Commonwealth Association of Legislative Counsel

THE LOOPHOLE

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THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel

Issue No. 2 of 2016

Editorial Policies

The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

Submissions and other correspondence about *The Loophole* should be addressed to —

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Disclaimer

The views expressed in the articles contained in this issue are those of the contributors alone and do not necessarily reflect those of the CALC Council.

Contents

Editor's Notes

This issue of the Loophole has a North American flavour. Two of the articles are by authors living in Canada and two are by US authors. They cover a wide range of topics relating to legislative drafting.

We begin with Ian Brown's prescription for ethical insomnia. Although most legislative counsel work within the confines of government offices, they have ethical obligations that are every bit as complex as those of their counterparts in private practice. As the Chief Legislative Counsel of the Canadian Province of Saskatchewan, Ian Brown is well-placed to see and comment on these obligations. He takes as his starting point the ethical codes that apply generally to lawyers in this jurisdiction, and then translates them to a legislative drafting environment.

The next article takes us to the Office of Legislative Counsel of the US Senate. It may surprise some readers to learn that there are such offices in the US. Gary Endicott has spent over 30 years working in one of them. His rise to its head parallels a series of transformational changes reflecting developments on many fronts, including technology, recruitment and drafting approaches. His article demonstrates that there is perhaps more in common between Commonwealth countries and the US when it comes to legislative drafting.

Toby Dorsey is another US legislative counsel with considerable experience, including in the Office of Legislative Counsel of the House of Representatives. His article takes us beyond the confines of the drafting office into the courts. He chronicles how US courts, including the Supreme Court in a recent case called *Yates*, have ignored legislative instructions about interpretive methodology, specifically injunctions against using headings. His article raises questions about the utility of interpretation provisions and the relationship between legislators and courts when it comes to interpretation.

Finally, David Elliott, who has drafted legislation around the world, rounds out this issue with an article he originally prepared as part of a legislative development project. He describes criteria for determining the quality of legislation and considers organizational structures and processes that can be used to attain it. He particularly looks at the Westminster and US Federal models for legislative drafting services and chronicles the strengths and weaknesses of each one.

This issue has much good reading demonstrating how rich legislative drafting is a legal discipline. I would also encourage further contributions to scholarship in this field and invite submissions for publication in the Loophole.

John Mark Keyes
Ottawa,
May, 2016

Upcoming Conferences

Legislative Drafting Conference of the Canadian Institute for the Administration of Justice (CIAJ)

This biannual conference will be held again on ***12-13 September, 2016 in Ottawa, Canada.*** The theme will be the *New Legislative Counsel at the Intersection of Law, Policy and Politics.* It will feature speakers on the challenges legislative counsel face in more dynamic legal, policy and political environments. It will also include practical workshops on important aspects of legislative drafting.

Further details will be available on the CIAJ website: http://www.ciaj-icaj.ca/.

Clarity 2016

Clarity's next international conference will be held in ***Wellington, New Zealand on 3–5 November 2016***. The conference will have a strong focus on practical, interactive learning. We promise compelling keynote speakers along with interactive workshops, case study presentations, panel discussions, mentoring appointments, and 'speed learning' events. There'll be a strong legal theme along with topics relevant to all sectors and industries. See more detail at the Clarity2016 conference website.

International Conference of Legislative Drafting and Law Reform

The fourth annual International Conference of Legislative Drafting and Law Reform will be held at the World Bank headquarters ***in Washington, DC on 10-11 November 2016***. Last year's conference in July drew attendees and speakers from a range of legislative drafting and legal backgrounds, including CALC members. (For more information about last year's conference, see ilegis.org.) Toby Dorsey, the Special Counsel of the United States Sentencing Commission and an associate member of CALC, is on the organizing board of the conference and is the chair of the speakers and agenda committee; they are very interested in having CALC members attend and serve as speakers.

If you are interested in attending, please save the date and plan to come; if you are interested in giving a presentation, please contact Toby Dorsey at tobiasadorsey@gmail.com. He intends to submit more information about the conference when it becomes available

Commonwealth Law Conference 2017

The 20th Commonwealth Law Conference will be held ***in Melbourne, Australia in March 2017***. It will be hosted by the Law Institute of Victoria. The conference will include an extensive program of 48 sessions as well as a gala welcome dinner and social events. Final dates in March 2017 are to be confirmed.

Further information will be available at https://commonwealthlawyers.com/.

CALC Conference

The next CALC Conference will also be held ***in Melbourne 29-31 March 2017***, in tandem with the CLC Conference. There will also be an optional workshop in Sydney on April 4.

