1. Drafting principles applicable to local government

   A. Use clear, precise and simple terms (communication at "grass roots" level)

   B. Avoid ambiguity, redundancy, inconsistency and overall lack of coordination, particularly for codifications and comprehensive regulations with penal provisions

   C. Minute book order rule for municipal and county governments

   D. Local Government Home Rule\(^1\) and Preemption

2. Common characteristics of accurate, effective, comprehensible, and understandable drafting at local government level.\(^2\)

   A. Information gathering:

      (i) identify the local government’s intention, purpose and objective,\(^3\)

      (ii) set priorities,

      (iii) evaluate alternatives,

      (iv) select the legislative instrument,\(^4\)

      (v) allocate discretion and

      (vi) choose research methods.\(^5\)

   B. Legal research and analysis\(^6\)

   C. Drafting\(^7\)

3. Role of draftsman at local government level visavis state and national level
A. Legislative actions (subdivision regs, zoning ordinances, master plans for land use)

B. Judicial and Quasi-Judicial actions (appeals from lower administrative levels, filling vacancies in public office, removal from public office)

C. Administrative actions (granting, denying or modifying licenses and permits)

D. Special matters (rate-setting for utilities, creation of special districts, budgets)

3. Different roles of municipal attorney responsible for drafting ordinances, resolutions, regulations, orders, minutes, mandates and other records of legislative decisionmaking on the local government level

A. Advisor

B. Facilitator of policy development

C. Participant in land use planning process

D. Draftsman

E. Arbitrator, Mediator or other Third Party Neutral

F. Hearing officer

G. Advocate

4. Sources of definitive guidance to resolve procedural questions and conflicts over local government actions

A. IMLA model ordinances at www.imla.org

B. ABA Section of State & Local Government Law publications at www.abanet.org/statelocal

C. ABA Division of Government & Public Sector Attorneys publications at http://www.abanet.org/govpub/books.html

D. National Association of Counties Model County Programs at www.naco.org

5. Limits on local government autonomy and legal authority

A. Revenues and taxation
B. Contracting authority

C. Preemption by state or national law

6. Ethical Lawyering for the local government attorney

A. Identify the client

B. Caveats for creation of attorney-client relationship: privileged communications

C. Consultation and communication with local government personnel
   (i) elected officials
   (ii) appointed officials
   (iii) employees and staff

7. Interaction between Citizen Oversight Organizations and local government

A. Law enforcement oversight committees

B. Citizen-comprised watchdog organizations

C. Ad hoc monitoring organizations (taxation, animal rights, environmental issues, etc.).

8. Immunity and liability exposure related to official actions of local government

A. Sovereign immunity for individual officers visavis entities of which they are a part

B. Personal liability (gross negligence, reckless disregard, intentional harm)

C. Insurance, Claim Funds, and other protective mechanisms

D. Criminal liability

9. Conclusion: Extrapolation of local government drafting considerations to international context
Ben Griffith is a partner in the Cleveland, Mississippi firm of Griffith & Griffith. His civil litigation practice focuses on representation of state and local governments and their official policymakers and representatives in the areas of election law, voting rights, civil rights actions under 42 U.S. C. §1983, Title VII, environmental law and public sector insurance coverage. He serves as Vice-Chair of the ABA Section of State & Local Government Law, IMLA State Chair and the World Jurist Association’s National President for the United States. He is an IMLA Fellow, a Fellow in the International Society of Barristers, and a member of the Europe Committee of the ABA Section of International Law. He serves on the Governmental Liability Committees of DRI, the ABA Litigation Section and TTIPS. He has also served as President of the National Association of County Civil Attorneys, Chair of the Counties and Special Municipal Districts Department of IMLA, President of the Mississippi Association of County Board Attorneys, and Chair of the Government Law Section of the Mississippi Bar. He authored two editions of the Handbook for County Board Attorneys (Center for Governmental Technology 2000 and 2004) and is editor of Census 2000: Considerations and Strategies for State and Local Governments (ABA 2000) and Sexual Harassment in the Public Workplace (ABA 2001). A graduate of the University of Mississippi (B.A. in English and German, 1973), he earned his Juris Doctor from the University of Mississippi School of Law in 1975. He is married to the former Kathy Lee Orr of Batesville, Mississippi, and they are the parents of Clark, 25, and Julie, 23.


2 In his definitive, practical work on the subject of drafting first published in 1966, The Fundamentals of Legal Drafting, Professor Reed Dickerson emphasized that legal drafting is not a subject in which attorneys receive much training. Many are simply not aware of their deficiencies in this area. Fundamentals addressed policy, clarity, readability, form, and style, but went further, delving into the “think” part of legal drafting as opposed to the “write” part, stressing the importance of quality draftsmanship in all
fields of law.


