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ONE APPROACH TO TEACHING LEGAL DRAFTING

Reed Dickerson *

For the law schools, one of today's most baffling pedagogical problems is to discover practicable ways by which an adequate drafting discipline can be taught to law students generally. It may be worthwhile, therefore, to describe an approach to his problem that has been developed over a period of five years at Indiana University to the point where it is now achieving considerable success. It is an approach that may also be adaptable to continuing legal education for practicing lawyers.

The traditional apprentice method has failed either because the typical young lawyer has been apprenticed to the wrong master or because the law schools have been unable to provide enough competent ones. As a result, some law schools have simply thrown in the towel. Others have gone along with watered down courses in "Legal Writing." Still others have deceived themselves into believing that the problem is merely that of curing a deficiency in pre-law training, to be handled by entrance examinations or by exerting back-pressure on the colleges and secondary schools. And so the problem largely remains.

Legal drafting has aspects of complexity and precision unknown to the great bulk of writing with which the pre-law student makes contact. The differences in degree are so great as to constitute practical differences in kind. For this reason, the law schools should face more resolutely their responsibility to teach a professional skill that every lawyer needs almost daily and that only they can teach on a mass basis.

For law schools that have already tried to do so, the critical difficulty has been the need for personal supervision. Writing exercises produce a work product that has to be carefully and individually scrutinized. The crucial question is always: Who corrects the papers and talks individually with the students? It is here that most attempts at large-scale drafting projects have foundered.

Indiana University's 1964 drafting exercise, consisting of the revision of a single, relatively short University lease and requiring about 11 weeks of student time, was framed by a professional draftsman with extensive experience and administered by three teaching associates to a class of 162 first-year students. The teaching associates were recent law graduates who had had little drafting experience. The exercise was so constructed that a student or teaching associate could not perform it without adopting the approaches necessary to sound drafting. A University real estate official served as client. Because the University is interested in improving its legal forms, the exercise was enhanced by the challenges and disciplines of a concrete, rather than a merely hypothetical, legal problem. This made the client a real client.

Such an exercise was possible only because it was tightly programmed by the professor in charge through the medium of specific and highly detailed

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instructions. These may be sampled by examining the initial instructions, included as Appendix A to this article.¹

Altogether, there were six "phases" plus a suggested final product. In Phase 1, the student was required, after carefully reading the existing lease, to answer 8 traditional questions involving specific hypothetical fact situations.² A sample question and a sample answer were included. Besides introducing the students to the instrument, Phase 1 laid the basis for pointing a sharp contrast between the traditional case-oriented approach that it exemplified and the drastically different draftsman's approach of Phase 2.

Phase 1 was significant also in that it required a minimum of substantive research. An adequate grasp of substance is, of course, vital to any drafting exercise. The problem is to supply it without squandering most of the student's time on research efforts in which he is being adequately trained elsewhere in the curriculum. (In an earlier exercise, relevant constitutional provisions, statutory provisions, and case digests were supplied in an attachment to Phase 1.) Besides, putting the research burden elsewhere lends realism, because the professional draftsman necessarily passes as much of the research buck as he can to other persons. He must learn to pick the brains of other people. Although untraditional pedagogically, this approach is closer to the actualities of practical drafting.

In Phase 2, the student was introduced to the point of view of the legal draftsman. He was asked sixty-four specific and detailed questions on provisions representing a little less than half of the instrument. These were intended to include every question that a skilled and conscientious draftsman might ask in the course of his work. Although the student was expected to try to develop answers, he was asked not to submit them. Instead, he was asked to prepare and submit questions on the remainder of the instrument comparable to those that he had answered.

Phase 2 was perhaps the most important of the six. No one could execute it without adopting the basic point of view of the draftsman. It was especially this aspect that intrigued the late Professor Karl N. Llewellyn, who judged it a significant pedagogical advance. Several features of Phase 2 are worth noting.

First, in emphasizing questions rather than answers, it centered on the aspect needing the greatest pedagogical emphasis. Second, the questions were grouped into four kinds, starting with matters of substance and moving in descending order of significance to matters of style. This put the drafting discipline in truer and more favorable perspective. Third, the project was keyed, through parenthetical references, to the accompanying manual of drafting style. This not only illumined many of the questions but started familiarizing the student at an early stage with the specifics of drafting tech-

¹The complete text of the exercise may be examined in Reed Dickerson, The Fundamentals of Legal Drafting, App. D (1965).

