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Five ~~(5)~~ Tips for Better Legislative Drafting

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Introduction.

Lawyers are often accused of being poor writers. Much ink and (presumably) many tears have been spilled decrying the sorry state of writing in the legal profession. From the amount of hyperbole out there, one might suspect that a lawyer cannot draft a shopping list without half of a page of footnotes.

I disagree. I have generally found lawyers to be above-average in their writing ability. Anybody who doubts this has spent little time reading the writings of business executives, scientists, or (heaven help us) philosophers. In their professional capacity, lawyers are, on average, pretty proficient with a pen and paper.

Except when it comes to legislative drafting.

Lawyers tend to be at least as bad as everybody else.[1] This should not be a surprise. Legal drafting, whether it's legislation, contracts, or other documents, is a specialized skill. And most law schools do not concentrate on teaching that skill.[2] As a result, most lawyers learn their drafting skills by osmosis; they learn to draft by reading and copying existing documents. This is the most effective and efficient way to ensure the continuation of bad habits.

The purpose of this paper is to give you some points to consider when drafting legislation. While presented as "tips," the points discussed are intended to bring up things for the drafter to consider. These are not iron-clad rules that must be followed slavishly; they are merely options to consider.

A legal draft has two goals: (1) to adequately accomplish the purpose of the document; and (2) to be clear enough that everybody who needs to understand the document can do so by reading its text. It is this second goal that provides an extra challenge to legislative drafters. Other types of legal drafting take place between discrete parties and only have to be understood between those parties. For instance, an asset-purchase agreement between two Fortune 500 companies can be dense and confusing without too many repercussions because each side affected by the contract will have expensive lawyers who will understand the minutia of the document. Legislation, however, is written to be understood by everybody. It has to be written in a way that the members of the general public can understand the laws that affect them.

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[1] Wayne Scheiss, *Legal Writing Is Not What It Should Be*, 37 S.U. L. Rev. 1, 6 (2009)("Of the many types of legal writing, legal drafting…is typically of the poorest caliber.").
[2] *Id.*

When things go wrong with legislative (or any legal) drafting, it is almost always for one of four reasons:

- Ambiguity over the meaning of a word or phrase.
- Ambiguity in sentence structure
- Inconsistency between differing provisions or differing statutes
- Inconsistency between legislation and reality

1. USE MORE WORDS.

Many legislative drafts are simply too short. They would benefit from having more words, more sentences, and more paragraphs. This added content allows for better reading comprehension, less opportunity for error, and more control for the drafter.

At first blush, this advice may sound counterintuitive. After all, a litany of legal writing gurus constantly scold us lawyers about writing too much. They tell us that we are too verbose. You've doubtless heard the famous quote from the author who would have written a shorter letter if he'd had more time.[3] Lawyers are frequently told that their writing should be concise. Unfortunately, many drafters frequently confuse being "concise" with jamming everything into one sentence. The quality of your draft does not necessarily correlate with its word count.

Using more words—particularly more sentences—can, ironically, make the document easier to read. Most comprehension problems do not occur because the document is too long—most comprehension problems occur because the document is too dense. Everybody who has ever practiced law is familiar with the soul-dulling experience of having to slog through thick, dense drafting. You reach the end of a sentence, paragraph, or page and realize that nothing that you just read has stuck. Putting everything into a single sentence doesn't do any good if the reader has to read that sentence 10 times in order to figure out what it says. This problem can generally be fixed by using more—albeit, shorter—sentences. This will increase your word count, but it will also increase comprehension. For example:

> For taxable years 2015 through 2017, a tax is imposed upon each person engaged in the business of selling rubber chickens at a rate of 15% of annual gross receipts on the sale of rubber chickens, which, each month, shall be paid over in accordance with the provisions of Section 10 of the State Sales Tax Act.

That sentence is awful. While it is (hopefully) obvious that I made it up, the sentence bears remarkable resemblance to many drafts that I've seen cross my desk. It is convoluted, irritating to read, and has at least two ambiguities. But it is only 57 words long.