5 D. Marcello, The Ethics and Politics of Legislative Drafting, supra n.4 at 2441-48 (excellent discussion of the methodology used by, and ethical questions that confront, professional legislative drafters, emphasizing the many advocacy opportunities that exist within the drafting process and notes the potential for the individual advocacy agenda of legislative drafters to influence drafting decisions, and concluding that "even the most conscientious drafter must labor mightily to avoid making decisions about the shape and substance of legislation that are the client's own" and that drafters should "be aware of the many points at which their personal and political views may be influential in the drafting process and that they take steps to minimize such influence – not by denying the opportunities to inject personal judgments into the process, but precisely by acknowledging the inevitability of such an occurrence." Id. at 2463-64.)


9 V. Nouse & J. Schecker, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575, 588-90 (2002). See Rule 2.1, Advisor, Annotated Model Rules of Professional Conduct (ABA Center for Professional Responsibility 2003) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law by to other considerations such as moral, economic, social and political factors.").

10 J. Tata, Improving the Quality of Law Drafting in Finland, 4 Colum. J. Eur. L. 629 (1998); N. Prescott, Orange Revolution in Red, White, and Blue: U.S. Impact on the 2004 Ukrainian Election, 16 Duke J. Comp. & Int'l L. 219, 233-34 (2005)("When a country is engaged in the constitution-drafting process, it looks 'to well--tested constitutional models and attempts
to rebuild them in the context of [its] own geopolitical circumstances.' Ukraine turned to
the U.S. constitutional model, which has been tested by centuries of judicial opinions.
However, the U.S. Constitution was not the only thing borrowed by Ukraine in the
process. Substantial resources were expended by the U.S. government and
nongovernmental organizations with the goal of improving Ukraine’s judicial system and
electoral process. Ukrainian judges were educated on how to decide election
controversies, and high Ukrainian officials were ‘instructed’ by the United States to
refrain from improperly influencing election commissioners. In 2004, it became clear that
the United States succeeded in its goal of fostering democracy in Ukraine and made the
Orange Revolution possible. …The U.S. Constitution undoubtedly had an impact on the
drafters of the Ukrainian Constitution. Ukraine adopted its Constitution on June 28,
1996, five years after declaring its independence. While the drafters of the Ukrainian
Constitution continuously debated over its form, it was clear that the contents would be
borrowed from the U.S. Constitution. First, the U.S. Constitution was a model that was
convenient, well-known, and tested by centuries. Second, the U.S. government spared
no time, efforts, or money persuading Ukraine to adopt a U.S.-modeled constitution. In
fact, during the drafting stage, the U.S. government sent representatives to the
Ukrainian Parliament to participate in the constitutional debates, to assist the drafters,
and to persuade them to adopt a democratic version of the Constitution. The final
version of the Ukrainian Constitution was, in fact, very democratic.”).

11 P. Salkin, Integrating Local Waterfront Revitalization Planning into Local
Comprehensive Planning and Zoning, 22 Pace Environmental L. Rev. 27 (2005).

12 V. Nourse & J. Schecker, The Politics of Legislative Drafting, supra n. 9 at 584-85.

13 See Rule 2.4, Lawyer Serving as Third-Party Neutral, Annotated Model Rules of
Professional Conduct (ABA Center for Professional Responsibility 2003) ( {a} A lawyer
serves as a third-party neutral when the lawyer assists two or more persons who are not
clients of the lawyer to reach a resolution of a dispute or other matter that has arisen
between them. Service as a third-party neutral may include service as an arbitrator, a
mediator or in such other capacity as will enable the lawyer to assist the parties to
resolve the matter. {b} A lawyer serving as a third-party neutral shall inform
unrepresented parties that the lawyer is not representing them. When the lawyer knows
or reasonably should know that a party does not understand the lawyer’s role in the
matter, the lawyer should explain the difference between the lawyer’s role as a third-
party neutral and a lawyer’s role as one who represents a client.”).

14 D. Marcello, The Ethics and Politics of Legislative Drafting, supra n.4 at 2451-51. see
Rule 3.9, Advocate in Nonadjudicative Proceedings, Annotated Model Rules of
Professional Conduct (ABA Center for Professional Responsibility 2003) ("A lawyer
representing a client before a legislative body or administrative agency in a
nonadjudicative proceeding shall disclose that the appearance is in a representative
capacity …


17 See, e.g., Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking (3d ed., ABA Govt. & Public Sector Lawyers Division and Section of Administrative Law & Regulatory Practice, 1998) (indispensable guide for those who develop or draft federal agency rules, complete source for understanding federal rulemaking, how rules are developed and implemented, requirements for each stage in the process, updating the essential Guide to Federal Agency Rulemaking).

