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The Fundamentals of Legal Drafting, by Reed Dickerson

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BOOK REVIEWS

THE FUNDAMENTALS OF LEGAL DRAFTING. By Reed Dickerson. Boston: Little, Brown and Company, for the American Bar Foundation, 1965. Pp. xx, 203. \$7.50.

It is likewise to be observed that this society hath a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, of right and wrong; so that it will take thirty years to decide whether the field left me by my ancestors for six generations belongs to me or to a stranger three hundred miles off.¹

Gulliver's celebrated diatribe is exceptional only in its style: its point has been made so often, by so many people, that lawyers themselves may by now feel at liberty to be amused—more amused, frequently, than their clients. Their professional amusement is probably understandable, and in some cases even defensible. Isolated from its institutional and historical context, certainly, the language of the law cannot be uniformly intelligible; and anyone who seriously proposes to supply all of that context for himself, without the education of a lawyer or the assistance of a lawyer, is a fool or a choplógic. To the conscientious lawyer, therefore, it must often appear that Gulliver and those of his supporters who are not fools, are everlastingly putting a discredited perversity into new and deceptive words. What his critics are really saying, the lawyer may conclude, is that they are willing to pay the physician who kills them, but not the lawyer who writes their wills.

It does seem inexplicable, at first, that the same people who revel in medical fustian should complain so bitterly about legal Latinity, but it may be that their pleasure and their pain are in the end consistent. It may be that a man can afford his physician's jargon and even enjoy it for its symbolic value—for the witness it bears to the physician's education and capacities: however learnedly and unintelligibly the otolaryngologist may choose to discourse, after all, the only thing the patient positively must know for his own purposes is what pills to take and how often. The rest, if it is not silence, is perfectly acceptable as a reassuring background noise.

1. Jonathan Swift, *Gulliver's Travels*, pt. IV, ch. 5.

If lawyers had the advantages of the medical brotherhood in this respect, their clients might find the language of the law as comforting as its seals and its ribbons. In the legal situation, however, language itself suddenly becomes the client's principal concern, for the word he does not understand may be the very word that will one day bind him to intolerable obligations. He may not be aware of this to begin with, of course, but one or two burnings can be relied on to teach even the dullest client that what is peripheral to the physician's trade is central to the lawyer's; and once any man truly grasps that distinction, he has taken the first perilous step—*mutatis mutandis, pari passu*, and according to his lights—toward the heresies of Gulliver.

At this stage, however, he is not yet a danger to the common weal or the legal profession, for he may still believe that any competent lawyer can explicate the hard word for him quickly, clearly, and cheaply. The trouble begins when he discovers to his delight that legal advice is in fact cheap, and to his horror that it is neither quick nor clear. He wants his lawyer to say, "This instrument means thus-and-so. It means thus-and-so to me, it will mean thus-and-so to any competent lawyer, and it will mean thus-and-so to any decent tribunal." Instead he too often discovers not that lawyers are cautious interpreters, but that the instrument to which he has irrevocably committed himself is for all practical purposes uninterpretable—that it is a compound of beautiful, ancient expressions no one has ever understood, and inappropriate, ill-organized modern expressions no one ever will understand. His consolation must be that when the matter inevitably comes to adjudication his chances of an advantageous interpretation will be at least even.

Lawyers sometimes comfort themselves, among the many dissatisfactions such enlightenments must produce, with the reflection that every profession has its incompetent practitioners; but bad legal draftsmanship is by no means invariably the work of incompetents. The shame of the profession, indeed, is that even the best lawyers are bad draftsmen. It is true that many law students these days take elective courses in drafting, but the courses are often badly taught, and even comparatively good courses may confine themselves rather narrowly to specific areas of the law. Once he is past his bar examination, moreover, such skills as the lawyer has acquired in law school are likely to deteriorate: few drafting problems will come his way, at first, and those few he will be encouraged to solve in the quickest way—that is, by recourse to form books and to the files of his firm. By the time he is ready to consider himself a finished lawyer, then, his formal education and his practical education have produced their predictable result: not only is he a bad draftsman

himself, but he is unable even to imagine the good draftsman's state of mind, unable to conceive of legal drafting even hypothetically as an art in itself, an art relevant to individual specialties but not exhausted by them, an art whose able practitioners may confidently draft any document from a statute to a ticket-stub.