[3] According to the Internet, this pithy phrase may have been uttered by any number of people. It has been credited to Cicero, Blaise Pascal, John Locke, Benjamin Franklin, Martin Luther, Henry David Thoreau, Mark Twain, and Woodrow Wilson.

Consider this revision:

> (a) A tax is imposed upon each person who is engaged in the business of selling rubber chickens. This tax applies only for taxable years 2015 through 2017.
> (b) The tax imposed under this Section is imposed at a rate of 15% of the annual gross receipts from the sale of rubber chickens.
> (c) The tax under this Section must be paid on a monthly basis in accordance with the provisions of Section 10 of the State Sales Tax Act.

This revised version uses the same basic language as the original, but it is 80 words long (a 35% increase in word count). While neither version is exactly poetry, the longer, revised version is easier to read and understand—particularly after reading it through only once. The revised version also avoids the ambiguities in the language that were in the first version. Which leads me to my next point…

Using more words frequently means less opportunity for misunderstanding. One of the biggest interpretation problems is ambiguity over sentence structure. This occurs when a sentence can be read to mean more than one thing due to the way in which it is written. Linguists refer to this as "syntactic ambiguity."[4]

Syntactic ambiguity is the bread and butter for comedians. Take the famous Groucho Marx quote:[5]

> *I once shot an elephant in my pajamas…how he got in my pajamas I'll never know.*

The humor, here, comes from the syntactic ambiguity of the phrase, "in my pajamas".[6] It can be read to modify either the "I" in the sentence or the "elephant" in the sentence. The ambiguity allows for the surprising and farcical interpretation of the boudoir-clad pachyderm.[7]

Here are some more jokes that rely on syntactic ambiguity:

- I haven't slept for two weeks…because that would be too long![8]
- My grandmother, started walking five miles a day when she was 60. She's 97 today and we don't know where the hell she is.[9]
- Never hit a man with glasses. Hit him with a baseball bat.[10]

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[4] LAWnLinguistics, *Syntactic ambiguity (Part 3 of Scalia and Garner on Statutory Interpretation),* July 8, 2012, available at http://lawnlinguistics.com/2012/07/08/syntactic-ambiguity-part-3-of-scalia-and-garner-on-statutory-interpretation/

[5] …Please!

[6] This is a document about drafting legal documents, so the bar for "funny" is pretty low.

[7] Hopefully, you did not really need me to explain that joke to you. If you did, then you are probably bond counsel.

[8] Mitch Hedberg.

[9] Ellen DeGeneres.

[10] The Internet.

While syntactic ambiguity may be a gold mine for comedians, it is a landmine for legal drafters. If a drafter folds too much information into a single sentence, then he or she must use a lot of dependent clauses. These dependent clauses are ambiguity magnets. In the rubber-chicken-tax example, the initial version contained syntactic ambiguities.

> For taxable years 2015 through 2017, a tax is imposed upon each person engaged in the business of selling rubber chickens at a rate of 15% of annual gross receipts on the sale of rubber chickens, which, each month, shall be paid over in accordance with the provisions of Section 10 of the State Sales Tax Act.

What gets paid over each month—the tax or the rubber chickens? Is the tax imposed at a rate of 15% of rubber-chicken sales? Or is the tax imposed on those who sell rubber chickens at a rate of 15% of annual gross receipts. The revised version resolves these ambiguities.

2. SUSPECT EVERY "SHALL."

The word "shall" might be the most frequently-used word in all of legal writing. It is probably the first word that pops into a drafter's head as he or she puts the pen to paper. When reviewing a legal document, one can expect to see the word "shall" at least once in virtually every sentence. This reflexive use of the word, however, can pose a number of problems.

The use of the word "shall" in legal drafting is one of continuing and capacious controversy. Some legal-writing gurus argue that no legal document should ever, under any circumstance, be blemished by the word "shall".[11] Others take a more nuanced approach.[12] Regardless of your personal feeling toward this particular modal auxiliary verb, you can dramatically improve your legal drafting by putting every "shall" under the magnifying glass.