²For example, the following question was asked with respect to the opening paragraph and clauses 3 and 15: "Jim Waits leased a house from the University. His rent was payable on the first day of each month. He has failed to pay any rent since he signed the lease and took possession three months ago. May the University require Waits to vacate the premises under the terms of the lease?"
In Phase 3, the student prepared an outline for a proposed revision of the whole lease. Here, he was introduced to the architecture of drafting. Of the six phases, this was the least satisfactory, because as yet no specific pedagogy appears to have been developed for expressly conveying the principles for developing a hierarchy of concepts to serve as the conceptual matrix of a legal instrument.

During Phase 3, the class had a conference with the client. (This was the only occasion on which it met as a whole.) The client told the class what policy changes the University wanted to reflect in the revised lease and then answered a large number of questions that had arisen during the first three phases. For the most part, the questions were perceptive and to the point, suggesting that the students had acquired a solid understanding of the practical as well as the legal and conceptual problems involved. The results of the conference were then crystallized in a written statement of policy, which was approved by the client and circulated to the students. It was a problem to make this statement sufficiently specific and informative without putting it in a form that would lend itself to verbatim inclusion in the final product (see Appendix C).

In Phase 4, the student tried his drafting skill by revising the parts of the lease dealing with payment of rent and restrictions in use, taking into account changes in substantive policy that had developed during the conference with the client.

In Phase 5, the student was given a second chance to try wings before revising the instrument as a whole. This phase was introduced at the request of students in earlier exercises who wanted a second try before the final effort. Experience also showed that the second try was better directed to a different part of the instrument from the first. The phase reflected additional policy changes that further study and informal conferences with the client had developed.

In Phase 6, the student undertook a complete revision of the lease. Here, he tried to synthesize what he had learned about architecture, form, and style, and to reflect the changes in substantive policy that had been adopted.

Although even an exercise of this intensity and depth can hardly develop an accomplished draftsman in the short space of one semester, it seems to accomplish the important goals of sensitizing the student to the existence and difficulty of the major drafting problems and of highlighting the vast contrast between (1) the traditional unicentric, case-oriented point of view of the litigant's counsel and (2) what Fuller has called the "polycentric" point of view of the legal planner and draftsman.

One advantage of such an exercise is that a single project is preferable to a series of short ones, none of which can adequately suggest the dimensions of a full-blown drafting operation.

The problem of possible boredom was handled by taking an instrument of current human interest and by providing the changes of pace represented by the differing kinds of phases. Interest is an unavoidable problem, because unlike the case-oriented lawyer, whose assignments have all the human inter-

nique and style. A sample of the questions that were included appears in Appendix B.
est involved in studying the problems of specific, identified people, the draftsman is problem-oriented and thus concerned with people only as general, abstract classes.

In theory, to use inexpert teaching associates is to let the blind lead the blind. In practice, this has not been a problem for the reasonably intelligent teaching associate. By participating in the advance planning and with some boning up in advance, he can keep sufficiently ahead of his students. Proof of the growth and agility of the teaching associates came when the professor prepared a tentative draft to be submitted as the “Final Product,” which gave the students a common basis for evaluating their own performances. That the specific criticisms of the teaching associates were both sharp and to the point was at the same time surprising and reassuring to the professor. There is also evidence that much of their increased perceptiveness rubbed off on the students. That the exercise also benefited the client is shown by the University’s adoption of the final product for use in future operations.

Although a lease was selected for this particular exercise, the exercise is equally significant when done with other definitive legal instruments. Each is basically an exercise in legal drafting and not one merely in drafting a particular kind of legal instrument. On an earlier occasion, for example, the instrument selected was a proposed Public Defender Act for Indiana. On another, it was the Law School’s Student Honor Code. The first one was the University’s “Married Housing Contract.”

If the size of the class becomes a problem and it becomes hard to maintain a workable student-teaching associate ratio, the problem can be reduced by moving the exercise into the second or third year, when it can be assumed that the total number of students exposed to any required exercise would be substantially less.

Although the approach described here could hardly be called an unqualified success, experience shows that it is solid enough to refute the notion that teaching legal drafting to relatively large numbers of students is either impossible or impracticable.

APPENDIX A—EXCERPT FROM INSTRUCTIONS FOR PHASE 1

The purpose of this project is to introduce you to the problems of legal drafting. If you are like most law students, you will not find the project easy, mainly because it differs from anything you have ever done before. The draftsman, unlike the lawyer who has a case in court, does not deal with a particular controversy, with all the human interest involved in studying the lives of specific, identified people. Instead, as a legal engineer or planner who tries to foresee all reasonably possible situations instead of investigating only one, he tends to be concerned with people as general classes rather than as individuals.

