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1954

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Reed Dickerson

*Indiana University School of Law*

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#### Recommended Citation

Dickerson, Reed, "Legislative Drafting: A Challenge to the Legal Profession" (1954). *Articles by Maurer Faculty*. 1494.

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# Department of Legislation

Charles B. Nutting, Editor-in-Charge

## Legislative Drafting: A Challenge to the Legal Profession

by Reed Dickerson

■ The author of the following article has for the past year been in charge of the military codification program in the General Counsel's Office, Department of Defense.

I will venture to affirm, that what is commonly called the *technical* part of legislation, is incomparably more difficult than what may be styled the *ethical*. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver.

John Austin, *Jurisprudence*  
(4th ed., Campbell, 1879) 1136

■ Middleton Beaman,<sup>1</sup> long time Legislative Counsel of the House of Representatives and generally acknowledged Heifetz of American draftsmen, was asked several years before he died why he had not written a book on legislative drafting. Although his reply that he would not know what to put in it was belied by his earlier performances before a congressional committee<sup>2</sup> and the American Association of Law Libraries<sup>3</sup>, the fact remains that America's top draftsmen have been singularly reticent about sharing their working tools and basic insights.

It would be hard to exaggerate the importance of knowing how to prepare an adequate legal instrument. This is particularly true of statutes. Sound government depends upon legislation that says the right thing in the right way, in language that is as clear, simple and accessible as possible. There must be draftsmen who can provide these things with the least friction and delay.

Good draftsmen are badly needed. This is not generally realized because the drafting skill is more subtle and copes with problems more difficult than surface appearances suggest. Legal drafting, like teaching, looks easy. But, as with teaching, the answers are rarely clear cut. The test of success is usually someone's individ-

ual judgment.

Legal drafting is not for children, amateurs or dabblers. It is a highly technical discipline, the most rigorous form of writing outside of mathematics. Few lawyers have the special combination of skills, aptitudes and temperament necessary for a competent draftsman. This is due partly to inadequate training.<sup>4</sup> More fundamental is the widespread misunderstanding of what adequate draftsmanship involves.

One of the most baffling aspects of the problem is the difficulty of convincing those in whose hands the solution lies that the problem is hard and, even more basic, that any problem exists.<sup>5</sup> I have discussed the matter with many lawyers, government officials and law professors. I rarely meet one who does not consider himself a well-trained, and even expert, draftsman. That the average lawyer or law professor senses little inadequacy either in himself or among bar members generally may explain the condescension they often show.

Actually, the legal profession is falling far below its real potentialities, not only in the highly specialized field of legislative drafting but in the general field (which touches every lawyer) of preparing contracts, wills, leases and conveyances. Basic ability is not hard to find. Basic ability adequately trained is rare.

It is time to drop the threadbare rationalization that the complexities and uncertainties of most completed legal work inhere in the complexities and uncertainties of the substantive problems they deal with. The substantive demands of concrete problems is no excuse for introducing unnecessary complexities and uncer-

tainities. Today there are ways of separating the avoidable from the unavoidable.

Because it is the legislator's job to enact laws, it is sometimes assumed that election to Congress or a state legislature is, without more, sufficient background from which to draft legislation. But whether a legislator has the capacities to draft legislation depends entirely upon other factors. Although it is certainly his privilege to draft the bills he introduces, few members have the time. That few also have the inclination is fortunate, because it frees them for matters of basic policy and the countless needs of their constituents.<sup>6</sup> The typical legislator relies almost entirely on others for his bill drafting: members of his staff; professional staff members of legislative committees; official bill-drafting services;<sup>7</sup> staff attorneys in the executive departments and independent agencies;<sup>8</sup> persons representing private institutions and trade associations; and finally individual lawyers and individual laymen. Unfortunately many of these are not equal to the job.

Like much state law, the existing body of federal statutory law is an intricate mass of live and dead law. It is a vast tower of Babel. Much of

1. Jones, "Middleton Beaman: Doctor of Laws", 35 A.B.A.J. 778 (1949).

2. Hearings on H. Con. Res. 18, Joint Committee on the Organization of Congress, 79th Cong., 1st Sess., 413-430 (1945).

3. "Bill Drafting", 7 *Law Lib. J.* 64 (1914).

4. "Few practitioners and fewer law teachers have experience in legislative advocacy or legislative draftsmanship". Horack, "Objectives in the Field of Legislation", 6 *J. Leg. Ed.* 18, 20 (1953).

5. "It is believed that no real improvement in the quality of our statutes can be hoped for until our legislators and others responsible for the preparation and passage of bills realize that all the processes involved in converting a meritorious idea into an effective statute are equally important and that in each process experts must be employed." Beaman, *op. cit.* note 3, 66.