As mentioned, "shall" is a modal auxiliary verb. A modal auxiliary verb is a verb that helps other verbs express a meaning. It provides shades of prediction, obligation, ability, or permission. Other modal auxiliary verbs include can, could, will, would, should, may, might, must, and ought. The precise meaning of one of these verbs depends on the context and other verbs with which it is used. The meaning of "shall" has a way of shifting on you if you are not paying close attention.

Modern English speakers rarely use the word "shall" in the way that it is used in legal documents, which is a rather antiquated usage. Imagine a wife telling her husband, "You shall stop by the store and pick up a gallon of milk and a fifth of bourbon." In the real world, we say "you must" or "you have to". In Britain and other (non-US) English speaking countries, it is traditional to use "shall" with the

[11] Bryan A. Gardner, Legal Writing in Plain English §35 (2001),

[12] Kenneth A. Adams, A Manual of Style for Contract Drafting §3.22 (2004).

first-person pronoun to indicate future tense; the word "will" is used second and third-person pronouns. So, for example, one would say "I *shall* be early, but she *will* be late." But this is not how legal documents tend to use the word.[13]

In legal documents, the word "shall" is (generally) used to indicate obligation on the subject of the sentence; it is used to impose a duty to perform an action or a duty to refrain from performing an action. At least that is the way that it is supposed to be used. In reality, the word shall gets used to mean all kinds of different things.

Bryan Garner lists the five meanings of the word "shall" from the Black's Law Dictionary:

(1) Has a duty to; more broadly, is required to "the requester shall send notice" "notice shall be sent". This is the mandatory sense that drafters typically intend and that courts typically uphold.
(2) Should (as often interpreted by courts) "all claimants shall request mediation".
(3) May "no person shall enter the building without first signing the roster". When a negative word such as not or no precedes shall (as in the example in angled bracket), the word shall often means may. What is being negated is permission, not a requirement.
(4) Will (as a future tense verb) "the corporation shall then have a period of 30 days to object".
(5) Is entitled to "the secretary shall be reimbursed for all expenses".[14]

Because the word "shall" is so overused and is used in inconsistent ways, the meaning of the word is subject to interpretation. Courts around the country have found that "shall" is not necessarily mandatory.[15]

Even the federal government has noted that the word "shall" lacks precision. The Federal Plain Language Guidelines state:

> Besides being outdated, "shall" is imprecise. It can indicate either an obligation or a prediction. Dropping "shall" is a major step in making your document more user-friendly. Don't be intimidated by the argument that using "must" will lead to a lawsuit. Many agencies already use the word "must" to convey obligations. The US Courts are eliminating "shall" in favor of "must" in their Rules of Procedure.[16]

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[13] Legal documents rarely use the first-person pronoun.
[14] Bryan A. Garner, *Shall We Abandon Shall,* ABA Journal (August 2012), available at http://www.abajournal.com/magazine/article/shall_we_abandon_shall/.
[15] *See,* Bryan A Garner, supra note 8 at §35.
[16] Federal Plain Language Guidelines, December 2010, pp. 25, available at www.plainlanguage.gov.

Imprecision, however, is not the only problem with the word "shall." Arguably, the bigger problem is that, with its authoritarian connotations, the word "shall" frequently disguises weak drafting.

If you choose to draft a legal document without using "shall", somebody, at some point, will want you to stick it in. I've lost track of the all of the times where people have told me that "shall" just sounds more mandatory than "must". It just has, for lack of a better word, more…OOMPH. This is, of course, wrong. The word "shall" does not mean "must…and we really, really mean it!" The word "must" is mandatory, and there is no more mandatory than mandatory—some kind of mandatory+ designation.

That said, however, the word "shall" does have a certain gravitas. It just sounds so gosh-darn legal. I suspect that this stems from the Ten (10) Commandments with all of the "Thou Shalt" and "Thou Shalt Not" provisions.[17] It is hard to get more official-sounding than the voice of God booming down from the mountaintop. It is this effect that some drafters are after when they write "no person shall jaywalk". What they want to say is "Thou Shalt Not Jaywalk!"[18] It is precisely this gravitas that hides the weak drafting.

