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Book Review: The Fundamentals of Legal Drafting

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BOOK REVIEWS

THE FUNDAMENTALS OF LEGAL DRAFTING. BY REED DICKERSON. Published for the American Bar Foundation by Little, Brown and Company, Boston, 1965, pp xx, 203. \$7.50.

"The world of legal draftsmanship has produced the lawyer's counterpart of Humpty Dumpty in a group of bills that stated that for their purposes the term 'September 16, 1940' meant 'June 27, 1950.'"

Professor Dickerson documents (p. 101) this fine example of the mastery of the resolute lawyer over words.

The legal profession has always had its great writers who, in the discharge of their professional tasks, created literature of the highest order. It has been, however, only comparatively recently that the profession has come to realize that the ability to write with skill and clarity is a talent which must be encouraged and cultivated with the other talents that have traditionally marked the competent lawyer.

The American Bar Foundation decided that "the fundamentals of good legal drafting should be enunciated and made more widely accessible to the bar." To discharge this assignment, the Foundation called on Professor Dickerson, and the result was this excellent volume.

If, after preparing a legal instrument, a lawyer feels vaguely uncomfortable and detects symptoms of literary distress, it is not improbable that he is suffering from one or more of the diseases of language, such as intolerable prolixity, ultraquistic subterfuge, elegant variation, obesity or Humpty Dumptyism. These diseases and many others have been isolated by Professor Dickerson. He prescribes "specifics" for the cure of them all.

A sampling of the subjects discussed will serve to show how intriguing the book is. There will be found the function of the form book; rules for the use of "shall" and "may"; the perils of pride of authorship ("in extreme form a kind of emotional hemophilia"); the necessity for checking with others; how and when to use "each," "every," "any," "all," "no," and "some"; the necessity for detailed interviews with the client; the role of rules of interpretation (slight); and the futility of "writing by conference." There is an interesting account of the origin and causes of wordiness (not at all flattering

to those who indulge) and a plea for the shedding of the "idiosyncrasies of the past."

Professor Dickerson points out that a legal instrument is both a declaration of legal relationships and a communication (p. 18). It is thus subject to principles of communication and it does not suffice that a document is clear to the drafting lawyer if it fails to convey the client's message.

The author examines the steps in drafting an instrument, the arrangement of the instrument (he calls it the architecture), the achievement of clarity and factors affecting readability. He makes many concrete suggestions and illustrates them with examples.

He is not hesitant to devise or test legal techniques by reference to other disciplines. In the arrangement of legal instruments, he finds (but does not belabor the discovery) an analogy to the ordered sets of mathematics. In a particularly enlightening and arresting passage devoted to "and" and "or," he adverts to the utility, quite limited in his view, of symbolic logic.

Professor Dickerson states that a good outline "is the most important single device for solving complicated problems" (p. 42). His advice on how to prepare the outline is detailed and eminently practical.

Lawyers who may have wondered how many ways there are to be ambiguous will find the answer in Professor Dickerson's superb essay on ambiguity. He classifies at least three—semantic, syntactic and contextual—but happily provides the insights to recognize them and the weapons to combat them. He makes a sharp distinction between ambiguity, which has no redeeming feature, and vagueness, which on occasion (but not invariably) has its salutary and beneficial uses.

For the sheer delight found in pricking the pomposities of the compulsive definer, the chapter on definitions is the most sprightly (given the ability to survive frequent winces) in a book that sparkles with readable, lively and engaging style.

Some grizzled veterans will not accept, without monumental huffing and puffing, Professor Dickerson's dictum that provisos "at best . . . constitute archaic legalisms."

For most practitioners the work suffers to some extent from the author's preoccupation with the problem of drafting legislation. The present volume is based, in part, on his earlier book *Legislative Drafting*. That perhaps accounts for his statement that "a good draftsman may make as many as fifteen to twenty revisions to iron

out an extremely difficult provision" and that he should keep on revising "until he feels the draft is 99 per cent right," to which latter admonition he adds the qualification that will be relevant to most lawyers "unless, of course, the economics of the situation make some compromise necessary."

Although the author rejects as too exacting the standard that "every definitive legal instrument should be drafted so that no one reading it in bad faith could possibly misunderstand it," in his view legal drafting differs from the preparation of documents such as briefs and pleadings in that it "seeks a degree of precision and internal coherence rarely met outside the language of formal logic or mathematics" and "is almost exclusively non-emotive, that is, it contains almost no 'sales talk'" (p. 6). Many lawyers will not share his view that legal draftsmanship should be so antiseptic. In addition to other audiences, before whom the instrument might eventually come, there is the potential jury, and for that audience, the use of emotive words, albeit sparingly, may be the most effective means of assuring that the intention of the parties at the time the document is prepared will be carried out. Thus, the use of the couplet "null and void," which is on the list of proscribed redundancies, may be justified on the ground that neither word standing alone has quite the impact of the two in combination.

Professor Dickerson accomplishes his objectives so well that before the book is finished the reader finds himself applying the author's standards of excellence to the "say" and "don't say" illustrations. At page 104, he recommends "a child adopted by any person shall be treated as if he were a child of the blood," and thus injects a pronominal ambiguity, and, at least under Texas practice, breaches the precepts of orthologous sanction, ("child of the blood" for "natural child") and is either guilty of a conceptual error (in assuming that "child," when applied to one adopted, is a fiction), or of redundancy (on the conceptual assumption made, the words "of the blood" are superfluous).

Of great inspiration and value is Appendix D, titled "One Approach to Teaching Legal Drafting." It is a detailed blueprint for a law school course on the subject.

The American Bar Foundation deserves the thanks of the profession for sponsoring this splendid book. It is commended to all lawyers.

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