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General Considerations in Legal Drafting

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General Considerations In Legal Drafting

By Reed Dickerson



Professor of Law, Indiana University; author, THE FUNDAMENTALS OF LEGAL DRAFTING (1965); Chairman, Standing Committee on Legislative Drafting, American Bar Association.

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I would like to thank the Arkansas Bar Association for helping me escape, even momentarily, from the turbulent atmosphere of the campus. Quite apart from this, it is a high privilege to talk to the members of this distinguished group.

Being a law professor, I am excused from saying anything practical, so let me begin with some glittering abstractions. First of all, I commend you for your perceptiveness in seeing the importance of good drafting to today's law practice.

It is lucky for me that in the field of legal drafting subject matter is largely a matter of indifference, because otherwise my appearance here would be presumptuous. Because almost all my experience has been in the field of legislation, I strongly resisted when Dean Blythe Stason and others at the American Bar Foundation started twisting my arm to broaden the scope of a prospective second edition of my book *Legislative Drafting* to cover the field of legal drafting generally. After much soul searching, I consented, because I realized that what was needed most was a book that dealt, not with contractual disclaimers, hold harmless agreements, attestation clauses, or any other recurring provision, but with the general principles of draftsmanship. It really makes no difference whether you improve your draftsmanship by drafting a better contract, lease, will, statute, or constitution for the local tennis club. Indeed, we recently conducted a successful drafting exercise at Indiana University by having the the students re-

work the existing student honor code. The important thing is that it was an instrument definitive of rights, privileges, immunities, and obligations.

We have never had in this country, nor probably elsewhere for that matter, a tradition of good draftsmanship. The latent talent has presumably been there. We just haven't gotten around to recognizing the need, at least until recently.

Why have we been so slow? The main reason, I think, is that the functions of lawyers generally have been gradually undergoing, during the past 75 to 100 years, a radical but not always observed shift in emphasis. Even though you and I know that the greater bulk of today's lawyer's time is taken up, not in court, but with helping people plan their affairs so that they won't wind up in court, people still tend to think of the lawyer as someone who helps bail them out when they get into specific hassles. This newly emphasized kind of planning, more often than not, ends with the preparation of a definitive legal instrument.

I used to be pessimistic about the chances of improving the drafting standards of the bar, but there are signs today that improvement may be on the way. The very fact that you are willing to listen to a talk on this subject is evidence of this. For one thing, there doesn't seem to be the professional resistance to getting rid of legal gobbledygook that there was 25 years ago. The law schools have even made sporadic attempts to teach courses in

legal writing, including some draftsmanship. Also, I hear from many professional, non-academic sources about the need to train law students in the drafting discipline. I even get a letter now and then from a recent graduate saying how glad he is to have had even a modest introduction, in law school, to the fundamentals of draftsmanship.

The key people, as I see it, are the law deans and the law professors. Unfortunately, most of these are still operating under at least one of the following assumptions: (1) that draftsmanship is inherently unteachable, (2) that it is just another name for freshman composition (and thus the responsibility of the colleges), or (3) that it is best taught by the apprentice method in the law offices. For me, only one of these assumptions makes sense and that is the first one. Certainly, legal draftsmanship has dimensions of depth and complexity unknown to college students outside the field of mathematics. The law office apprentice method has consistently failed, because the masters have done little beyond giving renewed life to the ineptitudes of the past. The question remains: How else can drafting be taught?

The nub of the problem is that even the law faculties provide only meager resources for breaking out of this unfortunate, self-perpetuating situation. Who teaches the teachers? And even if you are lucky enough to have on your faculty a couple of adequately trained professors, how do you personalize your approach in an era when the law schools are flooded with faceless customers?

Who has time to meet each student to discuss his efforts? In broadest terms, how do you adapt traditional teaching methods to the peculiar needs of legal drafting?