The biggest problem is that it makes passive sentences less obvious because they sound more forceful. We all know that passive sentences are an anathema to good legal drafting. They are both awkward to read, and they hide the subject of the sentence and, by doing so, hide who has the duty or obligation. Take, for example, the following provision: "The approved minutes shall be available for public inspection." It is very official sounding; anybody reading that sentence will have little doubt as to whether the approved minutes are, indeed, required to be available to the public. There is, however, considerable doubt as to who has the duty to actually make the minutes available. We don't know unless the answer can be inferred from surrounding provisions. But that means that we would have to go back and scour the surrounding provisions for clues. Most of us (hopefully) have better things to do than to scour legislation for clues.

The reflexive use of "shall" tempts drafters to turgid and overwrought language. When this happens, we get nonsense such as, "The pleading shall have been deemed to be received on the date that the petitioner shall have placed said pleading in a mailbox." It is virtually impossible to write such awfulness if you are careful with your use of "shall."

It is entirely possible to draft perfectly legal documents without using the word "shall." This practice is commonly referred to as the ABC Rule. The "ABC" here stands for Australia, Britain, and Canada, where it is customary to shun "shall" in legal drafting. To my knowledge, the legal systems of these countries have not

[17] Exodus 20:2-17; Deuteronomy 5:6-21.

[18] To be read aloud in a deep, booming voice—preferably followed by a clap of thunder.

imploded as a result of this practice. Somehow, they still manage to get statutes on the books.

In the United States, however, we seem dead-set determined to make up the difference from our shall-less English-speaking comrades. If you are adamant about using "shall" in your legal drafting, then consider the following guidelines:

- Use "shall" only in place of the phrase "has a duty to" or "has a responsibility to". Any other use is almost guaranteed to be incorrect.
- Use the term "shall not" only in place of the phrase "has a duty to refrain from". Any other use is almost guaranteed to be incorrect.
- Never use the phrase "no person shall." This will almost always mean something different than you intend. For instance, the phrase, "No person shall urinate in public" literally means that no person has the duty to urinate in public. It is not a prohibition.
- The phrase "shall be" is almost always wrong. The correct term is almost always "is" or "are".
- Obviously, avoid the phrase "shall be required to" or "shall not be required to". These phrases translate into "has a duty to be required to" and "has a duty to refrain from being required to." These don't work.
- Never use "shall" to refer to the future tense; "will" is the proper term. You will almost never need to refer to the future tense in legislative drafting.
- Because "shall" only imposes a duty, don't use "shall" to express a condition. Avoid saying "To obtain a liquor license, the applicant shall first submit a written application." You are not imposing a duty to submit an application, you are merely making it condition of licensure.

By reducing or eliminating your reliance on "shall," you will likely find that your initial draft is clearer and less legalese-y sounding.

3. KNOW THE BASIC TEXTUAL INTERPRETATION RULES.

At least theoretically, judges use the same set of rules to interpret ordinances, regulations, and statutes. It is beneficial for the legislative drafter to have a basic understanding of what rules that courts will (again, at least theoretically) use to interpret the document.

The courts rely on a number of canons of interpretation to decipher ambiguous legislation. The canons are generally broken down into two types: those that deal with the text of the legislation and those that deal with the subject of legislation. The cannons that deal with the subject of the legislation tend to face a high degree of criticism. These are canons such as, the canon that penal statutes are to be construed narrowly or the canon presuming an interpretation against a change in the common law. These canons tend to be subjective and are generally not used to the same degree by the courts as the canons that concern the text of the statute.

This is not to say that the textual canons are without controversy or that the court will always defer to them. In fact, it often seems that the only truly consistent interpretation rule that seemingly all lawyers agree on is that the judge will pick whatever rule that will make the case come out the way that the judge would prefer.[19] A working knowledge of the basic textual canons, however, can help the legislative drafter in two ways. First and most obvious, it can help the drafter spot potential errors or ambiguities in the drafting. Second, it gives the drafter an indication of where potential legal challenges to the draft may occur and helps the drafter draft around those potential challenges.

