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Professionalizing Legislative Drafting: A Realistic Goal?

by Reed Dickerson

The teaching of skills that result in sound legislative drafting is neglected in law schools, and professionalism in legislative drafting is lacking on both the federal and state fronts. With the adoption by the American Bar Association of seven major principles relating to the drafting of federal legislation, perhaps there is more hope now that there will be a move toward professionalism.

IS IT REALISTIC to hope that in the United States it may someday be possible to put the drafting of the nation's laws in the hands of trained professionals instead of leaving the great bulk of it to gifted, or not-so-gifted, amateurs?

Here are the reflections of one who has just completed seven years as a member of the American Bar Association's Standing Committee on Legislative Drafting and four years as its chairman, an experience supplemented by an extensive career as a government draftsman. During those years there has been a unique opportunity to observe the dimensions of the problem.

The gist of the matter is that American legislation in general and federal legislation in particular is falling far below its qualitative potential. This fact is important in an era when the law's changing impact is being made far more through the creative actions of legislatures than through the creative actions of courts.

Perhaps the most serious immediate aspect of the problem is that it is enveloped by a professional tradition that gives it low visibility. This tradition is built around a cluster of professional misconceptions.

It is widely believed that legislative drafting is mainly the mechanics of handling legal language. As a low-level intellectual skill, it may safely be viewed, therefore, either as an incident to the lawyer's more important skills or as a kind of legislative cosmetology that can safely be entrusted to paraprofessionals. For example, the staff members of Indiana's Legislative Council who draft legislation are not even required to be lawyers. Certainly, it is the rare lawyer who senses in himself any inadequacy in this respect; isn't a law school diploma supposed to qualify a lawyer to draft, without further training, the most complicated statute and even to author a major amendment to the United States Constitution?

This assumption leads easily to the conclusion that the best person to draft a statute is always the lawyer who has the greatest fund of substantive knowledge. If we need an amendment to the antitrust laws, we should engage the most knowledgeable antitrust lawyer. Yet assigning the primary drafting function to an expert draftsman whose substantive knowledge in the cognizant field is only modest in no wise bypasses the substantive legal expert, because the draftsman usually stays in close consultation with the available substantive experts.

Another conclusion is that we can safely wait until the substantive policy expressed by the proposed legislation is fully crystallized (that is, until the last possible moment) before calling in a technician to couch the proposal in appropriate legislative jargon and polish the numbering, paragraphing, and technical details—a procedure that prevents many of even the most skilled professional draftsmen from contributing significantly to the final product. This inability in turn confirms the original false assumption that the draftsman's main function is to frost the legislative cake.

Even the most enlightened law schools have done little to dispel this tradition. Staffed with teachers whose own educational exposure to legislation has been filtered through a system that still views the legal order almost wholly through the eyes of the courts and who are hampered by a lack of adequate pedagogical techniques, the law schools have largely abandoned any significant effort to develop the drafting skill or, indeed, to develop anything more than the shallowest understanding of what drafting is all about.

The Bar Should Attend to Legislative Output

It won't do to say that legislative drafting is an esoteric skill that the typical lawyer rarely uses. Legislative drafting is not essentially different from general legal drafting, which, far from being an esoteric skill, is probably the single most important intellectual skill now being used by lawyers, even those who never allow themselves to be seen in the company of a statute. Far more professional hours are spent in the kind of legal planning or other preventive lawyering that culminates in developing definitive instruments such as contracts, wills, leases, mortgages, and corporate agreements than are spent in litigation. It is ironic therefore, that most
legal education and most public legal utterances about the law, including those made at meetings of the American Bar Association, continue to focus on the machinery of litigation, while the great bulk of day-to-day legal effort is involved in almost heroic efforts to stay out of court. Wouldn’t it make better sense for the bar not to concentrate exclusively on the problems of judicial machinery but to give fuller attention to improving the general quality of legislative output, which gives the courts so much trouble and so much of their business?

For many years it was supposed that legislative drafting, as an assumedly specialized version of college-level English composition, could be effectively professionalized by developing and using a suitable style manual. As recently as six years ago, the Standing Committee on Legislative Drafting was still trying to develop a do-it-yourself guide for literate and clear legislation.

Twenty-five years ago there probably was that need and, if there was, the need has been adequately met. Although further improvement is both desirable and feasible, that is not now the main thing. Even if every lawyer had ready access to and used a sophisticated drafting manual, there would be little improvement in the end product unless other, more important steps were taken.

Administrative and Procedural Environment Is Needed

So far as the federal government is concerned, the committee’s now broader view of its mission has been shaped by two main considerations: (1) Congress depends on the executive branch to carry the main load in drafting new legislation to the point where, if an executive proposal for new legislation is not properly prepared, there is no assurance that its deficiencies will be corrected when it gets to Capitol Hill. (2) The responsibility thus imposed on the executive branch cannot be adequately discharged in the executive branch unless it is discharged by adequately trained lawyers operating in an administrative and procedural environment that permits them to use their talents to adequate advantage.

To provide that environment has been the committee’s main recent preoccupation. Here is what it has done so far.

Four years ago it persuaded the American Bar Foundation to fund a study of existing drafting practices in roughly a half dozen federal agencies. This was carried out by a team of three members of the Catholic University Law Review working under the general supervision of the committee. Its findings were published in 1972 in 21 Catholic University Law Review 703, “Legislative Drafting in Federal Agencies: A Special Project.”

Second, three years ago the committee held in Washington a national conference on federal legislative drafting in the executive branch. Participants included high officials from the three branches of government, the law schools, state legislative drafting agencies, private industry, a private university drafting agency, and the Office of Parliamentary Counsel in England. So far as I know, this is the only conference of its kind that has ever been held. The proceedings of the conference, edited by this author, are now available from the American Bar Association under the title Professionalizing Legislative Drafting: The Federal Experience. Anyone interested in the critical management aspects of legislative drafting would do well to examine this book.

