Legislative drafting

Teaching plain language drafting in a legislative and administrative advocacy clinic

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To those who are not members of the plain-language academy, the subject of drafting—much less the teaching of it—can seem deadly dull. That's why, when teaching drafting to law students and international trainees,[1] my assistant director and I like to share this anecdote drawn from a training event in Tbilisi, Georgia. One of our participants said she didn't feel well served by her legal education because she had been taught to draft in flowery language—and, she felt, that may have been deliberate: "A system governed by 'rule of edict' rather than 'rule of law' doesn't want substance in its legislation. It's easier to conceal a vacuum at the heart of legislation if you surround it with a lot of meaningless verbiage." Her story illuminates the connection between an apparently "academic" pursuit—plain-language drafting—and its "political" use in imposing meaningful constraints on the arbitrary use of official power.

The Public Law Center (TPLC) brings a similar message about the political implications of plain-language drafting to second- and third-year law students enrolled in its Legislative and Administrative Advocacy course at Tulane Law School. Since 1988, students in the Leg/Ad clinical course have drafted bills and agency rules ("subordinate legislation") to advance the political interests of clients who are traditionally underrepresented before legislative bodies and in agency rulemaking proceedings.

Tying plain language drafting to the representation of clients imparts a "higher purpose" to the development of writing skills and facilitates learning by students, who want to do a good job for their clients. Leg/Ad students learn from the earliest classes[2] that plain-language drafting is essential in competently crafting their clients' legislation or agency regulations. This marriage of style to substance produces a powerful learning model, motivating students to develop their plain language drafting skills in the service of clients' interests. Marrying style and substance also expresses a meta-message that is a truth known to most readers of *Clarity*: Plain-language drafting is more than a stylistic aid to reader understanding; it's also an analytical aid for drafters in developing the substantive content of an instrument.

Leg/Ad Drafting Projects

In teaching the Leg/Ad course, we believe in "learning by doing." Each student produces multiple drafts, taking a research and drafting topic from the initial "idea" stage through to completion as an instrument. Richard Wydick's superb book, *Plain English for Lawyers*,[3] is our drafting guide and is assigned reading for each student in the class. We help students integrate their hands-on drafting experience with the wisdom in Wydick's text by giving them written and oral feedback on each of the following drafts:

(1) During the first week of the semester, students write a *research plan* identifying preliminary research questions; any legislation or agency regulations from other states that might serve as a model; a "resource person" with relevant subject-matter expertise; and other useful tasks (e.g., researching the legislative history of earlier efforts to pass the measure). Leg/Ad instructors

return the research plans in individual student conferences during the second week, giving handwritten revisions and oral feedback to reinforce lessons learned from the readings, lectures, and exercises on plain language drafting.

(2) Over the next 6-8 weeks, students submit the proposed legislation or agency rule as a *preliminary draft*, a *revised draft*, and ultimately a *distribution draft* that goes to every member of the class before students begin their mock hearings. Leg/Ad instructors again give the students written markups and oral feedback in individual conferences on each draft—except for the distribution draft, which endures "trial by fire" in a mock hearing without the benefit of an instructor's corrective feedback. Drafting without the safety net of an instructor's feedback may motivate some students to work harder on improving their drafts before subjecting them to the scrutiny of other students and the Louisiana legislators who often sit in on these hearings.

(3) Students may choose to produce yet another, *final draft* informed by insights gleaned from the mock hearing. They might draft various *"collateral" documents*, such as a one-page information sheet; a press release; a fiscal and economic impact statement; potential amendments; testimony for a client or advocate to deliver before a legislative committee or in an agency hearing; or a regulatory instrument to implement the proposed legislation. They also write *research papers* of approximately 20–30 pages in length, preserving for use by others the substantive knowledge and political insights they've accumulated in researching and drafting their topics. Leg/Ad instructors review and grade these end-of-semester documents, but students rarely receive any instructional feedback from the grading process—except when a student with a disappointing grade requests a post-semester conference. Instructors who want to provide this final feedback could require all students to come in for a post-semester conference—admirable

pedagogy, probably beyond the ambitions and capacity of most instructors, but undeniably an additional learning opportunity for students.

Students in the fall semester course on Legislative and Administrative Advocacy experience how a single topic comes to fruition—from its conceptual origins to embodiment in a bill or rule. A spring semester course in Advanced Legislative and Administrative Advocacy offers a different experience, approximating the challenges faced in a "real world" drafting office by assigning students to work simultaneously on multiple drafts of different instruments at various stages of completion (e.g., a poorly-drafted bill or rule that needs improvement, amendments to existing law, or a completely new bill or rule drafted against tight time constraints).

Steps in the Legislative Drafting Process

We use Reed Dickerson's "steps in drafting"[4] to give students a sense of the sequence through which each draft moves: (1) gathering factual information and objectives from the client; (2) analysis; (3) legal research; (4) synthesis or outline; (5) drafting; (6) revising; (7) horizontal cross-checking; (8) dialogue with others; and (9) polishing the final version of a bill or rule. The first four steps Dickerson describes as the "think" part of the process; steps 5-9 comprise the "write" or compositional stage. Actual drafting is not so discretely structured in practice, but Dickerson's framework imparts a useful organizational overview.

