



12-1-1955

How to Write a Law

Reed Dickerson

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Reed Dickerson, *How to Write a Law*, 31 Notre Dame L. Rev. 14 (1955).

Available at: <http://scholarship.law.nd.edu/ndlr/vol31/iss1/3>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

HOW TO WRITE A LAW*

At the outset I confess a sense of embarrassment that I feel whenever I talk or write about the problems of drafting. This comes from the fact that, unlike most legal topics, discussions of legislative drafting have to be conducted on a kindergarten level. Since the art of legal drafting in general, and of legislative drafting in particular, is only crudely developed, I can only talk about the most elementary matters to a sophisticated audience that is expecting me to be profound. This leaves me feeling like a man who is trying to explain the alphabet to a group of Ph. D.'s.

One reason why it is hard to teach people how to draft is that like all writing it looks easy. There is one thing upon which almost everyone prides himself, and that is his writing. This is especially true of lawyers. Not only do they underestimate the difficulties of writing but they tend to think of themselves as individually accomplished. It is hard to sell a man a new suit when he considers himself already well accoutered.

This poses a dilemma. If I am to make this subject clear to you, I must oversimplify it to the point of confirming your natural prejudices. On the other hand, if I am to paint a true impression, I must frighten or confuse you with a bewildering mass of principles, approaches, and details. I will do my best to take a middle course.

Another trouble with teaching drafting is that the instructor can't do it just by talking about it any more than he can teach you, just by talking, how to box or play the violin. There is no substitute for doing it yourself with the right kind of guidance. But, even with this reservation,

* Address delivered at the Legislation Institute, held at Notre Dame University, March 30, 1955. Responsibility for the views expressed is mine alone.

there are some useful things we can talk about.

I don't think that I am exaggerating when I say that legal drafting is the most difficult thing a lawyer is called upon to do. Unfortunately, it is the one for which most lawyers are the least prepared. By "legal drafting," of course, I do not mean to include the more diffuse and less rigorous kinds of legal writing like the preparation of briefs and pleadings.

I think that it is also accurate to say that legislative drafting is the most difficult form of legal drafting. The basic problems are the same, but legislative problems are technically more complicated and socially more important. Middleton Beaman, late Legislative Counsel of the House of Representatives, went so far as to say, on one occasion, that ". . . the number of contingencies that a lawyer has to guard against in the case of a will or contract, while sometimes they are very numerous, are mere flyspecks compared with the contingencies that must be considered in the case of a statute. . . ."¹

In this discussion I don't want to dwell on the rather obvious fact that in general the job of legislative drafting is being done very poorly. I mention the point only for the purpose of saying that one of the most important reasons why this is so is that lawyers in general do not understand the role of the draftsman and that many draftsmen don't understand it either. It is very important to know clearly what that role is.

The first idea that I want to plant, and I hope to plant it deeply, is that legislative drafting is much more than chasing a lot of written ideas around on a piece of paper. The writing stage is merely the last stage of drafting and it is sometimes the easiest, although I would be the last one to underestimate the difficulties of putting ideas into exact words. The draftsman's problems begin with the

¹ *Hearings Before the Joint Committee on the Organization of Congress*, H. Con. Res. 18, 79th Cong., 1st Sess., pt. 2, at 419 (1945).

substantive ideas that he is called on to express, ideas that in more cases than not are imperfectly formed when he first makes contact with them. Briefly, the draftsman's job is to help his client do legislatively exactly what the client wants to do in fact and to help him do it in a way that will work as smoothly as possible.

How many of you have ever had anything to do with an architect? If you have not hired one yourselves, maybe you have watched one in action. If you have, you will have seen several things. The most important is the fact that the architect was called in at an early stage. Long before he got to the point of preparing his blueprints he was up to his neck in the substantive needs and problems of his client. An architect doesn't design a house for a client until he knows exactly what his client is trying to accomplish.

