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Five Tips for Successfully Drafting Pa. Legislation

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Special to the Legal

I have never met an attorney who did not believe that he was perfectly capable of drafting legislation. This confidence may come from a mastery of the case law governing the subject matter of the proposed legislation. Or perhaps it derives from the attorney's previous struggles with the ambiguities of a statutory scheme in the course of representing a client. Maybe it is simply because as lawyers we are trained from our earliest days in law school how to read, interpret and apply statutes to the most twisted set of facts our professors could come up with. Whatever the reason, we lawyers are a confident bunch when it comes to legislative drafting.

Is that confidence warranted? In a certain respect, it is. When our corporate clients or their trade associations come to us for help with drafting a legislative fix, it is often for good reason. Lawyers who have developed a certain subject matter expertise after years of practice are



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invaluable in the drafting process not only for the reasons stated above, but also because we are generally good at predicting the future of a new statute when it is applied in the courts.

However, this strength is also our weakness. Our ability to predict how a statute will be applied in the future often leaves us blind to the formidable challenge at hand, to draft legislation that actually has a chance to make its way through the General Assembly and earn the governor's signature. To accomplish this, we need a better understanding of the legislative process.

To that end, because nothing screams summer like an article about

legislative drafting, here are the top five things counsel should keep in mind when drafting Pennsylvania legislation:

- **Know the basic rules of legislative drafting.**

Once you have an informal draft together, review the language against the technical drafting rules set forth in the Statutory Construction Act of 1972, 1 Pa.C.S. Section 1501 et seq., the Legislative Drafting Manual, 1 Pa. Code, Subpart C, and the Pennsylvania Consolidated Statutes Style Manual, 1 Pa. Code, Subpart D. You can expect that the lawyers who work for the General Assembly—particularly those assigned to standing legislative committees and the Legislative Reference Bureau—will carefully review each word of a legislative proposal to understand its meaning. While the best language may not ultimately make its way through the political sausage grinder, do not make the mistake of underestimating the technical expertise of legislative staffers who often have a deep understanding of the language and politics of a given issue.

- **Respect the role and expertise of lobbyists.**

In a meeting to discuss a legislative initiative, corporate counsel should resist the urge to take over the room. While it is perfectly natural for all eyes to turn to corporate counsel at some point to discuss the problem to be remedied and the most technically accurate way to fix it, the conversation should really begin and end with the lobbyist's assessment of the political realities on the ground. As I learned rather brutally while working inside the Pennsylvania Capitol, good policy does not necessarily mean good politics. This lesson also extends to the drafting process. It is not enough that counsel circulate proposed language to the client to ensure its technical accuracy. Counsel should also work closely with the company or trade association's lobbyists in choosing language that will pass political muster.

For example, the use of language that, while technically accurate, may have the unintended effect of drawing the fire of advocacy groups who otherwise would have no skin in the game should obviously be avoided. Such language is not always easy to spot for corporate counsel who are not regularly plugged into the daily happenings of the General Assembly. Lobbyists can also be helpful in determining whether an existing bill is a viable legislative vehicle for introduction of a legislative measure. This will have a direct impact on how the language is drafted. Finally, a lobbyist may seek to split the language into multiple bills so that more than one legislator can take credit. While this may seem unwise to corporate

counsel, it may be the only way for the desired language to become law given the political landscape.

- **Avoid novel language.**

Pennsylvania is not a progressive state. When a particular industry or advocacy group is looking to break new ground nationally on a legislative issue, Pennsylvania is typically not the state of choice. Indeed, it is

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one of only two states that still has a state-run liquor system! As a result, when drafting new legislation, corporate counsel should try to borrow language that has already made its way into Pennsylvania statute, rather than using novel terminology that may hold up the process and kill the bill. Counsel should also make full use of suitable language that has already been adopted in other states, which can be very persuasive in a state like Pennsylvania that has proven to be risk adverse.

- **Research legislative history.**

Corporate counsel tasked with drafting new legislation should check first to see if it is actually new. The General Assembly's website makes it easy to locate prior bills that were previously introduced on the same subject in the current and a prior legislative session. Careful attention should be paid to the language of those bills and the bill's history.

Obviously, language in a prior bill that has made its way out of committee or one chamber of the General Assembly in the past is more likely to do so again, provided the politics have not changed.

- **Stay flexible and available.**

For those corporate counsel who are occasionally blessed with reviewing and drafting legislation, life may seem a little like the movie "Groundhog Day." It is important for counsel to be patient, responsive and attuned to the needs of the client's lobbyists and other legislative staff. It is important to understand that they are not in control of the legislative process and need constant guidance to determine whether a seemingly minor change in the language will have the unintended effect of changing the entire meaning of the legislation. •

