts will ignore a drafter who tries to tell them what the legislature meant.

Legislative drafting is not limited to Congress and state legislatures. Every county, city, town, and other local government with the power to enact local ordinances has lawyers on staff or on retainer to draft them. And administrative agencies at all levels of government adopt rules and regulations to carry out the authority that statutes confer on them. Courts also adopt many rules to govern the litigation process, as you have already learned in your Civil Procedure course.

## § 1.9 The Six Things You Can Do in a Contract

Think of a contract as something like a private statute. By reaching an agreement — a meeting of the minds, often through offer and acceptance — the parties create rules to govern themselves. A legislature can enact rules governing everybody because a constitution gives it that power and because voters elect legislators. Similarly, contract parties have the power to create rules governing their own transaction because they mutually agree to make them.

When you draft a contract, you can do the same four things you can do in a statute. You can impose duties (or prohibitions) on the parties. You can give them discretionary authority. You can make things true by declaring them. And you can limit any of these with conditions, as tests are known when they appear in contracts.

In a contract, you can also do two other things. You can have a party *represent* a fact. And you can have a party *warrant* a fact. Every transaction is a mixture of opportunity and risk. Contract parties use representations and warranties and other tools to manage risk. These concepts are explained in later chapters.<sup>6</sup>

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6. Statutes sometimes include legislative findings, which might appear similar to representations. However, legislative findings are simply declarations that help explain the legislature's policy reasons for enacting the statute. They are not representations in the contract sense that we mean here.

## EXERCISE

### Exercise 1-A. Basketball in Court

Read this case and answer the questions that follow.

**MENORA v. ILLINOIS HIGH SCHOOL ASS'N**  
683 F.2d 1030 (7th Cir. 1982)

Posner, Circuit Judge.

Interscholastic high school sports in Illinois, including basketball, are conducted under the aegis of the Illinois High School Association. . . . A rule of the Association forbids basketball players to wear hats or other headwear. . . .

[Rule 2-2 in the Association's 1980-81 rule book reads as follows: "The referee shall not permit any player to wear equipment which, in his or her judgment, is dangerous to other players. . . . Head decorations, headwear, or jewelry are illegal."]

This rule is challenged in the present case as an infringement of the religious freedom of orthodox Jews. According to a stipulation between the parties, orthodox Jewish males are required by their religion "to cover their heads at all times except when they are (a) unconscious, (b) immersed in water or (c) in imminent danger of loss of life." There is no exception for playing basketball. [Traditional Jewish law requires a head covering, in the district court's words, "as a sign of respect to God."] Orthodox Jews who play basketball comply, or at least try to comply, with this requirement by wearing yarmulkes (small skull caps that cover the crown of the head) fastened to the hair with bobby pins. Ordinarily a yarmulke just perches on the head; the bobby pins are an acknowledgment of the yarmulke's instability on a bobbing head. But bobby pins are not a secure method of fastening; yarmulkes fastened by them fall off in the heat of play with some frequency.

The Association has interpreted its rule to forbid the wearing of yarmulkes during play; and the plaintiffs in this lawsuit . . . contend that this interpretation forces them to choose between their religious observance and participating in interscholastic basketball. . . .

[It is uncontested that the Association is acting as an arm of the state for First Amendment purposes.] Although the Association is nominally a private organization, public high schools comprise the bulk of its membership and dominate its decisionmaking. . . .

[The Supreme Court has interpreted the First Amendment's free exercise clause] to require the government, when it can do so without too much cost or inconvenience, to bend its regulations — even when they are secular, general, nondiscriminatory, and do not forbid but merely burden a religious observance — to spare religious people the painful choice between giving up a part of their religious observance and giving up a valuable government benefit. . . .

[This requires] a comparison of two burdens: the burden on the person who is seeking a government benefit of being denied the benefit as the price of observing his religion, and the burden on the government of extending the benefit to someone who fails to meet the usual requirements for eligibility. . . . The more valuable the benefit to the claimant and hence the greater the burden on him of forgoing it in order to continue to observe his religion, the greater must be the burden on the government of relaxing the conditions it places on that benefit for a refusal to make an exception for the claimant to survive a challenge based on the First Amendment. Free exercise of religion does not mean costless exercise of religion, but the state may not make the exercise of religion unreasonably costly. . . .

[W]hile we are not Talmudic scholars we are reasonably confident . . . that the precise nature of the head covering and the method by which it is kept on the head are not specified by Jewish law. The wearing of a yarmulke — which by its size and position is liable to fall off in any activity involving sudden movement — is conventional rather than prescribed; some orthodox Jews prefer to wear an ordinary hat instead. The affixing of the yarmulke to the head (more precisely, the hair) by bobby pins is even more obviously a convention rather than a religious obligation, and it happens to be an inherently insecure method of keeping the yarmulke attached during basketball play.

If the Talmud required basketball players to wear yarmulkes attached by bobby pins, there would be a conflict with the state's interest in safety. But it does not, so it would seem that all the plaintiffs have to do to obviate the state's concern with safety is to devise a method of affixing a head covering which will prevent it from falling off during basketball play. We are not the people to devise the method. . . . But we are reasonably sure that a secure head covering exists or can be devised at trivial cost without violating any tenet of orthodox Judaism; that, on the facts of this case at least, bobby pins do not implicate First Amendment values.

Of course the Illinois High School Association might decide that its rule forbade even a completely secure head covering (as, indeed, the language of the rule suggests) and might also, if it so concluded, refuse to change the rule. A letter from an official of the Association, and testimony of Dr. Edward Steitz (who we are told is "Mr. Basketball"), provide some support for this supposition, though the point was not pressed below. But if the Association proves to be so obdurate — if it refuses to accommodate the indisputably sincere beliefs of a religious group though it can do so at no cost to the only objective, safety, that the rule in question is claimed to have — it will be standing on constitutional quicksand. Even if the interest in participating in interscholastic basketball is a slight one, a question we need not decide, it would by definition outweigh the burden on the state of accommodating that interest if there were no burden at all.

But by the same token the plaintiffs would be on weak ground if they claimed a constitutional right to wear yarmulkes fastened insecurely with bobby pins, on

the theory that the state has no interest in more secure head coverings. It is true, as the district court found, that the Association's efforts to prove that insecurely fastened yarmulkes pose a substantial safety hazard were unconvincing. All it could prove was that yarmulkes fall off basketball players' heads once or twice a game, on average, despite the bobby pins, and that in principle any loose object on the floor can cause a player to slip or trip and thereby fall and injure himself. The Association was unable to produce an authenticated instance of a fall caused by a yarmulke. But we do not consider this failure of proof quite so devastating as the district court did. The state need not await disaster to regulate safety; the effort of the Association to take preventive measures against injury before a history of accidents has been compiled is rather to be commended than condemned. Because the rule, which was drafted by the national federation of state high school associations, is in force in most of the nation and not just in Illinois, experience with interscholastic basketball games in which players wear yarmulkes has been limited. And falls are such a common part of basketball that when someone does fall no one stops the game to investigate the cause. As a result we do not know how many of the falls that occur in games where players are wearing yarmulkes are due to that fact — we do not even know whether falls are more common in such games than in games where the Association's rule is enforced. . . .

. . . The district court should retain jurisdiction so that the plaintiffs can have an opportunity to propose to the Association a form of secure head covering that complies with Jewish law yet meets the Association's safety concerns. If the Association refuses to interpret or amend its rule to allow such a head covering to be worn by orthodox Jews, the district court should then proceed to determine, consistently with the analysis in this opinion, the plaintiffs' right to have the rule enjoined as a violation of their religious freedom.

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Many basketball leagues have or have had rules like the one at issue here, affecting any player, male or female, who is religiously required to wear head-gear. These rules have disadvantaged Sikhs (turbans) and Muslims (hijabs). See the note at the end of this exercise.

**Different sources of rules.** The *Menora* court interprets rules from three sources: the Illinois High School Association, traditional Jewish law, and the Constitution's First Amendment. The Association's Rule 2-2 is inserted into the opinion in the bracketed paragraph near the beginning. The court does not cite or quote any authority for the traditional Jewish rule. Instead it quotes the parties' stipulation about what they understand the rule to be. The First Amendment free exercise rule has been developed in the case law, and the *Menora* court summarizes what it believes to be that rule.

**Clarity of rules and differing opinions about their meaning.** Because Rule 2-2 was drafted by a single authority — the Association — it has one official expression in words, and those words constitute the rule, as with a statute in which the



drafters' words govern. Justice Frankfurter said that the first three steps in interpreting a statute are —

- (1) Read the statute;
- (2) read the statute;
- (3) read the statute!<sup>7</sup>

But this is not so with the First Amendment's Free Exercise Clause. The rule is not in the First Amendment's words. It is in two centuries of case law. *Menora* states one formulation of the rule. Elsewhere in the case law are other formulations, and some are substantially different from *Menora's*. That can happen when there is no single and authoritative drafted text of a rule. Something similar is true of the traditional Jewish rule on head coverings. *Menora* states a rule, but that is not the only version of it. Talmudic scholars can disagree about what the rule is and can support their arguments by quoting different expressions of the rule in different texts.

The Association's Rule 2-2 was actually two rules: a declaration ("Head decorations, headwear, or jewelry are illegal") and a duty ("The referee shall not permit any player to wear equipment which, in his or her judgment, is dangerous to other players"). The declaration established illegality. The duty required that an official, the referee, take enforcement action.

**Questions about Rule 2-2.** Suppose you see a player wearing headgear while playing in a game governed by the Association's Rule 2-2 as it existed in 1982. You ask the referee what he plans to do about it. "Nothing," says the referee. You mention Rule 2-2. "I know the rule very well," says the referee. "But it doesn't require me to do anything here." Under what circumstances would the referee be right? Explain how the words support your answer.

*Hint:* Are Rule 2-2's duty (the first sentence) and its declaration (the second sentence) subject to identical tests or to different tests? Put another way, is it possible for headgear to be both illegal under the declaration and permitted because of the way the duty is drafted? Before you answer, do as Justice Frankfurter would command: (1) read Rule 2-2 carefully, (2) read it again carefully, and (3) read it yet again carefully. If you believe the duty and the declaration are subject to different tests, what might have caused the drafters to do that? Did they have a good reason? Or did they make a drafting mistake?

**Questions about the traditional Jewish rule.** What type of rule is it — a duty, discretionary authority, or a declaration? Three exceptions are listed in the opinion. Is the rule also subject to any conditions that you could express beginning with the word *if*?

**Questions about the First Amendment's Free Exercise Clause.** Where in the court's opinion do you find it expressed as a rule? What type of rule is it — a duty,

7. Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS: SELECTED PAPERS BY AN EMINENT FEDERAL JUDGE* 202 (1967) (quoting Justice Felix Frankfurter).

discretionary authority, or a declaration? Is it subject to any conditions that you could express beginning with the word *if*? Is it subject to any exceptions that you could express beginning with *except* or *unless*? What aspect of the rule is at issue here?

**The basketball rules today.** The Illinois High School Association’s rules have changed. The Association has adopted the rules of the National Federation of State High School Associations. Under the current National Federation rules, a “state association may approve a [head] covering or wrap” if three conditions are satisfied: (1) “there is documented evidence provided to the state association that a participant may not expose his/her uncovered head” for religious reasons; (2) the head covering “is not abrasive, hard or dangerous to any other player”; and (3) the head covering “is attached in such a way it is highly unlikely it will come off during play.”<sup>8</sup>

The International Basketball Federation changed its rules similarly in 2017. But the issue continues to arise in other basketball leagues and competitions. You can find examples by doing Internet searches for “basketball yarmulke,” “basketball turban,” and “basketball hijab.”

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8. NAT’L FED’N OF STATE HIGH SCH. ASS’NS, 2014–2015 BASKETBALL RULE BOOK, Rule 3, § 5, art. 4.

# 2

## Where Rules Originate

### § 2.1 Private Rules

Private rules include contracts, leases, covenants, bylaws, conveyances, trusts, and wills. Unlike public rules, private rules are the product of voluntary relationships or transactions. Most private rules take the form of contracts — consensual agreements between private parties.

Private rules take many more specialized forms as well. A lease, for example, is a contract through which a property owner agrees to grant a tenant a possessory interest in real property for a specific term, limited to certain purposes, in exchange for periodic rent payments. A restrictive covenant is a condition in a deed or other conveyance that restricts the use of real property, and which in some instances runs with the land to bind future purchasers. A different kind of covenant refers to an employee's agreement not to compete with her employer for a certain period of time after terminating the employment relationship.

Bylaws are rules adopted by private corporations, associations, and other organizations to govern their operations. Conveyances are instruments that operate to transfer interests in real estate or mineral interests, such as oil and gas leases. Trust agreements transfer assets from the property owner, known as the settlor, to a third-party trustee, who holds and manages the assets as a fiduciary for the benefit of specified beneficiaries, subject to conditions imposed by the settlor in the trust agreement. And a will is a set of rules prepared by an individual, known as a testator, giving directions to a personal representative to govern the distribution of the testator's assets upon death.

Different kinds of specialized agreements between private individuals have one thing in common: All are composed of legal rules that create duties, rights, discretionary authority, declarations, conditions, and exceptions. In most cases, these agreements are put into written form, often by a lawyer. Drafting skills apply in much the same way to all these instruments because all are fundamentally made up of legal rules.

Many lawyers spend much or most of their careers drafting and redrafting private law. Every client engaged in a transaction needs a contract to govern that transaction. Corporate and other organizational clients also need bylaws and other documents of internal governance. Individual clients need wills, trusts, and other estate planning documents. Lawyers draft some of these from scratch and produce others by redrafting prior work. In a typical general practice law firm, a substantial amount of the firm's revenue is generated from the types of drafting explained in this book.

## § 2.2 Public Rules Generally

Public rules include constitutions, statutes, codes, ordinances, administrative rules and regulations, executive orders, and court rules. They typically reflect broad public policies and priorities that result from executive, legislative, or judicial compromise.

Many lawyers participate in drafting public law. Every level of government — from your local county or town to the federal government in Washington — has lawyers on staff or on retainer to draft public law. Congress and every state legislature employ full-time statute drafters. This happens not only in legislatures but also in administrative agencies. Every department of the federal government has lawyers on staff who draft administrative regulations.

A local government too small to employ a full-time lawyer will have a local law firm on retainer to do all the work that a larger government would have its staff lawyers do. For a firm in that position, representing the local government might generate much of the firm's revenue. Whenever the local government decides to adopt a new ordinance or amend an existing one, the firm will do the drafting.