Association Adopts Seven Principles

After evaluating these developments in the light of its own rich professional background, the committee formulated in 1972 seven major recommendations, which it then submitted for consideration by the governing bodies of the Association. As adopted unanimously by the House of Delegates on August 14, 1972, they are worth restating here:

RESOLVED, That the American Bar Association recommends that the following principles relating to the drafting of federal legislation in the executive branch be supported and that the president of the Association be authorized to confer with the president of the United States and other appropriate officials of the federal government with a view to the adoption and implementation of these principles by the executive branch:

(1) Each agency of the executive branch of the federal government should maintain, under the general supervision of its chief legal officer, an office whose primary responsibility is to draft legislation proposed by the agency and perform related functions, unless the volume of its legislative proposals is too small to make it practicable to maintain such an office.

(2) To serve the executive agencies whose volume of legislative proposals is too small to make it practicable to maintain such an office, a general office for drafting proposed legislation and performing related functions

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1. See, for example, DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING (1965); DRIEDGER, THE COMPOSITION OF LEGISLATION (1957); and THORNTON, LEGISLATIVE DRAFTING (1970).
should be maintained in an appropriate part of the executive branch.

(3) The organizational status and functions of an office responsible for drafting proposed legislation and performing related functions should be made a matter of record in the agency of which it is a part. In defining the functions of the office, the agency should require that all legislation proposed by the agency be drafted by that office or, if drafting by it is impracticable, cleared by it. The functions of the office should relate not only to form and style but also to adequacy of the proposed legislation as an expression of substantive policy.

(4) Preferably, the functions covered by these recommendations should be the sole concern of such an office. However, if those functions are combined with other legal functions, the office should give first priority to the functions covered by these recommendations.

(5) Although an office responsible for drafting proposed legislation and performing related functions should not be assigned policy making functions, opportunity should be given to the attorney assigned to a legislative proposal to participate as early as possible in assisting the policy makers while the policy underlying the proposal is being formulated. Policy instructions to an attorney should not take the form of proposed legislative language.

(6) An office responsible for drafting proposed legislation and performing related functions should be staffed with attorneys who are expert in legal drafting and it should supply them with adequate guides to legislative composition. The agency of which the office is a part should take appropriate steps to see that the attorneys in that office are appropriately trained either within the agency or by another appropriate facility.

(7) Unless the United States Civil Service Commission abolishes position standards for the several categories of government attorneys, it should reinstate the category of "legislative attorney," supported by position standards consistent with these recommendations.

The Attorney General Is Considering Standards

At the instance of the White House, these standards are now undergoing careful consideration by the attorney general. A proposed draft order or directive to establish for the executive branch official guidelines reflecting the Association's recommendations has been prepared. Who should issue an order is not entirely clear. Obviously, it should be someone with enough clout that it will be taken seriously. The forces of governmental inertia are considerable.

In the meantime, conversations have been held with officials of the Civil Service Commission regarding the possibility of resurrecting its one-time career category called "legislative attorney" and orienting it specially toward the drafting function. This is an important aspect of maintaining a wholesome professional attitude by the government draftsman. As the committee observed in its report to the House of Delegates: "Because a career drafting field does not yet exist, there is little to attract good men to the field, little incentive for them to remain in it, and little opportunity for pride of identification with a recognized legal specialty."

As a result of these limitations, it is embarrassing to report that, if the proposed program were put into effect, it would be almost impossible to staff it immediately with fully adequate drafting personnel. This poses a dilemma.

Defer Adoption of New Standards...

One option is to defer adoption of the new standards until they can be entrusted to adequate personnel. Unfortunately, that deferral would be permanent, because the main reservoir of potential drafting talent, the law schools, is unlikely to sustain a massive effort to conquer the very difficult, although not necessarily insoluble, problems of pedagogy until a governmental demand for drafting specialists helps to persuade them that law schools need to concentrate as fully on the disciplines of legal synthesis as they have on the disciplines of litigation.

... Or Undertake a Crash Program?

The preferable approach would be to recognize the profound need for professionalized legislative drafting by adopting the American Bar Association standards and then trying to supply adequately trained draftsmen as fast as practicable. This would inspire crash efforts to extend the coverage and reach of the programs as the Civil Service Commission's legislation formulation workshops. It also might ultimately produce efforts not only to persuade the nation's law schools to bear down more heavily on the disciplines of legal planning that culminate in drafting but also to help them develop an adequate pedagogy for the purpose.

Would adoption of the standards be otherwise useful? The answer is clear. Even if no new draftsmen could be supplied, the existing fund of working talent would be greatly enhanced, because the new standards provide a greater opportunity, through specialization and earlier and fuller participation, to develop and exploit the substantial drafting skill that already exists.

Solving this problem for the executive branch of the federal government not only would benefit Congress and federal legislation as a whole, but also would serve as a model for states that have not seen fit to follow such leaders as Wisconsin and California in providing professional drafting services through which all proposed legislation must pass. Indeed, it might even suggest to private drafting organizations like the National Conference of Commissioners on Uniform State Laws and the American Law Institute that their own products would benefit considerably from an injection of professionalism in drafting.

In legislative drafting, as in legal drafting generally, amateurism is no longer enough. ▲

2. The shortage appears to be world-wide. Meeting in London last year, the Law Ministers of the British Commonwealth noted "the wide-spread shortage of expert legislative and legal draftsmen and the importance of taking early steps to overcome this shortage." The United Kingdom's Foreign and Commonwealth Office does offer a five-month course substantially devoted to drafting statutes and treaties. The course is available each year to about twenty legal officers from the several commonwealths.
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