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Dickerson: The Fundamentals of Legal Drafting

George P. Smith II

University of Michigan Law School, Member of the Indiana Bar

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THE FUNDAMENTALS OF LEGAL DRAFTING. By *Reed Dickerson*. Boston: Little Brown & Co. 1965. Pp. xx, 203. \$7.50.

Twelve years ago, Reed Dickerson published *Legislative Drafting*, which had its inception as a result of his work in 1951 as a member of the Joint Army-Air Force Statutory Revision Group. Drawing on his background as a scholar and educator, in addition to his talents as an expert legislative draftsman, he has now sought in *The Fundamentals of Legal Drafting* to serve the interests of a much wider group of readers. By expanding the coverage of this book to legal drafting, rather than limiting it to legislative drafting techniques, Professor Dickerson has given it a wider dimension; it is of equal value to the practicing lawyer, the young law student, and the legal educator trying to develop and administer an effective program in legal drafting. However, the general coverage of the present book is by no means a total revision of the earlier volume. As Professor Dickerson states, since the principles which apply to legislative drafting are, for the most part, the same ones which apply to the drafting problems encountered in any legal instrument, there was no need for drastic revision of the basic material in his first book.¹ Although the pertinent principles are therefore retained within *The Fundamentals of Legal Drafting*, one finds a new and better-balanced approach in crucial areas covering substantive policy matters, style, architecture, and clarity. Indeed, the level of practical yet sophisticated presentation attained in Professor Dickerson's new work is a substantial improvement over that of a book narrowly confined to one rather specialized area.

E. Blythe Stason, in his foreword to *Legal Drafting*, states that the American Bar Foundation, realizing the growing need to reduce the various principles of legal drafting to a common core, hoped to prepare a guidebook for all drafting problems, and at the same time to foster a more wholesome perspective toward draftsmanship on the part of the practicing bar.² Accordingly, it approached Professor Dickerson with the rather Herculean undertaking of preparing a work to meet these needs.

Legal writing and legal drafting are so inextricably related that it is exceedingly difficult to distinguish the two areas for separate consideration. It would seem obvious that one must first know how to write effectively before approaching any drafting problem. To cope with this situation from an educational standpoint, one law school gives a required first-year course dealing with general legal writing problems the first term and covering legal drafting the second term. In addition, the two leading books dealing with legal

1. DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING*, preface at xiii (1965). Dean Stason, writing on behalf of the American Bar Foundation, concurs in this policy statement. See foreword at xii.

2. Foreword at xi.

writing also treat extensively the areas of letters, opinions, and the preparation and execution of memoranda and trial briefs.³ One of the books even ventures quite successfully into the areas of contract, statute, and will drafting, as well as the preparation of pleadings.⁴

Defining legal drafting as "the crystallization and expression in definitive form of a legal right, privilege, function, duty or status [and] . . . the development and preparation of legal instruments such as constitutions, statutes, regulations, ordinances, contracts, wills, conveyances, indentures, trusts, and leases,"⁵ Professor Dickerson seeks to delineate his chosen topic. He notes that legal *drafting* differs from legal *writing* in that it is non-emotive and seeks to attain a high degree of precision and internal coherence seldom found outside the language of formal logic or, for that matter, even mathematics.⁶

In discussing the draftsman's chief tools for developing and improving substantive policy in his instruments,⁷ Professor Dickerson strikes hard at the need "to strive for complete internal consistency of terminology, expression, and arrangement."⁸ Following the development of clear substantive policy is the need to communicate effectively the ideas involved in the legal instrument.⁹ Listing the major barriers to effective communication as ambiguity, over-vagueness and over-precision, over-generality and under-generality, and obesity,¹⁰ the author places great emphasis upon the need of the draftsman to express himself and his client fully according to the standards of communication current in the particular community.¹¹ This approach is needed in light of the present judicial attitude toward attempting "to extract the meaning of an instrument as it would be understood by a typical member of the audience to which it is addressed."¹²

Of central importance to the draftsman is the absolute necessity to "mold" his finished work into as clear and useful a definitive instrument as is within his professional capabilities, in order that the subjects treated may be found, understood, and referred to with relatively little effort by all who must subsequently use the instrument.¹³