Because of the relatively small proportion of time that is devoted to legal drafting in the legal curriculum, it would be easy to conclude that legal drafting is a mere sideline or substantive specialty, like conveyancing, to be performed by a select few. But this would be wrong. You must realize that, whereas the lawyer has traditionally been oriented toward the courts, the great bulk of lawyers today either do not go to court
at all or go only infrequently. Instead of serving primarily as advocates in particular controversies, they are serving increasingly as planners and architects of commercial enterprises, estates, and other long-run arrangements. In this capacity, they are engaged in a constructive effort to advance their clients' interests and keep them out of trouble, instead of merely participating after a specific controversy has arisen. Except for specialists such as those of the trial and appellate bars, therefore, the lawyer who cannot put together such a long-run plan is not an adequate lawyer.

Nor can the legal drafting skill be passed off as a mere general writing skill that should have been fully learned in college or secondary school. This is perhaps best explained by saying that legal drafting requires a degree of precision and accuracy and an attention to structure and architectural detail that is otherwise unknown in writing outside the language of mathematics or logic. In addition, it stands apart from most other legal writing in that here the emotive element (the sales pitch) so important in briefs and other forensic legal documents is almost wholly absent.

The problems of drafting a lease, which is the subject of this project, are for the most part those of drafting a will, contract, indenture, or even a statute. Most of what you learn while drafting one of these instruments you can use when drafting other kinds.

The drafting skill is not easily acquired. Because it takes months and even years to make an accomplished legal draftsman, it is impossible within the space of the law student's academic career to train him fully, even if he has come to law school with a solid grounding in English composition. For this reason, this project aims primarily at (1) acquainting the student with the approach of the draftsman, which differs radically from that of the case-oriented trial or appellate lawyer, (2) sensitizing him to the important technical problems of draftsmanship, and (3) showing him what is probably most important of all: how a wholesome attention to legal architecture and form can have a profound effect even on substantive policy. If these things can be accomplished, the student will not be oblivious, as so many lawyers are, to the difficulties, pitfalls, and potential substantive benefits of legal drafting.

Whether the student ultimately becomes accomplished in performing this major legal function, however, depends largely on his own interest and determination to improve even after his formal legal education has ended. Formal training in drafting can give him an initial push in the right direction, but the long-run momentum must be his own.

The standard Indiana University lease, a copy of which is attached, has been selected for study and revision because it represents problems of current importance in a field in which the first-year student already has some background and thus does not need to do extensive research. Because the University would like to develop an improved version of the lease, which has been in use for a number of years, the present project is no mere academic exercise. Mr. George F. Bloom, who as Director of the University's Real Estate Department is responsible for the University's rental properties, will be our sponsor and client. At an appropriate time he will be available for questioning on matters of policy to be reflected in the final draft. It will be desirable, therefore, to keep a record of the policy questions that arise in the course of the project so that they may be presented to him for decision at that time.
APPENDIX B—DRAFTING QUESTIONS FROM PHASE 2

The following questions attempt to exhaust the particular matters that the draftsman should investigate in connection with the body of the lease and clauses 1-4. [The bracketed symbols refer to the relevant pages in Dickerson, The Fundamentals of Legal Drafting.]

A. QUESTIONS RELATING PRIMARILY TO SUBSTANTIVE POLICY

(2) How does Indiana University, as presumably the other party to this instrument, become bound under it? At what point, if any, is there a mutually binding arrangement?

(5) In view of the fact that clause 1 of the "Terms and Conditions" refers to "staff or faculty member," is it significant that the second sentence of the body of the lease refers only to "staff appointment"? Are faculty appointments to be treated differently?

(6) In the third sentence, do the words "it shall be cancelled" signify that the contract will be cancelled automatically, or that it may be cancelled by affirmative action? If the former, when will cancellation take place? If the latter, by whose action? Or is this a false imperative? [D 146]

(7) In the third sentence, what are the prescribed consequences of a request "to vacate"? Where are they shown?

(8) In the fourth sentence, what are the prescribed consequences of a request "to withdraw"? Where are they shown?

(9) In the fourth sentence, is the absence of the words "without prior notice" after the word "withdraw" significant in view of their presence after the word "vacate" in the third sentence?

(10) In the fourth sentence, what do the words "detrimental to the welfare of the dwelling unit" mean where the premises consist of a single-family dwelling? Is the provision definite enough to be objectively administered?

