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CLEAR LEGAL DRAFTING: WHAT'S HOLDING US BACK?*

F. Reed Dickerson

EDITOR'S NOTE:
Estate planners are often involved in drafting a variety of documents. Although Professor Dickerson commented on the status of the art in the United States many of his comments are applicable in Canada. — R.C.D.

If all the diatribes against bad legal drafting and all the tearful pleas for the use of "plain English" by lawyers were laid end to end, they would soon reach the farthest edge of our fast expanding universe. Perhaps the most dramatic example of the pent up public feeling so reflected appeared in New York's Sullivan Law (signed August 5, 1977 effective November 1, 1978), which mandated clear writing in consumer documents on pain of a $50 penalty in any instance of failure not purified by the defendant's good faith. Another example was President Carter's executive order directing his bureaucrats to clarify federal regulations. In reply to Mr. Sullivan's invitation to comment, I congratulated him on accomplishing a feat that would have been thought politically impossible and at the same time commented wistfully that Mr. Sullivan should now turn his attention to perfecting the products of the New York State Legislature, of which the Sullivan Law itself may be all too typical.

The Sullivan Law, taken for anything beyond its symbolic value is, of course, a sitting duck for statute hunters. As with most examples of current legislation, instances of how not to draft can readily be found. But the real basis for disappointment with the Sullivan Law is not so much that it is a bad piece

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of work as that, judging from some reactions among the New York Bar since its enactment, wrong and for the most part negative lessons are being drawn from it. Several distinguished New York practitioners, for example, have been preoccupied in print with the legal profession's usual concerns: How will the Sullivan Law fare in the Courts? How will the Courts protect the well-intentioned author of an obscure consumer document?

This strikes me as an off-centre reaction to a statute whose good faith defence, which is as wide as all outdoors, offers safe refuge for the pure in heart. My own reaction to the Sullivan Law is, rather, to wonder how its supporters could have considered it an effective mandate to clarify consumer documents, when it seems plain that most inadequate drafting results, not from bad faith, but from the iron hand of legal tradition, lack of time, laziness, professional vanity, or simple ineptitude. (Most of the ineffective drafters I have met operate from benign motives.) In short, the Sullivan Law is not so much a frontal attack on obscurity as one directed at bad faith. Even as a bad-faith statute, the Sullivan Law misses the main weapon of bad-faith, which is probably not obscurity, but the contract of adhesion. One explanation is that Mr. Sullivan is not a lawyer.

Anyway, let's not concentrate on nit-picking the Sullivan Law, and the amendments to it adopted on May 31, 1978. Let's look at that law as a sort of forerunner of California's Proposition 13, with Mr. Sullivan its Howard Jarvis. Here too, the more important questions are, what is the evil that prompted the legislative outburst and what, if anything, can we do about that evil? So viewed, the Sullivan Law becomes a valuable rallying point for those who want to meet an important social need.

The problem of badly written consumer documents and the broader problem of badly written statutes and administrative regulations, which are inundating the country, is hardly new. Those of you who managed to suffer through the agonies of price control and the allocation of scarce materials during World War II may remember the anguished responses of small business to the perplexing regulations that they were
forced to confront unbuffered by professional legal help. Fortunately, that experience inspired considerable improvement in the state of the drafting art, to the point where we can now say that, with the many recent refinements, a highly developed body of drafting expertise for simplifying consumer and other legal documents is available, waiting to be disseminated and used.

If this is so, why does the problem persist? Knowing the answer to this complicated question will help us avoid looking for right solutions to wrong problems. This is a real danger, because we seem to be currently concentrating on creating what is already here.

A very significant problem is that, since the end of World War II, the social pressures to reform legal drafting have slackened to the point where, until recently, they have been too weak to overcome the powerful force of professional inertia. There is considerable irony in this, because today's legal profession, following solid trends in legal education and an enlightened organized bar, has come to preen itself on its social conscience and modernity. The result is that the modern liberal lawyer, or legal academic, has become a miscegenous blend of the socially avant-garde and the professionally archaic.

What the all-out efforts of World War II once provided is again being provided by the law explosion inherent in the consumer movement and, more broadly, by the massive government regulation and social intervention exemplified by H.E.W. and the environmental protection agency and reflected in the efforts of Mr. Sullivan and President Carter.

