



Chapter Twenty-One – 0445LU
Presented by The Barristers' Association of Philadelphia, Inc.

Defensive Document Drafting



Course Summary

The creation of legal documents is integral to the practice of law; therefore, drafting skills are essential for every practicing lawyer. In this CLE program, panelists offer tips and techniques for drafting documents in all practice areas, including:

- ❖ Drafting for specific outcomes
- ❖ Drafting for specific scenarios
- ❖ Contracts and agreements
- ❖ Drafting for challenges
- ❖ “Think like a Judge, be a better writer”

Words are used to advocate, inform, persuade and instruct. Drafting documents that accurately reflect what you mean requires planning, clarity, correct word choice, precise use of technical terms and as much simplicity as possible.

Course Planner/Panelist:

Shabrei M. Parker, Esq.

Of Counsel, Mincey Fitzpatrick Ross, LLC
Former Barristers’ Association President

Panelists:

Hon. Lillian Harris Ransom

Senior Judge
Superior Court of Pennsylvania

Thomas O. Fitzpatrick, Esq.

Partner, Mincey Fitzpatrick Ross, LLC
Former Barristers’ Association President

BIOGRAPHIES

Defensive Document Drafting

Course Planner/Panelist:

Shabrei M. Parker, Esq.

Shabrei M. Parker is a lawyer of many talents. Ms. Parker's practice areas include trusts and estates, matrimonial law, civil litigation and small-business development. Ms. Parker has always been a multi-dimensional advocate, with a practice shaped via her training in several different settings. Prior to joining Mincey & Fitzpatrick, LLC, Ms. Parker started her practice providing legal assistance to both individual and organizational clients across disciplines. Additionally, Ms. Parker worked as a judicial law clerk, where she honed her skills as a scrivener and consultant, gaining an invaluable insight into the way that cases are viewed from a judge's perspective. Ms. Parker also worked for law firms, where she honed her civil litigation skills, mastering procedures before the courts of the Commonwealth of Pennsylvania and the United States District Courts of Pennsylvania and New Jersey. Ms. Parker is also a Certified Arbitrator and she is trained in Mediation.

Ms. Parker has been recognized as a *Rising Star* by Pennsylvania Super Lawyers in 2015, 2016 2017 and 2018. Ms. Parker has been recognized as a *Lawyer On The Fast Track* by the Legal Intelligencer, a Drexel University *40 Under 40*, and as a *Top 10 Family Lawyer Under 40* by the National Assn. Of Family Law Attorneys.

Ms. Parker is actively involved with local and national bar associations, as well as her community. Ms. Parker serves on the Board of Directors for the Support Center for Child Advocates. Ms. Parker is a leader in the Philadelphia Bar Association, serving as a member of the Executive Committee of both the Probate/Trust and Family Law Sections, including as Chair of the Diversity Committee and Programming Committee respectively. Ms. Parker is a Past President of the Barristers' Association of Philadelphia, and was a past recipient of the Barristers' Association's *President's Award*. Ms. Parker also works as a volunteer attorney with Philadelphia VIP, providing essential legal services to indigent citizens, Ms. Parker is a member of Delta Sigma Theta Sorority, Incorporated, and uses volunteer service as a platform to mentor, support and encourage others.

A Philadelphia native, Ms. Parker attended Central High School before attending Millersville University where she graduated, *cum laude*, with a Bachelor's Degree in English. She received her Juris Doctor from Drexel University School of Law, where she was a Dean's Scholar, selected as a Diversity Fellow and recognized for Outstanding Student Performance. Ms. Parker went on to receive a Master of Laws, *LL.M.* in Trial Advocacy from Temple University, Beasley School of Law, a nationally-recognized program where attorneys perfect cutting-edge trial skills.

Ms. Parker can be reached at Mincey Fitzpatrick Ross at 215-587-0006 or by email to shabrei@minceyfitzross.com.