18 Model County Programs from 1995 to 2001, with database searchable by county, state and categories that include community and economic development, corrections, county administrations, emergency management, environmental protection, health, human services, transportation, arts and historic preservation, parks and recreation, volunteers, parks and recreation, accessible at http://www.naco.org/Template.cfm?Section=Model_County_Programs

19 An Ounce of Prevention: Best Practices for Making Informed Land Use Decisions, "Minimizing the Risk of Preemption Arguments," at 17, http://www.cacities.org/resource_files/24468.ch3.pdf ("A local law conflicts with state law when it duplicates, contradicts or enters a field which has been fully occupied by state law, whether expressly or by legislative implication…"). See M. Gadeberg, Presumptuous Preemption: How 'Plain Meaning' Trumped Congressional Intent in Engine Manufacturers Association v. South Coast Air Quality Management District, 32 Ecology L. Q. 453, 459-60(2005)("The Supreme Court has described three types of
preemption - express, implied and conflict – based on how explicit Congress had made its intent to preempt. In express preemption, state action is foreclosed by express language in a congressional enactment. Implied preemption exists where a 'scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' where 'the Act of Congress … touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or where the goals 'sought to be obtained' and the 'obligations imposed' reveal a purpose to preclude state authority. Finally, under conflict preemption, federal law preempts state law to the extent the two conflict. This can occur when either 'compliance with both federal and state regulations is a physical impossibility' or when a state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."


21 V. Nourse & J. Schecker, The Politics of Legislative Drafting, supra n. 9 at 586-87.

22 V. Nourse & J. Schecker, The Politics of Legislative Drafting, supra n. 9 at 585-86.

Bibliography for Legislative Drafting

Attorneys engaged in legislative drafting and other professional draftsmen may wish to review some of the more prominent publications on the subject of legal drafting, including the published works of Professor Frederick Reed Dickerson, faculty member of Indiana University School of Law from 1958 until his death in 1991. During his 33 years at IU, Professor Dickerson developed an international reputation as the leading authority on legal drafting and was often referred to as "the dean of American legislative drafting." As author of several standard texts and dozens of articles, Dickerson's influence reached well beyond his students and colleagues in Bloomington.


Dickerson, Reed, Fundamentals of Legal Drafting (2d ed. Little, Brown & Company,
1986) (substantive policy, construction, clarity, form, and style in legislative drafting, "plain English" laws, computer aids, amendments, and verbal sexism).

Dickerson, Reed, The Interpretation and Application of Statutes (Little, Brown & Company, 1975) (analyzing interaction between legislatures and courts, how courts ascertain meaning of statutes, apply statutory law to specific cases, and, ostensibly based on statutory interpretation, use statutes as catalyst for judicial lawmaking).

Dickerson, Reed, Legislative Drafting (Little, Brown and Company, 1954) (considered The bible for legislative drafting, addressing everyday drafting problems), reprinted in Dickerson, Reed, Legislative Drafting (Greenwood Press, 1977)

Dickerson, Reed, Materials on Legal Drafting (West Publishing Co., 1981) (comprehensive compilation readings and exercises used in legal drafting courses and codification).


MacDonald, Duncan A., Drafting Documents in Plain Language (Practicing Law Institute, 1979) (includes legal drafting style manual of the Office of the Federal Register).

Mehlman, Maxwell J., and Edward G. Grossman, Handbook of Legislative Drafting (Yale Legislative Services, 1977) (basic techniques of legislative drafting, word choice, sentence structure and parts of bill).

Mellinkoff, David, Legal Writing: Sense and Nonsense (New York: Charles Scribner's Sons, 1982). Provides lively instruction in ways to make legal documents more precise and readable. Does not deal specifically with legislative drafting. (SL) KF 250 M4s


Attached as .pdf files are examples of legal drafting extracted from the writer's archived
county government ordinances, resolutions, orders and regulations covering local government subjects that include elections, emergencies, finance, intergovernmental relations, judicial matters, land use, law enforcement and corrections, legislation, personnel, public health and safety, taxation and transportation. While not held out as the archetype for perfect draftsmanship, particularly with respect to a flood emergency ordinance drafted by the writer while standing in six inches of water in his own flooded residence, these forms do provide some insight into the practical application of the drafting principles discussed throughout this presentation.

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