Legislative Drafting: Common Law and Civil Code Perspectives

David Marcello
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The Public Law Center

• TPLC Runs the Legislative and Administrative Advocacy Clinic at Tulane Law School.
  – “Clinical” Legal Education + Representation of . . .
  – “Traditionally Underrepresented” Clients

• We Teach About Two Sources of U.S. Law.
  – Statutes: Enacted by Legislatures (“Primary Legislation”)
Where Might Law Students Think Most U.S. “Law” Comes From?

• Law Reform Litigation and the Warren Court
  – *Brown v. Board of Education*
  – *Gideon v. Wainwright*

• Legal Education: Langdellian “Case Method”
Ground Rules

• No parliament is “just like” parliament described in this presentation.

• Nor can any single description of U.S. process encompass all variations:
  – United States Congress
  – 50 state legislatures
  – Local government councils
Clarification of Terminology

• What do we mean by “Government”?  
  – U.S.: Three Branches—Executive, Legislative, and Judicial  
  – Parliamentary System: Majority Party or Ruling Coalition

• “Agency” = ”Ministry”

• ”Regulations”=”Subordinate Legislation”
OVERVIEW: COMPARISON OF U.S. AND PARLIAMENTARY PROCESS

• Relationship between legislature and chief executive
• Public participation opportunities
• Executive-legislative branch conflicts
• Independent members
• Many bills; most will not pass
• Amendments: offered by anyone; could win
• Drafters work for legislators (lawyer-client confidentiality)
## Three Branches and Three Levels of Government

<table>
<thead>
<tr>
<th></th>
<th>Executive</th>
<th>Legislative</th>
<th>Judicial</th>
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<tbody>
<tr>
<td><strong>State of Louisiana</strong></td>
<td>Governor, State Agencies, Bds., Comms.</td>
<td>Louisiana Legislature</td>
<td>La. Sup. Court Cts. Of Appeal District Courts</td>
</tr>
<tr>
<td><strong>City of New Orleans</strong></td>
<td>Mayor, City Agencies, Bds., Comms.</td>
<td>City Council</td>
<td>Municipal &amp; Traffic Courts</td>
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Three Branches of U.S. Government: Separation of Powers Principles

• Executive: Executive privilege protects the confidentiality of executive deliberations.
• Legislative: Each chamber decides its own members’ qualifications.
• Judicial: Courts regulate judges’ conduct and the practice of law by licensed attorneys.
• “no one of these branches . . . shall exercise power belonging to either of the others.”
Enactment Process: Overview

EXECUTIVE

GOVERNOR OR PRESIDENT

HOUSE OF REPRESENTATIVES

COMMITTEE

SENATE

COMMITTEE
Opportunities for Public Participation

• Originating Legislative Ideas and Bills
• Committee Testimony
• Direct Lobbying of Members in Committee and During Floor Debate
• Holding Press Conferences
• Indirect ("Grassroots") Lobbying
• Appealing to Governor/President for Veto
• Influencing Agency Implementation of Law
AGENCY REGULATIONS: APA PROMULGATION PROCESS

• “Notice and Comment” Rulemaking
  – Publication: Louisiana Register or Federal Register
• Fiscal and Economic Impact Statement
• Legislative Oversight and “Veto”
• Delegation Doctrine
  – Need for “Standards” and “Criteria” to govern agency implementation of legislative delegation
• Public Access to Final Regulations
  – Louisiana Code or Code of Federal Regulations
  – Internet Access
Louisiana: A Civil Code Island in a Sea of Common Law Jurisdictions

- Louisiana’s Spanish and French Civil Code Heritage
- 49 Other States: Common Law Jurisdictions
- Prof. Vernon Palmer, “Mixed Jurisdictions”
Common Law vs. Civil Code: Different Ways of Thinking for Legislative Drafters

• “Common Law” Method: Originates in Judicial Decisions Resolving Specific Disputes
• Retrospective: “Looking Back” Orientation
• Analytical: “Deconstructing” Cases

• “Civilian” Method: Formulates rules of law by anticipating future fact situations—a creative, synthesizing process.
Prof. Williams on “Common Law” Orientation in Legislative Drafting

“[Drafting] statutes requires different mental operations from traditional common-law legal reasoning . . . . In working on the development of statutes, the lawyer is looking forward creatively instead of looking back critically. This is a dramatic shift in orientation.”
Deconstructing Litigation & Legislation

Litigation: Conflict Between Two or More Parties

Legislation: Focuses on Broad Social Interests
Deconstructing Litigation & Legislation

Litigation: Looking Back, Focusing on Specific Facts

Common Law: Derives General Principles from Ad Hoc Decision Making

Legislation: Looking Forward, “Big Picture” Perspective

Civil Code: Articulates General Principles Applied Later in Resolving Specific Disputes
Deconstructing Litigation & Legislation

Litigation: Inward-Looking, Analytical

Legislation: Outward-Looking, Global
# Deconstructing Litigation & Legislation

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<th><strong>LITIGATION</strong></th>
<th><strong>LEGISLATION</strong></th>
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<tbody>
<tr>
<td>• Constrained by Current Legal Context</td>
<td>• Unconstrained (Mostly) by Current Law</td>
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<tr>
<td>• Change Arises Out of Existing Constitutional and Statutory Landscape</td>
<td>• Changes the Existing Constitutional and</td>
</tr>
<tr>
<td>• Change Governed by Judicial, not Political Considerations</td>
<td>Statutory Landscape</td>
</tr>
<tr>
<td></td>
<td>• Change Constrained by Political Considerations</td>
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**Common Law** versus **Civil Code**: Which Methodology Works Better for Drafters?