6. "... there are limits to human intelligence, even to the intelligence of a legislator, and that the legislator who thinks himself not only entitled but bound to put his finger into every legislative pie and to scrutinize every measure submitted for the approval of the body to which he belongs, may possibly be placing an exaggerated estimate both on his intelligence and on his responsibilities." Ilbert, *The Mechanics of Law Making* 198 (1914).

7. Jones, "A Note on Legislative Drafting Services in the State Legislature", 36 A.B.A.J. 142 (1950).

8. Jones, "Drafting of Proposed Legislation by Federal Executive Agencies", A.B.A.J. 136 (1949).



its terminology violates accepted usage. Much of the text is confused and ambiguous. It is full of gaps and overlaps.<sup>9</sup>

In the rush to meet the exigencies of particular problems, laws are proposed and frequently enacted that do not show how far they amend or supersede pre-existing laws. Others are proposed that do not dovetail adequately with related or companion legislation. Many show little regard for the need to develop a reliable means of communication between the legislator and the persons the legislation is addressed to. Common usage is too readily perverted by short cuts that save the draftsman's time but sooner or later lose untold hours for the individuals, agencies and courts that have to determine what the law means.

Some of this is unavoidable. And the fact that a particular law is badly drafted does not mean that its author is a bad draftsman. Many of the things that make for bad legislation are beyond the control of the persons who are charged with preparing it. Even so, many could be avoided if uniform writing conventions and the best modern principles of legal drafting were adopted and if legislative drafting were concentrated in persons with the necessary mental capacity, temperament and training.

Voices have recently been raised suggesting that the existing law can be greatly clarified, but a general preoccupation with the problem of style shows that adequate cures must await fuller diagnosis. The greatest need in existing legislation is not a more readable style but greater systematization and greater uniformity in concept, approach and terminology. Legislation cannot, of course, be permanently embalmed in static terminology. New laws should reflect the needs of the times. But the dis-

crepancies in existing legislation are only partly traceable to normal growth. Many flow from accident, mistake, ignorance or ineptitude.

Normally, it is proper to assume that when Congress or a state legislature says different things it means different things, and that when it says the same thing it means the same thing. Experience shows, however, that it frequently enacts language that has been prepared by persons who pay inadequate attention to these assumptions. As a result, much of the law is unnecessarily hard to understand, both for itself and in its relationship to other enacted law. Terminology varies not only between different statutes dealing with the same subject but often within the same statute and sometimes even within the same section of the same statute.

Besides the minimum requirements of consistency, what is needed is a closer adherence to accepted usage, and where accepted usage does not give an unequivocal answer, the adoption of conventions within the limits of what accepted usage allows. Although the individual draftsman can do little about leading the governmental drafting procession as a whole, he can do his part by selecting from among the varying usages those which seem closest to general usage and good sense.

9. "... the laws which have found their various ways into the statute books of English-speaking countries... are spoken of as disgraceful, unworkmanlike, defective, unintelligible, abounding in errors, ill-penned, inadequate, loosely worded, depraved in style, peculiar absurdities, mischievous, baneful in influence—and besides, in their making 'technical skill is often below the mark.' Otherwise, it might be presumed, they are all that could be asked of them—but no, in other writings we find that they are uncertain, confusing, obscure, ill-expressed, ambiguous, overbulky, redundant, entangled, unsteady, disorderly, complex, to say nothing of being 'uncognoscible.'" "Guide to Legislative Drafting in Arizona", Arizona Newsletter No. 15, 9 (1941).

Suitable standards and conventions not only save the draftsman's time, but the time of private citizens, administrative officials and the courts. (It is safe to say that the lack of these things costs the Government and the public many millions of dollars annually.) More important, they improve the quality of the end product as a vehicle for carrying out the legislative will. Sound legislative approaches, consistency and clearness are tools for eliminating errors of substance or omission that would otherwise remain hidden until after enactment.

For the Federal Government, much of the responsibility rests with Congress and the executive agencies. Members of Congress, individually and collectively, can have a much larger proportion of the bills now drafted on Capitol Hill prepared either by the highly capable lawyers of the offices of the Legislative Counsel or by skilled specialists attached to the various committees.

The executive agencies, for their part, can centralize and co-ordinate their drafting activities more fully. They can pay greater attention to the problems of getting trained personnel. Where they cannot acquire it ready-made, they can develop adequate training programs.

The law schools, too, have an important responsibility. They can help to develop those general skills which form such an important part not only of legislative drafting but of many other kinds of legal craftsmanship.<sup>10</sup> Unfortunately, their justifiable preoccupation with the disciplines of analysis have led them to

"The English lawyer, more especially in his character of parliamentary composer, would, if he were not the most crafty, be the most inept and unintelligent, as well as unintelligible or scribblers. Yet no bellman's verses, no metrical effusion of an advertising oil-shop, were ever so much below the level of genuine poetry, as when, taken for all in all, are the productions of an official statute-drafter below the level of the plainest common sense." 3 Bentham, *Nomography* (Bentham's Works, Bowring's ed., 231, 242 (1843)).