Public law drafting is done even by lawyers who are never paid by any government. If you have a private client who wants a legislature to enact a statute or an administrative agency to adopt a regulation, there's a good chance that you will have a role in the drafting. You will propose wording for parts of the statute or regulation. Sometimes you will draft the entire statute or regulation and try to persuade the legislature or agency to adopt it. Your client might be a business, or it might be a public interest group.

### § 2.2.1 Public Laws of General Operation

Public laws are enacted, issued, or adopted by public bodies or entities with authority to issue legal rules. They include electors, legislatures, judicial officers, state governors, and administrative agencies. In that respect, public rules differ from private law, which is negotiated by individuals or organizations to govern impending transactions or current and ongoing relationships.

Most often, public rules operate generally; they reflect broad public policy goals or preferences, which often compete with other policies. For example, a

state might enact a statute imposing limits on how law enforcement officers conduct strip searches, balancing public safety interests against the accused's privacy rights.

### § 2.2.2 Public Laws of Narrow Application

Most statutes apply generally, but not all do. Although no longer common today, state legislatures historically enacted “private” or “special” laws as well as public laws.<sup>1</sup> A “private law” in this sense is legislation that benefits particular individuals rather than the public generally. The term “special law” refers to both private and local statutes that apply to certain localities rather than the entire state.

In fact, until the second half of the nineteenth century, state legislatures enacted relatively few laws of general application.<sup>2</sup> For example, a legislative body in those days might pass a private bill granting a divorce, or a bill issuing a charter to an individual or company to operate a ferry on a particular navigable river. Even today, Congress and many state legislatures enact private laws that grant specific benefits or privileges to private persons.<sup>3</sup> A private law might be enacted to legislatively resolve an individual's claim against the government, or to grant a citizen of a foreign country relief from a deportation order issued by a federal administrative agency. While private federal statutes are published in the *Statutes at Large*, they are not codified.<sup>4</sup>

A combination of factors in the late nineteenth century led many states to amend their constitutions to prohibit or strictly limit state legislatures from enacting special or private laws. These factors included an increasing proliferation of special laws, constituent pressures, and concerns about political favoritism.<sup>5</sup> But these constitutional restrictions do not apply nationwide. The U.S. Constitution and about 20 state constitutions impose no restrictions whatsoever on special legislation.<sup>6</sup>

For drafting purposes, even private and special laws as described here are subcategories of what we broadly define as “public rules.” The source of special statutes, like all other public rules, is a public entity with constitutional or statutory authority to enact or issue law, even though the special laws themselves are typically narrow in scope and application. Once enacted, private and special laws, as well as other public laws, are subject to constitutional challenge under the Equal Protection Clause.

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1. Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 271 (2004).

2. *Id.*

3. Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 43 n.19 (2014) (citing Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109–3, 119 Stat. 15 (2005)).

4. See *Researching Federal Statutes*, LAW LIBRARY OF CONG., <http://www.loc.gov/law/help/statutes.php> (last visited April 26, 2017).

5. See generally Schutz, *supra* note 3, at 44–48.

6. *Id.* at 41, 48 & nn.37–38.

### § 2.2.3 Prospective v. Retroactive Application

Most, but not all, public rules operate prospectively to future circumstances and events within their scope, unless a different intent is clearly expressed in the rule itself. As a general rule, courts presume that statutes operate prospectively, unless the legislature clearly expresses its intent that a particular statute apply retroactively.<sup>7</sup> But sometimes, if the law affects only procedure and does not implicate any vested substantive rights, a court will apply a law retroactively even without a clear statement from the legislature.<sup>8</sup>

The lesson for public law drafters is to always clearly express the client's intent about whether the proposed legislation will apply prospectively or retroactively. Default rules on retroactive application vary from state to state and from time to time. But in close cases, courts will first consult the language of the public law itself to determine whether the legislative body clearly expressed an intent on the issue. The best course of action for the drafter is to always include a provision that spells out exactly whether, and to what extent, the law applies retroactively.

## § 2.3 Constitutions

The U.S. Constitution is the supreme law of the land. All other public laws, whether federal, state, or local, must be consistent with the U.S. Constitution. The Supremacy Clause guarantees that in case of a conflict, federal law pre-empts contrary state or local law.<sup>9</sup>

For most lawyers, especially those who draft public law at the state level, state constitutions are more important than the federal constitution in their day-to-day drafting work. State constitutions include many procedural and format requirements for state statutes, and a state legislative drafter must be aware of those restrictions and draft accordingly. State constitutions are also amended much more often than the federal constitution, and those amendments are drafted by lawyers, generally legislative staff. While separately numbered amendments to the U.S. Constitution are appended at the end, most state constitutions are amended by interlineation in much the same way as codified statutes.

In an initiative or a referendum state — in which voters, in general elections, can legislate and amend their own constitution — some amendments are drafted by private lawyers who represent individual clients or advocacy groups. In recent years, for example, advocacy groups have proposed state constitutional amendments to allow for the sale and purchase of marijuana for regulated medical uses.<sup>10</sup>

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7. *See, e.g.*, *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001).

8. *E.g.*, *GreenPoint Mortg. Funding, Inc. v. Poniewozik*, 23 N.E.3d 525, 531 (Ill. App. Ct. 2014).

9. U.S. CONST. art. VI, cl. 2.

10. *E.g.*, Arkansas Medical Marijuana Amendment of 2016, ARK. CONST. amend. XCVIII.

The United States, unlike many other nations, has a strong tradition of judicial review of legislation. The separation of powers doctrine, including the courts' power to review statutes for consistency with the Constitution, is steeped in judicial tradition in the United States.<sup>11</sup> The drafter must always keep in mind that anything in a bill draft that might be interpreted as inconsistent with the state or federal constitution puts the client at risk of litigation. The legislative body itself might debate whether a proposed enactment is constitutional. But most legislators are not lawyers, and they are not necessarily persuaded by constitutional arguments. Upon enactment, if a statute can be reasonably challenged on constitutional grounds, its opponents are likely to institute litigation. But courts are generally reluctant to declare statutes unconstitutional.<sup>12</sup>

As a public arena, the legislative process is designed to invite controversy, which is an inherent aspect of deliberating on questions of public policy. But for public law drafters, the ever-present risk of constitutional challenge by opponents is an occupational hazard. Private law drafters generally do not face similar challenges — not because a contract or other private rule can contradict applicable public law, but because parties to a mutual agreement are unlikely to challenge it as contrary to law.

Because federal and state constitutions are amended much less frequently than statutes, most lawyers are not likely to draft many constitutional amendments in their legal careers. However, understanding how to effectively draft legal rules will help any lawyer interpret constitutional provisions and understand how they limit the reach of other drafted rules.

Most important, a drafter must be thoroughly familiar with constitutional constraints on the format and substance of all public rules. Every state constitution includes provisions that govern the work of the legislative drafter. Usually they appear in the article that governs the legislative process.

## § 2.4 Legislation — Statutes, Codes, Ordinances, and Appropriation ACTS

Legislation at the federal, state, or local level is the most common form of public law. A statute's life begins as a bill prepared by a drafter for introduction and consideration by the legislative body. The form of a bill differs, sometimes substantially, from the form of an enacted statute. A bill's format, organization, and substantive contents are governed by the constitutional and statutory requirements of the jurisdiction in which the bill originates.

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11. *E.g.*, *Marbury v. Madison*, 5 U.S. 137 (1803).

12. *See, e.g.*, *Regan v. Time, Inc.*, 468 U.S. 641, 696 (1984).

### § 2.4.1 Statutes

Upon enactment, a bill generally becomes a public law. Laws enacted by a legislative body go by different names and might take several forms. At the federal level, an enacted bill is known as a slip law, which is assigned a unique number. Enacted legislation is transmitted to the Archivist of the United States, who is required by law to preserve the originals.<sup>13</sup> Both public laws and private or special laws are numbered in the order enacted, beginning with the congressional session number. The laws Congress enacts in each congressional session are compiled in chronological order and published in the *Statutes at Large*. At the state level, a similar process is used to number, compile, and publish laws enacted at each legislative session. These uncodified state statutes are generally known as session laws.

For more than a century, the *Statutes at Large* was the only source available to lawyers for researching federal statutes. No codified version existed as we know it today. To find current statutory law, a lawyer had to search every volume to determine whether a statute enacted years ago had been amended or repealed at some later date. Because the *Statutes at Large* published laws in chronological order, they were not organized or searchable according to subject matter. Indexing was generally inadequate. Therefore, neither the *Statutes at Large* nor any other published version of enacted laws was a satisfactory source for finding current statutes on any specific subject matter.

In the country's early years, researching federal statutes in the *Statutes at Large* was not especially onerous because Congress enacted so few statutes of general application. As the nation grew in size and complexity, the federal government took on more complex functions, which underscored the need for improved access to current federal law. The lack of codification and systematic organization of statutory law profoundly influenced not only the process of legislative drafting, but also the way courts interpreted enacted law.<sup>14</sup> The courts approached early legislation as "situational edicts" overlaying a common law canvas, and traditional canons of statutory interpretation treated them accordingly.<sup>15</sup>

### § 2.4.2 Codes

Beginning in the early 1800s, the codification movement advocated for a compilation of enacted laws by subject matter to make them more accessible. In 1874, Congress published the *Revised Statutes at Large*, consolidating and replacing all prior enactments. While that publication represented an important step toward codification, it was not organized by subject matter. By the late 1800s, several states had embarked on their own efforts to codify state statutes.<sup>16</sup>

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13. 1 U.S.C. § 106a (2012).

14. Dru Stevenson, *Costs of Codification*, 2014 U. ILL. L. REV. 1129, 1140–41.

15. See, e.g., *Douglass v. Lewis*, 131 U.S. 75, 85 (1889).

16. See, e.g., Leonard A. Jones, *Uniformity of Laws Through National and Interstate Codification*, 28 AM. L. REV. 547, 560 (1890). See generally R. FLOYD CLARKE, *THE SCIENCE OF LAW AND LAWMAKING* 33–43 & 263–340 (1898).



Publication of the *United States Code*, as we know it today, was not approved by Congress until the mid-1920s.<sup>17</sup> Even now, the best evidence of federal statutory law is not necessarily the *United States Code*. Congress has enacted only about half the Code's 54 current titles as "positive law," which replaces and supersedes all previous enactments compiled in each title. But the rest — fully half of all codified federal statutes — have *not* been enacted as positive law. The best evidence of statutes organized and published in those titles remains the original and amended versions of the statutes that appear chronologically in the *Statutes at Large*.<sup>18</sup>

The difference is critical when a drafter is preparing a bill to amend federal statutes. If the bill would amend a statute in a title that has been enacted as positive law, the bill would simply refer to the codified version of existing law and amend it further. But if a bill would amend a statute published in a title not yet enacted as positive law, the drafter must refer to the original enactment by its public law number, as well as each subsequent public law that has amended the original enactment.

Over time, congressional staff continues to compile and propose titles for enactment as positive law, but the process is not likely to be completed for many years to come.<sup>19</sup>

### § 2.4.3 Ordinances

State statutes must conform to the state and federal constitutions, and they might be preempted by federal law. Similarly, local governments in most states have the power under state law to enact local laws governing local affairs. States vary greatly with respect to the scope of authority granted to local governments. All states grant at least some power to local authorities to enact local legislation, as long as it is not contrary to generally applicable state law. Some states grant home rule authority to local governments, which allows certain localities to adopt their own local charters that set out the basic organization and administration of local government.

Given the wide variation among states regarding the power conferred on local governments, it is difficult to generalize about the lawmaking authority of U.S. municipalities. Complicating matters further, the very definition of "municipality" varies from state to state, and sometimes even within a state.<sup>20</sup> In general, the term applies to any unit of local government.<sup>21</sup> A municipality or

17. Stevenson, *supra* note 14, at 1140.

18. 1 U.S.C. § 112 (2012).

19. See *Positive Law Codification in the United States Code*, U.S. HOUSE OF REPRESENTATIVES OFFICE OF THE LAW REVISION COUNSEL, [http://uscode.house.gov/codification/positive\\_law\\_codification.pdf](http://uscode.house.gov/codification/positive_law_codification.pdf) (last visited Feb. 12, 2017).

20. See, e.g., *Jericho Water Dist. v. One Call Users Council, Inc.*, 887 N.E.2d 1142, 1144 (N.Y. 2008) ("Municipality" is an ambiguous word.).

21. See generally 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 2:8, at 176–82 (3d ed. 2010).

other unit of local government has only as much authority as the state constitution or state statutes give it.

In most states, municipalities are authorized to act by adopting ordinances and resolutions. Only ordinances have the force of law. Resolutions are used primarily to make policy statements or to direct administrative or ministerial functions. Few formalities are required for resolutions, and they are typically temporary in nature.

Local ordinances are analogous to state and federal statutes. They differ from resolutions in several respects, which vary from state to state. In general, an ordinance is required for municipal action that involves persons or property and that imposes a penalty for a violation. State laws sometimes require municipalities to take certain actions by local ordinance. And an ordinance is necessary to repeal or amend any other ordinance.

An ordinance's form and content are dictated by state law. In home rule states, local charters might add required formalities for enacting ordinances. Every ordinance is typically assigned a unique number reflecting the chronological order of its enactment. Some municipalities codify their ordinances, but others do not. In general, an ordinance cannot take effect immediately unless the legislative body declares an emergency. And every ordinance must comply with certain publication requirements, which also vary from state to state.

### § 2.4.4 Appropriation Acts

Appropriation acts are essential to government operations because they are the legislative vehicles financing public services. Tax legislation is enacted to raise revenue for the government on an ongoing basis, but separate legislative action is required to specifically appropriate funding to provide for public schools, police protection, welfare programs, and other essential public services.

Constitutional provisions dictate the format and content of appropriation acts, just as they do for substantive legislation. Often they also provide special procedures for enacting appropriation bills into law. In some jurisdictions, for example, appropriation bills must be introduced in the House of Representatives. Some state constitutions require a supermajority vote of both chambers to enact appropriations.<sup>22</sup> Legislative drafters must be aware of these unique requirements for appropriations because no new program, however meritorious, can succeed without suitable operational and financial support.

Most state constitutions restrict the number of subjects in any one bill to help prevent legislative "logrolling," which occurs when several legislators combine unrelated proposals in a single bill. The bill gains sufficient political support as a whole based on the combined votes of the legislators who support each component proposal in the bill. Logrolling is perceived as an evil practice because it often allows a group of provisions to pass that would fail if each

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22. *E.g.*, ARK. CONST. art. 5, § 31 (requiring two-thirds majority of each chamber to appropriate money).

stood alone. For that reason, appropriations typically do not appear in the same enactment that establishes a new government program.