PANELISTS:

Hon. Lillian Harris Ransom

Judge Ransom (Ret.) is a true jurist. She is renowned for her judicial temperament, thoroughness and considerate decisions. Judge Ransom began her judicial career in 1995 when she was elected to a ten year term on the Court of Common Pleas in Philadelphia. She was retained for two additional terms. During her tenure on the Philadelphia bench she presided over cases in Family Court and in the Criminal Division.

At the time of her appointment to the Superior Court of Pennsylvania, Judge Ransom was the Homicide Team Leader and was responsible for leading the implementation of the resentencing of over 300 juveniles who had been sentenced to mandatory life in prison. Judge Ransom is a graduate of Hampton University, Temple University and Saint Louis University School of Law.

Judge Ransom most recently served on the Pennsylvania Superior Court following her nomination by Governor Tom Wolf and confirmation by the Pennsylvania Senate on June 29, 2016. She continued her service to the commonwealth as a senior judge of the Superior Court.

Thomas O. Fitzpatrick, Esq.

Thomas O. Fitzpatrick is a former sex crimes prosecutor in the elite Family Violence and Sexual Assault Unit of the Philadelphia District Attorney's Office. Fitz leverages his knowledge of complex investigation techniques and medical trauma review in representing his clients across disciplines. His practice covers many facets of civil rights' litigation, including employment discrimination, police misconduct and criminal defense.

Over the last decade, Fitz's achievements as a trial attorney have steadily grown in both scope and notoriety. Covered extensively in the media, his work has resulted in significant financial awards, settlements and verdicts in favor of his clients.

As lead trial counsel, Fitz has prevailed in a number of matters where others have been unwilling to fight. He has represented clients against Fortune 500 companies, national organizations, institutions, regional hospitals and powerful pharmaceutical companies.

In addition to his trial work, Mr. Fitzpatrick lends his business acumen and legal insights to clients involved in business disputes and organizational investigations. Fitz has defended private citizens and for-profit/not-for-profit organizations against state and federal criminal indictments, corruption investigations, and grand jury proceedings.

A true leader in the legal community, Mr. Fitzpatrick served as President of the Barristers' Association of Philadelphia, Co-Chair of the Criminal Justice Section of the Philadelphia Bar Association and member of the Board of Governors. His peers have recognized his talent for practicing law by voting him the Outstanding Young Lawyer of 2011. Mr. Fitzpatrick has also been recognized as a Rising Star by *Pennsylvania Super Lawyers* in 2010, 2011, 2013 and 2014.

Mr. Fitzpatrick maintains involvement in several civic and professional organizations including: Alpha Phi Alpha Fraternity, Inc., NAACP, National Bar Association, Barristers'

Association of Philadelphia, Villanova Law Alumni Board of Directors, Overbrook Farms Club Homeowners Association, J. Willard O'Brian American Inn of Court.

Fitz graduated from the Villanova University School of Business receiving an undergraduate degree in Marketing. He earned his joint JD/MBA at the Villanova University School of Law as an Albert Goldberg Scholar and served as an Extern on the Third Circuit Court of Appeals for the Honorable Dolores K. Sloviter.

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Defensive Document Drafting: Driving Isn't the Only Time to Keep Your Guard Up

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Drafting Theories

- A. Regardless of your industry, when drafting documents, you should never approach it as “routine,” or “just like the last time.”
 - a. Just as each set of facts is different, so too should each set of documents.
- B. Each time, you should be reading and thinking about the specific facts and the best way to elicit or present them.
 - a. For example, in a PI cases with a client who was injured in a slip and fall, it may be easy to follow a “form” complaint without thinking through the variables which could affect your presentation.
 - i. Examples include instances where the relevant parties have different scales of insurance and coverage, different types of injuries, rights of access, recovery needs, etc.
- C. When you use form language, from litigation drafting like complaints, discovery, or motions, to contracts and agreements, you do your clients a disservice by not intentionally tailoring documents to reflect their particular situation and highlight their matter’s strength.

Practice Tip

Before you set out to draft a document, you need to know the answers to the following questions:

- i. What do I need?
- ii. Why do I need it?
- iii. Why am I entitled to it?
- iv. How can the recipient give it to me?
- v. What would stop me from getting it?
- vi. Why doesn’t that apply?
- vii. What things do I need to definitely highlight (or minimize)?