The Conference's theme is ***Beginning with the End in Mind – Legislative Drafting in the Context of 21st Century Challenges.*** This theme recognises the role of legislative counsel in seeking to ensure that what they draft will be legally effective and will properly reflect the underlying policy. It also reflects the rapidly changing context in which legislative counsel are drafting, including advances in information technology, and the increasing global prominence of human rights.

The Conference Programme Committee invites proposals for papers that explore this theme in both general and practical terms. Topics of particular interest are:

- anticipating legislation's impact,
- human rights and statutory interpretation,
- drafting and publishing legislation in the digital age,
- legislative approaches to the challenge of corruption,
- legislation enacted or published in multiple languages, and that does or may engage multiple legal systems
- complexity and interconnection in legislation, and
- legislative counsel of the future.

If you would like to present a paper at the conference, please send a proposal to katy.leroy@parliament.govt.nz, including—

- your full name, title, postal address and email address,
- a brief CV,
- the proposed paper's title, and a brief summary of the points to be made.

Each presentation should be 15−20 minutes in length, but a little extra time will also be available for questions.

The deadline for receiving proposals is ***30 June 2016***, but please respond as early as you can.

Further information on the Conference will be available at http://www.opc.gov.au/calc/conferences.htm.

Sleeping Better: Ethics for Drafters

Ian Brown[1]

Abstract:

Drafters play a central role in helping clients develop policy. This article discusses some of the ethical issues that drafters must consider in carrying out their responsibilities and touches on some of the benefits from adopting an ethical approach.

A man without ethics is a wild beast loosed upon this world. ***Albert Camus***

Ethics is knowing the difference between what you have a right to do and what is right to do. ***Potter Stewart***

In civilized life, law floats in a sea of ethics. ***Earl Warren***

Even the most rational approach to ethics is defenceless if there isn't the will to do what is right. ***Aleksander Solzhenitsyn***

There are two types of people in this world, good and bad. The good sleep better, but the bad seem to enjoy the waking hours much more.

1. What is Ethics and Why Should Drafters Bother about It?

The *Oxford English Dictionary* defines ethics as "the science of morals in human conduct." It is concerned with the goodness or badness of human behaviour. Ethics tells us how we ought to behave and is founded on a belief that there is a standard of right and wrong. We find sources for ethical guidelines in both external standards, rules or laws and in our personal conscience. As lawyers, drafters can find guidance in codes of professional

[1] Chief Legislative Crown Counsel, Ministry of Justice and Attorney General, Saskatchewan (Canada). This article was originally delivered to the Joint Annual Conference of the Associations of Parliamentary Counsel and Legislative Counsel in Canada, held in Winnipeg, August 10-12, 2015.

conduct.[2] In the case of drafters who are employed by government, we can also look to the various codes that govern public servants.

Drafters as lawyers are under a duty to act ethically. Acting ethically can be personally costly. But does it also have practical value? Does it help us sleep better at night but make our waking hours less enjoyable? The purpose of this paper is to look at what are a drafter's ethical obligations and to canvass whether acting ethically brings practical benefits.

Do drafters face ethical questions? Certainly. We deal with clients who may instruct us to incorporate provisions that are arbitrary and ignore basic rules of natural justice. We also increasingly deal with clients who have no experience with law making and who need assistance.[3] We advise ministers of the Crown who may not be fully briefed on issues, who may have no legal background and who may lack experience in administering government departments. In some countries, there may also be a climate of corruption or bad governance and elected members who insist on laws that are unjust, immoral or improper. In those circumstances, the drafter has an ethical responsibility to speak truthfully and to recommend appropriate courses of conduct.

This is not a new challenge for drafters. Lord Thring, the first Parliamentary Counsel, provides a vignette of how the *Irish Land Act* of 1870 came to be constructed under the direction of Prime Minister Gladstone:

> The instructions given to me were as usual, to a great extent, verbal ones, conveyed during a series of conferences with Mr. Gladstone. I used to attend at his house generally by myself. I never hesitated to tell him my mind, 'This will not do!' he would then stand up with his back to the fire and make me a little speech urging his view of the case; I then replied shortly till the point was settled. I recollect on one occasion his manner was so vehement that I thought I must have gone beyond bounds in contradiction and began to apologize. His reply was, "Go on as you always have done and make no apologies; if my manner has led you to think that I am offended, I am sorry for it".[4]

I am sure that many contemporary drafters can recount a similar experience.

The American Bar Association Model Rules of Professional Conduct comments on the advisory role of drafters/lawyers:

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[2] Many of the issues that codes of professional conduct deal with are not relevant to drafters, such as the setting of fees, the role of the lawyer as advocate, the preservation of clients' property and advertising and soliciting work. But they do contain insights and principles that can help drafters in settling ethical issues.