We pay particular attention to the heart of this process—creating a good outline—because "attention to the architecture of the instrument will do much to improve the substantive policies that it is intended to serve."[5] In *The Plain English Guide*, Martin Cutts suggests multiple organizational strategies, including the top-heavy triangle; problem-cause-solution; chronological order; or question-and-answer.[6] A discussion of structural issues helps students understand that plain-language drafting goes beyond words-text-grammar-style; it also demands a well-conceived organizational scheme. Clear expression depends upon appropriate structure and organization—the good "bones" over which plain-language style is draped.

Students view the drafting process through another useful lens developed by Dr. Betty S. Flowers, a University of Texas English professor.[7] The "Flowers Paradigm" attributes four distinct "personalities" to the drafter: Madman, Architect, Carpenter, and Judge. The Madman engages in "brainstorming"—a chaotic, creative, and (crucially) nonjudgmental process that captures all ideas, good and bad. The Architect discards some ideas and organizes others into a "blueprint"—an outline for drafting. The Carpenter builds on these structured ideas, creating a text to which the Judge brings critical faculties, editing and improving the document's word choice, grammar, organization, and overall readability.

We point out to students how these four personalities correspond to the sequence described by Dickerson. The Madman initiates what Dickerson described as the "think" part of the drafting process. The Architect completes the "think" part by producing an outline, which lays the predicate for transition into the "write" part, when the Carpenter takes over and begins to draft. Finally, the Judge's editorial revisions affirm Justice Brandeis's wisdom about drafting: "There is no great writing, only great rewriting."[8]

We emphasize that the drafting process is not relentlessly linear. Dickerson's "steps" explicitly acknowledge the importance of "feedback loops" that return drafters repeatedly to earlier stages for more fact-gathering, analysis, and legal research. We encourage students to move freely between the later compositional and the earlier conceptual stages of drafting. Dickerson elaborates on this concept by encouraging drafters to listen to "talk back" from the draft and to engage in a "two-way conversation" with what they've written.[9] We recommend Dickerson's "write early" approach to students, liberating them to start writing before completing their research and encouraging them to establish an early, ongoing dialogue with the developing text. But we also caution them to honor Dickerson's wisdom about the feedback loop, letting later research inform and reform their earliest products in the drafting process.

Drafting Is Thinking on Paper[10]

Like Dickerson, Robert Martineau describes the drafting process as a vehicle for developing—not merely expressing—content:

> The drafting of legislation or a rule does not merely express the previously formed intent of those for whom the drafter is working. Only in the drafting is the proponent's intent developed. . . . Drafting thus becomes not merely the process by which words are chosen to reflect policy choices previously made, but . . . the process by which the range of choices are identified and one of the alternatives selected.[11]

This relationship between text and policy formation has political and ethical implications for student-drafters: "[L]egislative drafters do not operate in a political vacuum. The legislative process and its essential derivative, the drafting process, are inherently political in nature. The choices made within such a context are inescapably political, advocacy choices."[12]

We highlight how drafters might occasionally exert inappropriate influence on legislative policymaking. We do so not to foster an attitude of cynical manipulation among law students or to suggest that the legislative process is populated with subversive drafters. Instead, we seek to heighten students' awareness of the drafter's ethical obligation to consult early and often with clients throughout the drafting process. As Martineau observes, "At this stage of the legislative or rule making process, almost every word chosen by the drafter reflects a policy choice."[13] Drafters must maintain a continual dialogue with policymakers in order to avoid usurping the legislator's policymaking prerogatives.

Writing legislation is no mere scribe's task; drafting creates policy, which should be driven to the maximum possible extent by the needs and choices of clients—not drafters.

Conclusion

Plain-language drafting is not simply about "style." It's also a tool for developing and expressing the "substance" of legislation. Also intertwined with the drafter's stylistic and substantive role at the heart of this process are "political" and policy choices that demand our ethical attention. As instructors in

Legislative and Administrative Advocacy, we understand these truths; we hope our students share a similar understanding after completing their coursework.

Endnotes

1   See International Legislative Drafting Institute: http://www.law.tulane.edu/ildi/.

2   See Leg/Ad syllabus under "Clinic Course and Curriculum" at The Public Law Center's website: http://www.law.tulane.edu/tlscenters/PublicLawCenter/index.aspx.

3   Richard C. Wydick, *Plain English for Lawyers* (5th ed., Carolina Academic Press: Durham, No. Carolina 2005).

4   F. Reed Dickerson, *The Fundamentals of Legal Drafting* 51–78 (2d ed., Little, Brown & Co. 1986).

5   Id. at 16.

6   See Cutts on "Using reader-centred structure" at 108–117 in *The Plain English Guide* (Oxford University Press, 1995).

7   See Bryan A. Garner, *Garner on Language and Writing* 4–7 (American Bar Association, 2009).

8   See http://www.brandeis.edu/acserv/fellowships/essays.html.

9   Dickerson at 74.

10 William Zinsser, *On Writing Well* 147 (HarperCollins: New York, N.Y. 2006): "Writing is thinking on paper."©

11 Robert Martineau, *Drafting Legislation and Rules in Plain English* 65-66 (West Publishing Co., 1991).

12 David A. Marcello, "The Ethics and Politics of Legislative Drafting," 70 Tulane L. Rev. 2437, 2446 (1996).

13 Martineau at 65.

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