While the U.S. Constitution does not restrict bills to one subject, other House and Senate procedural rules have the practical effect of requiring separate bills to appropriate federal money. Standing congressional committees must “reauthorize” federal programs from time to time, and those authorization bills generally include multiyear limits on the funding amounts authorized for each federal program. Other committees are then responsible for considering separate bills each year to appropriate specific amounts of money to finance each agency’s programs.

At both the state and federal levels, appropriation bills have limited life spans and do not become part of the permanent law. For that reason, unlike public laws, they are not codified. They generally appropriate money for specified government programs for one fiscal year. Some state appropriation bills might appropriate funding for more than one year, especially when the state legislature meets only once every other year.

Legislatures have adopted a variety of sometimes innovative techniques for drafting appropriation bills to restrict the use of government funding for specific purposes or to otherwise limit the discretion of government agencies. To illustrate, one rider prohibited the Department of the Interior from spending funds to issue rules that would have placed a specific bird species (the “sage-grouse”) on the endangered species list.<sup>23</sup> “Riders” attached to appropriations bills sometimes bar agencies from spending appropriated funds to carry out programs that are otherwise authorized by substantive law. As a general rule, while a legislature might impose conditions and restrictions on appropriations, it cannot enact or amend substantive law in a general appropriation bill, even temporarily.<sup>24</sup> But if Congress renews funding restrictions or conditions in an appropriation bill year after year, those provisions can have the same practical effect on government services as permanent legislation.<sup>25</sup>

Everyone is familiar with the long-standing custom of Saturday mail delivery, which offers a perfect illustration of the technique. Since 1987, Congress has used appropriation bills to mandate that U.S. Post Offices deliver mail on Saturdays. Every year Congress has included a “proviso” (a kind of condition) in each U.S. Postal Service appropriation bill requiring that “6-day delivery and rural delivery of mail shall continue at not less than the 1983 level.”<sup>26</sup> In 2013, the Postal Service proposed to save funds by eliminating Saturday mail delivery. But Congress stymied the plan once again by adding a proviso to the 2013 Continuing Appropriations Resolution. The effect was to create a

23. Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1805 & n.78 (2015).

24. Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT’L REV. L. & ECON. 191, 192 (1992); see S.D. Educ. Ass’n/NEA *ex rel. Roberts v. Barnett*, 582 N.W.2d 386, 392 (S.D. 1998).

25. See Gluck, *et al.*, *supra* note 23, at 1832–33 & n.242.

26. U.S. GOV’T ACCOUNTABILITY OFFICE, B–324481 2 (Mar. 21, 2013), <http://www.gao.gov/assets/660/653188.pdf>.

recurring annual exception to the discretionary authority granted by substantive law, which empowers the Postal Service to deliver mail “as it finds appropriate to its functions and in the public interest.”<sup>27</sup>

Appropriations are an essential legislative tool for getting things done, preventing things from getting done, and controlling how things are done and how much they cost. An experienced legislative drafter once observed, “The real guts of much legislative effort are the control and careful manipulation of the state purse. No class of bills is subject to greater need of careful analysis of constitutional limits.”<sup>28</sup>

## § 2.5 Agency Rules and Regulations

A rich source of legal rules in the United States consists of administrative regulations issued by numerous federal and state agencies. For regulations to be enforceable, the agency must have express statutory authorization to issue substantive regulations to implement a government program or regulatory framework. If issued according to proper procedure, agency rules and regulations have the force of law.

The federal procedure for issuing agency rules and regulations is outlined in the federal Administrative Procedure Act, which also provides generally for judicial review of agency regulations.<sup>29</sup> The federal courts are typically quite deferential to agencies when a litigant challenges regulations for exceeding statutory authority or for inconsistency with authorizing statutes.<sup>30</sup> On the other hand, state courts vary with respect to the deference they give state agency regulations when challenged for exceeding the agencies’ statutory authority.<sup>31</sup>

New or amended federal agency regulations are initially published in the *Federal Register* and later codified in the *Code of Federal Regulations*. Similar notice and publication requirements apply to state regulations. In content and form, a regulation is indistinguishable from a statute. Regulations are an essential component of primary legal authority, and every practicing lawyer must be familiar with them and how they relate to other sources of law.

## § 2.6 Executive Orders

Executive orders are issued by the U.S. president or a state governor. They have been used to implement a variety of executive policy decisions with

27. 39 U.S.C. § 403(a) (2012).

28. Fred J. Carman, Nat’l Conf. of State Legislatures, *Bill Drafting Research* (Nov. 10–11, 1977), reprinted in REED DICKERSON, MATERIALS ON LEGAL DRAFTING 122, 124 (1981).

29. 5 U.S.C. §§ 553, 561–570 (2012); *id.* §§ 701–706.

30. *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 227–31 (2001).

31. *Compare, e.g.*, *Denning v. Kan. Pub. Emps. Ret. Sys.*, 180 P.3d 564, 568 (Kan. 2008), *with, e.g.*, *United Ins. Co. of Am. v. Md. Ins. Admin.*, 144 A.3d 1230, 1249 (Md. 2016).

relatively little judicial oversight. During times of legislative gridlock, executive officials sometimes use these orders to implement controversial policy decisions without legislative endorsement. While executive orders have sometimes drawn political controversy, they have been issued throughout U.S. history.

In general, courts give executive orders the effect of law to the same extent as administrative rules and regulations. In some cases, specific statutes authorize the issuance of executive orders, and those orders have the force of a statute.<sup>32</sup> On the other hand, a court will not enforce an executive order that conflicts with the chief executive's constitutional power or any statute. On rare occasions, courts have vacated presidential executive orders for exercising power inconsistent with the authority granted by the Constitution.<sup>33</sup>

The Federal Register Act requires publication of all presidential executive orders, except those that have no general applicability and legal effect.<sup>34</sup> Orders beginning with Executive Order 7316 issued March 13, 1936, are published in 3 C.F.R. and online on the National Archives website.<sup>35</sup> Gubernatorial executive orders are sometimes published and sometimes not. Practices vary from state to state.<sup>36</sup>

## § 2.7 Court Rules

Court rules are analogous to legislation.<sup>37</sup> Courts routinely draft and adopt rules to govern their proceedings. Rules of evidence, criminal and civil procedure, and appellate practice are all forms of judicial legislation. In addition, each state supreme court has adopted a code of professional conduct that governs lawyers licensed to practice in that state.

Every law student learns about court rules. They are drafted and amended in much the same way as statutes, administrative rules, and executive orders.

At the federal level, new court rules, and amendments to existing court rules, are annually proposed to and debated by the Judicial Conference of the United States.<sup>38</sup> Among other duties, the Conference is required to study the general rules of practice and procedure used in the federal courts and recommend changes and additions it considers appropriate. In carrying out its duties, the Conference makes recommendations to the Supreme Court, which might accept, modify, or reject any recommendation. The Conference also has the

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32. See, e.g., *Farkas v. Tex. Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) (citing 40 U.S.C. § 486(a) (recodified at 40 U.S.C. § 421(a))).

33. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952).

34. 44 U.S.C. § 1505(a)(1) (2012).

35. See *Federal Register: Executive Orders Disposition Tables Index*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/federal-register/executive-orders/disposition.html> (last visited Apr. 27, 2017).

36. See, e.g., Robert A. Zarnoch, *Gubernatorial Executive Orders: Legislative or Executive Power?*, 44 MD. B.J. 48, 53 (May/June 2011).

37. See Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 916 (1976).

38. 28 U.S.C. § 331, ¶ 5 (2012).

duty to review other court rules authorized by the Rules Enabling Act,<sup>39</sup> and it has the statutory authority to amend any court rule found inconsistent with federal law.<sup>40</sup>

In addition to the duties prescribed for the Judicial Conference, the Rules Enabling Act authorizes the Supreme Court and all other federal courts to prescribe rules for conducting business. Any rules proposed under this discretionary authority must be consistent with federal statutes and with Supreme Court rules governing practice and procedure in the federal district courts. Those procedural rules may not “abridge, enlarge or modify any substantive right.”<sup>41</sup>

The Rules Enabling Act requires the Judicial Conference to prescribe and publish procedures governing its consideration of proposed court rules,<sup>42</sup> and the process has many parallels to those used by the legislative and executive branches to propose and deliberate on statutes and administrative rules. The Conference has established various committees to handle its work.<sup>43</sup>

Before May 1 of each year, the Supreme Court is required to submit to Congress any new or amended rules that have been proposed under the Rules Enabling Act. Unless Congress enacts a law to the contrary, the rules automatically take effect on the following December 1.<sup>44</sup>

Each state has adopted its own procedures for proposing and amending court rules. In many states, rules of evidence and court practice are enacted by the state legislature and codified along with other state statutes. Other court rules, especially those governing practice in state trial courts, might be separately published by the state supreme court and amended from time to time by administrative order.

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39. 28 U.S.C. §§ 2071–77 (2012).

40. 28 U.S.C. § 331, ¶ 6.

41. 28 U.S.C. § 2072(b).

42. 28 U.S.C. § 2073(a)(1).

43. *Id.* § 2073(a)(2).

44. 28 U.S.C. § 2074(a) (2012).

# 3

## Good Drafting Skills Benefit Everyone

Complex ideas can be written as clear law.

— Susan Krongold<sup>1</sup>

### § 3.1 The Citibank Promissory Note

In the 1970s, Citibank, which was then known as First National City Bank, replaced its traditionally drafted consumer loan promissory note with a plain language version. The traditionally drafted one is in Appendix A. The plain language replacement is in Appendix B. Take a look at them now to see the difference.

Imagine that you are borrowing money to buy a car or something else. You have never been to law school. Maybe after college you went into dentistry or computer science. You are sitting in a bank branch ready to sign the loan papers. A bank employee puts several documents in front of you and shows you where to sign. One is the traditionally drafted promissory note in Appendix A. You try to read it. (*Turn to Appendix A and try to read it right now, as though you are that borrower sitting in the bank branch. Really. Go through it sentence by sentence to figure out what your obligations are and what the bank's are.*)

Most people — most law students, even many lawyers — can't get past the first sentence. Most people can't figure out where that sentence *ends*.

As the borrower sitting in that bank branch, how do you feel about the bank that is asking you to sign that promissory note?

- Are you *comfortable* dealing with that bank?
- Do you *trust* the bank?
- Are you being treated with *respect*?

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1. Susan Krongold, *Writing Laws: Making Them Easier to Understand*, 24 OTTAWA L. REV. 495, 504 (1992).

After decades of using the old promissory note, Citibank finally realized that its customers were unconsciously asking themselves those questions and unconsciously answering all of them *no*. Customers had little choice, however, because all the other banks were asking their borrowers to sign promissory notes just like the one in Appendix A.

The document you see in Appendix B has gone down in history as the Citibank Plain Language Promissory Note. It was the first widely used plain language contractual document. And it proved that everyone is better off if a legal document can be understood by all who read it.

**How Citibank benefited from its plain language note.** People don't shop for loans by comparing promissory notes. They shop by comparing interest rates. But if similar interest rates are being offered by several banks — which often happens — borrowers are influenced by past experience with a bank.

People borrow frequently over a lifetime. If they have had a good experience dealing with a bank, they become repeat borrowers from that bank as long as its interest rates are competitive. They feel comfortable with it and trust it *because it has treated them with respect*.

Good legal drafting gave Citibank an advantage against other banks in the competition to gain borrowers. As soon as the other banks realized this, they started using promissory notes that imitated Citibank's.<sup>2</sup>

Citibank benefited in another way as well. Its own employees had not been able to understand the old note. When faced with situations that were not routine, Citibank's loan officers could not read the note to figure out the parties' rights and duties. The bank's loan officers actually did not know all the terms of the loans they were making.

**How borrowers benefited.** You already know how. You knew it the minute you compared the two notes.

If a borrower can understand the parties' rights and duties, the borrower is less likely to breach inadvertently and become liable for that breach. And if the bank breaches, the borrower has the power that comes from words — the power to point to words in the note and insist that the bank do what it promised to do.

**How courts benefited.** Suppose you are a judge presiding over a trial. A bank had its borrower sign the Appendix A promissory note. Now the bank is suing the borrower. All the issues are governed by the note's first sentence. You must figure out what that sentence means. And at the end of the trial, in your jury instructions, you must explain to the jury what it means. (*Read that sentence again. Show it to a friend or family member who is not a lawyer. Try to explain what it means as though your friend or family member were a juror.*)

Suppose instead that you are presiding over a different trial. This time the bank had the borrower sign the Appendix B plain language promissory note. How much trouble will you have?

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2. Duncan MacDonald, *The Story of a Famous Promissory Note*, 10 SCRIBES J. LEGAL WRITING 79, 81 (2005-06).



**How society benefited.** All else being equal, that trial over the Appendix A note would have been more complicated than the one over the plain language note. The public pays, through taxes, for every minute of courtroom time — not just the judge’s salary but also salaries for the clerks, bailiffs, and others as well as a proportion of the interest on the bonds issued to pay for the building’s construction. A four-day trial will cost the taxpayers twice as much as a two-day trial.

And there’s a ripple effect through other cases with plaintiffs and defendants who know nothing about these promissory notes. While that four-day trial is going on, the case backlog, which was already bad, grew a tiny bit worse. But it won’t be just one case. Promissory notes are litigated over and over. The cumulative effect is not tiny.

Bad drafting costs money, and everyone pays for it.

### § 3.2 Traditional Drafting, Modern Drafting, and Consumer Drafting

Fog in the law and legal writing is often blamed on the complex topics being tackled. Yet when legal texts are closely examined, their complexity seems to arise far less from this than from unusual language, tortuous sentence construction, and disorder in the arrangement of points. So the complexity is largely linguistic and structural smoke created by poor writing practices.

— Martin Cutts<sup>3</sup>

Table 3-1 illustrates traditional drafting, modern drafting, and plain language standard-form consumer contract drafting.

**Traditional drafting:** In the left column are the original Citibank promissory note’s nonwaiver provisions. Read them carefully. Read them *very* carefully. After everything you have studied in law school, you should be able to understand a nonwaiver provision. Do you understand these?

**Modern drafting:** In the middle column is our redraft of those provisions in language appropriate to a modern contract in which each side would be represented by a lawyer or would at least consider consulting one. Read it. Most people read it twice: once to get the general idea and a second time to get the details. That is as it should be. After reading it twice, how much do you understand?