While certain parts of the book appear, on first reading, to be

3. COOPER, *WRITING IN LAW PRACTICE* (1963); WEIHOFEN, *LEGAL WRITING STYLE* (1961).

4. See COOPER, *op. cit. supra* note 3.

5. P. 4.

6. Pp. 5-7.

7. See ch. 2.

8. P. 11.

9. See ch. 3.

10. Pp. 22-32.

11. P. 32.

12. *Ibid.*

13. See ch. 5.

reminiscent of a college grammar book because they deal with problems of substantive clarity, ambiguity, definition, readability, and specific wording problems,¹⁴ a closer examination reveals that Professor Dickerson is painstakingly attempting to "codify" all of the pertinent rules of construction into a working frame of reference. He is doing considerably more than this—he is making a concerted attempt to show the attorney an escape from the quagmire of legalistic jargon so peculiar to legal instruments. Even though some of the author's points may seem too obvious for explanation and deep consideration, it is well to remember the belief of Mr. Justice Holmes that education in the obvious is generally needed.

There have been but few books dedicated solely to legal drafting. In fact, Professor Dickerson's book and one written by Professor Robert Cook¹⁵ appear to be the only significant ones available. Professor Cook uses an illustrative case approach, supplemented by such materials as excerpts from leading law review articles, opinions of attorneys general, and professional committee reports. Professor Dickerson, however, develops a more sophisticated attitude of definitive precision in his book. If a book on legal drafting could be written which balanced both of these approaches, it would be an ideal publication in the drafting area. The Dickerson book, however, makes no claim to being a compendium of the entire subject matter. Rather, it merely seeks to serve as a guidebook, primarily for use by the practicing attorney. That purpose has been achieved, and the volume is a valuable addition to legal literature. The author has expressed with convincing clarity the universality of the application of principles of good legal draftsmanship.

Notwithstanding this reviewer's general feeling of commendation, he cannot help speculating about the possible increased value of Professor Dickerson's book if he had been somewhat more generous with his illustrations of improved drafting results,¹⁶ if he had not been quite so select, and therefore limited, in his bibliography,¹⁷ and if he had included a somewhat more extensive educational approach to legal drafting.¹⁸ The author uses as the single example to demonstrate the possibilities of teaching legal drafting a problem that requires ten or eleven weeks for completion. This prolonged attention to a single exercise may involve a serious problem from the standpoint of maintaining student interest for the period required.¹⁹ Nevertheless, there can be no quarrel with the professor's

14. See chs. 6-9.

15. COOK, *LEGAL DRAFTING* (rev. ed. 1951).

16. See ch. 10.

17. See app. A.

18. See app. D.

19. The reviewer is speaking from recent personal experience in attempting to administer a similar drafting problem.

"vision" in attempting to develop a working program in legal drafting; on the contrary, he deserves much credit and respect.

The average lawyer will almost invariably use a standard form book in his particular area of interest to start his drafting project. Perhaps if the form book is used only as a model rather than being completely accepted as *the* solution, it may still serve a useful place in the attorney's library, but the attorney's ability to be a legal craftsman in drafting matters should be maintained at all costs and not sacrificed to the printed form.

Professor Dickerson's exacting precision and high level of sophistication in his treatment of the vital area of legal drafting is a contribution of note which attains the goals set by the American Bar Foundation.²⁰ The book not only serves as a guide on drafting problems for the practicing attorney, but also goes further and serves both the needs of the law student struggling to master problems within this area and those of the legal educator whose responsibility it is to develop and administer an effective teaching program in legal drafting.

In the final analysis, this reviewer finds himself in complete agreement with Dean Stason when he states: "Until the day, if ever, when a team of specialists can write a set of coordinated texts covering the peculiarities of each major field, this book goes a long way toward furnishing the tools for making all kinds of legal drafting more accurate and understandable."²¹

*George P. Smith, II,
Instructor in Law,
The University of Michigan
Member of the Indiana Bar*

20. See text accompanying note 2 *supra*.

21. Foreword at xii.