- **Common Law**
  - “Look back” and “deconstruct” cases
  - Extract general principles of law from ad-hoc decisions

- **Civil Code**
  - “Look forward” for “law creation” purposes
  - Devise general principles of law and apply them to resolve specific disputes as they arise

- These two distinct methodologies are both addressed in Louisiana legal education.
WHY USE PLAIN LANGUAGE?

• Wydick’s criticism of legal writing:
  • Wordy
  • Unclear
  • Pompous
  • Dull
WHAT IS PLAIN LANGUAGE?

“... simplicity would dictate that the language used by lawyers agree with the common speech, unless there are reasons for a difference.”

David Mellinkoff, *The Language of the Law*

“... good legal writing should not differ, without good reason, from ordinary well-written language.”

Richard Wydick, *Plain English for Lawyers*
WHAT ARE THE CHARACTERISTICS OF A PLAIN LANGUAGE WRITING STYLE?

• A writing style that is:
  • C
  • C
  • C
  • C
  • C
WHAT ARE THE CHARACTERISTICS OF A PLAIN LANGUAGE WRITING STYLE?

• A writing style that is:
  • Correct
  • Complete
  • Clear
  • Concise
Drafting in Plain Language: How Do We Know It When We See It?

- Short sentences and paragraphs
- Everyday words
- Personal pronouns or names
- Active verb forms
- Readable type size
- Boldface section headings
- Layout and spacing
- Coherent organization
- Average words per sentence: 22 or less
Dickerson’s “Steps in Drafting”

1. Factual info; objectives
2. Analysis
3. Legal Research
4. Synthesis (Outline)  

SUBSTANTIVE

5. Draft
6. Revise
7. Cross-checks (Horizontal)
8. Dialogue with others
9. Polish
10. Bill/Rule

FORM & STYLE

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Synthesis (Outline)

• General Organization of Instrument
• Chronological Organization
• Drafting Manuals

• Equipped with an outline, we can move from the “thinking” part of the drafting process into the compositional or “writing” part of the process.
WHIRLYBIRD!

• How can the drafter free up ideas and get started drafting when facing a blank computer screen or sheet of paper?
• Let’s do an exercise: Create a Code of Governmental Ethics.
Convert Whirlybird to Outline

• I. Definitions

• II. Standards
  A. Bribery
  B. Conflicts of Interest
  C. Income Disclosure
  D. Nepotism
Convert Whirlybird to Outline

• III. Administration
  A. Board of Ethics
    1. Qualifications
    2. Terms
    3. Appointment Process
  B. Staff
    1. Executive Director
    2. General Counsel
    3. Investigators
Convert Whirlybird to Outline

• IV. Enforcement Procedures

• V. Penalties
  A. Fines
  B. Employment Status
    1. Demotion
    2. Suspension
    3. Termination
The Drafter’s “Personalities”

- Madman
- Architect
- Carpenter
- Judge
“Whirlybird” Outputs

- Brainstorming on paper—can be done by a group or as an individual.
- Conversion of “whirlybird” to orderly outline.
- Interaction between “brainstorming” and “outlining” enriches both products.
- “Madman” and “Architect” produce whirlybird and outline (Drafting Steps 1-4: “Think” Part)
- “Carpenter” and “Judge” = Legislative Drafters
Legislative Advocacy: A Powerful Tool

- Neglected in legal education
- Poorly served among *some* clients; but well represented among others
- Invites consideration of democratic legitimacy: judges vs. elected policymakers; but also, special interest lobbyists vs. public interest
- Words matter; drafters have power; use it.
- Plain language aids understanding not only among readers but also by drafters.
STRUCTURE OF HOUSE AND SENATE

• Number and Terms of Members
• Selection of Leaders
• Appointment of Committees and Chairs
• Informal Considerations
  – Floor Leaders
  – Caucuses
  – The Role of “Party”
LEGISLATIVE ENACTMENT PROCESS

• A. Origination of Legislative Initiatives
  – Ideas/Proposals
  – Drafting
  – Introduction of Bill
• B. Committee Hearing
• C. Floor Debate
• D. Alternate Chamber
• E. Conference Committee
ENACTMENT PROCESS: Executive Role

- F. Executive Approval or Veto
- G. Veto Override by Legislature with Two-Thirds Vote
Enactment Process: Related Bodies

- Legislative Bureau

- Legislative Fiscal Office (Fiscal Notes)

- Louisiana Law Institute
  - Distinguish: House and Senate Legislative Drafting Services