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Introduction

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Symposium on the UCC, SEC, ALI, Federal Rules and Federal Government Simplification Experiences—Is It Time for a Model Set of Drafting Principles?

Introduction

Louis F. Del Duca*

I. Preface

The articles which follow are based on papers presented at the Annual Meeting of the Association of American Law Schools (AALS) in a program jointly sponsored by the AALS Commercial and Related Consumer Law, Civil Procedure, and Federal Courts Sections at the Marriott Wardman Park Hotel in Washington, D.C. on January 9, 2000. The authors initially address their particular plain English project. They also discuss the impact which completion of their project may have on law school curriculums and teaching, and in developing model drafting principles.

Public and private sectors of the law are using plain English simplification in more and more of their documents. Noteworthy are the following:

- To achieve a more user-friendly and more readily understandable text, the National Conference of Commissioners on Uniform State Laws and The American Law Institute use these techniques in their newly promulgated Revised UCC Article 9 on Secured Transactions

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- SEC rules now require issuers to write the front and back cover pages and the summary and risk factors sections of prospectuses in plain English.
- The American Law Institute has recently appointed a Style Committee.
- The United States Supreme Court has recently approved new simplified Appellate Rules of Civil Procedure developed in cooperation with the Subcommittee on Style of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. More work is in progress to simplify the Federal Civil and Criminal Rules of Procedure and Bankruptcy Rules.
- The President issued an order in 1998 requiring agencies to write rules and other materials meant for the public in plain language. The National Partnership for Reinventing Government works to fulfill this federal initiative through its Plain English Network.

In his paper on “The UCC Article 9 Revision Project Simplification Experience,” Professor Neil Cohen¹ at the outset emphasizes the importance of achieving accuracy as well as simplification and understandability. He traces the need for Article 9 revision, and reports that the ten-year drafting process did not initially involve use of simplification techniques. The appointment of a simplification task force occurred only approximately two years before the end of the process. The job of the task force was not to change substantive provisions, but to make the substantive provisions understandable to those who read the statute without the benefit of being involved in its drafting, or having listened to it being debated and drafted. The Task Force attempted to have the Article 9 Drafting Committee and the Style Committee of the National Conference of Commissioners on Uniform State Laws apply fairly basic principles (such as active voice, short sentences, rule first—exceptions last) and some visual techniques that make it much easier to read a statute. These visual techniques include having a series of rules or items appear vertically down a page rather than horizontally in a run-on sentence, and use of subsection headings to facilitate understanding, particularly in dealing with long sections.

Professor Cohen states that some improvement was made but that more could have been made if the simplification process had

1. Professor, Brooklyn School of Law, Reporter for the Restatement of Suretyship and Article 1 of the Uniform Commercial Code Revision.

been built in as part of the Article 9 revision process and started earlier. At the end of his article he reaffirms the importance of “getting it right” as well as simplified. He concludes that the most important simplification principle is “try it.” This requires the simplification effort to break through the great natural resistance of drafters of statutes to believe that it could not possibly be the case that their work product could be stated more simply or more effectively. It involves working alongside the drafters to convince them that their work will receive greater appreciation from more lay people, attorneys and judges if the work can be understood and answers to questions can be ascertained in advance with greater reliability and predictability.

Martin Dunn² opened his remarks on “The Securities and Exchange Commission Simplification Experience” by noting the Commission’s need for simplification in light of the Commission’s receipt of 400-page prospectuses and 500-word introductory sentences to a description of a merger.

Two typical reactions of authors to recommendations to simplify legal documents are likely to occur. The first is to make numerous comments to make the person proposing simplification “sound like the village idiot.” The second response will be that “I already write clearly. Don’t tell me what to do.”

To overcome these types of objections, the Commission staff visited law firms and set up pilot demonstration programs. Over a period of four months in 1998, Dunn personally did sixty of these pilot programs, working through documents sentence by sentence to rewrite them in plain English. Dunn emphasizes the importance of writing text for the reader. “Do not write it for yourself.” It is not sufficient for drafts to be crystal clear to reporters and members of the insider drafting group who have lived with the project. The product must be understandable to persons who are not reporters or within the “insider” drafting group.

In closing, Dunn notes that some persons erroneously oppose simplification on grounds that loss of precision may increase their liability exposure. This argument is not valid since the goal of the simplification process is to say exactly the same thing as the original but in simplified, understandable language. This may not always be possible in a brief manner. “Plain English is ultimately clarity, not necessarily brevity.”

2. Associate Director of the Securities and Exchange Division of Corporate Finance.

Michael Greenwald³ notes in his paper on "The American Law Institute Style Committee Simplification Project" that simplification and clarification of the law were purposes set forth in the American Law Institute 1923 Certificate of Incorporation. Simplification and clarity is the American Law Institute (ALI) response to uncertainty and complexity. However, because of the evolution from the concept of a single restatement to a series of specialized restatements, and proliferation of other ALI products Greenwald concludes that there is now a need for a style committee set of drafting principles. The ALI appointed a style committee in the latter part of 1998. It is planning to produce an American Law Institute handbook for project reporters. Distinctive guidelines are needed for particular kinds of ALI projects such as restatements, model legislation, and "principles." The concept of "principles" is a new type of hybrid approach which tries to state underlying concepts and leaves to others whether to translate them into legislation, regulations or court decisions.

Judge Robert Keeton⁴ noted that the common goal of each of the authors is to simplify writing of professionals in law, although each of these speakers had a somewhat different primary focus. Judge Keeton sets forth a dozen reasons for developing a model set of drafting guidelines generally usable in drafting legal documents.