If my assessment is correct, clear legal drafting is an idea whose time has, at long last, come. With two of the biggest needs now largely met by the development of an adequate state of the drafting art and a favourable social climate in which to exercise it, what, if anything, still stands between us and successful reform? I suggest that there are formidable obstacles to overcome and my main purpose this afternoon is to point out the more important ones.

One crippling assumption, widely shared by laymen and
lawyers, tends to trivialize the problem by treating legal drafting as simply a matter of communication. Unfortunately, this ignores the powerful effect that language has, not only on the audience, but on the quality of the ideas being communicated. Because sound formulation is thus a prerequisite to sound policy, legal drafting is more than a pedestrian skill; it is a basic professional discipline.

Another crippling assumption is that law is mainly litigation, an assumption that has led many lawyers to conclude that, if an event doesn't take place in Court, it isn't mainstream stuff. This overlooks the fact that today's typical lawyer is more heavily engaged in planning and counselling than in trying cases, an oversight that diverts attention from his preventive and constructive functions. The lawyer as craftsman of practical arrangements deserves far greater attention.

Among the practising bar there are other impediments to good drafting. Because drafting in its sophisticated sense is one of the most intellectually demanding of all legal disciplines, and because few lawyers have been adequately trained for it, we should not be surprised that, even though they are heavily into legal planning, they spend only a small proportion of their professional time in drafting. This proportion may be read by some as reflecting the relative importance of this legal function. I am inclined to read it, rather, as a professional cop-out. Lawyers are neglecting a discipline that is necessary to discharging what may well be today's most important professional responsibility: keeping the client out of trouble and advancing his lawful objectives.

"Cop-out" may be too strong a word here, because the pressure of time justifies relying heavily on legal forms, and the abundance of adjudicated gobbledegook in all its intimidating confusion discourages lawyers from adequately adapting those forms to particular situations. Lawyers are also reluctant to reduce legal forms to clear essentials lest the end-product lose its legal mystique, the lack of which may make the client wonder whether he has not been overcharged. With the general blending of Anglo-Saxon and Norman French, the increasing friendliness of the Courts to decently understandable expres-
sion, and the disappearance of scriveners who were paid by the word, most of the historical justifications for the traditional legal style have long since disappeared. The need for strings of synonyms has lessened as word magic has fallen before increasing sophistication in the ways of language. We must now learn how to persuade lawyers that they can charge as much for comprehensible legal documents as for incomprehensible ones. The price of clarity, of course, is that the clearer the document the more obvious its substantive deficiencies. For the lazy or dull, this price may be too high. For others, clarity is the way to better substance and greater effectiveness.

The practising bar may not fully appreciate such benefits, because its attention has been diverted to other, presumably more important, matters. Modern legal education, fortified by contacts with sociology, political science, and other related disciplines, emphasizes the lawyer's responsibility to social justice. Unfortunately, many lawyers have learned that lesson to the point of misconceiving the lawyer's role in making policy in the context of the attorney-client (solicitor-client) relationship, where that role is normally played. The temptation to intrude on the client's prerogatives is great, because making policy is great fun, especially when contrasted with the apparently grubby work of shaping it to the complexities of specific situations. You may recall John Austin's statement that "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 law giver".

Ironically, the lawyer who is quick to perceive the drafting deficiencies of others usually rates himself more than adequate. I have rarely known a lawyer (including myself) who is more than superficially humble in this respect. This tendency to underestimate the drafting discipline is reinforced by the occasional gifted amateur whose native talent lifts him above the untalented or untrained professional. All of which tends to congeal in a kind of professional conspiracy of silence as to the need to identify the drafting function, perfect it, and give it room to operate.
Instilling these insights is a pre-condition to stiffening the bar's still fragile motivation to do what is necessary to bring its constructive expertise into line with its current professional responsibilities.

What practicable means are there to improve and clarify public or private legal documents? An administrative ploy sometimes used in large organizations with drafting responsibilities is to hire lay writers to rewrite what the lawyers or technicians have written. Others have set up "style" committees of modestly equipped lawyers to perform the same function. These approaches have been generally ineffective beyond the development of legal boiler-plate, because, once a document has jelled, there is usually little time for more than cosmetics. This is normally not enough, because many of the things that defeat clarity lie in inadequate substantive concepts or structure. Reliance on laymen, while common in some European countries for legislative drafting, is highly chancy in a country where illiteracy thrives even among the elite and where political forces insist on legislating mountains of detail that is better left to administrative discretion.

