1954

Book Review. Legislative Drafting by Reed Dickerson

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BOOK REVIEWS


It is time, long past time, that we face facts concerning legislative drafting. An infinitesimally small percentage of the bar can draft a statute satisfactorily. Whatever its analytical skills may be, the profession fails ignominiously in expressing new standards of conduct in statutory form. It would be pleasant to assign this failure to the habit patterns of the profession: a carry-over from complaint writing where redundant terminology hides a cause of action in abstruse, archaic, and incomprehensible verbiage.

Or it might be blamed on "form book practice"—in legislation, the copying of statutes from other states without regard for their merit. Or the fault might be placed on the practitioner's contempt for the legislative process. But these are too easy answers.

The responsibility must come back to the teaching profession. We, in large measure, determine the approach, the cast of mind, the method, and the skills of the bar. True, the current bar is not our product but that of our predecessors. True also, our predecessors were more contemptuous of the legislative process and all "practical matters" than are we. But it remains a fact that too large a percentage of the teaching profession is still contemptuous of all forms of legal drafting because (1) it is beneath our dignity, (2) it does not develop analytical skills, (3) it is so simple that it can be learned better in practice, (4) it is not one of our skills, or (5) it is too much like teaching Freshman Composition if we have to correct the student's drafts. Whatever the reason, the result is that few law graduates in modern times have been prepared to draft legislation or any other legal document.

Against this background Reed Dickerson has had the temerity to publish a small volume devoted exclusively to the problem of Legislative Drafting. If words speak as loud as actions it will receive rough treatment at the hands of the sophisticates. For myself, I find it a welcome addition.

1. Represented principally by groups specializing in the statutory field, i.e., The National Conference of Commissioners on Uniform State Laws, the Legislative Reference Services of the two Houses of Congress and the Library of Congress, the New York Law Revision Commission, and staffs of some of the state Legislative Councils and Legislative Reference Bureaus.

2. This of course is unnecessary in the first place. See, Pantzer and O'Neal, THE DRAFTING OF CORPORATE ChARTERS AND BY-LAWS (1951).

3. But a few have been willing to accept the burdens: Since the 1937 Indiana University Law School has required first year students to draft a bill and a committee report as a part of the course in legislation, or in the course in first year research. At Ohio State, "in the third year, the methods of instruction are those of problem solving ... and legal drafting ... and planning." 52 OHIO ST. UNIV. BULL. 9 (No. 6, Jan. 15, 1953); at Nebraska "the course [Legislative Laboratory] includes the preparation and analysis of social science data upon which the need for legislation is bottomed ... the drafting of legislation to achieve the objectives; the preparation of legal memoranda in support of the validity of proposed legislation, and of reports for submission to legislative bodies." 58 UNIV. OF NEB. BULL. 19 (No. 5, Feb. 21, 1953). The Law School of the University of Pennsylvania offers a course in legislation dealing in "legislative method, organization and procedure; policy formulation; form and style of statutes; drafting; sanctions." 54 U. OF Pa. BULL. 37 (No. 14, Jan. 29, 1954).
to the literature. It is not startlingly new; it is not revolutionary; it is perhaps no better than Coode,\textsuperscript{4} Ilbert,\textsuperscript{5} or Jones,\textsuperscript{6} but it is both "up-to-date" and "in print" which the others are not. I venture to say that its severest critics can learn much from it and none could do a better job of drafting than has its author.\textsuperscript{7}

The book is divided into three parts: "What Legislative Drafting is About," "How to Draft," and "What to Say." The content of these three parts is heavily influenced by Mr. Dickerson's experience as Assistant Legislative Counsel of the House of Representatives and as Chief of the Codification Section, Office of General Counsel, Department of Defense. In other words, some of his suggestions are practical only when they concern departmental legislation proposed and sponsored in the Congress of the United States.

The first part, "What Legislative Drafting is About," attempts in five and a quarter pages to orient the lawyer as to his place in the drafting process. It emphasizes, as all writers have, that the draftsman should not determine policy. In terms of basic objectives this is true; but the point should also be emphasized that at the level of secondary policy the draftsman should inject his professional skill. The objective of the bill can often be furthered and its chance of enactment improved by the type of legal controls selected, by the form of its standards, and by the kind of sanctions selected.\textsuperscript{8} The final choice should be the client's, but the draftsman's knowledge and experience should make the clients' decision an informed one.