(12) In clause 2, may the University cancel if it gives the prescribed notice?

B. QUESTIONS RELATING TO FORM THAT MAY INVOLVE MATTERS OF SUBSTANTIVE POLICY

(2) In the first sentence, what do the words "and having knowledge of the following Terms and Conditions of the contract" add [D 57]?

(9) In the third sentence, do the words "unless I am eligible and" imply that the contracting authority of the University might otherwise contract for another period with the signer even if he were ineligible for University housing? If not, what do they add?
(10) In the third sentence, do the words "my space" signify anything different from what the words "dwelling unit" in the fourth sentence or the words "housing covered by this contract" in clause 4 signify? If not, why the differences in phrasing? Or is this "elegant variation"? [D 31, 152]

(11) Why is the third sentence written in terms of what may happen to the signer, when the fourth sentence is written in terms of what may happen to "any resident"? Is some subtle difference of meaning intended here? If so, what is it? If not, why the difference in phrasing? Or is this "elegant variation"? [D 31, 152]

(12) In the fourth sentence, what do the words "I understand that" add? Do they signify anything different from the words "I sign this contract with the understanding that" in the third sentence? Why the difference in phrasing? Or is this "elegant variation"? [D 31, 152]

(13) In the fourth sentence, do the words "the Administration of the University" mean something different from the words "the University" or from the words "the Real Estate office" in clause (2)? If so, what is the difference? Was a substantive difference intended here? Or is this "elegant variation"? [D 31, 152]

(20) In clause 4, to what do the words "including the responsibility. . . ." relate grammatically? To the word "damages," to the words "wear and tear," or to something else? If the first, how can damages include responsibility? If they relate to the word "liable," how can an adjective include a noun?

C. Questions Relating to Arrangement

(1) Why is the lease divided into a basic paragraph and "Terms and Conditions"? Does the body of the lease contain something other than terms and conditions? If so, what? If not, why split the lease into two parts? [D 96]

(2) Is clause 2 the most appropriate location for a cancellation provision? If not, what would be? [D 96]

(3) Should clause 3 be combined with or placed next to any section from which it is now separated? [D 96]

D. Questions Relating to Clarity and Readability

(8) In the second sentence, why is the word "University" introduced at this point? Would it have been preferable to introduce it earlier? If so, at what point?

(9) In the third sentence, what does the word "prior" add to the word "notice" in this context?

(10) In clause 1, what does the word "full" add? [D 57, 149]

(11) Can clause 2 be stated more simply? If so, how?

(12) In clause 2, why is the word "providing" italicized?
(13) In clause 2, is there a simpler way of saying “prior to”? [D 203]

(14) In clause 3, is the phrase “60 days notice” punctuated properly?

* * *

APPENDIX C—EXCERPT FROM POLICY STATEMENT

(1) Provision should be made for the signatures of the tenant and the University representative and for the date on which each signs the lease.

(2) Rent is to be paid in advance on the first of each month. However, rent will be treated as delinquent only if not paid before the eleventh of the month.

(3) The University is to have the power to cancel the lease after 60 days’ notice if the land is needed to make way for University construction that is imminent.

(4) The University wants the right to enter the premises at any time for purposes of maintenance and will give reasonable notice. The notice under clause 6 is also to be reasonable.

(5) The University wants to cancel the lease after 10 days’ notice if the tenant violates clauses 3, 4, 5, 8, 10, 11, and 12; the fourth sentence of the preamble; or the tenant’s duty to repair.

(6) The University wants to be compensated for damage to the premises resulting from violations of clauses 4, 5, 8, 10, 11, and 12; the fourth sentence of the preamble; and the tenant’s duty to repair.

(7) Proration is intended to cover the right to possession rather than mere physical occupancy. No proration will be made, in cases of cancellation, if the tenant fails to cancel the lease in accordance with clause 2 or if the University cancels the lease because of a violation of clauses 3, 4, 5, 8, 10, 11, and 12; the fourth sentence of the preamble; or the tenant’s duty to repair.

(8) In clause 16 the phrase “less than a full month” is not intended to refer to total occupancy but to the right to possession during the initial or terminal calendar month.

(9) The lease should provide for a return of the deposit subject to deductions for damage unless, in cases of cancellation, the tenant fails to cancel the lease in accordance with clause 2 or the University cancels the lease because of a violation of clauses 3, 4, 5, 8, 10, 11, and 12; the fourth sentence of the preamble; or the tenant’s duty to repair. The deposit will be returned not too long after the tenant leaves the premises.