Because the process is only imperfectly understood, it has been easy for the law schools to steer around the difficult problems of pedagogy by characterizing legal drafting as a mere "skill", which is the term that legal pedagogues condescendingly use to refer to the more pedestrian routines of law practice that they prefer to entrust to the stewards of continuing legal education.

Although we may not have the answer at Indiana, we think that we have developed an answer. Those of you who would like to see in detail how we have operated can examine the full text of a required exercise that we did several years ago. This appears as Appendix D in my book *The Fundamentals of Legal Drafting*.

Because you are not directly concerned with pedagogy, you would probably prefer to listen to some suggestions for upgrading that are more immediately realizable.

I suspect that many of you are too preoccupied with other matters, or otherwise pressed, to spend any significant time rechanneling your own

deeply grooved drafting habits. For us older draftsmen, I suggest only that we try to update our styles to pick up some of the specific tricks of simplification that have been tested over the past 25 years.

As for improving the performance of your junior draftsmen, you can do what a number of law offices have done: adopt a book such as mine as an office drafting manual and then require those juniors to follow it. Not all of them will comply with unrestrained enthusiasm, but real benefits will accrue. Critical review by you or other senior lawyers will help sustain their motivation. The main thing is to instill the notions that drafting is a major legal operation and that you expect a high level of professionalism. In the meantime, we pedagogues will keep trying to adapt our methods to the needs of continuing legal education.

In your drafting or review, I hope that you will keep constantly in mind those elements of the drafting discipline that produce not merely improvements in readability but improvements in the substance of the ideas you are trying to express. Because this highly important dimension of drafting is usually overlooked, I will give it primary emphasis.

In the early years of World War II, some of us at the Office of Price

Administration thought that the solution to the problems of good drafting lay mainly in learning how to state our ideas in the language of the audiences for whom we were writing, in that case the American businessman. We did a pretty good job, I think, in ridding government price regulations of much of their spurious legalese, but in the course of our efforts we discovered that the difficulties lay much deeper. We learned that good drafting was not simply a matter of good style and readability. As somebody once asked in *Fortune Magazine*, "Why make the fatuous readable?" The basic problem in drafting a legal instrument is always: How do you get substantive sense into what you are trying to say?

The key, of course, is not to start with the means of expression but with the underlying thought. The draftsman of the Indiana administrative regulation providing that hunters may shoot deer only between sunrise and sunset, "Central Standard Time," wasn't just expressing himself badly. He was thinking badly. Good drafting, therefore, starts with good thinking and ends with good expression. In between, there are important steps such as getting the architecture right.

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General Considerations In Legal Drafting

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toward nailing the heresy that good draftsmanship can be achieved merely by following a good style manual. Many lawyers still yearn for a handy list of specific rules such as you'd expect to find in Fanny Farmer or a Heathkit hi-fi instruction book. If that is what you are looking for here, I promise to disappoint you. Good drafting just isn't easy and there is no known way to make it so. It's still blood, sweat, and tears in a genteel atmosphere.

It is popularly assumed that you should first work out 100 percent of the substance of what you are trying to accomplish and then express it as clearly as you can. The trouble with this approach is that the unassisted mind is for most of us an imperfect generator and repository of thought. One thing that I have learned over the years about writing in general and legal drafting in particular is that there is a tremendous substantive feedback from any systematic attempt to express one's ideas. This is true to the point where we can almost say that the pen or typewriter is an extension of the brain. I see this verified in almost every drafting exercise.

Arthur Littleton, a Philadelphia lawyer, put it very well when he said several years ago, "... [L]anguage is something more than a tool of thought. It is a part of the process of thinking." Notice how much of your own minds' working involves an attempt to formulate and verbalize.