3. MARTIN CUTTS, OXFORD GUIDE TO PLAIN ENGLISH 187 (3d ed. 2009).

<p><b>Table 3-1.</b> <b>NONWAIVER PROVISIONS COMPARED</b></p>		
<p><b>TRADITIONAL DRAFTING</b> <b>Citibank’s Original Note</b> — from Appendix A</p>	<p><b>MODERN DRAFTING</b> <b>21st Century Drafting Standards</b> — where both parties use lawyers</p>	<p><b>STANDARD-FORM CONSUMER</b> <b>Citibank’s Plain Language Note</b> — from Appendix B</p>
<p><i>(end of first paragraph)</i> The acceptance by the Bank of any payment(s) even if marked payment in full or similar wording, or if made after any default hereunder, shall not operate to extend the time of payment of or to waive any amount(s) then remaining unpaid or constitute a waiver of any rights of the Bank hereunder.</p> <p><i>(beginning of the 7th paragraph)</i> Acceptance by the Bank of payments in arrears shall not constitute a waiver of or otherwise affect any acceleration of payment hereunder or other right or remedy exercisable hereunder. No failure or delay on the part of the Bank in exercising, and no failure to file or otherwise perfect or enforce the Bank’s security interest in or with respect to any Collateral, shall operate as a waiver of any right or remedy hereunder or release any of the undersigned, and the Obligations of the undersigned may be extended or waived by the Bank, any contract or other agreement evidencing or relating to any Obligation or any Collateral may be amended and any collateral exchanged, surrendered or otherwise dealt with in accordance with any agreement relative thereto, all without affecting the liability of any of the undersigned.</p>	<p><i>(a redraft of everything in the left column)</i> None of the following waives the Bank’s rights:</p> <ul style="list-style-type: none"> <li>(a) delay in enforcing a right;</li> <li>(b) failure to perfect a security interest in Collateral; or</li> <li>(c) accepting a payment that is                             <ul style="list-style-type: none"> <li>(i) less than the amount due,</li> <li>(ii) late, or</li> <li>(iii) marked “payment in full” or similar wording.</li> </ul> </li> </ul>	<p><b>Irregular Payments —</b> You [the bank] can accept late payments or partial payments, even though marked “payment in full,” without losing any of your rights under this note.</p> <p><b>Delay in Enforcement —</b> You can delay enforcing any of your rights under this note without losing them.</p>

The left column and the middle column mean exactly the same thing. *Every idea in the left column is also in the right column.* It's all there. This book explains how to draft that clearly and concisely.

**Standard-form consumer contract drafting:** In the right column are the non-waiver provisions from Citibank's plain language promissory note.

Here arguably there is a difference in meaning. Although the left and middle columns specifically address failure to perfect a security interest in the loan's collateral, the right column does not.

Reasonable lawyers can disagree about whether the language in the right column ("enforcing any of your rights") includes perfecting a security interest. A security interest is a creditor's lien on a debtor's collateral. If you buy a car with borrowed money, the lender will have a security interest in the car. Suppose you use the car as collateral again when getting another loan from a different lender, whom you don't tell about the first loan. (When the two lenders become aware of each other, they will both become unhappy with you because you probably breached both loan contracts.) Suppose you then go into bankruptcy, and your other creditors will want some of the car's value even if they are unsecured. In these situations, which creditor will win? The answer is in the procedure for perfecting a security interest under the Uniform Commercial Code's Article 9. There is a good argument that under Article 9 perfecting and enforcing are separate concepts. But there is also a good argument that perfecting is a step in preparing for enforcement.

Another problem is that the term "delay in enforcement" in the right column might not include "failure to perfect" as used in the other two columns. Imagine that you are the bank's lawyer in the middle of a trial, and everyone in the courtroom suddenly realizes that your client never perfected its security interest. It cannot be done now. It's too late. This is failure to perfect, not delay in enforcement. Delay is doing something late. Failure is not doing it at all.

In a contract between parties who both have access to lawyers, a prudent drafter would address this gap, which is why you see a specific reference to it in the middle column. But it is virtually impossible to express it in language understandable to a consumer. Citibank decided to omit it from the plain language promissory note in the right column. In doing so, Citibank did something socially responsible. For the sake of issuing a note in language the borrower could understand, the bank gave up some of the leverage it would otherwise have had over the borrower.

### § 3.3 Clients Prefer Modern Drafting — and it Protects them

Modern clients . . . are no longer impressed with [legal] hocus-pocus. . . . They should be able to read a contract or a will and to

have a reasonably good idea of whether their intentions are being carried out.

— Robert C. Dick<sup>4</sup>

It used to be thought that clients expect their lawyers to write in legalese and would be disappointed if they didn't. Those days are receding fast; public attitudes are changing. . . . I've actually had the experience of delighted clients writing and calling to say things like "Your documents were a joy to read" and "I could understand every word."

— Michele Asprey<sup>5</sup>

**Client preference.** When a client tells you that your documents are a joy to read, you have solidified a client relationship because, in the client's eyes, you have stood out as an exceptionally skilled lawyer.

Not many clients will understand literally *every* word you draft. The client who means that literally is probably a businessperson with a lot of transactional experience. The client who means it figuratively might have understood perhaps 85 to 90 percent of your sentences.

No one feels truly safe signing a document that is mostly a mystery. You would not feel safe signing a document in Italian (unless you can read Italian). To the extent your clients can understand your documents, they will for that reason alone respect you and believe that they are getting their money's worth.

**Client protection.** Clients are usually better off if both parties do what they are supposed to do. In a contract, if the other party performs perfectly, the client gets what was bargained for. And a client who performs will not be penalized for breach. When everybody involved understands the words that govern the situation, clients are less likely to get into trouble. (Keeping clients out of trouble is every lawyer's first obligation.)

**Lawyers' mistakes.** You will make fewer mistakes if you draft clearly and concisely. If your contracts are convoluted and obtuse, you will inevitably create ambiguities through inconsistencies. Your section 14 will say one thing, and your section 32 will say another. Or you will forget to put X into the contract. You will assume that X is somewhere in that sea of words because you remember thinking about it.

Bad drafting confuses not only the reader. It also confuses the drafter.

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4. ROBERT C. DICK, LEGAL DRAFTING IN PLAIN LANGUAGE 10 (1995).

5. MICHELE ASPREY, PLAIN LANGUAGE FOR LAWYERS 34 (2003).

### § 3.4 Poor Drafting Harms the Law

Citizens are charged with generally knowing the law, and what a law means is a function of interpreting the statute.

— *U.S. v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017)

There are costs to unreadable law. . . . Legislation that is not readily accessible to the public increases the cost to the public. A statute that is difficult to understand makes decision-making more difficult, makes administration more costly and increases the need for legal services. A clearly drafted statute saves money and time for all users — administrators, lawyers, the courts and the general public.

— Susan Krongold<sup>6</sup>

It is . . . harmful to the general cause of respect for the law if the people of a country are under the impression . . . that the enacted law cannot be understood by them.

— Sir William Dale<sup>7</sup>

**Poor drafting can prevent legislators from understanding the statutes they vote for.** Congress and state legislatures employ skilled drafting professionals. Some have produced thoughtful manuals on statute drafting.<sup>8</sup> Many care deeply about their craft, are very good at it, and write excellently worded legislation when the legislative process allows. But things do not always work out that way.

Suppose you have been elected to your state’s legislature. Twenty or so bills will come up for a vote tomorrow, and you are reading them now so you can decide how you will vote. (*Assume that, like most legislators, you are not a lawyer.*)

One bill would amend parts of your state’s vehicle and traffic code. Among those amendments are two new subsections to be added to the section on driving while intoxicated.

You have a report from the legislative committee that produced the bill. The report says that these subsections are needed because commercial vehicles can

6. Krongold, *supra* note 1, at 502.

7. SIR WILLIAM DALE, LEGISLATIVE DRAFTING: A NEW APPROACH 11 (1977).

8. See U.S. House of Representatives, Office of the Legislative Counsel, *House Legislative Counsel’s Manual on Drafting Style* (1995); Uniform Law Comm’n, *Drafting Rules* (2012); LAWRENCE E. FILSON & SANDRA L. STROKOFF, *THE LEGISLATIVE DRAFTER’S DESK REFERENCE* (2d ed. 2008). The National Conference of State Legislatures has links to most state legislative drafting manuals: <http://www.ncsl.org/legislators-staff/legislative-staff/legal-services/bill-drafting-manuals.aspx>; see also REED DICKERSON, *LEGISLATIVE DRAFTING* (1954); ROBERT E. KEETON, *GUIDELINES FOR DRAFTING, EDITING, AND INTERPRETING* (2002); ARTHUR J. RYNEARSON, *LEGISLATIVE DRAFTING STEP-BY-STEP* (2013); JACK STARK, *THE ART OF THE STATUTE* (1996).

be even more dangerous than ordinary vehicles when driven by an intoxicated driver. Here are the proposed new subsections:

**(e) Commercial motor vehicles: per se — level I.**

Notwithstanding the provisions of section eleven hundred ninety-five of this article, no person shall operate a commercial motor vehicle while such person has .04 of one per centum or more but not more than .06 of one per centum by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article; provided, however, nothing contained in this subdivision shall prohibit the imposition of a charge of a violation of subdivision (a) of this section, or of section eleven hundred ninety-two-a of this article where a person under the age of twenty-one operates a commercial motor vehicle where a chemical analysis of such person's blood, breath, urine, or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article, indicates that such operator has .02 of one per centum or more but less than .04 of one per centum by weight of alcohol in such operator's blood.

**(f) Commercial motor vehicles; per se — level II.**

Notwithstanding the provisions of section eleven hundred ninety-five of this article, no person shall operate a commercial motor vehicle while such person has more than .06 of one per centum but less than .08 of one per centum by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article; provided, however, nothing contained in this subdivision shall prohibit the imposition of a charge of a violation of subdivision (a) of this section.<sup>9</sup>

Reading this is like wading through glue.<sup>10</sup> Do you understand what any of it means? How will you vote?

You know that drunk drivers create horrible risks to other people. And you agree with the committee that a drunk driver is exponentially more dangerous behind the wheel of a bus or a big truck. You want to vote yes — even though you don't really know what you're voting for or how it will work. You ask half a dozen of your colleagues. They are voting as you are, based on the same reasoning you are using.

Of the legislation enacted in any given year, much of it happens more or less this way. Later the courts interpreting these subsections will discuss the legislature's intent — *your* intent and your colleagues' intent. What did you intend

9. This example is modeled on New York Vehicle and Traffic Law § 1192(5) & (6). (We are grateful to Ronald W. Meister for suggesting it.)

10. See ALFRED LORD TENNYSON, *FIGHTING WORDS* 5 (James Charlton ed. 1994) (saying the same thing about reading Ben Jonson, the first English poet laureate).

when you voted that the alcohol range would be .04 to .06 in subsection (e) but .06 to .08 in subsection (f)? Why does your statute make that distinction? (Because you and your colleagues enacted it, it is your statute now.)

“A law should be clear, first of all, to the law-makers who are called on to vote it into the statute books.”<sup>11</sup> If *they* cannot understand it, who can?

**Poor drafting makes law inefficient.** Efficiency is measured by the ratio between effort and results. Suppose two methods exist for getting the same result. One takes an hour of work. The other takes ten hours. The one-hour method is efficient. The ten-hour method is inefficient.

When litigated, the traditionally drafted Citibank promissory note was inefficient because it was difficult to understand. The plain language replacement’s clarity made it efficient. Because the parties understood what they were supposed to do, they performed more reliably and sued each other less often. And when litigation happened, it required less effort from lawyers and courts.

The traditionally drafted Citibank promissory note hurt even those who knew nothing about it. Other litigants in other lawsuits waited longer for a trial. And ultimately the public suffered because court inefficiency costs more in taxes. It wasn’t just the Citibank note. Other banks used similar notes. And when you add all the other obtusely drafted contracts and statutes, the inefficiencies impose serious social costs.

**Nonlawyers administer law and contracts, which they need to be able to read and understand.** Nonlawyers probably do more work administering law and contracts than lawyers and judges do.

Contracts are administered by a business’s middle managers, like Citibank’s loan officers. To do their jobs, they must be able to pull a contract out of a file cabinet or up on a computer screen, read it, understand it, and act based on it. Many middle managers must also understand the statutes and regulations that govern the business. Airline mechanic supervisors, for example, must understand the Federal Aviation Administration’s complex and detailed regulations on airworthiness, which are published in the *Code of Federal Regulations*<sup>12</sup> and which the agency promulgated under its authorizing legislation.

Government employees are on the opposite side of the same situation. They must understand the statutes and regulations they enforce. But “[m]any public officials have just as hard a time understanding statutes as do many citizens.”<sup>13</sup>

**If law and contracts are unreadable, fewer people will obey them.** Drafted language is really instructions to those governed about what is expected and what is permitted. If you tell people what to do, you will get better compliance by using language they can understand.

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11. Alfred F. Conard, *New Ways to Write Laws*, 56 *YALE L.J.* 458, 459 (1947).

12. 14 C.F.R. §§ 21.1–43.17 & apps.

13. Conard, *supra* note 11, at 465.

There is a deeper problem as well. People naturally distrust what is hidden from them. When law is hidden inside a fog, it loses some of its moral authority. And to the extent law lacks moral authority, people feel less inhibited about violating it.

### § 3.5 Poor Drafting Harms the Legal Profession

Legalese . . . demeans its readers by making them feel powerless and stupid.

— Martin Cutts<sup>14</sup>

**The profession’s reputation.** The public hates traditional drafting. And they blame lawyers for it. They suspect that lawyers draft in mystifying language deliberately to make billable work for themselves — both in writing unnecessarily long documents and in interpreting ones other lawyers have written. “Every time a lawyer writes something,” said Will Rogers, “he is writing so that endless others of his craft can make a living out of trying to figure out what he said. . . .”<sup>15</sup>

Lawyers do not really do that. What the public complains about is caused by old drafting habits, not by a desire to run up billable hours. It takes at least as much lawyer time — and probably more — to draft a concise and crystal clear document as it takes to draft a long and baffling one. The problem is old habits, not bad intent.

**Lawyers’ own job satisfaction.** Interpreting badly drafted language, in both contracts and statutes, can be painfully unpleasant even for lawyers. An Australian judge noted that “lawyers dislike this feature of their lives intensely. They find the obligation to read Acts of Parliament, from beginning to end, so distasteful that they will do almost anything to postpone the labour.”<sup>16</sup>

From the first weeks of law school, you have known what this feels like. Imagine a workday in which you must devote significant time to slogging through obtuse contracts, statutes, and administrative regulations, asking yourself all along, “Will someone please tell me what this is supposed to mean?”