“I want what I want...” - Drafting for specific outcomes

A. Complaints

1. Complaints are your entrée into the court, and you should always put your best foot forward.
 - i. Just because we often have the right to amend (or at least the right to request an amendment) lawyers often make unnecessary or careless errors in their initial filings.
 - ii. Alternatively, many attorneys will file “form” documents and await responsive pleadings like Preliminary Objections before perfecting their claims before a court.
2. Reasons to draft intentionally the first time:
 - i. **It’s expensive.** Wasting hours drafting incomplete documents and then following with more hours drafting amendments and responsive pleadings is an ineffective use of time.
 - ii. **It makes you look bad.** The law is a reputational field. Your strategy shouldn’t be to approach a matter as superficially as possible and wait to see whether opposing counsel takes issue.
 - iii. **It’s not strategic.** If you don’t take it as your responsibility to always put your best case forward, you lose the ability to present the facts as you wish.

Practice Tip:

It’s widely known that you should have a handle on the presentation of your “good facts” and “bad facts.” If you don’t take the time to carefully present both, you give opposing counsel the opportunity to present those same facts in the light most favorable to them, a perception you can’t always overcome.

B. Drafting to Avoid P.O.s

1. Drafting to avoid Preliminary Objections is just that—a careful consideration of what objection could be made, and drafting to make filing less probable, and success less likely.
 - i. You can't stop an opponent from filing a response, but you can control how much merit the response may have if you're intentional about the information you present.
2. Consulting the rules when drafting can ensure that you don't leave your matter exposed to valid POs.
 - ii. Pa. RCP 1028 outlines the specific grounds for which Preliminary Objections can be raised.
 1. One of the most commonly used objections is the objection for insufficiency, or lack of specificity in pleadings.
 - iii. With a fresh consideration of the questions above, you'll have a good grasp on your good and bad facts, and can avoid being insufficient in pleading those facts.

Practice Tip: Instead of a cause of action treatise, consider using the statute as a guide for drafting your Complaints.

For example, if pleading an action for Fraud, consult the statute for the specific elements which must be proven to advance that cause of action.

Pro Tip: Consult case notes and jury instruction for the claims you intend to present to ensure that your initial complaint outlines the same requirements that the trier of fact will be required to consider.

C. Strategy Drafting

1. Sometimes the presentation of your matter requires thoughtful presentation of the facts.

- i. Maybe there is another matter that is separate from yours but has an effect on your matter.
 - ii. Maybe there are additional parties that you want to bring in at some future time, but for whatever reason, it's appropriate to stagger the filings.
 - iii. Maybe you want a non-party to remain neutral (or at least not be hostile toward your client).
 - iv. Maybe your matter is appropriate in different courts, but you need to determine the more (or less) sympathetic venue.
2. Regardless of the situation, you should always be thinking through the potential effect of your presentation against your ultimate goals.

Practice Tip:

When preparing a submission, think through:

1. If I say this or that, will it expose my strategy?
2. If I say this at the beginning, will it increase or decrease my leverage?
3. How does this Court usually handle this type of matter?
4. Will getting an answer on this issue have an effect on future presentations of this or similar issues?
 - a. If it will, how can I avoid that while advancing this?

Persuasive Writing: Judicial Perspectives

A. Briefing/Motion Drafting

1. Briefs and Motions are sometimes your only opportunity to argue your position to the court.
2. Many cases are decided on the pleadings without being called for oral argument, so the information you put into your motion may be the only time that your particular argument is presented to the court.
3. Your job is to make it easier for the court to decide in your favor. If you merely present the court with its options, or with undecided or unpersuasive precedent, you haven't advocated for your position or demonstrated why the court should grant your request.

