

The Art of Legal Drafting[©]

By Barbara Child

The Drafter as Playwright

Most people have heard the Will Rogers quip: "The minute you read something that you can't understand, you can almost be sure it was drawn up by a lawyer."¹ I remembered that line when Professor Joseph Kimble asked me to deliver the Krinock Lecture at Thomas M. Cooley Law School on "The Art of Legal Drafting." Then I remembered the metaphor of the late Jonathan Chase, Dean of Vermont Law School, who observed that law schools train students to be critics and actors (scholars and litigators), while what most lawyers do most of the time is the work of the playwright.²

It is an apt metaphor. When a lawyer drafts a contract or a statute, an estate plan or a set of corporate by-laws, in a very real sense, that lawyer is writing a script with a plot, stage directions, and the characters' lines as well.

Document drafting is to be distinguished from writing legal memoranda and briefs. Memoranda and briefs require analytical and persuasive skills. In contrast, transactional documents do not persuade. Instead they describe the universe in which they function and they make plans for the future of that universe. In a sense, every transactional document is a miniature constitution or, if you prefer, a legislative code. Drafting such a document in-

volves discovering conceptual problems and addressing them with attention to strategic decisions about organization and language. Doing all of these things well is indeed an art.

The artistry employs both theoretical and technical principles; neither alone is enough. Reed Dickerson, the universally acclaimed patriarch of legal drafting, views the study of drafting as essentially jurisprudential.³ I understand his concern that drafting not be taught as simply "more legal writing" or "Plain English II." It is crucial that we who teach drafting not let technical matters of syntax and format swallow our courses.

It is true that we strive to enable lawyers to draft something that somebody *can* understand, but that does not mean we want lawyers to insult either their clients or themselves by drafting in kindergartners' style. It is probably unfortunate that the Plain English Movement was associated early on with Rudolph Flesch, who is famous for testing readability mainly by counting words and syllables.⁴ His rigid prescriptions greatly oversimplify the issues of what is appropriate legal writing style, and how significant a role "readability" plays in deciding what is appropriate. Even so, the Flesch Test and other similar readability tests did serve as the basis for some states' Plain English legislation. Therefore, if a lawyer is going to practice in a state that has Plain English statutes, that lawyer certainly needs to know how to comply with them.

Those states are relatively few, however. The point of drafting in plain English is not merely to comply with a consumer statute. The challenge involves more than merely counting

words or syllables. Ultimately, the challenge of drafting in plain English is to express transactional or legislative terms—however complex they may be—accurately, completely, and clearly to their potential users. The user group is often disparate, including, for example, consumers, corporate counsel, juries, and judges.

It is no wonder then that students, who have an idea of what is ahead of them in practice, are not complaining when they say that drafting is the most practical course they have taken in law school. Students have no patience for a course in drafting theory taught without context.

In Flannery O'Connor's short story called "A Good Man Is Hard To Find," a character called The Misfit kills an old woman, known only as the grandmother, who has been annoying everyone around her all day long. When she discovers she is probably going to be killed, her behavior improves considerably. This prompts the Misfit to observe, after he has killed her, that "she would of been a good woman if there had been somebody there to shoot her every minute of her life."⁵

In a real sense, we lawyers tend to be as annoying as the grandmother, and Will Rogers is our Misfit. All of us—students, teachers, practitioners,

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and judges—may need Will Rogers' verbal gun always on us, challenging us to behave and not draw up things you can't understand.

The Need for Teaching Drafting in Law School

It is becoming increasingly clear that law students should study drafting in law school. A skills training revolution has been going on now for about a decade. Consider these milestones:

- In 1979, the ABA's Cramton Report went on record saying that *all* law students, not just those who elect clinical programs, should have a "rigorous legal writing experience in each year of law study."⁶

- In 1981, the ABA amended its standards for approving law schools to include this prescription: "The law school shall offer instruction in professional skills."⁷ Interpretation two of that standard included the comment: "Thoughtful professional studies have urged that . . . drafting be included in such programs."⁸

- In 1987, the ABA Long Range Planning Committee of the Section of Legal Education and Admissions to the Bar issued a report recognizing skills training as a major objective of legal education, including the ability to "write effectively (both in general and in a variety of specialized lawyer applications, such as pleadings, opinion letters, briefs, contracts or wills, and legislation) . . ."⁹ It concluded that "one overall goal [of skills training] should be to instruct students to be problem solvers rather than mere managers of conflict."¹⁰

- In 1987, the ABA began instructing site evaluation teams to review professional skills programs in the law schools they evaluate. Specifically mentioned in the instructions are courses in drafting taught after the first year.¹¹

- Now the ABA has a National Task Force on Law Schools and the Profession: Narrowing the Gap. This task

force is chaired by Robert MacCrate, former ABA President. It is actively engaged in surveying current skills training in law schools and seeking descriptions of model courses and programs.

- The Board of Governors of the California State Bar has recently established a Joint Commission on Lawyering Skills, with professors and practitioners as members. The charge of the commission is to encourage schools "to voluntarily engage in the teaching of lawyering skills and to improve and enhance professional training in those skills."¹² The commission intends to establish a liaison with the ABA Task Force. Its work is geared toward amending the California rules of admission to practice with respect to skills.¹³

The new joint commission in California is especially encouraging because it involves much needed cooperation between schools and the practicing bar in the interest of ensuring professional competence. We who are in the law schools rather than in practice need to recognize the lead taken by the ABA in fostering the advancement of skills training in law schools. Also, we need to encourage the Association of American Law Schools to be equally progressive.