Similarly, the legal draftsman must be brought into the picture long before he picks up his pencil, and he must find out as much as possible about what his client's particular problem is and then help the client bring about the desired result. He leads the client, but where the client wants to go. Although the draftsman is not himself a policy maker, he can help educate the client so that the client can make informed decisions. In doing this the draftsman must avoid two extremes. On the one hand, he must avoid being a mere legal stenographer or short order cook. On the other, he must not be an officious meddler in policy. Mr. Beaman, to whom I have referred, once remarked that the legislative draftsman must be an "intellectual eunuch." I would like to add that he must also be an emotional oyster. However deeply he may feel about the wisdom of the policy he is called on to express, he must submerge his own feelings and act with scrupulous objectivity. He will do his utmost to carry out his client's purpose even when he strongly disagrees with it.

It ought to go without saying that the draftsman should make his legislative message as clear as possible and that he should stay out of "hidden ball" plays. Deception is good football, but it is mighty poor drafting. It would be unnecessary to say this but for the fact that experience has shown that some lawyers in the executive branch of the government have seen fit to mislead members of Congress into enacting legislation that they don't fully grasp or that actively subverts their known will. The lawyer who tries this is usurping the functions of the legislature and the fact that he is motivated by what he fancies to be the public welfare is no excuse.

We come now to the basic steps in drafting. At this point, I should warn you that the things I am about to tell you are neither very new nor very startling. Most of them have been thoroughly tested in practice and, where practiced, they materially improve the end-product. Unfortunately, they have not been practiced as widely as they should be.

I want to take these steps in two parts, divided by a basic distinction. This is the distinction between the substantive and the stylistic. These things can't be separated functionally, but for understanding and emphasis it is useful to distinguish the "think" part from the "write" part.

On the substantive side, there are three basic steps. The first step I have already mentioned: You find out what the client wants to accomplish and what specific problems it involves. This entails exploring the detailed possibilities with the client and helping him think the problem through. The main emphasis here is on *analysis* of the problem.

At this stage, you pump the client dry with questions. You find out specifically what he wants and how much he wants to leave to the draftsman's discretion. You point out any substantive inconsistencies you think you see in his idea, including any constitutional problems that occur to you. You point out also any administrative or other prac-

tical problems, or any drafting problems that you think he ought to know about. You tell him how much time is involved in whipping together a professionally adequate bill. But in the end you defer to the client's judgment.

To give you an idea of what is involved in developing the substantive basis for a relatively simple bill, here are some of the questions I asked a Congressman who wanted me to draft a bill emancipating Indians who could establish their general competency. I also include the answers that discussion with him and with the Bureau of Indian Affairs ultimately developed.

Q: Do you want to limit the bill to Indians of any particular age?

A: Yes, to those 21 or above.

Q: Who should determine the question of competency?

A: The local naturalization court.

Q: Should the court's jurisdiction depend on the applicant's domicile or on his residence?

A: His residence.

Q: Who should be notified of the hearing?

A: The head of the local governmental unit, the local welfare department, the Superintendent of the applicant's tribe, the head of its governing body, and any other persons the court considers appropriate.

Q: How much notice should be given?

A: 30 to 60 days.

Q: What factors should the court consider in determining competency?

A: The applicant's moral and mental qualifications and his ability to manage his own affairs.

Q: After a writ of competency is issued, what further steps, if any, need to be taken to assure full emancipation?

A: The Secretary of the Interior should be required to give the applicant all money and property that has been held in trust for him and to issue any necessary land patents.

Q: At what point should the applicant's tribal connection be severed?

A: When he and his tribe have fully settled all claims against each other.

If you don't build a solid base at this stage you will probably wind up with a flimsy structure.

The next important step is to explore the existing legal situation. An architect wouldn't dream of remodeling a house without first taking a good look at it. As a draftsman, you must closely examine the existing law to see what to repeal, what to amend, and what to supplement. Failure to do this results in implied repeals, overlaps, and inconsistent terminology; in a word — confusion. Once I was asked to prepare a bill requiring brewers of beer to show the ingredients of their product on the label, but a check showed that there was already such a statutory requirement. The real problem was one of enforcement, not of legislation. More often there is a statute already in effect and it needs to be amended. In other cases, the legislative field is wide open. The emphasis here is on *research*.

