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Frank Edward Horack

*Indiana University School of Law - Bloomington*

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OBJECTIVES IN THE FIELD OF LEGISLATION *

FRANK E. HORACK JR.†

IT IS GENERALLY agreed that the primary purpose of a course in
legislation is not to train legislators, nor legislative counsel, nor lobby-
ists, but to train students who will engage in the general practice of the
law. Because of this, there is a temptation to assume that the core of the
legislation course should be statutory interpretation. A further tempta-
tion arises from the fact that very few teachers of legislation have had any
legislative experience and thus cling to the judicial areas where by training
and practice they feel more at home and more comfortable.

If, however, we hitch our objective to the star of statutory interpre-
tation, we are hitching it to a setting star. Not more than thirty years
ago the course in equity was organized around the so-called maxims
of equity; this organization is now long abandoned because of the reali-
zation that the maxims had little if anything to do with the final determi-
nation of a litigation. So with statutory interpretation. There is no
rule of construction that does not have a companion rule directing an
opposite result, nor a rule which is mandatory, nor a rule that a court
cannot ignore with propriety, nor a rule that is equally applicable to every
type of statute.

Statutory interpretation depends far more on the type of statute in-
volved and the character of the litigation than it does upon the “rules
of construction.”¹ The interpretation of tax statutes bears little rela-
tion to the interpretation of statutes of wills and frauds, or to public
regulatory statutes. There is increasing evidence in the decisions that
interpretation is specialized by subject matter and should be taught as a
part of the substantive courses; and if taught at all as a part of a course
in legislation, only as a general introduction to the specific interpretation
problems involved in practically every second and third year course.

What then is left for legislation: legislative procedure, bill drafting,
policy determination. Some will point out that legislative procedure may
duplicate courses in political science; that a law student should be suffi-
ciently proficient in English to write an acceptable statute; and that his

* Based on a talk at the Legislation Round Table at Chicago, Dec. 29, 1952.
† Professor of Law, Indiana University.
¹ Since this round table was held, Mr. Justice Frankfurter, in United States v.
Universal C.I.T. Credit Corporation, 344 U.S. 218, 221 (1952), has underscored
this point most effectively when he observed: “Generalities about statutory construc-
tion help us little. They are not rules of law but merely axioms of experience. . . .
They do not solve the special difficulties in construing a particular statute. The
variables render every problem of statutory construction unique.”
social science courses should prepare him for policy determination. If this is all true, it may be that for twenty-five years we have been following the wrong star and that we should now abandon the legislation course altogether. For myself, I am not convinced.

A proper course in legislation is no luxury in the curriculum; it is a necessity if the general practitioner is to be well trained. I make this statement not as a generalization nor as an assertion but upon the basis of specific and unhappy experience.

I am currently the chairman of our local Plan Commission and thus hear numerous requests for rezoning. Few of the lawyers who appear before us adequately present their client’s case. The lawyer’s job in such appearances calls for entirely different skills than those acquired in the usual law school curriculum.

The issues before us are purely legislative—which means that the framework of inquiry is broader, the relevant facts more inclusive, and the relief prospective rather than retrospective. Seldom have I seen an attorney present his case with a true realization of these differences. In matters of form his petition is accurate and workmanlike—but in terms of the judicial process. The petition invariably gives a full and detailed legal description of the property. The property, however, is already well known to the commission. Its legal description is not necessary, for we are not trying title. What we are interested in, is the evidence upon which he justifies his claim for rezoning. It is here that the attorney should do his work; but invariably his petition states no more than that the “petition should be granted in the interest of the public health, safety, and morals.” Nor does the oral presentation elaborate this inadequate conclusion. Counsel apparently do not appreciate that the legislative process requires evidence and argument directed to “why-should-the-rule-be-changed.” The pertinent evidence should illuminate the effect of the proposed change upon adjacent property, upon traffic flow, upon the sewer and water system, upon school and recreation facilities, and upon the orderly development of the area and of the entire city. Nor are these problems limited to zoning. Similar legislative skills are requisite in appearances before common councils, boards of public works, county commissioners, and special district commissioners, to mention but a few. I emphasize the local level legislative problems not only because they are so frequently ignored but also because it is there that the great majority of our students will practice.²

² Nor should local governmental practice be dismissed as petty and insignificant. At the present time, for example, a rezoning case pending before an Indiana Plan Commission involves more dollar value than any judicial litigation now on file in the state.
In support of training in the legislative process it is often pointed out, particularly where issues are before administrative tribunals, that a well prepared legislative case will determine the ultimate judicial success when appeal is made to the courts. This is true, but it completely misses the point that in many legislative proceedings there is no appeal to the courts and if the job is not well done at the outset the cause is lost then and there without right of appeal.

What then are the skills necessary to effective legislative advocacy? They are skills which though not exclusive to the legislative process require special application and adaption to be effective. These are the skills of:

1. Exact expression.
2. Fact finding and analysis.
3. Interpretation.
4. Policy determination.

The skill of exact expression, though certainly a requisite to all effective human communication, presents special problems in the legislative field. Thus, unfortunately, the lawyer who can draft an excellent complaint cannot necessarily draft an excellent statute or petition for legislative relief. Indeed, the very skill that makes his complaint outstanding if applied to a statute may destroy its effectiveness. A complaint is founded upon a past and reasonably determinate set of facts and the lawyer’s particularization of those facts is often dramatic and effective. Not so in the legislative process. Particularization may defeat the very purpose for which relief was requested by opening the door to ejusdem generis construction. It may so narrow the applicability of the rule that the statute may be declared invalid as arbitrary and discriminatory or special legislation. In the rezoning case it may result in “spot zoning” so that the commission should refuse to act or if it does, its action may be invalidated by the courts.