Attention to teaching drafting is especially needed. The inability to communicate is pervasive enough to be regarded as a crisis in the legal profession. A scathing assessment by Judge Roger J. Miner, U.S. Court of Appeals for the Second Circuit, concludes that the inability to communicate "diminishes the service of the bar, impedes the resolution of disputes, retards legal progress and growth, and, ultimately, undermines the rule of law."¹⁴

Judge Miner cites the failure to communicate as near the top of the list of complaints by clients about their lawyers.¹⁵ He cites the failure of litigators to communicate with witnesses and juries.¹⁶ He rails at terrible briefs and worse oral arguments.¹⁷ He does not compliment judges' opinions either,¹⁸ and he calls much legislation "incomprehensible."¹⁹

Judge Miner directs his harshest criticism at law faculty, whom he faults for being more interested in talking to each other, chiefly in esoteric scholarship, than to students and practitioners.²⁰ If law professors send students messages, however cryptic and coded, that it does not matter how lawyers write in practice, then no one should be surprised if students lack the incentive to learn to do it well.

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Responses Outside the Law School to the Need for Better Drafting

Neither should anyone be surprised to discover that if law schools do not take seriously the obligation to teach law students to draft, then others will step in. Continuing legal education is rapidly becoming a major industry in this country. So far, the continuous stream of seminars put on by the American Law Institute in conjunction with the ABA (ALI-ABA) has not included much about writing. On the other hand, ALI-ABA's relatively new project, the American Institute of Law Training within the Office (AILTO), includes writing in its consulting services. Moreover, the very existence of writing specialists and editors in law firms is itself a commentary on what has not been accomplished in the law schools.

Some, of course, say that it is appropriate for the new lawyer to learn skills in the law office because the law school has headier work to do. The trouble is that continuing legal education about drafting occurs usually in the form of a concentrated seminar—at worst, a grueling one full day's affair, and at best, an hour a week for six or eight weeks. Many popular writing seminars are offered by private consulting firms, some with personnel who have no present or past connections with a law school.

To be sure, some of the seminar instructors are among the best teachers in the entire field of legal writing: George Gopen, Steven Stark, and Jo-

seph Williams, for example. But no short seminar can substitute for detailed attention to an individual's work over an extended period. For this reason, the in-house writing consultant usually accomplishes more than the seminar instructor. But the proportion of lawyers who practice in a firm with such a consultant available is small. All lawyers need to draft well.

Meanwhile, more and more clients are giving up on lawyers who do not, or cannot, draft well. Hyatt Legal Services and Nolo Press, among others, are now offering draft-it-yourself computer software. Their forms are no doubt in plain English, and that alone is enough to make them appealing to the Will Rogers aficionados, consumers—and businesses—who will use the forms without consulting a lawyer, even though their legal situations may be far more complex than the forms accommodate.

What the Law Schools Are Doing About Drafting

Fortunately, law schools have begun to give drafting more than casual attention in their skills training programs. A full semester of drafting is required of every student at several schools. Many more are offering elective drafting courses, and some are incorporating drafting exercises into their first year writing courses or into advanced courses such as Trusts and Estates and Corporations.

The 1990 conference of the Legal Writing Institute in Ann Arbor was the third biennial conference of that organization featuring panels on teaching drafting. More and more publications are appearing in this field—books, parts of books, and articles, so that people who want to teach drafting now have teaching materials available.

The ideal curriculum becomes more and more possible. It is one in which students have a miniature preview of drafting in one of their first year courses, say, Contracts or Civil Procedure; then they have a general drafting

course in their second year; finally, they take a seminar in their third year that gives them some concentrated practice drafting in an area of their particular interest. After such a progression of drafting experiences, students can truly appreciate—and practice—the art of legal drafting. ■

Footnotes

1. L. Wilde, *The Ultimate Lawyer's Jokebook* 6 (1987).
2. Chase, *The Play's the Thing...*, 10 *Nova L.J.* 425, 425 (1986).
3. See R. Dickerson, *The Fundamentals of Legal Drafting* xxiii (2d ed. 1986); Dickerson, *Legal Drafting: Writing as Thinking, or, Talk-back from Your Draft and How to Exploit It*, 29 *J. Legal Educ.* 373 (1978).
4. See R. Flesch, *How to Write Plain English*, 20-25 (1979).
5. F. O'Connor, *A Good Man is Hard to Find*, *The Complete Stories* 133 (1971).
6. ABA, Section of Legal Educ. & Admissions to the Bar, *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools* 3 (1979).
7. ABA House of Delegates, Standard 302 (a)(iii), *Standards for Approval of Law Schools* (1981).
8. *Id.*
9. ABA, Section of Legal Educ. & Admissions to the Bar, Long Range Planning Committee, *Long-Range Planning for Legal Education in the United States* 24 (1987).
10. *Id.* at 27.
11. J. White, Consultant on Legal Educ. to the ABA, unpublished memorandum to Members of Site Evaluation Teams 2 (Sept. 1987) (copy on file in author's office).
12. See *Dean Brest to Co-Chair Commission on Lawyering Skills*, 21 *Syllabus* 3 (newsletter of ABA Section on Legal Educ. & Admissions to the Bar (No. 2, 1990)). For an account of the background of the commission's formation, see Kay, *What Is Legal Education? And Should We Permit It to Continue in Its Present Form?* 6 *Ga. State U.L. Rev.* 349, 362-65 (1990).
13. *Id.*
14. Miner, *Confronting the Communication Crisis in the Legal Profession*, 34 *N.Y.L. Sch. L. Rev.* 1, 1 (1989).
15. *Id.* at 2-6.
16. *Id.* at 6-8.
17. *Id.* at 8-10.
18. *Id.* at 10-13.
19. *Id.* at 14.
20. *Id.* at 15-17. See also Edwards, *The Role of Legal Education in Shaping the Profession*, 38 *J. Legal Educ.* 285, 291 (1988).

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