The following are probably the most frequently used textual canons:

Expressio unius est exclusio alterius: This is one of the more frequently cited canons of statutory construction.[20] This Latin phrase[21] means that the expression of one thing implies the exclusion of those items that were not expressed. If certain terms have been explicitly set forth in the legislation, then that legislation may be interpreted so as to not apply to any term that was not explicitly set forth. For example, if an ordinance prohibits the keeping of "chickens, turkeys, pigeons, ducks, or geese" on property that is residentially zoned, then one can argue that the ordinance does not prohibit the keeping of guineafowl, pheasants, and partridges because the statute does not prohibit those particular poultry.

This canon comes with a rather large caveat. It should be used only if we presume that the drafter carefully thought through all of the various options and carefully considered what to include or exclude.[22] For instance, the sign on the restroom door that says "Women" most likely considered all of the affected genders, and the sign is intended to exclude men from that specific facility. Sometimes, however, a drafter will choose not to address all of the particular options, but will, instead focus on those options that are most likely to arise. Consider, for example, the sadly-necessary sign at the restaurant that informs that customer "No Shirt, No Shoes, No Service". One should also expect to be refused service even if he is wearing a shirt and shoes…but is not wearing any pants. In this case, it is rather obvious that the writer of the sign chose to focus on a particular reoccurring situation without intending to address every instance in which service may be refused. It would be inappropriate to apply the canon in this case.

***Ejusdem generis*:** This Latin phrase[23] means "of the same kind or nature." This doctrine applies when the legislation sets forth a series of specific terms and then follows that list of specific terms with more general terms. According to this

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[19] *See e.g.* Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 401 (1960).
[20] Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 4 Marq. L. Rev. 190, 190 (1931).
[21] Because lawyers can't seem to get enough of Latin phrases, this cannon of construction is also commonly referred to as "inclussio unius est exclusio alterius".
[22] *See e.g. Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 169, 123 S. Ct. 748 (2003).
[23] Pronounced (eh-YUSS-demm JE-neh-riss)

doctrine of statutory construction, if a general word or phrase follows a list of specifics, then the general word or phrase is interpreted to include only items that are of the same type as those specifically listed. In other words, if legislation lists specific classes of persons or things and then refers to them in general, then the general statements apply only to the same kind of persons or things that are specifically listed. For example, if an ordinance prohibits the keeping of "chickens, turkeys, ducks, geese, *or other fowl*, the "other fowl" provision would likely include guineafowl, pheasants, and partridges, but it would probably not include parrots, parakeets or cockatoos because they are not of the same character as the agricultural poultry that are enumerated in the itemized list. The purpose of this canon is to prevent the general phrase from rendering the specific term superfluous.[24]

***Noscitur a sociis*:** This Latin phrase[25] translates to "it is known from its associates." This canon is useful when a word or term has more than one meaning and you have to choose which meaning applies to the legislation. According to this canon, if the ambiguous term is grouped together with two or more terms that have similar meanings, then the grouped-together terms provide clues as to the definition or the scope of the ambiguous term.

For instance, "in the phrase 'staples, rivets, nails, pins, and stakes,' the word 'nails' obviously does not refer to fingernails." [26] In this instance, the canon assisted in choosing between the various definitions of the word "nail." Similarly, if an ordinance imposed a sales tax on all dog houses, dog leashes, flea collars, and food, one could rely on this canon to argue that the term "food" includes only food for dogs; it does not include other food such as spaghetti.[27] Here, the canon assisted in determining the scope of the term "food."

***Reddendo singula singulis*:** This is commonly known as the Rule of the Last Antecedent. This canon provides that a limited or restrictive clause that is contained in a statute is generally construed to refer to and limit and restrict an immediately preceding clause or the last antecedent.[28] For example, before leaving town, a teenager's parents forbid him to "drink alcohol, throw a party, or do anything else that damages the house." While the parents are away, the teen drinks alcohol and throws a party. The house, fortunately, is not damaged by either activity. The too-clever-by-half teen argues that he did nothing wrong because he was only prohibited from drinking or throwing a party that damaged the house. The teen's parents (who are both lawyers) know the rule of the last antecedent and know that the qualifying phrase "that damages the house" referred

[24] 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47:17 (7th ed.2007).
[25] Pronounced (NOS-i-ter ay SOH-shee-is)
[26] Antonin Scalia & Bryan A Garner, Making Your Case §23 (2008).
[27] *Accord*, *Lady and the Tramp,* Walt Disney Productions, 1955.
[28] 2A NORMAN J.SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION §47:26 (7th ed. 2007).

only to the phrase "other activity;" it did not qualify the items "drinking" or "throwing a party."