Now imagine a different day. Everything you read is so well crafted that you understand it immediately, without frustration. You are in a more generous state of mind, and you ask yourself whether you should send thank-you emails to the drafters who made your day’s work easier.

14. CUTTS, *supra* note 3, at 187.

15. *Will Rogers on Lawyers*, WILL ROGERS TODAY, [http://www.willrogerstoday.com/will\\_rogers\\_quotes/quotes.cfm?qID=9](http://www.willrogerstoday.com/will_rogers_quotes/quotes.cfm?qID=9) (last visited Oct. 25, 2017).

16. Justice Michael Kirby, *Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts*, 48 CLARITY 3, 3 (Dec. 2002).



## § 3.6 Much — But Not All — of Law and Contracts

### CAN BE DRAFTED IN WAYS THAT NONLAWYERS UNDERSTAND

In a democracy people should be able to understand the laws they are expected to obey. . . . Fairness demands that people be informed of benefits or obligations in language which they can understand. . . . People should be able to read statutes. . . .

— Susan Krongold<sup>17</sup>

[W]e can at least aim at a code that is capable of being understood by a person of average intelligence. . . .

— Peter Raymond Oliver, an English judge as Lord Oliver of Aylmerton<sup>18</sup>

Laws and contracts *can* be drafted so that educated readers can understand them. That happens in some other countries. In France and Sweden, for example, a nonspecialized statute — one of general applicability — is considered well drafted if it can be understood by an educated person fluent in the language. Specialized legislation, such as statutes regulating insurance or financial markets, is expected to be understandable to educated people who know something about the subject being regulated.

Justice Ruth Bader Ginsburg learned this firsthand early in her career. Two years after graduating from law school, she began researching Swedish civil procedure. Seven years after that, she and a Swedish judge published a translation of the Swedish procedural code.<sup>19</sup> They felt a special challenge putting into English the straightforward Swedish wording, which its drafters had crafted so that “laymen would be able to read and understand” the Swedish equivalent of the Federal Rules of Civil Procedure. In an introduction to their translation, she and her coauthor spent two pages explaining, down to sentence structure and verb tense, how they tried to reproduce that style in English.<sup>20</sup> They proved that a procedural code can be accurately expressed in plain language that any educated person can understand. If it can be done when translating into English, it can be done when drafting from scratch in English.

Some fairly sophisticated American statutes are drafted so that non-lawyers can understand them. For example, in the Uniform Commercial Code:

17. Krongold, *supra* note 1, at 501, 504.

18. Lord Oliver of Aylmerton, *A Judicial View of Modern Legislation*, 14 *STAT. L. REV.* 1, 2 (1993).

19. *THE SWEDISH CODE OF JUDICIAL PROCEDURE* (Anders Bruzelius & Ruth Bader Ginsburg trans. 1968).

20. *Id.* at 12-13; see Richard K. Neumann, *Legislation's Culture*, 119 *W. VA. L. REV.* 397, 417-18 (2016).

**§ 2-308. Absence of Specified Place for Delivery.**

Unless otherwise agreed

- (a) the place for delivery of goods is the seller's place of business or if he has none his residence; but
- (b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and
- (c) documents of title may be delivered through customary banking channels.

Every word can be understood by a person who has substantial business experience buying or selling goods.

*With generally applicable statutes and regulations*, you should try as much as possible to draft so that your words can be understood by a well-educated person who is not a lawyer. Rarely will you succeed 100 percent. Some concepts can be expressed only with legal terms of art that do not appear in ordinary dictionaries. Succeeding perhaps 80 to 90 percent of the time is a reasonable goal.

*With specialized statutes and regulations* — for example, a statute or an administrative regulation governing lead paint abatement in residential housing — you should try as much as possible to draft so that the statute can be understood by an educated person who works in the field being regulated.

*With contracts*, you should draft so that the parties can understand everything except for true terms of art (see Chapter 7) and some technical clauses like those on merger, successors, and assignments in contracts.

### § 3.7 Why Traditional Drafting is Common Today — and Why it will not be Common in the Future

Before Citibank introduced its plain language promissory note, there was intense debate inside the bank about whether to adopt it. Loan officers and other employees who were not lawyers argued in favor of replacing the old note. But the bank's lawyers were adamantly opposed. They thought that replacing the traditional language was reckless. One of the key people later recalled that the bank's lawyers "had been conditioned to believe that agreements had to be in lawyers' gibberish to be enforceable."<sup>21</sup> The lawyers predicted that the plain language note would entangle the bank in many new lawsuits, which the bank would lose. They said the wording would not hold up in court because it was "untested."<sup>22</sup>

21. MacDonald, *supra* note 2, at 82.

22. ASPREY, *supra* note 5, at 34.

But the reverse happened. After Citibank rejected its lawyers' advice and introduced the plain language note, the bank was involved in *less* litigation — not more. Borrowers and the bank sued each other less often because there were fewer disputes. Both sides understood what the note meant, and they did what the note required or permitted them to do. And when litigation did occur, it was easier and cheaper to resolve because judges understood the note.

Why were the lawyers wrong? Why were the results the exact opposite of what the lawyers had predicted? The answers are in history — the history of the legal profession and the history of legal education.

**The legal profession's history.** For centuries, lawyers have been notorious for bad writing. Lawyers have a reputation for long-windedness, legalese, hyper-technical expression, and convoluted sentence structure. A legal language scholar characterized legal writing as wordy, unclear, pompous, and just plain dull.<sup>23</sup>

One reason is that legal pleading predates literacy and the age of the written word. From its beginning, legal pleading was steeped in an oral tradition. As late as 1640, most English citizens were illiterate. Written pleadings were unknown in common law courts until the early fifteenth century, and they were not used routinely until the sixteenth century. Before then, written pleadings in Latin were more common in chancery courts.

A second reason for the notoriety of English legal language is its centuries-long evolution as an amalgam of Old English, Latin, and French. The common law of England and the language of the law both have “countless collateral relatives as well as a polyglot parentage.”<sup>24</sup> Vestiges of English law language's bilingual heritage remain with us today in redundancies such as “will and testament,” “devise and bequeath,” and “goods and chattels,” representing Old English, French, and Latin influences on legal language carried over from centuries ago.

In medieval times, the regular use of “law Latin” and “law French” in lieu of English obscured the meaning of legal proceedings to the lay public. In 1362, the Statute of Pleading ordered all oral pleas in the King's courts to be “pleaded, shewed, defended, answered, debated, and judged in the English tongue,”<sup>25</sup> but all written documents were to be in Latin. Ironically, the Statute of Pleading was written in French. Lawyers resisted by generally ignoring the statute's mandate and continuing to use French, Latin, or a combination in what were then primarily oral court proceedings.

Not until 1650 did Parliament enact a statute that required all written legal pleadings and proceedings to be in English. This time the reformers meant business. Anyone who violated the Act was subject to a £20 fine for each offense. The

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23. DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 24-29 (1963).

24. *Id.* at 35.

25. *Id.* at 111-12 (quoting Statute of Pleading, 36 Edw. III, Stat. I, c. 15 (1362)).

Act also required all court reports, statutes, and other law books to be translated into English.<sup>26</sup>

Another reason for the characteristic wordiness of legal language is that law clerks and court officials, who drew up most legal instruments, were paid a fee for each page.<sup>27</sup> In that era, verbosity and redundancy generated higher fees. At first, drafters used extra line spacing and wide margins to lengthen legal documents. In the seventeenth century, these abuses caused Francis Bacon, then Lord Chancellor, to direct that “[a]ll copies in chancery shall contain fifteen lines in every sheet thereof, written orderly and unwastefully. . . .”<sup>28</sup> In 1731, legislation was enacted restricting the line and word spacing of legal documents.<sup>29</sup> The various English courts each adopted rules fixing the minimum number of words that could be printed on each sheet of paper, providing a modicum of relief to litigants against routine fee-gouging.<sup>30</sup>

But the strict rules that prevented eighteenth-century lawyers from abusing the fee-per-page remuneration system also had the effect of encouraging wordiness. One way around those restrictions was to pad legal documents with lengthy recitals, repetitive allegations, and general redundancy.<sup>31</sup> In that era, lawyers thus had a financial incentive to resist efforts by legal reformers pressing for change to make written pleadings and documents more clear and less verbose.

English common law was steeped in precedent, and courts were prone to dismiss a writ or a pleading for the slightest technicality.<sup>32</sup> Early English lawyers became obsessed with fastidious attention to detail to minimize the risk of losing a case for a paying client for minor deviations from wording that courts in those days required.<sup>33</sup>

The habits created during that era are still traditional among lawyers today. They have been handed down from generation to generation. There’s a history behind the way lawyers often write, but the historical causes stopped mattering long ago. The world has changed.

**Legal education’s history.** Only during the last two decades have significant numbers of students learned drafting in law school. Before that, drafting courses were offered infrequently, if at all. Nearly all lawyers have taken a legal *writing* course. But among lawyers who graduated before about the year 2000, very few took a *drafting* course.

When most lawyers entered practice, they tried to learn drafting by observing what more experienced lawyers were doing. They did not learn drafting the way

26. *Id.* at 126-27 (quoting II Acts and Ordinances of the Interregnum 455 (1650)).

27. *Id.* at 188-89; PETER M. TIERSMA, *LEGAL LANGUAGE* 41 (1999).

28. MELLINKOFF, *supra* note 23, at 189 (quoting *Bacon’s Ordinances* ¶ 67, in 5 FRANCIS BACON, *WORKS* 287 (Matagu ed. 1826)).

29. *Id.* (citing *Records in English*, 4 Geo. II, ch. 26 (1731)).

30. *Id.* at 189-90.

31. *Id.* at 190-91.

32. *Id.* at 113-14, 183-85.

33. *Id.* at 145.

you are learning it in this course, with a teacher, a textbook, exercises, and assignments.

In other words, one of the reasons you see so many badly drafted statutes and contracts is because, until recently, legal education had not done a thorough job teaching drafting. It is not so much the fault of individual lawyers as it is the fault of history, including legal education's history.

### § 3.8 Good Drafting Skills Can Give You a Career Advantage

Clients might say, “Your documents were a joy to read” and “I could understand every word” (see § 3.3). And other lawyers might say it also. Drafting well can help you build a professional reputation. What you write is the most tangible proof of what you are. Once you write it, it lasts forever.

[Drafting] is probably the single most important intellectual skill now being used by lawyers. . . . Far more professional hours are spent in the kind of legal planning or other preventive lawyering that culminates in developing definitive instruments such as contracts, wills, leases, mortgages, and corporate agreements than are spent in litigation.<sup>34</sup>

An often-cited 1993 survey of practicing lawyers in both urban and rural areas identified legal drafting as among the top five most highly valued professional skills in the practice of law.<sup>35</sup> But only 16 percent of respondents reported that they had learned that skill in law school.<sup>36</sup> In today's job market, a graduating law student who knows how to effectively draft legal rules has a distinct advantage.

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34. Reed Dickerson, *Professionalizing Legal Drafting: A Realistic Goal?*, 60 A.B.A. J. 562, 562-63 (May 1974).

35. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 478 (1993) (identifying legal drafting of all skills studied as having the largest gap between the percentage of lawyers who thought the skill could be effectively taught in law school (80 percent) and the percentage who thought law schools were doing an adequate job of teaching that skill (24 percent)).

36. *Id.* & tbl. 4.



# 4

## Drafting as Lawyering

[D]rafting is the most important phase of the average lawyer's work.

— J.G. Thomas<sup>1</sup>

### § 4.1 Drafting and Professionalism

For a practicing lawyer, drafting is an essential professional skill. Reed Dickerson, internationally renowned for his leadership in professionalizing legal drafting, underscored its importance to the practicing bar:

[L]egal drafting ... is probably the single most important intellectual skill now being used by lawyers, even those who never allow themselves to be seen in the company of a statute. Far more professional hours are spent in the kind of legal planning or other preventive lawyering that culminates in developing definitive instruments such as contracts, wills, leases, mortgages, and corporate agreements than are spent in litigation.<sup>2</sup>

The legal profession and its clients are increasingly demanding practice-ready law school graduates. And today's law students are more and more aware of the importance of learning professional skills as part of their academic legal education. Knowing how to draft legal rules clearly and effectively is central to a lawyer's role as a professional.

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1. *Problems in Drafting Legal Instruments*, 39 ILL. B.J. 51 (1950), quoted in REED DICKERSON, MATERIALS ON LEGAL DRAFTING 3-4 (1981).

2. Reed Dickerson, *Professionalizing Legal Drafting: A Realistic Goal?*, 60 A.B.A. J. 562, 562-63 (May 1974).

## § 4.2 Client Goals

As a professional drafter of a contract, statute, or other legal instrument, your primary obligation is to carry out your client's goals.

How does a drafter ascertain and effectuate the client's goals? The first step is to identify your client. The second step is to ask questions to clarify your client's overall objectives. The third step is to research the legal background and context, including any existing legal relationships that need to be considered. The fourth step is brainstorming alternatives to accomplish the client's goals as well as anticipating possible roadblocks and how to overcome them. The fifth and final step is consulting with the client to fine-tune the strategy for accomplishing the client's goals. Only after following each of these five steps will you be adequately prepared to competently draft the document to achieve your client's goals.

The drafting process is highly interactive. Only rarely can a drafter do the job effectively without several meetings with the client to clarify goals. Drafting is also recursive in nature: competent legal drafting requires multiple drafts, edits, amendments, and revisions.

### § 4.2.1 Identify Your Client

One of a legal drafter's greatest challenges is ascertaining exactly who the client is for a specific drafting project.

In drafting a contract or other transactional document, your client could be one of the parties to a contract, both of whom are motivated to work out the terms of a deal so they can engage in a productive business relationship for an indefinite time. Or your client might be a property owner who wants to structure a sales transaction to allow for repossession if the buyer defaults. Or your client might be an organization — for example, a homeowners' association or nonprofit corporation — with conflicting institutional goals. The objectives of the organization as a whole might not coincide with the goals of any individual member or officer. Is your client the association, or its individual members? A lawyer who serves as general counsel for a corporation might think of her client as the corporation itself. But what about the shareholders who own fractional interests in the corporation?