B. What will the Court think?

1. Upon receipt of motions and briefs from the parties, Judges are looking for:
 - a. Clarity and Conciseness
 - b. Consistency
 - c. Conclusions (Proposed)
2. The role of the court is to review disputes or conflicts and render decisions. To do so, the court needs parties to be clear and concise with their presentations to ensure the court is advised of the basis of your position.
3. Consistent arguments are essential. If you're unclear about your position or appear to be making contradictory arguments throughout your presentation, the Court can't be expected to rule in your favor.
4. Conclusions, conclusions. You should always tell the Court what exactly you are asking it to do. When in doubt, revisit those CREAC, CIRAC, etc. acronyms from law school and be sure to state what you are requesting in clear terms.

Practice Tip:

The rules of drafting that you learned in law school still apply to practice.

Paragraphs should generally have the following structure:

Conclusion (or purpose of the paragraph)

Rule

Explanation/Application

Conclusion (reminder and transition)

Each paragraph should transition naturally to the next. Just as when telling a story, you wouldn't jump around from detail to detail, so in your writing, don't abruptly change directions.

C. What do I want to say and...am I saying it?

1. The Court will benefit if you focus your review of your documents to easily extrapolate your message and identify where you're going.
2. Have a colleague review a document before submission. If the reader can't repeat back to you what you believe to be your main points, then the Court won't be able to either.
3. Remember to phrase your arguments, headings and statements of questions in the affirmative or the negative and retain the same tone throughout.
 - i. Example: If you want the court to deny an opponent's motion for summary judgment, use your argument headings as a means to demonstrate that you have met your burden for a prima facie case, as opposed to simply repeating and denying the assertions of your opponent.

“If I would’ve known then..” Drafting for Specific Scenarios

A. Predicting Outcomes:

1. If you pay attention to the Court and the way that the Court rules, you can then be more informed and strategic in your filing.
 - i. Maybe some judges allow and encourage less “legalese” and more fluid argument, while others don’t like “flashy” language and prefer an air of formality. Knowing (and noting!) these details will better prepare you in the next matter, and save you time in your next preparation.

Practice Tip:

When in doubt, default to formality over informality.

B. Contracts & Agreements

1. Maybe you have an institutional or organizational client who has many different types of agreements and relationships with its employees and independent contractors.
 - i. Would you draft agreements the same way for the janitor as for the CEO?
 - ii. Have you experienced issues with a predecessor that you want to avoid in the successor?
2. Does your client need an easy out or an air-tight agreement?
 - i. For example, with the leader of an organization, you would be intentional about tailoring any notice requirements for terminating an employment contract.
 - ii. If you have a blanket “30 day notice” provision that you write into all of your agreements, it won’t be until much later that you realize it was inappropriate for both instances.
3. Do you need flexibility in contracting because of variables in funding/resources/etc.?

- a. Contracts are intended to be specialized. No two contracts should be exactly the same because no two scenarios are exactly the same.
- b. Counseling clients through contracting issues is the best way to avoid issues, especially with institutional clients.
 - i. Implementing document review and contract signing procedures are best practices that are easy to implement and protect both counsel and client.

Practice Tip:

Contract issues are created and resolved at the drafting stage.

C. It's All in the Brainstorm

1. Alternate Outcomes are Drafting Tools
 - i. Wisdom is applying the results of previous matters to form your perspective in future matters.
 - ii. When a client presents a problem, while the facts may be distinct, the underlying issues may be similar
2. By balancing your clients' experiences against one another, you make yourself sharper on all of your matters because they become more readily accessible in your mind.
3. Moving Forward
 - i. Sometimes your client has just emerged from a crisis or a big change, and you must be conscious of the fall out and prepare for the next steps.
 - ii. It's our job to be a few steps ahead—of everyone—and if we treat matters in isolation, we don't get the benefit of using our hindsight as 20/20.

Practice Tip:

When a client has emerged from a crisis, especially those that predate your representation, you should be brainstorming:

How did we get here?

How do we avoid getting here next time?

What were the signs of this?

What policies or practices can be placed to keep this from being a concern in other settings?

Are there other issues that we should deal with?

Take inventory when you take on representation (and periodically thereafter) to avoid being blindsided by foreseeable issues.