Series-Qualifier Rule: This canon apparently does not warrant a Latin moniker. It is a lesser-known canon and in many ways it is the opposite of the prior canon. Under the series-qualifier rule, if there is a parallel construction that involves all nouns or verbs in a sentence, then a modifier that is placed at either the beginning or the end of the series normally applies to the whole series. For instance, a statute allows actions to challenge decisions of a tax appeal board. Under the statute, a complaint may be brought by a "taxpayer, officer, or department *affected by a decision*." Can a taxpayer who is not affected by a decision bring a suit? Under this canon, one can argue that, due to the parallel construction, the modifying term "affected by a decision" applies to the entire series, including the taxpayer.

This canon applies to parallel constructions. If you want to avoid the result of this rule, you can insert a determiner into the series (e.g. "a," "the," or "any") to break up the parallel construction. Therefore, if the complaint may be brought by a "taxpayer, officer, or *any* department affected by the decision," then this canon would not apply. Similarly, you can avoid the result of the canon by moving the modifier to a place other than the beginning or end of the series. Therefore, if a complaint may be brought by "a taxpayer, an officer affected by the decision, or department," then the modifier would not apply to a taxpayer or to a department.

4. CONTROL YOUR DEFINITIONS.

Drafters frequently include a "Defined Terms" or "Definitions" section within a piece of legislation. The point of these definitions is to make the legislation easier to read and understand. Definitions allow the drafter to avoid using repeated lengthy descriptions throughout substantive text of the legislation. Definitions are also helpful in ensuring the consistency in the use of the defined terms throughout the legislation. Despite their usefulness, however, definitions come with their own set of drafting challenges.

The first challenge with definitions is that they force the reader to jump back and forth through the text. If there is a large number of definitions, the reader will have to refer back to the definitions section each time that he or she comes across a term that *might* be included in the definitions. Contract drafters can avoid this problem by italicizing, bolding, or capitalizing the defined term in the substantive provision; this way, the reader knows that the term has a specific definition that is unique to that document. This option is generally not available to legislative drafters. This flipping back and forth between the definitions and the substance of legislation is a particularly time-consuming and aggravating way to try to read and understand legislation.

Another problem that frequently arises with definitions is that the drafter includes a definition for a term that is not used or that is used infrequently. It can be

frustrating to see legislation that contains a definition that piques the curiosity, search through the document to find how that definition actually works, and discover that the definition is never actually used in the underlying legislation.

A similarly frustrating experience is to come across stacked definitions. These are definitions that are not used in the substantive provisions, but they define a term that is included within another definition. If you need a definition in order to understand a definition, then the train is likely to be off of the proverbial rails. Consider this particularly irksome example taken from recent legislation considered in the Illinois General Assembly:

> "Aggregate extension base" means: …for levy years 2014 and later, [the] modified aggregate extension base.
>
> "Aggregate extension limit" means: …the previous levy year's maximum limiting rate multiplied by the equalized assessed value of the district in the previous levy year.
>
> "Modified aggregate extension base" means the preceding year's aggregate extension base plus the recapture aggregate extension base.
>
> "Recaptured aggregate extension base" means one-third of the difference between the aggregate extension limit and the previous year's aggregate extension base.
>
> "Maximum limiting rate" means a fraction the numerator of which is the last preceding aggregate extension limit times an amount equal to one plus the extension limitation defined in this Section and the denominator of which is the current year's equalized assessed value of all real property in the territory under the jurisdiction of the taxing district during the prior levy year.[29]

If this does not make your brain hurt, then you didn't read it. This is an amendment to Illinois' property tax-cap statute. In order to determine what taxes can be levied, the reader would have to know what the "aggregate extension base" for the tax year is. To know what that is, you would first have to know what the "modified aggregate extension base" is. But, in order to know that, you first have to know what the "recaptured extension base" is and what…never mind. This is basically indecipherable. It is somewhat like a Zen koan; if you concentrate on it long enough, there is a decent chance that the resulting confusion will snap you into a stage of enlightenment.