A lawyer who drafts statutes might be tasked with carrying out the goals of an advocacy group — to lobby for legislation that advances the organization's objectives. Or your client might be an administrative agency whose mission is to carry out one or more government programs created by statute, subject to detailed regulations adopted by the agency. Or you might be asked to prepare a bill for introduction by an individual legislator who has political motives that might or might not be disclosed to you as the drafter. Often government agencies or corporations retain outside counsel to represent the organization with



specialized projects. Even associates in private law firms might find themselves representing institutional clients.

Before you can effectively draft any document to serve your client's goals, you must determine just who your client is. If you're not sure, read the retainer agreement carefully or ask your supervisor. Remember that the person you meet with to identify and discuss the client's goals might — or might not — be in the best position to communicate the goals and objectives of the *real* client. That is particularly true when the client is an organization or institution.

### § 4.2.2 Ask Questions to Clarify the Client's Objectives

At your first meeting, you might discover that your client does not have a crystal-clear idea what she wants to accomplish. Maybe she just agreed to purchase a used car from a distant relative and has asked you to draw up the bill of sale. She might not realize that she needs a contract to protect her against certain risks inherent in the transaction. Or a city commissioner might approach you with a request to draft an ordinance permitting a nonprofit religious organization to erect a Christmas display in the town square. The commissioner might not recognize the constitutional issues involved.

Almost every client will rely on you to ask the right questions to clarify the client's objectives. Most of your clients will not be lawyers and will not understand the legal context that you must consider in drafting a document to carry out the client's goals. Before embarking on the next step, ask plenty of questions to be sure you understand the client's true objectives, not just what the client says she wants you to do.

### § 4.2.3 Research the Legal Background and Subject-Matter Context

Every legal instrument or document you draft has a legal context that a competent drafter must thoroughly understand before beginning the drafting process. And if you don't know very much about the subject matter, it's your job to learn enough factual context to draft the document competently.

Parties to a private contract are free to tailor the agreement to carry out their mutual goals. But they cannot agree to terms contrary to the law of the jurisdiction that will govern any contract disputes. For example, a provision for binding arbitration to resolve any contract dispute might not be enforceable under state law if a party has a change of heart. The parties might have a prior business relationship that needs to be considered in drafting the agreement. Does one party have a history of renegeing on prior deals or failing to perform in a timely manner? The parties' prior relationship might prompt suggestions by the drafter about how best to allocate the business risk between the parties.

A lawyer who drafts public rules has even more context to consider. Any statute, regulation, or court rule takes its place within a larger and more complex legal framework. An agency regulation has no effect unless consistent with the scope of authority the legislature granted by statute to the agency. And the legislative grant of authority to issue agency regulations has no legal effect if it exceeds the legislature's constitutional power to delegate lawmaking authority to the executive branch. A statute enacted without reference to other related statutes might lead to litigation if its substance is inconsistent with those laws. A state statute enacted to bar judicial enforcement of mandatory arbitration agreements in consumer contracts might be unenforceable if preempted by the Federal Arbitration Act. And if one section of a statute is successfully challenged on constitutional grounds, the drafter must determine whether the client wants to preserve the rest of the statute without the unconstitutional clause.

Of course, a legislator has the option of sponsoring legislation that could be challenged on constitutional or other legal grounds. However, the drafter has the responsibility to identify any potential legal issues raised by the bill draft, to discuss them with the requesting legislator, and to document those concerns for the record.<sup>3</sup>

Thorough research is essential before embarking on any drafting assignment. Be sure you fully understand the nature of the parties' relationship and the business context before drafting a private agreement. For both contracts and public laws, research the existing legal context before you begin the drafting process. In the public arena, your research might even reveal that a legal framework already exists relevant to your client's objective, but for some reason the current law is not working effectively. For example, perhaps a statute grants an agency discretionary authority to regulate an industry, but the legislature has not provided the agency with adequate financial resources or personnel to exercise that authority. See § 2.5. Whether drafting private or public law, your draft must always take existing law into account, including relevant case law interpreting current statutes and regulations.

#### § 4.2.4 Brainstorm Alternatives

As you research the parties' prior relationship, if any, and the larger legal context, keep your client's overarching goals in mind. Make note of alternative strategies the client might not have considered.

In the example above, you might suggest amending the statute that grants the agency *discretionary authority* to regulate the industry so that the statute instead imposes a *duty* to regulate. If your amendment is successful, the agency

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3. See HELEN XANTHAKI, DRAFTING LEGISLATION: ART AND TECHNOLOGY OF RULES FOR REGULATION 50–51 (2014); Robert Stutz, *The Legislature's Lawyers: Their Place and Their Challenges in the Bill-Drafting Process*, 37 MONT. LAW. 7, 9 (Oct. 2011).

will be in a better position to request adequate budget resources to carry out the regulatory program.

If drafting legislation for a new government program, you might consider a “sunset provision” that would terminate the program after a set time unless the legislature amends the statute to extend the program or make it permanent. Or you might consider establishing a pilot program in an appropriation bill, allowing the legislature to consider the program’s merits after one year before debating permanent substantive legislation.

In a private agreement, you might suggest alternative wording or enforcement provisions that will protect your client if the other party attempts to avoid its contract obligations. If the agreement is designed to operate for the indefinite future, you might suggest an initial term of short duration, subject to renewal if both parties agree, or renegotiation of the contract terms if they do not.

Any legal document is highly unlikely to be executed or enacted in a form identical to your draft. Contracts and statutes alike are always subject to negotiation and amendment before they become final. Your efforts to brainstorm alternatives will provide your client with helpful information to facilitate the negotiation process that is inevitable in reaching an agreeable compromise with other parties and, for public laws, multiple constituencies.

### § 4.2.5 Consult with the Client to Fine-Tune Strategy

Subject to any time constraints, discuss your research and alternative strategies with your client before devoting too much time to drafting. If your research into a legislative proposal has disclosed legal or constitutional barriers, your client might decide to drop the matter or change course entirely. In researching a private agreement, you might discover that a different jurisdiction’s law would be more favorable to your client, or you might learn that the courts have interpreted a specific contract provision in a manner contrary to the client’s objectives.

If you have kept your client’s overall goals in mind while doing your background research, you should be well prepared to suggest other alternatives for the client to consider. Your job as the drafter is not to make the decision for the client, but to competently research alternatives and the pros and cons of each. You will serve your client well if you lay out workable strategies as well as their probable consequences so that your client can make an informed decision about which alternative to pursue.

## § 4.3 Multiple Audiences

Identifying the audience for your draft might seem obvious. In the first instance, the audience for your draft is your client. But every legal document has multiple audiences, and that is especially true for statutes, ordinances,

regulations, court rules, and other public documents. The audiences for every document are diverse and might include members of the public, consumers, in-house corporate counsel, judges, juries, and even law students.

For a contract or other transactional document, the parties to the transaction comprise the primary audience. Others who rely on the document, such as employees, accountants, beneficiaries, or subcontractors, make up the secondary audience. Still others constitute the “unexpected” audience — those who might use the document in ways not anticipated by the drafter.<sup>4</sup> For example, an attorney might use the document as precedent for drafting another contract. Or if a party to a lease agreement later dies, the personal representative might use the document to establish a value on a leasehold interest for purposes of dividing the estate among the heirs.

Public law has an even broader and more diverse set of audiences. For example, an enactment’s proponent might be an individual constituent who has a problem with a neighbor’s fence, or a special interest group that represents hundreds of stakeholders. By its very nature, a public law’s audience is as broad as its scope. Lawyers, judges, regulators, law enforcement personnel, and many others are prospective audiences for public law. Even those who never actually read or hear about the statute or regulation will be treated as if they have. Law enforcement officers, prosecutors, and courts presume that everyone is on constructive notice of the law.<sup>5</sup> Thus, as a practical matter, an “unexpected” audience might not exist for public law. Instead, the audience is everyone.

Or is it?

#### HELEN XANTHAKI, DRAFTING LEGISLATION: ART AND TECHNOLOGY OF RULES FOR REGULATION

113-16 (2014)

[P]lain language requires ease of communication to the audience. . . . But, which audience is that? Who are the people that are on the receiving end of the government’s regulatory message? Who are the people whose cooperation and positive action government needs in order to achieve efficacy of regulation? Who are these people whose action, or [inaction], makes government policy a success, or a failure? Who are the people to whom the legislation, as a tool for regulation, must speak and explain clearly what needs to be done, how and when? Whom is the drafter speaking to by means of a legislative text?

This is not an esoteric existential question for drafters. Far from it. Identifying the audience of legislation is excruciatingly necessary for the drafting team aiming to pitch the regulatory message at the right level of user general and legal sophistication. . . .

4. Karen Sneddon & David Hricik, *Three General Principles of Good Drafting*, 16 GA. B.J. 62, 63 (Oct. 2011).

5. See *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“The familiar maxim ‘ignorance of the law is no excuse’ typically holds true.”).

[K]nowing the legislative audience is a matter very relevant to democracy, the rule of law, citizens' rights and of course regulatory and legislative quality. But is there one audience of legislation? Can a drafter rely on the common notion of the "lay person," the "average man on the street," the "user"? [A]t least three categories of people constitute the audience of legislation, and these are lay persons reading the legislation to make it work for them, sophisticated non-lawyers using the law in the process of their professional activities[,] and lawyers and judges. The categories identified may well be simplistic, but at the end of the day the diversity of each and every one of these groups can only allow for all-encompassing simplified profiles. And so the fallacy of speaking to "an" or "the" audience has now collapsed. But we are not much closer to identifying who the audience is, at least not without taking an extra factor on board.

Since the diversity of the audience prevents the drafter from attaching to it enough characteristics to identify the level of pitch of the legislative language, perhaps turning to a more objective and less diverse factor may do the trick. Having realised what the rough profiles of the audience are, the drafter can look at the topic of legislative text itself as a means of steering towards the right user profile. Legislative texts are not all aimed at the same readers. Their primary audience varies.

For example, in drafting rules of evidence the drafter must be aware of the probability of judges and lawyers being the main audience of the text. And so the language and terminology used can be sophisticated. And indeed, it must be sophisticated: if the drafter chose to paraphrase the term "intent" or even "mens rea" with a plain language equivalent such as "meaning to," then the primary audience of lawyers and judges would make the rather legitimate assumption that the drafter means something other than "intent". . . .

At the other extreme[,] using the term "mens rea" in a criminal law statute would ensure that most of the primary audience of lay persons whose behavior would be regulated by the statute would completely miss the point about what is prohibited post enactment. . . .

As a result, the drafter must identify the primary audience of the legislation with as much precision and accuracy as the topic allows. . . . As audiences become more specialised and more educated in technical areas, they expect texts that are targeted to their particular needs. Moreover, . . . passing inaccessible legislation under the feeble excuse that its primary audience possesses legal sophistication is not easily acceptable. And so legalese cannot be promoted even in cases of specialist legislation, such as rules of evidence. . . .

And what about the other extreme? How plain must legislation be? Even within the group profile of lay persons reading the legislative text in order to resolve a personal issue there is plenty of diversity. The private person will not be a trained lawyer, and will not be another trained professional using the legislation in the course of their work. But their sophistication, general and legal, can be very diverse, ranging from a fiercely intelligent and sophisticated user to a rather naive illiterate and intellectually challenged individual. Whom does the

drafter speak to? One would find it difficult to gauge the sophistication of . . . “the average man on the street.” Even if a drafter could identify such a person and attribute characteristics to them, are they to ignore the “below averages” amongst us? Going back to the aim of legislative drafting as the production of an effective text contributing to efficacy of regulation offers a rather lucid answer to this question. The drafter is speaking to each and every user who must comply with the new legislation: this includes the above averages, the averages and the below averages. Really the drafter speaks to each and every citizen or subject, provided that they remain legally capable. And so the level of plainness required is currently underestimated: the criterion currently used is the average person, whereas the real criterion must be the least sophisticated, below average citizen or subject. “In the absence of instructions to the contrary, drafters are not only entitled to write for this audience but may even have a professional obligation to do so.”<sup>6</sup>

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Do you agree that legislation should be drafted in language so plain that even unsophisticated laypersons can understand its meaning? Not everyone agrees that legislation should be drafted for everyone.

#### 1A ELMER A. DRIEDGER, MANUAL OF INSTRUCTIONS FOR LEGISLATIVE AND LEGAL WRITING

6 (1982)

One hears it said that laws are for everybody; therefore laws should be written so that everybody can understand them. Both assertions are false. Who is everybody? Obviously, laws cannot be written so that infants, the unintelligent or completely uneducated people can understand them. The [Canadian] Governor General’s Act was written for the Governor General and the Treasury authorities; not for me. The Canada Grain Act was written for those engaged in the grain trade; not for the corner grocer, and it matters not a whit whether he can understand it or not. The Companies Creditors Arrangement Act was not written for a Doctor of Philosophy in ancient philology.

Laws are written for persons of average intelligence and education who have an interest in or knowledge of the subject-matter of the law. Certainly, laws that concern them should be written so that they can understand them.

There are three audiences a draftsman should have in mind, and the emphasis may vary according to the nature of the law. The audiences are: the public; the courts and lawyers; parliamentarians [legislators]. And in many statutes some provisions are particularly directed to one audience and other provisions to another. A Highway Traffic Act, or the Criminal Code, are for the most part

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6. See XANTHAKI, *supra* note 3, at 50-51 (quoting R. Sullivan, *The Promise of Plain Language Drafting*, 47 McGill L.J. 97, 114 (2001)).

directed to the public at large, although there would be some enforcement or legal provisions intended primarily for law enforcement officers, lawyers and judges. The Precious Metals Marking Act is directed principally to those engaged in the jewellery trade. The Explosives Act is written for those who manufacture, store, transport or use explosives; I have no interest in it. The Senate and House of Commons Act is directed to members of Parliament. All that can be asked is that the persons to whom a statute or a portion of a statute is directed should be able to understand it; perhaps not to the finest nuance, but they should be able to grasp the gist of it.

Then there is the complaint that laws are too complicated. It may be granted that the expression of a law is too complicated, but we live in a complicated society, a society that cannot be regulated by simple little laws. The law is necessarily complicated. The challenge to draftsmen is not to simplify the law into short dos and don'ts; that cannot be done. The challenge is to make the law more presentable and comprehensible. That can to a large extent be done by language alone, but there are other aids as will be illustrated in this work. . . .

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Both of these passages were written by experts in legislative drafting — one from the United Kingdom, the other from Canada. In your opinion, who has the better argument? Can you find a way to reconcile the two perspectives?