[3] Toni Walsh, Senior Assistant Parliamentary Counsel, Australian Office of Parliamentary Counsel, highlights that there is, in contemporary governments, a decline in the capacity of instructing agencies to give drafting instructions. As she notes, "[b]ecause we often find that our instructors have little experience, or access to experience, a certain amount of our time is almost always spent in guiding them through the process". Toni Walsh, "Addressing the Decline of Capacity to Give Drafting Instructions", (2013) *The Loophole - October, 2013*, at 25.

[4] Lord Henry Thring, *Practical Legislation* , 3rd ed.(Edinburgh: Luath Press, 2015), at 21.

> Rule 2.1 Advisor
>
> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

The drafter's role extends beyond being a mere scribe who translates instructions into law. It also extends beyond being a technician who has mastered rules of composition and who has a basic understanding of general law. As one of the key actors involved in the process of developing legislation, the drafter has a central role in shaping laws that are clear, effective and just. In playing that role, the drafter must consider his or her ethical duties.

In this paper, the focus will be on drafters who are employed by government. A special emphasis will be given to the ethical questions involved in shaping proposed legislation and in providing policy advice to clients. The author is not a professional philosopher and does not claim any expertise in the subject of ethics. The comments set out here are the product of my years of practice as a legislative drafter and of my reflections on the experiences had and the lessons learned. This paper sets out my personal thoughts and is not an official statement of policy of the Government of Saskatchewan or of the Legislative Drafting Branch of the Saskatchewan Ministry of Justice and Attorney General. My hope is that the paper will be of practical use to its readers. I would like to acknowledge the comments and helpful suggestions from my colleagues. Whatever faults or gaps appear in this paper are my responsibility.

2. What is the Scope of a Drafter's Ethical Duties?

What is the scope of the ethical duties that are placed on drafters as they perform their work? Many books and articles have been written about the technical aspects of drafting, but relatively few have been written focussing on ethics for drafters. [5]

Each drafter could compile his or her own list of ethical duties. The following is mine.

A. Duty to be Competent

Every drafter has a duty to his or her client to be competent. Chapter II of the Canadian Bar Association's *Code of Professional Conduct* (the "CBA Code") begins with the following:

> 1. The lawyer owes the client a duty to be competent to perform any legal services undertaken on the client's behalf.[6]

[5] Two of the best works focussing on ethical issues for drafters are Deborah McNair, "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective" (2003), 24 *Statute Law Review* 125 and Ann Seidman, Robert B. Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Social Change* (London: Kluwer Law, 2001).

[6] Canadian Bar Association, *Code of Professional Conduct,* (2006) at 5.

The commentary to the Law Society of Saskatchewan's *Code of Professional Conduct* (the "Sask. Code") states, with respect to competence:

> As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.
>
> Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.[7]

Ann Seidman, Robert B. Seidman and Nalin Abeyesekere ("Seidman, et al") say that "Of all the ethical commands to a professional, competence constitutes the most important".[8]

The word "competence" is derived from the Latin word *competere* meaning "sufficient to deal with what is at hand". A competent drafter, then, is one who has sufficient experience, skill and wisdom to deal with the particular instructions he or she is given.

What are some areas of competence that a drafter should develop? These include areas of general competence common to all lawyers and special areas peculiar to the profession of drafting:

1. a knowledge of general legal principles and procedures, including the substance of any constitutional requirements and limitations that apply to the drafter's jurisdiction and the major judicial decisions that affect the jurisdiction's laws;

2. a knowledge of the rules of statutory interpretation;

3. familiarity with drafting standards and precedents used in the drafter's jurisdiction;

4. the capacity to investigate facts, identify issues, ascertain client objectives, consider possible options, analyse circumstances, envisage likely scenarios and develop and advise the client on appropriate courses of action;

5. an ability to write clearly, to properly organize proposed legislation and to compose legislative sentences. Seidman, et. al. note that a drafter "must draft bills in clear, unambiguous language while ensuring that those bills fit appropriately into the existing corpus of laws";[9]

[7] Law Society of Saskatchewan, *Code of Professional Conduct*, (2012) at 16.

[8] Seidman,above n. 5 at 4.

[9] Seidman, ibid. at 45.