1. Use them in drafting and editing statutes, or proposals for legislation.
2. Use them in drafting and editing administrative rules and regulations.
3. Use them in drafting and editing rules of practice, procedure, and proof in court.
4. Use them in drafting and editing scholarly publications.
5. Use them in drafting and editing course materials for learning and teaching substantive law.
6. Use them in drafting and editing course materials for learning and teaching professional skills.
7. Use them in drafting and editing judicial opinions.
8. Use them in drafting and editing verdict forms and charges to the jury.
9. Use them in training associates in law offices.

3. Deputy Director of the American Law Institute, Reporter of the recently appointed American Law Institute Style Committee.

4. Judge, United States District Court of Massachusetts; Former Professor, Harvard Law School; Member, Federal Rules Simplification Committee and American Law Institute Style Committee.

10. Use them in training law clerks in judges' chambers.
11. Use them in teaching other professional skills.
12. Use them in teaching substantive law.

Annetta L. Cheek,⁵ in her paper on "The National Partnership For Reinventing Government Simplification Experience," describes her task force efforts in getting the federal government to write more clearly. She notes her project's use of basic, generally accepted simplification guidelines and, by way of example, cites successful simplification achieved by the Veteran's Benefit Administration. Much work remains to be done. She emphasizes that plain English is important because the purpose of federal regulations is to set forth instructions to influence people's behavior. This goal is facilitated if the regulation makes clear to the public what it seeks them to do.

Carol Mooney⁶ emphasizes the relationship between substance and style in her paper on "The Simplification Experience of the Federal Appellate Rules of Procedure Committee." Being clear is not only a matter of style but also a matter of understanding and knowing the subject matter. When you undertake to rewrite a rule or a statute to make it clearer and more coherent, the process inevitably transforms what you have written. Nevertheless, at the pragmatic operating level, the aim of her committee was to rewrite without changing substance. She states that calling the five-year work product on Simplification of the Federal Appellate Rules of Procedure a "restyling project" understates the process. Not only are rules suddenly transformed by things such as creating subdivisions with headings, but the re-writing process inevitably uncovers ambiguities. These ambiguities require a choice to be made between one of the many possible readings. The Committee highlighted these instances in its notes. She observes that even though the Committee did not intend to change substance, this was an inevitable result of the process in some instances.

Professor Mooney, in closing, notes the practical value of having judges, lawyers, and court clerks on her Committee. She also notes that the various groups represented in the Symposium have accumulated a very valuable body of experience in working on their own projects. She encourages continuing cooperative efforts by these groups to develop a coordinated set of model guidelines

5. Chair of the Plain English National Partnership for Reinventing Government.

6. Professor, Vice President and Provost of Notre Dame, Recent Reporter and presently a Member of the Federal Rules of Appellate Procedure Simplification Project.

that can be used generally in drafting legal documents. These guidelines will have a very important impact in her classroom teaching.

Professor Douglas Rendleman⁷ notes challenges which exist in developing support for simplification. Successful simplification will tend to quietly reduce the number of problems and therefore is not likely to generate much publicity. Conversely, the trial lawyer is the type of legal personality who, like a surgeon doing a transplant, is more likely to attract excitement and comment and achieve public acclaim. He noted the dialect of complexity and simplification in procedural law. He notes the switch in our lifetimes from fact to notice pleading and a "dialect" sequence of simplification and complexity in the development of procedural rules. He concludes that technology and development of a single market economy will also impact on the simplification movement.

Peter M. Goodloe⁸ in his paper on "The Simplification Experience of the Office of Legislative Counsel of the House of Representatives," provides perspective on simplification viewed from a federal legislative point of view. He notes that the training process for attorneys in the bill drafting office of the House of Representatives has been in place for many years. This program trains attorneys in many of the same principles that are advocated by the Vice President's Re-invention of Government Task Force headed by Annetta Cheek. Every attempt is made to apply these basic principles.

The opportunity to implement these principles is, however, sometimes limited by time pressures and other constraints under which legislation must be prepared. Difficulties in achieving effective communication among all the people that have to agree on the legislation can also produce complications. The House, Senate, and frequently large numbers of people inside and outside the federal government have to come to agreement on language. Goodloe notes that the process is sometimes like trying to build a house with no general contractor, just a bunch of subcontractors trying to coordinate with each other.

One of the most dangerous things that can happen is to draft for the comprehension of only the people around the table involved

7. Professor, Washington & Lee University Law School; Chair 1999, AALS Section on Civil Procedure.

8. Assistant Counsel, Office of Legislative Counsel of the House of Representatives.

in the drafting process. The drafter's job is to make the legislation understandable to the entire world.

Goodloe notes the occasional introduction of legislation prepared outside his office which may be in serious need of clarification and simplification. The parties involved nevertheless refuse to adjust any of the language because doing so may cause the political agreement to collapse. The choice then is between the technically perfect product which cannot be enacted and an imperfect product which can be enacted.

Goodloe closes by referring to his day-in and day-out experience of seeing drafts that completely comply with all of the simplification principles, but are nevertheless not intelligible because the person who prepared the draft, although familiar with the basic policies involved, lacked the full range of substantive knowledge required for drafting federal legislation. He states that "You cannot draft what you do not understand."

Goodloe concludes that practical limitations on successful application of simplification guidelines make the simplification process more difficult than appears in the abstract.

II. Unfinished Business

The success achieved by each of the projects addressed by the authors in this Symposium is encouraging. Progress is being made to achieve user friendly, readily understandable legal documents. Nevertheless, the projects addressed and successes achieved impact directly on only a small part of the legal world. A large part of the legal world remains to be sensitized to the needs and benefits of use of simplification guidelines. Development of a set of model guidelines as advocated by the authors in this Symposium for general use in drafting legal documents is therefore desirable and necessary.

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