That some few lawyers nevertheless become capable draftsmen is, under the circumstances, a small miracle, and it is a tribute to their public spirit that they sometimes seek to make the results of their painful self-teaching generally available. Clearly, Professor Reed Dickerson is such a lawyer. His new book is an ambitious attempt to state systematically and concisely the desiderata of good draftsmanship, to persuade lawyers that they are in fact bad draftsmen, and to show them how they might improve to their great advantage and the advantage of their clients. That so vast an undertaking should consume well under two hundred pages of text and appendices is in itself reason for congratulation, especially since Professor Dickerson also aims to produce a book that can be read through for its argument, or referred to on emergent occasions for its principles.

It is Professor Dickerson's special contribution to his subject, that he regards drafting precisely as a single activity whose discoverable principles are widely applicable. He tells us at the outset that he proposes to consider problems relevant to all drafting, leaving specialized problems to specialized works; but he is not interested in composing a mere rule-book: instead he begins with "general attitudes or approaches not to be acquired by merely memorizing specific language techniques."² His comments on "specific language techniques" are accordingly reserved for the second half of the book: the first half is devoted to attitudes, approaches, and what Professor Dickerson properly calls the "architecture" of legal instruments. Throughout the book, naturally, he is dealing from his special standpoint with problems that arise in all writing, and though he denies that all of the problems of legal drafting are reducible to the problems of freshman composition, he makes resourceful use of material originally designed for students of composition. By the same token, much of what he says is applicable to all writing: few students of freshman composition would fail to benefit from his treatment of "degenerate definitions,"³ for example, or indeed from a careful reading of his entire chapter on definitions. For the lawyer, whose linguistic habits have been vigorously degenerative when they have not been simply comical, reflections like Professor Dickerson's are all but

2. DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 7 (1965).

3. *Id.* at 108-09.

indispensable, and they are to be found only rarely in standard legal literature.

For this reason, if for no other, a reader is likely to finish this book with the highest hopes for the immediate reform of the legal profession. In many fields, certainly, books that ask important questions and supply provocative answers may be counted on to produce their modest revolutions, but law is no ordinary field, as even its detractors are quick to concede. The extraordinary qualities of the law are relevant, moreover, to a proper estimate of a work that is intended, as this book obviously is intended, to produce a specific effect; for if such a book fails to produce its intended effect, its author is unlikely to be comforted by the reflection that he has done all that could be expected of him. The critical question, then, is whether the book is in fact calculated to help make better draftsmen; but in that form the question is all but unanswerable. It can be stated a little more manageably, however, and the book itself gives valuable assistance to that end when it points out that what Professor Dickerson calls "the written communication process" depends not only on the author and his writing, but on the audience and the context in which the audience reads.⁴ From that point of view, our problem is one not so much of prediction, as of identification: the book aims at an audience of lawyers, and its effect on them will depend on their characteristic attitudes.

What some of those attitudes are I have already suggested, but we must also ask how they arose in the first place, and for that purpose it may be necessary to extend a little Professor Dickerson's observation that draftsmanship is unitary: perhaps *all* writing is unitary; perhaps the man who reads almost nothing but bad writing, inevitably becomes a bad writer himself—a bad writer of legal essays and a bad writer of legal instruments. If that is so, then the manifest deficiencies of lawyers in this area become a little easier to understand, for it can hardly be denied that what the lawyer must read in his professional capacity—legal textbooks, articles in law reviews, judicial opinions, other lawyers' briefs—is in the main execrably bad writing. It may well be denied, however, that my own implied definition of "good writing" is relevant to the draftsman's art. Professor Dickerson, for one, might well deny it, although on this point his book is not entirely clear.