The second part, "How to Draft," deals with the importance of research and conference in the drafting process. The author's reproduction of Professor Jones' case study on time allocation for research, conference, and drafting should convince the most skeptical.\textsuperscript{9} It is true as Dickerson says that clients often expect "a draft by Thursday noon"; but what is more discouraging is that most draftsmen think that they can finish it Wednesday evening.

Too frequently the draftsman's concept of research is to look for a "case in point" which, when applied to bill drafting, means copying a statute from another jurisdiction. This most certainly is not research. It is nothing more than copying atrocities of form and language in the vain belief that

\textsuperscript{4} Legislative Expression (1848).
\textsuperscript{5} Legislative Methods and Forms (1901).
\textsuperscript{6} Statute Law Making in the United States (1912).
\textsuperscript{7} For example see the work of the author and his associates, Proposed Codification of the Laws Relating to the Armed Forces vols. I–V (H.R. Comm. on Judiciary, Comm. Print, 1954).
\textsuperscript{8} Unfortunately these problems are but briefly mentioned; obviously, Dickerson could not discuss all of the facets of drafting in so compact a book, but it is in this area that draftsmen are most deficient. Landis, The Study of Legislation in Law Schools, 39 Harv. Grad. Mag. 433 (1931); Horack, Can American State Legislatures Keep Pace?, 26 Rocky Mt. L. Rev. 468 (1954).
if the statute has been judicially interpreted, that security is preferable to mediocrity.

Dickerson emphasizes the desirability of drafting as a team operation. This view is certainly acceptable, but it is not easy of achievement when drafting for non-governmental groups at the state level. Under these circumstances, the preparation of a bill is usually a one man task. But this should put a greater responsibility on the draftsman to try his draft out in conference and to include persons with as many different points of view in the conference as possible. Furthermore, when the final draft is complete the draftsman should insist that his client submit the draft to the opposition. Too frequently, both draftsman and client treat the bill as highly confidential and try to conceal its existence from known opposing groups. This is folly of the worst order. It merely gives to the opposition an irrelevant argument—that the bill must be bad because its introduction is secretive. It also injures the bill's chance of enactment, for not infrequently many minor objections can be eliminated prior to introduction, thereby reducing argument and uncontrolled amendment from the floor.

The coordination of conflicting governmental interests is regularized in the federal system by clearance through the Legislative Reference Division of the Bureau of the Budget; for private legislation either at the federal level or in the states it is the responsibility of the draftsman to "educate" his client to the advantages of the "pre-trial conference" in the legislative area.

The first two parts of Dickerson's book, together with its excellent introduction, contain the experience of an expert; the experienced draftsman will recognize it as sound advice to the neophyte. Perhaps I share with Beaman the doubt that the inexperienced will profit from anything but experience. This is the discouraging part of the whole process, for there are so few competent draftsmen that the apprenticeship system is more likely to produce incompetent draftsmen than it is to improve the bill drafting process.

The third part, "What to Say," will no doubt be looked upon as the "meat" of the book. In one sense this is true, for no matter how careful the research, no matter how illuminating the conferences, if the ultimate decisions are not transposed into a draft consistent and accurate in form, the result is still a failure. If anyone should be so bold as to assert that the suggestions on arrangement, brevity, style and grammar, specific word form, and general writing problems are too elementary, let him read the session laws of any state for any year. Dickerson's material on specific word form is particularly good and, although he presents it as suggestive only, it should be accepted as mandatory by all but the veteran draftsman.

10. The Indiana practice is to introduce all bills, regardless of length, on a four page folio. I have known "draftsmen" to deliberately write enough to fill the first three pages in an endeavor to discourage the reading of the fourth page; invariably the "legislative news bulletins" published by the lobbying organizations carry careful analyses of the content of the fourth page. But the draftsmen never seem to learn.
One final word. Dickerson suggests a "basic library" for the draftsman. His selection is excellent, but it is beyond the means of all but the large law office and the governmental department. For the average practitioner three books, well read and understood, will go far toward improving his competence. They are: Hurst, *The Growth of American Law: The Law Makers* (1950); Gross, *The Legislative Struggle* (1953); and Dickerson, *Legislative Drafting*.

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11. Page 19. In addition three appendices, pp. 115-29, include a description of federal statute law, a table of state constitutional provisions, and a selected bibliography of books, articles, and drafting manuals.

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