Like private rules, public rules have multiple audiences with diverse interests, needs, and expectations. Generally, the drafter can anticipate the nature of the primary and secondary audiences and how they might rely on the drafted document. Sometimes those interests conflict, but clear drafting meets all possible audiences' needs, anticipated or not, for rules that are easily understood.

## § 4.4 Unforeseen Consequences

For a contract or other transactional document, the drafter's primary goal is to translate the client's objectives into legal language that is clear, concise, and comprehensive enough to resolve any issue that the drafter can reasonably anticipate during the life of the parties' relationship. Some agreements have a short life, such as real estate sales contracts. While the relationship governed by a sales contract might have a short duration, the contract terms will continue to govern any disagreements about the bargain, especially if something goes wrong with the subject matter of the transaction. Other private rules govern ongoing business relationships, and for that reason the drafter might have a greater challenge anticipating potential disputes over the life of the agreement and draft accordingly.

The parties to a contract are generally free to mutually agree to its terms. But a court will refuse to enforce contract provisions that are contrary to law or public policy. Classic examples include restrictive deed covenants that

discriminate on the basis of race or religion, as well as noncompete clauses in employment agreements. Even one unenforceable clause in an otherwise enforceable contract poses a risk that the entire contract will be invalidated. Or a court might refuse to enforce the unlawful term and enforce the rest of an otherwise valid agreement, but only if the illegal term is not an essential part of the agreement.<sup>7</sup> If a client requests provisions in a private agreement that are unenforceable, the drafter has a responsibility to advise the client about the risks and suggest appropriate alternatives.

In contrast to private rules, most public laws have an indefinite life. It is nearly impossible for the client or the drafter to anticipate every possible issue that might come up during the life of a public law. But the drafter has a professional responsibility to include provisions in the bill that will address those issues, to the extent reasonably possible.

Without careful research, planning, and revision, unintended consequences might defeat the client's objectives for even the most carefully drafted law. The greatest risk of an unintended consequence is that a court might invalidate the statute or rule as a whole. If the drafter has failed to identify and resolve possible constitutional challenges or federal preemption arguments, the entire statutory scheme could fail.<sup>8</sup> Or the court might sever an unconstitutional provision from the rest of an enactment and effectively amend the statute by enforcing the rest. Perfectly precise wording and immaculate organization will not save the legislation from substantive failure on constitutional or preemption grounds.

Similarly, the drafter must be familiar with the process for enacting the statute or issuing the rule, as explained in Chapter 2. Constitutional and statutory requirements for the form of a bill and the process for its enactment must be followed faithfully, or the legislation might never take effect in the first instance. When drafting proposed legislation, a full understanding of the jurisdiction's procedural and format requirements is essential. Some requirements are constitutional, but others are found in statutes. At the local level, the form and process for adopting ordinances are sometimes governed by a charter ordinance or by state statutes.

Proposed legislation or other public rules are frequently revised (before introduction) and amended during the deliberation process (after introduction). Every revision or amendment raises the risk that other aspects of the proposed rule will be inconsistent with the amendment, which in turn might create contextual ambiguities that complicate how the law will be interpreted or implemented.

The most common kind of unintended consequence of any drafted rule or instrument is litigation to resolve a dispute about its meaning or intended effect.

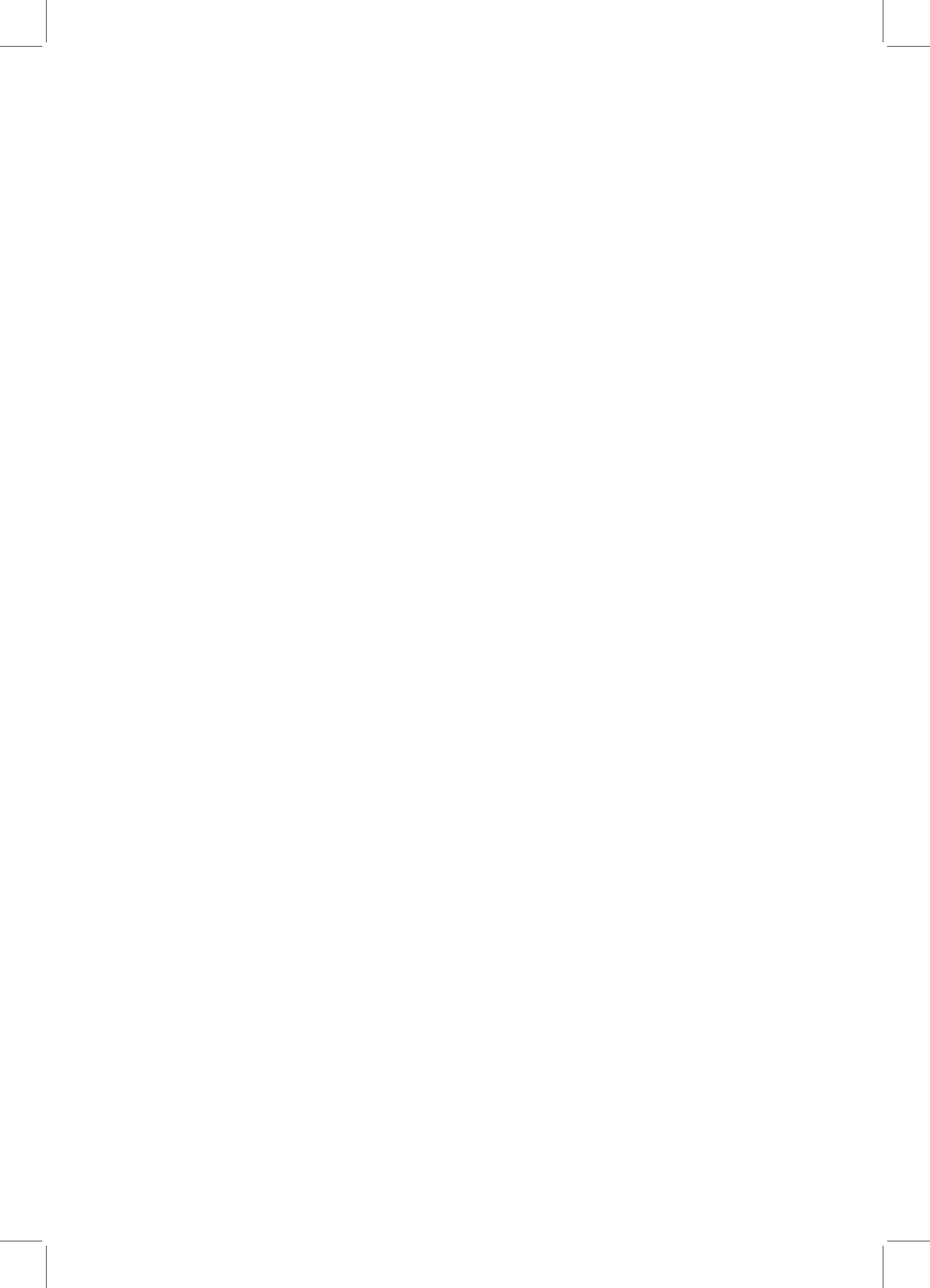
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7. Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 47–48 (1995).

8. State laws and local ordinances can be preempted not only by federal statutes, but also by federal regulations. See *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).



While litigation might not ultimately change the meaning or application of drafted language, it always causes uncertainty, confusion, delay, and expense to the contract's parties and to everyone within the scope of a challenged public law. For the drafter, the most important measure of effectiveness is whether the parties governed by a drafted rule can resolve disputes by consulting the document's language, without resorting to litigation.



A green square containing the white Roman numeral 'II'.

# General Principles



# 5

## Basic Drafting Principles

This chapter explains 14 basic drafting principles.

1. Don't talk — create.
2. Focus on the problem you are trying to solve or prevent.
3. Create rules wisely — and express them perfectly.
4. Predict — and draft accordingly.
5. Draft for all your readers.
6. Draft precisely what you mean — and draft it so that everyone will understand.
7. If a concept is simple, do not complicate it.
8. Use consistent wording throughout.
9. Draft in the present tense unless you have a good reason not to.
10. Draft in the singular unless you want the provision to apply only to multiples.
11. Find and close loopholes.
12. Never include a provision without knowing why.
13. Never use a word or phrase unless you know exactly what it means.
14. Think like a lawyer — but don't imitate noises that you assume lawyers make.

### § 5.1 Don't Talk — Create

Drafted documents are words in action. That is why statutes are called *acts* — such as the Environmental Protection Act and the Americans with Disabilities Act.

Contracts and statutes *require, prohibit, authorize, empower, provide, permit, define, establish, grant, or set out*.

Contracts and statutes do not *say* or *explain* or *describe*. They do not *talk*.

In conversation, we can use the word *say* like this: “Title IX says you can’t do that.” That is casual talk. A lawyer does not write that way. Instead, write “Title IX prohibits . . .”

## § 5.2 Focus on the Problem you are Trying to Solve or Prevent

Professionals solve and prevent problems. That is what clients hire lawyers to do.

Every big problem is made up of smaller problems. Your client is buying a painting worth \$5 million and asks you to draw up the contract. The big problem is “my client needs a document through which she purchases an art masterpiece.” Inside that big problem, the smaller problems include protecting your client now in case, for example, someone other than the seller has a legal claim to it; it turns out to be a fake; it has an undisclosed history of being damaged and repaired; or the seller does not deliver it on time, in the right place, and in the right condition. You cannot prevent these future problems from happening, but in drafting the contract, you can help prevent a total legal loss to your client if they do. (Chapter 32 explains how.)

What are you trying to get people to do? How do you want them to do it? Why do you want them to do it that way? The answers to those questions — the *what*, the *how*, and the *why* — are a function of the problem you are trying to solve or prevent.

Drafters use rules to solve and prevent problems.

## § 5.3 Create Rules Wisely — and Express them Perfectly

There are two ways for a rule to go bad.

A rule can be unwise in substance. It was the wrong rule for the circumstances. Unwise rules accomplish little and create problems rather than solving and preventing them.

Or a rule can be imperfect in expression. It might have been the right rule for the job. But a mistake in phrasing might lead courts to construe it in ways the drafter had not intended. Even if a rule is wise, it will fail if expressed imperfectly. Choose words very carefully to get the results you want.

## § 5.4 Predict — and Draft Accordingly

Casebooks are about the past. Things have already gone wrong, and courts are deciding who takes the blame.

Drafting is about the future. What events will happen? What will people do? How will market conditions and technology change? You are drafting now to govern events in the future. If you do not foresee the future, your drafting will govern badly.

If you are drafting a statute, how will people react ten years from now to your words? How will courts interpret them? How will people change their behavior?

If you are drafting a contract, what could go wrong? If your client is buying machinery, what can you do now to ensure that your client recovers if the machinery fails next year? If your client is concerned that the other party might want to get out of the deal next month, how can you draft now to make that difficult? If your client might want out, how can you draft now to make that easier in case your client needs an escape hatch?

## § 5.5 Draft for All Your Readers

For a contract, your readers include

1. the parties, who would read the contract to learn what each is expected to do;
2. lawyers who might advise the parties later, including litigators if disputes break out; and
3. judges, if disputes break out.

For a statute, administrative regulation, or other part of public law, your readers include

1. members of the public who are affected by the provision you draft;
2. government employees who enforce that provision;
3. lawyers representing members of the public and lawyers representing the government; and
4. judges, if disputes break out.

## § 5.6 Draft Precisely What You Mean — and Draft it so that Everyone Will Understand

A drafter's first duty is to communicate precisely and clearly. If a word or phrase can reasonably be interpreted two different ways, its meaning is ambiguous, and the drafter has failed. Draft so clearly and so precisely that reasonable readers cannot disagree about what you mean.

Sometimes a student will say, “I don’t need to worry about the fine points. Courts will figure out what I mean.” That kind of bad lawyering potentially harms everyone because litigating is costly — to the parties, the courts, and society in general.

Costs are not always obvious or exclusively financial. Some things that look free are not. When you are a student, Westlaw and Lexis appear to be free because nobody asks you to pay for them. But ask any law firm partner what the firm pays for the same services, and you might hear a jaw-dropping number. Westlaw and Lexis charge less-than-market rates to law schools to encourage you to learn how to use them. Litigation might appear to be free because casebooks are full of cases, and none have price tags attached. But ask any party to a lawsuit, and you might learn how litigants suffer paying lawyers’ fees and other lawsuit expenses and experiencing years of disruption, uncertainty, and anxiety. And these financial costs do not include how overwhelming the disruption, uncertainty, and anxiety may feel to a client.

Every disputed issue costs money. If reasonable people can disagree about what your drafting means, they will sue each other if it is in their interests to do so. Do not make the reader guess. Litigation should never be necessary to resolve a drafted rule’s meaning.

Even if no one sues, your drafting fails if it does not make clear what those affected must do or not do. Most people will do what is required of them — if they know what it is. The reader who wants to do the right thing should be able to learn from your drafting what to do — *exactly* what to do. The reader who wants to do something unless it is prohibited should be able to learn from your drafting whether it is prohibited or not.

American law is filled with terminology that baffles laypeople. Some terms — like *successors and assigns* — carry specialized meaning that is difficult to express another way. But lawyers overestimate how many legal terms are that specialized. “How else can I express *force majeure*?” asks a contract drafter. Just translate it into real English: “events that excuse a default.”

## § 5.7 If a Concept Is Simple, Do not Complicate it

Good lawyering includes the ability to simplify wisely. Here’s an example:

<b>needlessly complex</b>	Nothing in this Act shall be construed to . . .
<b>what it really means</b>	This Act does not . . .

Both versions introduce a declaration clarifying what the Act does not do. This simple concept does not need the extra idea of construing, so simply write: “This Act does not . . .”



Here's another example:

**needlessly complex** does not operate to  
**what it really means** does not

“Operate” is an unnecessary idea that complicates a simple concept. Just write “does not.” Here's another:

**needlessly complex** during the course of  
**what it really means** during

“The course of” is an unnecessary idea that complicates the simple concept of duration. Just write “during.” Here's another:

**needlessly complex** the provisions of this section  
**what it really means** this section

The simple concept is “this section,” which is enough. Here's one more example:

**needlessly complex** The law of the State of Idaho  
governs . . .  
**what it really means** Idaho law governs . . .

Why insert the extra idea of statehood? It is pointless idea-clutter. Just write “Idaho.”