The third "think" step is to develop a concrete plan of organization and arrangement. The thing must jell. This is the stage at which the legal architect develops what the real architect calls a "sketch." It's a sort of blueprint without all the details. This is the stage of *synthesis*.

The job of fitting all the pieces together is unquestionably the hardest part of drafting. The specific pieces should cover the intended area, and they shouldn't leave any gaps, they shouldn't duplicate each other or overlap, and they shouldn't contradict each other.

How do you plan a machine shop? You get the right ma-

chinery and then arrange it to minimize the steps, effort, and expense required. Instead of a good, efficiently made product, the legislative draftsman tries for clarity and findability when he is putting the statutory pieces together. Unfortunately, the problem is so elusive that it is impossible for him to do a perfect job. Those of you who have studied calculus will find a helpful parallel in the problems of maxima and minima. It is too bad that no one has yet invented a calculus for drafting. You have to fall back on informed judgment. Incidentally, the time you spend developing and perfecting an outline will be time well spent.

After you have the substance of your legislative message well in hand, you gradually move into the field of form and style. And thus you come, at long last, to the writing stage of drafting. The transition is not abrupt and the two phases blend almost imperceptibly, since substance and form cannot be functionally divorced. The shift is mainly one of emphasis because you continue to be interested in substance up to the last minute. With this fact clearly in mind, perhaps it is safe to go ahead and talk about form.

Altogether there are about five separate steps in establishing the final form of a statute. First you prepare a draft of the proposed bill, paying general attention to the accepted rules of form, checking doubtful questions of substance, and handling new problems as they arise, finding your answers by asking questions or by doing individual research. At this early stage you are still interested in the broad essentials — the substance of your message and the problems of general arrangement. You don't worry much about details and polish. Speaking of my own experience, I am always embarrassed to have anyone see a first draft. It is usually wooden and awkward. But don't let this sort of thing bother you. Remember, it's the last draft that people are going to read.

Next you revise your draft as many times as it takes you to produce the desired result. And let me give you a little

tip that will help you get over a hurdle that pride puts in the path of most people: It's no disgrace to revise a draft a dozen times. Somehow the idea has gotten around that if you don't have it right by the third try, either you are beyond your depth or that's the best anyone could do with it. Nonsense. Some of the best draftsmen in the business take 15 to 20 revisions to iron out an extremely difficult provision. The important thing to remember is that you should keep on revising until you have the thing 99+% right.

The third step is not usually recognized as a separate operation, since for small bills it is usually taken as an incident of one of the other steps. However, with the longer bills it is well worth special attention. I refer to the making of those specialized across-the-board checks that are necessary to tying the bill together, to having internal consistency of treatment, and to having real clarity. Here the draftsman gives the bill a specialized "horizontal" treatment. He checks his definitions one by one to see that he has followed each throughout the bill. He checks his citations separately, and then his cross references, and such other elements as recur and need to be treated uniformly. Each of these checks is a specialized testing of the bill as a whole.

One very important step that is frequently overlooked, and sometimes impossible under the circumstances, is cross-checking with others. I'll admit that if the bill is simple enough and covers familiar territory you may be safe in skipping this step. At the same time this is like saying that if you let your fire insurance lapse your house may not burn down. "He travels the fastest who travels alone," said Kipling, but if my edition is correct he wasn't talking about legislative draftsmen. Unless the bill you are drafting is really simple, you are on safer ground if you have someone check your work.

As a general rule, therefore, it is wholesome to approach the broad drafting problem on a team basis. In a well run legislative drafting group individual draftsmen are apt to

cross-check each other, certainly on complicated bills. I think it is safe to say that a large part of drafting involves complications too treacherous to be conquered single-handed. I am not contradicting this when I say that the composition of every bill should be the ultimate responsibility of one person.