Exact expression is more than good draftsmanship; it involves the substantive understanding of the type of problem and the type of relief desired and a knowledge of how to transplant those desires into effective requests for legislative relief.3

Few practitioners and fewer law teachers have experience in legislative advocacy or legislative draftsmanship. Case-law education has stressed the “exception” and disparaged the “general rule” to the point that few law school graduates would ever consider making a flat, unconditional statement even where as a legislator it is possible. Thus, most

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3 For the diversity of problems involved in draftsmanship, see Pantzer and O’Neal, The Drafting of Corporate Charters and By-Laws 14-20 (American Law Institute, 1951).
statutes proceed from single instance to single instance and as a conse-
quence are unreadable, disorganized, and confusing. It is small won-
der that there is a growing body of decisions holding acts invalid for
uncertainty or vagueness.

A statute should be written not only on the assumption that compliance
will be achieved best by simple, general rules understandable both to those
who must comply and those who must enforce, but also on the assump-
tion that it will be neither followed nor enforced if it is not understood.
Common law language is not known to the great majority of society and
so long as lawyers apply it to statutory draftsmanship, statutes and ordi-
nances and orders will be incomprehensible, absurd, and unenforceable.

Correctly or incorrectly the bar has always believed that those of us
engaged in legal education are incapable of effective instruction without
some actual experience in the practice. Certainly in the field of legis-
lation this judgment is more compelling than elsewhere if for no other
reason than that areas of responsibility are wider, the standards for judg-
ment are fewer, and the opportunities for creative law-making are
greater.

Fact-finding is another skill which is given but scant attention in the
law school curriculum. The fact-finding requirements of the judicial
process are relatively confined and experience indicates that our gradu-
ates quickly acquire sufficient competence for judicial litigation. Where
legislative fact-finding is involved, however, the framework of the in-
quiry, the ability to discover and evaluate the worth of non-legal data,
impose burdens which our graduates have not readily mastered. And
this is not for the lack of opportunity. For the use of these skills is
broader and more frequent than is generally supposed. Unfortunately,
as indicated by the zoning example, the usual graduate assumes that a
factual inquiry sufficient for the judicial process is adequate in the legis-
lative process. The failure to appreciate the difference results in poor
legislative advocacy. Here, as in the case of draftsmanship, there is little
opportunity for apprentice training and the obligation of the law school
therefore to present material of this character becomes much more de-
manding.

Problems of interpretation in legislative litigation are not basically
different than they are in judicial proceedings. They are the problems
of semantics, of communications, of the "meaning of meaning." Our
existing courses in legislation probably over-train in this area.

Policy determination is certainly the most difficult and hazardous of
all the problems involving a course in legislation. Here we are all ama-

4 See the Ohio and Indiana Conservancy Acts: Ohio Acts, 1914, p. 13; Ind. Acts,
1947, c. 239.
teurs; lawyers perhaps more than others. *Stare decisis* has permitted lawyers and courts to avoid all too frequently, the responsibility for decisions involving fundamental value judgments concerning our society. The legislator, on the other hand, finds these problems as his primary obligation.

Teaching materials involving policy determination are almost negligible and most of them are non-legal. Yet the lawyer seeking legislative relief must make these determinations and in our present state of knowledge must make them intuitively. The course in legislation, if it does no more, and it should do no less, should articulate the areas of decision even though it cannot and perhaps should not attempt to decide the validity of particular policies.

The lawyer seeking legislative relief seldom needs to decide the major policy questions, for society itself seldom decides them. On the broad front we do not consider abolishing the system of private property; but within that system we constantly concern ourselves with problems of estate and inheritance taxation, with zoning laws, and rent control. Here the secondary policy decisions become pertinent to the lawyer's success. He must decide: (1) Where he should seek legislative relief; (2) what kind of relief he should seek; and (3) what manner of sanction he should request.

In judicial litigation, unless a federal remedy is involved, the choice of forum is made for the lawyer by statute; but when seeking legislative relief there is no limitation on choice of forum. In a given case, relief may be procured at the simplest governmental level—the city council, the board of county commissioners, the township trustee, a special board or commission; or it may be procured administratively at the state level or from the state legislature; or it may be procured from a federal administrative body or from Congress. What factors determine the choice? Expense? Distance? Political factors? The generality or speciality of the regulation sought? The territorial jurisdiction to be covered? These and many other questions must be answered before an intelligent choice of forum can be made.

After the forum is selected additional policy determinations must be faced. Will the type of statute or ordinance or petition achieve the desired result? If a majority of legislators oppose administrative controls should relief take the form of a simple criminal statute or should it create private rights founded in contracts, torts, or property? Often the relief sought may be achieved in any of these ways. The lawyer's success may depend more upon the type of statute which he selects than upon the substance of the relief he seeks.
So also with sanctions. Everyone recognizes that a judgment without execution and satisfaction is a hollow victory. So with statutory enactment. If the new rule is unenforceable in fact, the time, effort, and expense in its procurement have been lost. Nevertheless, the law as a science has given little if any attention to the devices for law enforcement.

These three areas—draftsmanship, fact-finding, and policy—are peculiarly the province of the course in legislation. These should be our objectives; their attainment, our challenge.