10. "... drafting is the most important phase of the average lawyer's work." Thomas, "Problems in Drafting Legal Instruments", 39 *Ill. B.J.* 51, 57 (1950).

neglect the disciplines of synthesis, the skills involved in weaving complicated materials into an intelligible whole.<sup>11</sup>

Filling this gap does not necessarily mean adding new subjects to already overloaded curricula. What is needed is to work into existing subject matter the kind of legal engineering for which brief writing, term papers and law review experience are an inadequate substitute. There is no better gymnasium for flexing this kind of intellectual muscle than the field of drafting documents that mark out legal rights, privileges, du-

ties and functions.<sup>12</sup>

Finally, the Bar itself can improve the constructive skills of many of its members by practicing individual self help, by publishing helpful materials and by exploiting such devices as the practitioners' institute.

Can the legal profession develop lawyers who are as capable as craftsmen as they are as analysts, who can put complicated materials together as well as they can take them apart? Only by meeting this challenge can it adequately discharge its responsibilities in the great complex of modern society.

11. "The lawyer's treatment of the law is analytical, the legislator's constructive." "Report of the Special Committee on Legislative Drafting", 38 A.B.A.Rep. 622, 629 (1913).

12. Traditional courses in "legal writing" are usually overbalanced with brief writing or other forms of concise legal essay that are a watered-down substitute for the more concentrated disciplines. A man trained in drafting legislation can be made qualified to write an adequate brief more quickly than a man trained in brief writing can be made qualified to draft adequate legislation. This is because the referential aspects of language, up-

on which legislation draws almost exclusively, are generally harder to master than the emotive, of which legislation ("free from all colour, from all emotion, from all rhetoric") has almost none. See Mackay, "Introduction to an Essay on the Art of Legal Composition Commonly Called Drafting", 3 L. Q. Rev. 326 (1887); Curtis, "A Better Theory of Legal Interpretation", in *Jurisprudence in Action*, 155 (1953). Compare Williams, "Language and the Law", 61 L. Q. Rev. 384, 387-401 (1945).

Moreover, as between legislation and other definitive legal documents, "... the number of contingencies that a lawyer has to guard against



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in the case of a will or contract, while sometimes they are very numerous, are mere flyspecks compared with the contingencies that must be considered in the case of a statute . . ." Beaman, *op. cit.* note 2, 419. "The textbook of Story on Equity Pleadings tells us that the drawing of a well-constructed bill in equity requires great accomplishments, and the endowments which belong only to highly gifted minds, and yet that is a summer-day pastime compared with the difficult task of framing a wise and well constructed bill for enactment into a law by a legislature." Beaman, *op. cit.* note 3, 65

## THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young • Editor-in-Charge

### Hungarian Plane Incident in the World Court

Under date of February 16, 1954, the Government of the United States filed with the Registrar of the International Court of Justice at The Hague two applications instituting proceedings in that Court against the Governments of the Union of Soviet Socialist Republics and of the Hungarian People's Republic respectively. Inasmuch as both applications dealt with the same subject matter, it was requested that they be dealt with together insofar as it might be convenient and proper to do so.<sup>1</sup>

The action marked the most recent step in a prolonged controversy with the Soviet Union and Hungary over their treatment of an American military aircraft and its crew which landed in Hungary in the fall of 1951. The incident, which attracted great attention at the time, became the subject of much correspondence

and debate among the three governments, with the United States seeking unsuccessfully to obtain satisfaction for the misconduct, as it asserted, of the two Communist countries. The facts in the case, as alleged by the United States in notes of March 17, 1953, to the Soviet and Hungarian governments which were annexed to the applications to the Court, are summarized in the following paragraphs.

On November 19, 1951, a United States Air Force C-47, with a crew of two officers and two enlisted men, left Erding, Germany, on a routine cargo flight to Belgrade, Yugoslavia. There were no passengers and neither plane nor personnel were armed. By unforeseen high winds of which the crew was unaware, the plane was blown off course in Hungary and Rumania. Realizing he was lost,

the pilot eventually turned westward; and as the fuel supply ran low, signals for assistance were made both by radio and with lights. About 6 P.M. the plane was intercepted by a Soviet aircraft shortly before it would have crossed from Hungary into Austria and escorted to a landing near Papa in Hungary, some eighty miles west of Budapest. Only then did the American airmen learn that they had been flying over Hungary.

The C-47 and its contents were seized, and the four Americans were separately detained and interrogated by Soviet military authorities in Hungary from November 19 to December 3. They were then turned over to the Hungarian authorities, and the men were conveyed to Budapest and lodged in prison. On Sunday morning, December 23, they were informed by a military prosecutor that they were under arrest and held for trial on charges of having violated the Hungarian frontier.

1. The text of the application with respect to the Soviet Union is printed (but without annexes) in 30 Department of State Bulletin 450-451 (March 22, 1954).