The only satisfactory long-run solution that I can suggest is to train the general run of lawyers how to draft at least passable routine legal documents and to train specialists for the more difficult or socially more important legal documents such as those turned out by offices of legislative counsel.

How can this be done? Continuing legal education is too slender a vehicle to carry the educational load; it provides too little too late. The same is true of crash courses. Instead, our ultimate hope, dim though it may now seem, lies with the law schools, which have heretofore been noted mainly for their neglect.

Because legal drafting is a highly complicated and disciplined form of expository writing, the law schools' traditional neglect can be traced, in large part, to the well-publicized fact that the colleges and secondary schools have been botching what is probably their most important job.

But, even if pre-legal education were adequate in this respect, the law schools would still have a heavy responsibility
to enhance the expository discipline to meet the far higher technical and intellectual demands of legal drafting. That the law schools, from neither malice nor stupidity, have not yet met the challenge may be attributed more plausibly to a massive insensitivity resulting from their historic and still chronic preoccupation with litigation, where drafting is needed only for jury instructions, and more recently from a misguided emphasis on social planning that focuses on the cosmic level of policy making instead of the architectural engineering and craftsmanship necessary to turning the client's aspirations into practical reality. This is reflected in the typical law school's response to social change by adding substantive courses, such as environmental law and women's rights, without realigning its emphasis to include the planning, architectural, and creative discipline to which the legal profession has been steadily shifting, perhaps unconsciously, for many years.

Some schools have tried to handle legal drafting by providing courses in "legal writing" that at best treat legal drafting only incidentally and even then water it down by spending the great bulk of available time creating substantive "policy", usually in a detached, academic background. Although this approach is more immediately appealing to the student and more fully within the competence of the typical academic youngster to whom this pedagogically distasteful task is usually assigned, it unfortunately doesn't deliver the needed goods.

Pedagogical distaste for teaching drafting is considerable and, for the mature pedagogue, almost inevitably overwhelming. Few current law teachers have had significant training in legal drafting and even the few trained draftsmen who have extensive experience in law teaching have not yet succeeded in developing a mature pedagogy for teaching drafting to large classes that can be sustained for a full semester without a numbing amount of personal attention to student papers.

Although drafting can now be taught, with good success, on a seminar-project basis, the approach offers little better solution to this profession-wide problem than sending an occasional care package to India. As with case analysis, we must learn how to reach lawyers generally. The "pervasive" meth-
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od, which involves sprinkling drafting exercises around the curriculum where relevant and which has been successful with the case method, will not become feasible, in the case of legal drafting, for several generations of academics. The traditional apprentice method, which involves passing the buck to practising attorneys has been a sodden failure, because it has succeeded mostly in passing on the ineptitudes of the past. In this area, legal tradition is overwhelmingly bad.

According to a report commissioned by the American Bar Association, there are few law school courses in drafting and those that exist are only sparsely populated. Current foot dragging is lamely explained by saying that "law teachers do not want to teach English", and the academic issue is obscured by asking how we can reconcile the main aim of law schools to teach students "how to think like a lawyer" with the practical need for better draftsmanship? This puts the matter in the context of the chronic competition for academic time between the pedestrian aspects of practicality and the intellectual disciplines of sound lawyering. The issue is a false one, because a sophisticated use of language involves far more than mastering the mechanics of language. It involves the management of thought, especially the art of synthesis.

The most feasible approach would seem to be to require every law student to take at least one course in general drafting principles and to provide an optional course for those who anticipate making legal drafting their specialty.

Fortunately, law students and, to a less extent, law faculties have begun to sense the importance of legal drafting. The warm response of many law schools to the opportunity to acquire the recently published transcript of Indiana University's and the American Bar Association's joint seminar on the problems of teaching legal drafting suggests that the problem of motivating the law schools is being solved and the ultimate problem is how to develop large-class teaching materials that instruct the unsophisticated instructor as he struggles to instruct the students.

Solutions to this major problem may not be far off. My optimistic guess is about two years.