Warren Seavey, late Professor at the Harvard Law School, once told me that

he wrote his articles first and then did his research. This may sound flippant, but in my opinion he was expressing a profound insight. Too many people try to do *all* their research before trying to record *any* of their conclusions. Such an approach is wasteful, because much of the research turns out to be irrelevant or incomplete. The point is that you should do as much of your research as you can with a sharp focus and specific objectives. Unfortunately, it is almost impossible to sharpen a point of view and specific objectives without first trying to express them. Systematic efforts to record tentative conclusions subject the underlying ideas to a discipline that most people cannot supply solely by mental effort. On the other hand, you shouldn't begin to write until you have a generally good idea of your problem and tentative solution. The important thing is not to put off composition to the end.

I have done several recent consulting jobs for the Federal Government. In one of these, involving altogether about eight weeks, I began writing my report at the end of the first week. Ultimately, this saved me many hours, because during the remaining seven weeks I had a much more sharply defined idea of what I was up to.

Fortunately, this is one area of the drafting discipline where we can talk about specific, communicable principles. Indeed, several of these principles are so sure-fire that you don't have to do much more than stay awake while applying them. Substantive flaws will emerge, almost by themselves, from the written page.

Here are what I consider the three most important principles to follow, if you want to use draftsmanship to improve the substantive quality of the result.

The first ranking principle is that of consistency. On different occasions in the same document, never state the same idea differently and never state different ideas the same way. It pays to be almost fanatical about this. The reason is simple: It facilitates the comparisons that alone make it possible to see whether a pattern of ideas hangs together. Conversely, inconsistencies of expression tend to hide discrepancies of inclusion, exclusion, or overlap. The mechanical device to use here is the specialized across-the-board check. For instance, during the codification of the military laws, we assigned to one draftsman the job of going through our revision of titles 10 and 32 of the United States Code to see whether we had used the term "commissioned officer" consistently. The number of substantive discrepancies that such searches uncovered was amazing.

The second ranking principle is to use

words in senses that involve the minimum semantic readjustment by either the reader or the draftsman. This is important because draftsmen are prone to fall into their own verbal traps. The Canadian draftsman who defined "mosquito" as including gopher was not only making it harder for his audience to get the legislative message, but making it easier for himself to make mistakes of coverage and internal coherence.

The third ranking principle is that of sound arrangement. Here, you must do much more than merely stay awake. This is the most elusive of the three, because sound arrangement is essentially a matter of trying to develop the most useful hierarchy of ideas. In general, the problem is to start with whatever the over-all idea is, break it down into its main segments, and then break those segments down into their respective subsegments. This is where an architectural sense is highly important. It takes a sophisticated understanding of a problem to know what principles of breakdown to use and to determine which are the main ones and which are subordinate. Your scale of values will vary, of course, according to your particular objective. (My chapter on arrangement may be of some help on this.)


Here, again, you will probably start out with imperfect ideas and then discover, in the course of trying to frame a structural outline, that you have omitted something, included something that you shouldn't have, or perpetrated an inconsistency. The most useful single feature of arrangement, of course, is the well known principle of parallelism.

Let's take a simple example. Suppose, after juggling your ideas on paper, you come up with the following outline:

- A. Gasoline vehicles
 - (1) Trucks
 - (2) Automobiles
- B. Diesel vehicles
 - (1) Trucks

The parallelism in this kind of juxtaposition of ideas immediately suggests that perhaps you should also include diesel automobiles. Maybe you should or maybe you shouldn't. The important thing is that the application of the three ranking principles will inevitably suggest questions that it will be profitable for you to try to answer. I guarantee that in almost every application they will produce worthwhile results.

Professor Layman E. Allen, a law professor at Michigan who is also a mathematician and logician, developed an elaborate system of notation roughly equivalent to showing the kind of logical branching you get in an aerial photograph of a railroad yard. He has used this to portray the various



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instances of syntactic ambiguity that continually creep into writing. He called it "systematic pulverization." If this scares you, take a look at my own, less elaborate system of tabulation exemplified in Appendix B of my book. Professor Allen's most recent approach to this problem is called "language normalization," in which he uses symbolic logic as a tool.

