

INTRODUCTION AND DEFINITION OF LEGAL DRAFTING



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INTRODUCTION

- The technical writing engaged in by members of the legal profession falls into two classes, i.e.; legal writing and legal drafting.
- Legal writing embraces all kinds of expository writing including that encountered in correspondence, legal opinions, text books on legal subjects, as well as reports of decided cases.
- Legal drafting is the composition of legal instruments such as contracts, deeds, wills and legislation.

INTRODUCTION

According to Black's Law Dictionary, legal drafting refers to 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.”

DRAFTING BASICS

- When drafting a legal document, an advocate must ensure that he/she identifies all the relevant facts and law and then apply them to prepare a document that accomplishes their client's goals.
- Legal documents are typically a set of instructions for others to follow in an effort to fulfil the intent of one or more parties to the document. Clear, complete, and functional instructions promote the client's goals.

DRAFTING BASICS

Through the process of legal drafting, an advocate structures their client's factual world to make the law achieve their client's goals. The documents we draft can create the facts that trigger the legal response our client desires. This is the essence of drafting. We manipulate the facts to achieve a predictable and planned legal result

THE LEGAL DRAFTING PROCESS

The legal drafting process can be summarised and reduced to the following steps:

1. Identify the facts that define what must be addressed in the document
2. Research the law:
 - (a) implicated by the facts; and
 - (b) implicated by the subject matter of the document; and
3. Use the law and facts to state the terms of the document that will accomplish your client's goals.

THE DRAFTING SKILL

Drafting consists of the following key skills:

- 1. Obtaining information from the client and other necessary sources to fully understand the client's goals and the commercial context in which the parties operate;**
- 2. Preparing a rough draft expressing the basic agreement the client contemplates;**
- 3. Analysing the rough draft to identify the legal issues that impact each term of the rough draft;**

THE DRAFTING SKILL

4. Researching all legal issues to identify how the applicable law should be accounted for in the agreement;
5. Analysing the rough draft and the applicable law to identify planning and structuring opportunities available to the client;
6. Redrafting the agreement by applying the applicable law to accomplish the client's planning, structuring, and underlying business goals;

THE DRAFTING SKILL

- 7. Consult with the client to ensure the document will be appropriate for their needs; and**
- 8. Editing and revising the document to ensure the deal is stated using a format and language that are clear, concise, and functional. The document must be reviewed from three perspectives:**
 - a) how the draftsman and the client will understand and use the document;**
 - b) how an opposing advocate might interpret the document; and**
 - c) how a reasonable judge, of ordinary prudence, might interpret the document in the event of a dispute**

- The ultimate goal of this process is to ensure that for any document a lawyer drafts, or reviews, he/she fully understands why each word, sentence, clause, or paragraph is being used, and the effect it will have on their client. Anything less is simply unacceptable.
- The way legal provisions are expressed, whether in a contract between two individuals or in a statute that applies to everybody, can have serious consequences. Small differences in wording or grammatical arrangement can produce large changes in meaning and have a devastating impact. Once a contract is signed or a statute is enacted, its terms become definitive and binding. It is then too late to say, "That's not what I meant." The drafting process therefore involves finding out what is meant, and matching that to what is said.

THE USE OF TEMPLATES WHILST DRAFTING

- Once you have produced a draft, the last step can include looking at a template to evaluate the content of your document.
- If you begin with a template, it will improperly channel your analysis of the problem. If you begin with a systematic analysis of the problem, you will understand what should be in the document and, equally important, you will understand why it is included, or excluded.

THE USE OF TEMPLATES WHILST DRAFTING

- **The goal is to merely see what is included in the template that you did not include in your draft, and evaluate why.**
- **You must modify the template to meet the facts and needs of your client and update it as the law and circumstances dictate.**
- **Be very careful when it comes to Boilerplate clauses. Boilerplate clauses, also known as standard, miscellaneous, or general clauses, are clauses that are found at the end of most legal documents. These provisions address a range of things such as what happens if a document is declared unenforceable, how disputes will be resolved, which laws govern the contract, and more. They are fairly standard but they can have unintended legal consequences.**

➤ The drafting process is the same regardless of the type of document. The principles and goals are identical whether drafting a contract, conveyance, letter, consent, a plaint or a petition. In each situation, an advocate must know what he/she desires to accomplish, the facts and law that apply, and how the document uses facts and law to create the desired legal relationships.