Drafters' inability to simplify is the biggest cause of unreadable drafting. Here's an example of the cumulative effect (from a sports stadium lease):

“Concessions” means souvenirs, including but not limited to scorecards, programs, yearbooks, and other publications, promotional materials, hats, jerseys, t-shirts, and other sports apparel and merchandise including items bearing the Tenant's insignia, as well as food, and beverages, including but not limited to beer, wine and wine coolers, alcoholic beverages, confections, peanuts, popcorn, ice cream, hot dogs, and hamburgers.

This definition includes three simple ideas that are overwhelmed by pointless clutter, which is crossed out below:

“Concessions” means souvenirs,  
~~including but not limited to scorecards, programs, yearbooks,  
and other publications, promotional materials, hats, jerseys, t-~~

~~shirts, and other sports apparel and merchandise including items bearing the Tenant's insignia, as well as food, and beverages, including but not limited to beer, wine and wine coolers, alcoholic beverages, confections, peanut, popcorn, ice cream, hot dogs, and hamburgers.~~

Could anyone seriously believe that a hamburger is not food? Remove the crossed-out words, and you have this:

"Concessions" means souvenirs, food, and beverages.

Do not complicate something that is inherently simple.

## § 5.8 Use Consistent Wording Throughout

Inconsistent wording creates confusion and risks ambiguity.

**When you mean the same thing, use the same words — exactly.** Memorize the following: "Use exactly the same wording to express the same thing." Always use the same words when referring to the same object, action, or idea. Never vary the wording. If you do, a court can assume that you meant different things in different places — even if you did not.

**Never use the same word or phrase to mean two different things.** Don't use a word in section 2(b) to mean one thing and in section 3(a) to mean something different. Because you used the same word in both places, many courts would decide that you meant the same thing — even though you meant different things.

**Never provide the same thing twice.** Suppose in a contract's section 4(d), you impose a duty on the seller to ship the goods "in frustration-free packaging." Later, in section 11(a), you impose the same duty to ship the goods, but this time you write "in cardboard packaging." Which packaging is the seller required to use?

*Frustration-free* is a term of art in website retailing. Amazon promises that frustration-free packaging is

- Recyclable and does not include excess packaging materials, such as hard plastic clamshell casings, plastic bindings, and wire ties.
- Designed to be opened without a box cutter or knife, while protecting products just as well as traditional packaging.<sup>1</sup>

1. See *Amazon Frustration-Free Packaging*, AMAZON.COM, <https://www.amazon.com/gp/help/customer/display.html?nodeId=200404820> (last visited July 1, 2017).

If a cardboard box is sealed shut with metal staples, it might not satisfy this definition of “frustration-free.” The only way to find out is for the buyer to reject a shipment, the parties to sue each other, and a court to decide. (Good drafting should minimize lawsuits rather than encourage them.)

You committed the sin of trying to do the same thing twice. Unless you use exactly the same words the second time as the first, you risk creating ambiguity. Provide once — and do it right that one time.

## § 5.9 Draft in the Present Tense Unless You have a Good Reason not to

The law speaks continuously in the present. It refers to the past only when necessary. And it rarely refers to the future, except when an enacted statute has a delayed effective date. Even then, once the statute takes effect, it speaks in the present to anyone reading it. The same is true of contracts.

The future is like the horizon. We never get there. It keeps retreating as we move toward it. If law is expressed in the future tense, it can never govern us because we are never in the future. We are always in the present, and the law must govern us *now*. As we move through time, the law moves with us.

**wrong** This Agreement will terminate on the date the Employee dies or becomes disabled.

**correct** This Agreement terminates on the date the Employee dies or becomes disabled.

When the employee signs the contract, she is alive and presumably not disabled. The future tense “will terminate” seems right. But it really is not. At the moment the sentence activates — the moment of death or disability — everybody involved will be in the present, which is why the present tense “terminates” is the right verb form to use.

Suppose you are drafting a statute creating a government commission that will come into existence next January 1. Right now it does not exist, but it will exist at the stroke of midnight that begins the new year. The legislature is enacting the statute now. You are drafting for the future, and as you draft, you think in the future tense. But when someone reads your statute on January 1, it must speak in the present tense because by the time the statute is read, it will be in operation. What appears to be in the future to you now as drafter will become the present to the reader. Present tense best captures that pragmatic reality.

**wrong** The Commission will be composed of . . .

**correct** The Commission is composed of . . .

Sometimes a duty, discretionary authority, or declaration takes effect only on condition that some event *has already happened*. Here's how to express it:

**correct** If the Owner has occupied the Premises for five years or more . . .

“Has occupied” is not in the past tense. It is in the *present perfect tense*, which is used to describe actions that began in the past and as of now — in the present — are completed.

Sometimes a condition is based on a *present* fact that predicts a *future* event. Here's how to express it:

**correct** If the quarterly audit report projects that the agency will have a budget shortfall within six months . . .

The governing fact here would be a report that “projects” (present tense). A report would predict in the present something that might happen in the future.

In contracts, parties routinely warrant (promise) future facts. Every consumer product warranty promises that the product will perform well for a specified time in the future. This is one of the few instances when you should draft in the future tense. Chapter 32 explains why.

## § 5.10 Draft in the Singular Unless you Want the Provision to Apply Only to Multiples

In contracts and statutes, a singular noun or pronoun implicitly includes the plural of that noun or pronoun. If it applies to one, it will also apply to two. But if you draft in the plural, you are literally providing that the term can never apply to just one alone. As a U.S. House of Representatives' drafting manual explains,

provisions should be drafted in the singular to avoid the ambiguity that plural constructions can create. Take, for example, this provision: “Drivers may not run red lights.” It is ambiguous as to whether there is any violation unless multiple drivers run multiple red lights. This problem can be avoided by rewriting the provision as follows: “A driver may not run a red light.”<sup>2</sup>

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2. U.S. House of Representatives, Office of Legislative Counsel, *Introduction to Legislative Drafting*, at 9 (2015).

Occasionally you need to draft in the plural to clarify that a provision governs groups or categories. These examples are from the Texas Legislature’s drafting manual:<sup>3</sup>

- correct** The Texas Education Agency shall establish a program to identify children with impaired hearing.
- also correct** If it appears that a child has impaired hearing, the agency shall inform the child’s parent and recommend appropriate treatment.

If the first example had been drafted in the singular (“to identify a child”), the agency would have a duty to only one child in the entire state. Drafting in the plural clarifies that the duty covers children with impaired hearing *generally*.

But the second example is properly in the singular (“a child”). If it had been in the plural (“If it appears that children have impaired hearing”), the agency would have an argument that it owes duties only to families with at least two hearing-impaired children.

The singular includes the plural. But the plural does not include the singular.

## § 5.11 Find and Close Loopholes

Assume your client wants to buy a factory built in 1981. The current owner bought it in 1988 from the original owner and is now selling it to your client.

You and your client are concerned about the possibility of toxic materials on the premises. You are not worried about steel barrels with warning labels on them. Your client has examined the place thoroughly and found none. You are worried about chemicals that the factory might have used in the past and that might have seeped into the soil, where they would be invisible. Under federal law, the property owner must pay the cost of removing toxic materials, which can be incredibly expensive. In some situations, the expense can bankrupt the owner. Right now the seller owns the property. After the closing, your client will own it.

The sale contract has been drafted, but the parties have not yet signed it. The contract contains this sentence:

The Seller represents and warrants that it has not used any materials in the Factory that the law requires a property owner to abate at the owner’s expense.

Find the loophole. It does not matter who drafted the sentence. The seller’s lawyer might have inserted the loophole deliberately. Or if you drafted the

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3. TEXAS LEGISLATIVE COUNCIL, DRAFTING MANUAL 113 (2015).

sentence, you might have included the loophole by accident. The only thing that matters is that the problem sentence is in the contract, which the parties have not yet signed.

You can advise your client not to sign until you have renegotiated the contract and redrafted the sentence to remove the loophole. But first, you must find it. How would you redraft the sentence to protect your client from bearing the expense of removing toxic materials once the sale closes?

### § 5.12 Never Include a Provision Without Knowing Why

Never put something in a statute or contract just because you saw it in a different statute or contract, and it looked good there. Here are two reasons:

1. The provision you include might have caused a problem in the statute or contract where you saw it — and you might not know about the problem it caused.
2. That provision might have worked wonderfully in the statute or contract where you saw it. But your situation is different, and adding it without thinking might cause trouble.

For every provision — every sentence — ask yourself what you want it to accomplish. What is your goal? And decide how the provision or sentence accomplishes your goal. Know exactly what you are doing and why.

### § 5.13 Never Use a Word or Phrase Unless you Know Exactly What it Means

You are drafting a contract. You represent the buyer, and the seller has a duty to deliver the goods by June 19. You throw in the words *best efforts*. You have heard and read those words many times. They sound good when you hear them and look good when you see them. What could be better than *best efforts*? How can you go wrong by including them?

In your contract, these words are a potential disaster. They do not require the other party to deliver by June 19. They require only that the party *try very hard* to do it. If the goods have not been delivered by June 19 and the other party points to your “best efforts” clause as an excuse for failing to deliver on time, you are in trouble with your client, who absolutely needed the goods by then.

## § 5.14 Think Like A Lawyer — But Don't Imitate Noises that You Assume Lawyers Make

Imitating creates only an illusion of lawyering. Good legal drafting uses your mind to build rules that get results.

Clients pay lawyers to think, not to imitate.

### EXERCISES

#### Exercise 5-A. The Loophole

In § 5.11, what is the loophole? How would you close it?

#### Exercise 5-B. The Driveway

Redraft this statute to avoid the result in *People v. Rea*.

##### **Michigan Vehicle Code, § 257.625(1).**

A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated.

##### PEOPLE v. REA

889 N.W.2d 536 (Mich. App. 2016)

Gleicher, P.J.

Late one spring night, defendant had a lot to drink and withdrew to his Cadillac sedan to listen to loud music. A neighbor objected to the noise and called the police. Two officers responded. They found defendant seated in his car, the driver's door ajar. The vehicle was parked deep in defendant's driveway, next to his house. An officer instructed defendant to turn down the music. The neighbor complained a second time, and one of the officers returned to the scene. The officer heard no music and could not see the Cadillac.

When the third noise dispatch issued, Northville police officer Ken Delano parked on the street near defendant's home and began walking up defendant's driveway. The door to the detached garage opened, and defendant's vehicle backed out for "about 25 feet" before stopping. At that point the car was still in defendant's side — or backyard. As noted by the officer:

Q. . . . So at all times he was either in his side yard or in his own backyard, correct?

A. Yes, sir.

Defendant then pulled the car back into the garage. He was arrested as he walked toward his house.

Here is a photograph depicting defendant's driveway and its relationship to his house.



At no time did defendant's car cross "the front of [the] house," officer Delano admitted.

The prosecution charged defendant with operating a vehicle while intoxicated, MCL 257.625(1). The statute provides in relevant part:

A person . . . shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, . . . if the person is operating while intoxicated.

The circuit court granted defendant's motion to quash the information, ruling that "[t]he upper portion of Defendant's private residential driveway" does not constitute an area "generally accessible to motor vehicles." . . .

Here, the prosecution failed to establish probable cause to believe that defendant "operate[d] a vehicle upon a . . . place open to the general public or generally accessible to motor vehicles. . . ." The term "generally" means "to or by most people; widely; popularly; extensively[.]" *Webster's New World College Dictionary* (5th ed), p 604. Other dictionaries provide similar definitions. *The*



*American Heritage Dictionary of the English Language* (5th ed), p 731, has the following definition:

generally . . . *adv.* 1. Popularly; widely; *generally known*. 2a. As a rule; usually: *The child generally has little to say*. b. For the most part: *a generally boring speech*. 3. Without reference to particular instances or details; not specifically: *generally speaking*.

The *New Oxford American Dictionary* (3d ed), p 722, offers these definitions:

generally . . . 1 [sentence adverb] in most cases; usually: *the term of a lease is generally 99 years*. 2 in general terms; without regard to particulars or exceptions: *a decade when France was moving generally to the left*. 3 widely: *the best scheme is generally reckoned to be the Canadian one*.

Common to all three definitions is the concept of regularity, ordinariness, or normality.

. . . “Generally accessible” in the current statute modifies the noun phrase “other place.” The statute thereby prohibits intoxicated driving upon a highway or upon any “other place . . . generally accessible to motor vehicles. . . .” MCL 257.625(1).

Defendant drove his car from his garage to a point in his private driveway in line with his house. A residential driveway is private property. See MCL 257.44(1) (“Private driveway’ means any piece of privately owned and maintained property which is used for vehicular traffic, but is not open or normally used by the public.”). Even assuming that the *bottom* of one’s private driveway (that is, its exit) qualifies as a “place open to the general public or generally accessible to motor vehicles,” MCL 257.625(1), reasonable fact-finders could not differ on this record that the area of defendant’s driveway in which defendant operated his car was not. The “general public” is not “widely” or “popularly” or “generally” permitted to “access” that portion of a private driveway immediately next to a private residence. That part of a private driveway is simply not a “place . . . generally accessible to motor vehicles.” *Id.* Rather, it is a place accessible to a small subset of the universe of motor vehicles: those belonging to the homeowner or those using the driveway with permission. That particular area of defendant’s driveway is akin to a moat; it is an area that strangers are forbidden to cross but defendant may wade at will. Defendant consumed alcohol and drove, but only in this private area. Accordingly, charges were not supportable.

The prosecution insists that because the driveway was not barricaded and any visitors or delivery persons could access the driveway, the trier of fact must decide whether the specific area in which defendant drove was “generally accessible to motor vehicles.” We are unpersuaded. That other vehicles had the ability

to enter the area of defendant's driveway between his house and his garage misses the point. Physical ability is not the touchstone of general accessibility. Had the Legislature intended to include every place in which it is physically possible to drive a car, it could have so provided. However, the plain language of the statute prohibits driving while intoxicated in places where cars are regularly, "widely," and "usually" expected to travel. The area of a private driveway between one's detached garage and house is not such a place.

Moreover, had the Legislature wanted to criminalize driving while intoxicated in one's own driveway, it could have outlawed the operation of a motor vehicle in *any* place "accessible to motor vehicles," omitting the adverb "generally." But the statute uses the word "generally" to modify the word "accessible," and the combined modifier to further describe "other place." The commonly understood and dictionary-driven meanings of the term "generally" in this context compel the conclusion that the Legislature meant to limit the reach of MCL 257.625(1). On this record, no one could reasonably conclude that defendant drove in an area that was open to the general public or was generally accessible to motor vehicles other than to defendant and the members of his household. . . .

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4. The Michigan Court of Appeals opinion was reversed on appeal. *People v. Rea*, 500 Mich. 422 (2017).