Examples of the substantive benefits of sound drafting are not hard to find. For instance, here are some of the pertinent questions that resulted from careful organization and comparisons during the recent revision of a zoning ordinance:

- (1) Is it intended to exclude residential uses from B2 zones, while permitting them in B1 and B3 zones?
- (2) If a movie house would not be permitted in a B1 zone, should it be permitted in a B2 zone?
- (3) Does the mention of "theatres" in B3 zones mean that live theatres are meant to be excluded from B2 zone?

Without parallelism, the juxtaposition of related ideas, and an almost fanatical devotion to consistency, significant questions such as these would often remain obscured.

One of the nice things about the principles I have been talking about is that as a bonus they also improve the understandability and readability of the result. As a minimum, you will confuse fewer of your intended audience.

Do you have an audience in the case of a contract? Your primary audience is the parties to the contract. Your secondary audience, who you hope will have no occasion to read the instrument, is the court to which it will be submitted if the deal goes sour. You should keep it in mind, too.

You will notice that so far I have said nothing about the choice of particular language. As for matters of wording and style, I think I'll just refer you to the last couple of chapters of my book. My present disposition is to play down the role of specific wording and style, important though they are, simply because so many lawyers, professors, and students think that that's all there is to drafting.

There are two general things that I want to say about getting simplicity and clarity in legal instruments. One is always to shoot for what James P. Johnson has called the "lowest common denominator". In other words, you should always try to achieve the greatest degree of generality that is consistent with the objective that you have in mind. To take a crude example, if you

wanted to deal with all the states, you would ordinarily name them individually but would refer to "the states" as a general class. To take a more sophisticated example, in his book on will drafting, Johnson pointed out that setting up cross remainders between trusts for three or more children is very complicated if you treat them as individuals, but it is much easier to handle and understand if you treat them as members of a single class. Sydney Lamb calls this minimizing "surface information". Simplicity of idea must precede simplicity of expression.

Another thing: Don't be afraid to use or develop forms or boilerplate. Actually, you have no choice; you have to develop forms for instruments or parts of instruments that deal with frequently recurring situations. On the other hand, don't take them for granted or follow them slavishly; they can cause a potful of trouble. So-called "adjudicated forms" are especially undesirable, because they were bad enough to get into court. If possible, develop your own office forms and then make clear to your draftsmen that they must never use a piece of legal boilerplate until they have checked it carefully against the current situation. Also, allow your draftsmen to make piecemeal improvements. In this way, inadequate forms will ultimately grow into dependable ones.

The main trouble with forms is that they tend to get the draftsman in a rut. They get out of date and tend not to fit the situation at hand. Kurt F. Pantzer, a leading practitioner in Indianapolis, made a systematic study of the boilerplate provisions of several kinds of insurance policies and was shocked to discover that, whereas some relevant matters had been verbally beaten to death, others were treated inadequately, or overlooked altogether. That is why in a systematic attempt to update and simplify a standard contract or other legal form you are likely to wind up with a longer, rather than shorter, instrument. While you are cutting out the gobbledygook, revising the arrangement, and translating the result into consistent current English, you are likely to discover matters that either have been dealt with inadequately or have been previously overlooked.

In drafting a contract or other instrument, you should normally feel free to address yourself to the peculiarities of the problem at hand and shape the instrument accordingly. You can

even be a little bold. (Don't be afraid, for example, to use lists, diagrams, or tables.) In today's jurisprudence, there are few words of art or other magical terms. The real problem is to get your message over in language that is generally familiar to your audience.

One of the most important aspects of good drafting is developing a sensitivity to language and form. This involves developing an adequate editorial point of view. This, in turn, means trying to evaluate your work from the viewpoint of a typical member of your audience. One way you can do this is to have your work checked by another. Another way is to put your work aside for awhile before coming back to it.