The last problem with definitions is more serious. Definitions should never include any substantive requirements. All of the other problems with the definitions have basically been stylistic annoyances. Hiding substantive requirements in a definitions section can cause substantive problems. For

[29] 98 Senate Bill 2256 (Senate Amendment No. 2), available at http://www.ilga.gov/legislation/98/SB/PDF/09800SB2256sam002.pdf.

instance, Illinois' Vehicle Code defines the term "revocation of a driver's license" as

> The termination by formal action of the Secretary of a person's license or privilege to operate a motor vehicle on the public highways,…

But it then goes on to provide that

> …which termination shall not be subject to renewal or restoration except that an application for a new license may be presented and acted upon by the Secretary after the expiration of at least one year after the date of revocation.[30]

If one is looking for the conditions upon which a revoked driver's license may be renewed, one may search the statutes for a long time before thinking to look in the definition of "revocation of a driver's license." One simply does not expect to find substantive requirements or provisions in a definitions section, and the reader is likely to pass over what may be an important part of the legislation.

Here are several tips for drafting definitions in legislative documents:

- Use definitions only when necessary or proper to clarify the text of the substantive legislative provisions. Do not use definitions simply for the sake of including definitions.
- If a defined term occurs only once or twice in the substantive provisions of the legislation, then place that definition in the substantive provision in which it occurs rather than in a separate provision.
- Try to avoid deviating too far from commonly-understood definitions if possible. For instance, you might want to define the term "automobile" to include an airplane or boat, but you should expect a great deal of confusion after a large portion of your readers skim over the definitions and miss that crucial detail.

5. CONSIDER THE CONSEQUENCES.

Frequently, practicing municipal law can feel like practicing in a big, giant gray area. The relevant statutes and ordinances often do not quite address the situation at hand, and the practitioner is left to guess at how the courts might interpret the law where the statutes don't quite fit. This problem is often caused because the drafter did not stop to think about what would happen if the law is not followed exactly as drafted.

There are generally four types of drafting provisions:

- Rules prohibiting an activity.
- Rules allowing an activity.
- Rules requiring something.
- Rules establishing something.

[30] 625 ILCS 5/1-176 (West 2012).

It is the last two types where problems in this area occur most often—particularly where the legislation establishes a process or a procedure. Take, for example, the Illinois statute for filling a vacancy in a municipal office. Under the statute, the mayor must appoint a person to fill a vacancy within 60 days after the office becomes vacant.[31] In the real world, however, it often takes the mayor more than 60 days to twist enough arms to find somebody who is willing to fill the vacancy. What happens, then, if the appointment is not made within the required 60-day period? Nobody knows; the statute fails to make any provision for this. The practical, real-world result is that the 60-day requirement is frequently ignored.

Another example of this recently occurred after the 2010 Decennial Census. Many communities were required to redistrict to account for demographic shifts that affected elected representation. Often state statutes require that reapportionment to occur within a specified timeframe, such as before the filing deadline for the next election.[32] Many communities, however, weren't aware of the requirement for them to redistrict and did not do so by the specified deadline. If, there was not a contingency plan in place to address this, lawyers were left scratching their heads trying to figure out what the remedy was.

When you are drafting provisions that establish some type of procedure, be aware that the more precise the procedure is, the more important it is to consider what happens if, for any reason, the procedure is not followed exactly as it is spelled out. In some cases, unwritten consequences will be obvious. An application for a zoning variance that does not meet the requirements set forth in the ordinance will likely be construed as void. But in many cases, the consequences will not be so obvious. Avoid that legal wasteland known as the "gray area" by taking a few moments to consider what might happen if things don't go exactly according to plan.

[31] 65 ILCS 5/3.1-10-50 (West 2012).
[32] *See e.g.* 65 ILCS 5/3.1-20-25 (West 2012).