For adequate testing there are several available devices. The most usual is individual checking with fellow draftsmen or outside experts, or both. A second one, which is sometimes useful, is to submit the tentative results to a panel of critics, not much larger than a half dozen if the group is to move faster than a slow tortoise. A third device is to reproduce the bill and circulate it for suggestion and comment to a carefully selected sampling of the kinds of persons who are going to have to live with the law in case it is enacted. You can use these devices separately or in combination, as circumstances suggest.

But I must warn you not to confuse getting other people's help, which is very fruitful, with writing by conference, which wastes time and talent. Groups can chew over ideas, they can criticize, and they can give or withhold approval. But they simply cannot compose concisely, consistently, or clearly.

The fifth, and last, step is to polish the result for the greatest readability and clarity. And this brings us to a matter that has received a great deal of attention in recent years.

Form and style are important to a bill because they have an important bearing on its success as a vehicle of communication, which you may be sure is as necessary to adequate legislation as it is to any other human endeavor.

Style, as you all know, is a matter for which the law has been taken severely to task. Recalling the frequent jibes of exasperated laymen, some of you may remember one that floated around during the days of federal price control. A business man was charged with violating a complicated regulation setting ceiling prices on the articles he sold. When:

he betrayed some unfamiliarity with the regulation, the judge asked him whether he had ever read it. The defendant replied indignantly, "Read it, Judge? I can't even *lift* it!"

The following excerpt from a magazine article is even more devastating:

One sure way of making an American audience laugh is to use the language of the United States Government. Just say "Notwithstanding the exceptions hereinafter provided" and people start grinning, all prepared to enjoy a fresh piece of genuine Washington Gobbledygook.

Why is Federalese so funny? Simply because nobody can understand it and nobody talks that way. It's a kind of speech disorder; it's comical in the same way as stammering or a "Rooshan" accent. In other words, we laugh at Washington bureaucrats because those poor people can't talk like the rest of us.²

Over the years the lawyers have built up an immunity to this sort of thing. They have consoled themselves with the thought that, since definitive legal documents have to pin down more contingencies than more casual writings do, they are necessarily more complicated. This is perfectly true. But the lawyers have gone even further. They have also persuaded themselves that all legal complications are of this kind and that it betrays a gross disregard of the legal proprieties to suggest that many of the complications that ornament the typical statute, will, contract, or lease are at best unnecessary or, in some instances, downright silly.

Who is right? Is it the public, which says that the legal profession is unnecessarily confusing them, or is it the legal profession, which says that the public doesn't appreciate the necessity of dealing with all significant contingencies?

The answer, I think, lies well within the extremes. It is certainly true, as the lawyers contend, that there is an irreducible minimum of substantive considerations that no

² Rudolf Flesch, *The Science of Making Sense*, 60 THE AMERICAN MERCURY 194 (February 1945).

amount of simplification of style can remove. On the other hand, it is no real heresy to say that today there are ways of writing statutes and other legal documents that eliminate a large number of unnecessary complexities without violating the substance of the legal message. The possibility of this is suggested by the fact that our present legislative style was largely inherited from an old English system in which statutes were at one time drafted by conveyancers.

Here are some of the rules for writing that will help to make your bill more understandable. They won't guarantee that the result will make sense, but they will make whatever sense there is in the idea you are trying to express a lot clearer. I'm assuming at this point that you have thought out your ideas and have got them adequately organized.

Taken by itself, one of these rules doesn't amount to much. Certainly, a single application of one of them will have only a slight effect. How much does a grain of sand weigh? Very little. But a sand pile can be pretty heavy. Similarly, these rules are valuable for their cumulative effect; and their cumulative effect, I assure you, can be considerable.