To me, the most appealing feature of the art of legal draftsmanship is not that it helps to do an immediate job better (which it does), but that in the long run it does more to sharpen the mind and its capacity to handle new problems than almost any other discipline you could name. The sophisticated draftsman is not merely a master of language and the art of communication, but a designer and molder of underlying ideas. And if he finally acquires that ultimate insight of being able to tell which human problems are problems of ideas and which are problems of expression, and to what respective extents, he has acquired one of the most valuable single tools of human understanding that a person can have.

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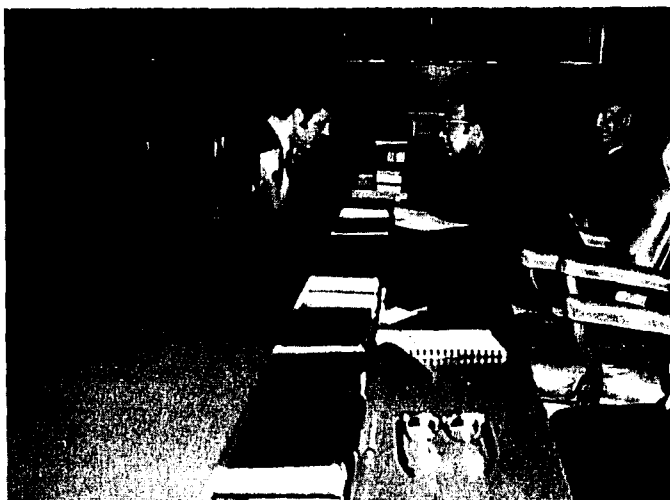
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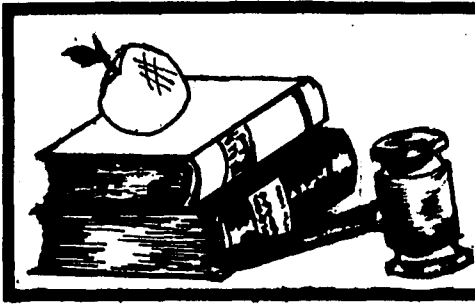
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Bar Association Figures



NEWS

by Professor Robert Brockmann

There are five areas of activity that have been in the forefront at the law school in recent months. One of these, the Law Student Division of the Arkansas Bar Association was explained in the notice sent out for the annual meeting and will have been voted upon by the time this is read.

The Arkansas Supreme Court adopted the Model Student Practice Rule on February 23, 1970, by per curiam order. This rule was promulgated by the American Bar Association. In essence it provides for third year law students to appear in court on behalf of indigents. Under the plan at the law school students will appear in the Washington County municipal courts and juvenile court. First and second year law students while not under the Model Practice Rule will be included in the juvenile court program but not in the positions and roles covered by the Rule. Standards have been developed for the students selected to participate in practice under the rule—the student will have to be in good standing and approved by the dean of the law school. It is planned to develop this program into a comprehensive clinical legal education program eventually. The program will commence this summer and get under full swing with the fall semester. Based on the municipal and juvenile court experience further programs will be implemented in other courts.

A placement program is now in full swing at Fayetteville directed by George Kopp second year law student. Apparatus is being set up for graduating law students to interview prospective law firm employers during the annual meeting and mid year meetings of the Arkansas Bar Association. A placement brochure is presently being assembled. This brochure will contain the pictures and biographical data concerning the third year students. The law school would like to encourage as many prospective employers as can to come to Fayetteville to interview so as to see as

many students as possible and to have access to the records. Anybody interested in hiring a prospective law graduate should write to George Kopp at the

University of Arkansas School of Law, Fayetteville, Arkansas 72701.

A summer internship program is now in the fledgling state. This has been planned with the cooperation of the Executive Committee of the Arkansas Bar Association and the special assistance of Henry Woods and Winslow Drummond. The plan is for second and third year students to work in law offices throughout the state for a wage scale as set by the members of the bar. The plan is for the summer months and is designed to give the students some practical experience in the practice of

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