He certainly denies that good writing, as a student of literature might understand good writing, is the draftsman's primary consideration:

So long as drafting is considered solely a search for the accurate

4. *Id.* at 19.

and felicitous phrase, many a vigorously practical lawyer will continue to think of it as the kind of exercise that can safely be minimized when the going gets tough. The aesthetics of legal readability, at least, are clearly expendable.⁵

Nevertheless, he regards stylistic revision as one of the necessary steps in drafting—the last step, admittedly, and a step he unfortunately calls “applying the polish.”⁶ Professor Dickerson’s position seems to be, then, that rhetorical skill is useful to a draftsman but by no means essential, and that style is in any case an external embellishment, to be supplied after the real work of drafting is completed. No doubt such a formulation has all the virtues of balance and vigorous practicality, but it may be that in this case, for a change, the balanced, vigorously practical answer is not after all the right answer.

It may not be the right answer because style can be relegated to the realm of aesthetics only if we allow aesthetics to include considerations of proportion and due subordination that are crucial to the very clarity Professor Dickerson urges. He believes, presumably, that such things can be abstracted from other stylistic concerns and taught independently, but the history of such endeavors suggests to me that the atom of style cannot in fact be broken: most of the time the writer who deliberately avoids grace, accidentally evades clarity. For an illustration of that process we need go no further than Professor Dickerson’s own book. Of the important distinction between ambiguity and vagueness he writes, “The uncertainty of ambiguity is central, with an ‘either-or’ challenge, while the uncertainty of vagueness lies in marginal questions of degree.”⁷ Surely no one who does not already understand the distinction between ambiguity and vagueness will learn it from this sentence, and such sentences are nothing more than the natural consequence of the approach to style that Professor Dickerson commends.

What is most disconcerting about the sentence I have quoted is that it should have been produced by a man who can write competently. From such a writer even a single solecism is noteworthy, but when difficulties accumulate, the outsider may well be pardoned his distress. To the lawyer, of course, such things are not at all distressing: they are simply the time-honored solecisms of all legal writing. In one instance, it is true, Professor Dickerson’s practice may appear novel, but it is really an elaboration of the widespread lawyerly conviction that there are degrees of fundamentality. Professor Dickerson improves an already superlative

5. *Id.* at 4.

6. *Id.* at 49.

7. *Id.* at 28.

comparison in his chapter on architecture, where he urges draftsmen to arrange instruments according to "the most fundamental principle of division," "the next most fundamental principles," and "the next most fundamental principles." "And so forth," he continues, "in descending order of significance."⁸ To most of his readers, no doubt, his point will in this case be clear enough, but they will have to be readers whose educations have already conferred on them a more or less precise notion of what an outline is, and a more or less imprecise notion of what a fundament is.

In Professor Dickerson's book, as in his thinking, such imprecisions are comparatively rare, and I have cited these two examples only for the sake of convenience. The reader may accordingly imagine, if he does not painfully know, what the student and practitioner have daily to endure from writers far less conscientious than Professor Dickerson. For my part, my own recollections and imaginings lead me to doubt that men whose styles have already been formed on the best legal models are likely to succumb even to Professor Dickerson's attack. The problem is one no book can solve: the real problem is legal education itself, and its conspicuous failure to warn students effectively, from the very beginning, that the best legal models are little better than traps for the unwary. Not until such warnings are made loud and clear and often, will a book like *The Fundamentals of Legal Drafting* be likely to succeed in its own terms, but its admirers may continue to hope that it will have a different and a more important success just the same—that some budding Langdell, let us say, may one day read it and be moved by it to reflect on the basic dogmas of legal education, especially those dogmas that have helped to make all legal writing what it is today.

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8. *Id.* at 58.

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