The cardinal rule of all drafting, sometimes called "the draftsman's golden rule," can be stated in four words: Use your terms consistently. For one thing, don't vary your terminology when referring to the same thing. For example, don't refer to an automobile as an "automobile" in one place and as a "motor car" in another. That's what Fowler calls "elegant variation." And don't do the converse. Don't use the same term to refer to different things. For example, don't use the term "military" to mean just the land forces in one section and then use the same term to include the naval forces in another section. Consistency is a *sine qua non* of all effective communication.

Another good rule: Keep your sentences from getting longer than necessary. The old reasons for paragraph-long

sentences no longer exist.

Use the present tense. The fact that a statute speaks constantly allows you to avoid all sorts of complicated verb forms. Taking the present as your base line, you hardly ever have to refer to the future, and the past tense can be confined largely to conditions precedent.

Use the indicative mood in preference to the subjunctive, and use the imperative only where you have a true command; that is, where the statute directs somebody to do something. This will avoid what Driedger calls the "false imperative." For instance, don't say, "The term 'synthetic fiber' shall mean . . ."; say, "The term 'synthetic fiber' means . . ." A statute makes such a fact true in the very act of declaring the legal result.

By preferring the active voice to the passive, preferring the singular (where appropriate) to the plural, and stating matters positively rather than negatively, you can further clarify and simplify your presentation.

Another device that will improve your legislative style is to use active verbs instead of their noun equivalents. I can explain this best by a couple of examples. For instance, don't say "make a determination"; say "determine." Don't say "give consideration to"; say "consider."

Then there is the very fundamental matter of definitions. First of all, don't define a word unless you have to. Draftsmen are prone to define a word in one sense and then, without realizing it, use it in a very different one.

The second thing to remember about definitions, and this is one of the most important things in the whole field of legal drafting, is that you shouldn't define a word in a sense significantly different from the way it is normally understood by the persons to whom the legislation is primarily addressed. This is a fundamental principle of communication and it is one of the shames of the legal profession that draftsmen so flagrantly violate it.

While it may be true, as the philosophers of language like

to emphasize, that words have no inherently correct meanings, the communicant who ignores established usage is setting up unnecessary barriers between himself and his audience. This is true even where he gives advance warning, in the form of a specific definition, that he is using his word in a special sense. The lawyer who defines "wheat" as including "rye" is laying a trap not only for his readers but also for himself. This is because of a psychological law that even a legislature is powerless to repeal. Like ghosts returning to a haunted house, established connotations return to haunt the user who attempts to banish them. I have seen many cases where a draftsman, having resorted to this slovenly device, has later forgotten his special definition and reverted unconsciously to the established sense, thereby introducing either an unintended result or an intended result disguised as something else.

The third thing to remember about definitions is that you shouldn't stuff them with substantive rules of law. The purpose of a definition is to identify or clarify the term defined, not to give its history or a full list of its ingredients, or to tell how to bring it into existence.

How long does it take to draft a statute? How long will it take to complete your work?

Abraham Lincoln's answer is as good as any. When asked how long a man's legs should be, he answered, "Long enough to reach the ground." For the legislative draftsman this means, "As long as it takes the particular draftsman to do the particular job." Unfortunately, the draftsman is often under time limitations that he can't control and he has to compromise accordingly. The practical answer therefore is, "Longer than you have time for." There will even be times when you have to draft right off the cuff, as they say. At times like that, when you have to get it right the first time or not at all, you cross your fingers and hope that your past experience and a little luck will keep you from getting too far off the track. Even so, you can often re-

duce the time problem if you take the trouble to educate your client on what is involved in turning out a professionally adequate product.

In closing I would like to say that conscientious effort in drafting pays rich rewards. If the bill turns out well, the draftsman will share the credit with many others. If it turns out badly, he will have the credit all to himself. Seriously, there are rich rewards in legislative drafting and the biggest one is the deep satisfaction that comes from wrestling with man-sized problems whose satisfactory solutions are a necessary phase of the art of government and a buttress of the public good.

*Reed Dickerson**

* Chief, Codification Section, Office of General Counsel, Department of Defense. Author: *LEGISLATIVE DRAFTING* (1954).