6. an understanding of how laws are made in the drafter's jurisdiction in order to explain to clients the process of getting a Bill or statutory instrument drafted and approved and to guide the client through that process;

7. if laws in the drafter's jurisdiction are enacted in more than one language, a familiarity with the other language(s) or, at least, with the challenges that a drafter writing in another language has in developing a version that is equally authoritative;

8. the capacity to be sensitive to the client's political and parliamentary needs, including the need to fulfill any directions from Cabinet or voters, to ensure that a proposed law is publicly acceptable and to make the law acceptable to legislators who will enact the law;

9. a familiarity with technology and an understanding of changes in technology so that, in our era of computer assisted drafting, of online access to legislation and of paperless systems,[10] the drafter can keep abreast of developments in software and hardware and, where required, get the necessary training. [11] Proper use of technology can result in greater efficiency and accuracy in preparing drafts, while reducing costs.

With respect to the sphere of competence, the drafter must also possess the ability to recognize his or her limitations. No drafter is competent or has experience in every field of law and policy. In cases where the drafter admits his or her limits, the drafter should be prepared to involve others who have the necessary experience or expertise. In areas requiring technical or scientific expertise, such as controlling diseases, regulating the drilling of oil wells or constructing roads, the drafter will have to rely on the client's knowledge and experience.

Finally, the duty to be competent imposes an obligation for the drafter to engage in continual learning and improvement. I once heard a drafter[12] say that there was only so much to learn about drafting and that she had learned all there was to know. That approach is wrong-headed. Drafting, like every other field of law, continues to evolve. New judicial decisions affect how laws are interpreted and written. A drafter must keep abreast not only of changes in the specialized field of drafting, but of developments in other areas of law and of economic, policy and societal changes that will influence how laws are written and administered. Over the years, for example, the public's concept of spousal relationships, family structure, gender, sex, and mental and physical disabilities have changed and the drafter should understand how these changes affect the wording of legislation. As well, the

[10] Saskatchewan successfully introduced a paperless system for Cabinet and for Cabinet committees in 2010. All documents, including legislative documents, are now submitted for collaboration, review and approval only in an electronic format.

[11] This list is developed, in part, from the definition of "competence" in the Sask. Code. Tobias Dorsey in *The Legislative Drafter's Deskbook: A Practical Guide* (Alexandria, Va.: TheCapital.Net. Inc., 2006) at 13 to 15 also presents a useful list of knowledge, skills and experience that a drafter should possess.

[12] Not a Saskatchewan drafter.

development of the internet and the greater use of social media mean that governments must now communicate with citizens in new ways. It is now common, for example, in Saskatchewan legislation for a minister or ministry to be required to post important information on a publically accessible website in addition to traditional methods of printing notices in the official Gazette or in a newspaper and to permit applications and requests for information to be made electronically.

Drafters should take advantage of opportunities to develop their skills and to expand their general knowledge of laws and of government and legislative procedures and policies. Much of what drafters learn comes from practical experience and learning from senior counsel.

I also suggest that there is a duty for experienced drafters to share what they have learned with junior drafters and to act as a mentor. Any competencies that a drafter has developed are the result, in part, of an investment of time, energy and money by others, including employers who provide opportunities to learn and senior colleagues who pass on experience and wisdom. That investment can be repaid by passing on what we have learned to others. Transferring learning to others also helps to reinforce and deepen the drafter's understanding. Someone once remarked that the best test of whether you really understand a concept or a process is to try to teach it to someone else.[13] Helping others develop their potential permits the drafter to share the drafting load and also gives the drafter an opportunity to develop new areas of expertise.

B. Duty to be Loyal to the Client

The word "loyal" encompasses the notion of being true or faithful in carrying out one's legal obligations and of providing optimal service.[14] In the sphere of private law, this duty encompasses the duty to avoid conflicts of interest and to place the client's interests above personal interest. If a client has deposited personal property with a lawyer, the lawyer must deal with it as a careful and prudent owner would and make every reasonable effort to preserve it.[15]

For a drafter employed by a government, the duty arguably encompasses a duty to refrain from public criticism of the government.[16] It also includes the duty to provide fair and

[13] Attributed to Richard Rusczyk.

[14] John Ayto, *Bloomsbury Dictionary of Word Origin* (London, Bloomsbury Publishing Limited, 1990) notes that "loyalty" and "legal" derive from the same Anglo-Saxon word, *leal*. The semantic link is "faithfulness in carrying out one's (legal) obligations".

[15] See, for example, the rules set out Chapters 2.04 [Conflicts] and 2.05 [Preservation of Clients' Property] in the Sask. Code and Chapter VI [Conflict of Interest Between Lawyer and Client] in the CBA Code.

[16] For a thorough discussion of the duty to refrain from public criticism see the paper developed by the Treasury Board of Canada Secretariat, *Duty of Loyalty*. The paper also refers to the seminal case on the duty of loyalty owed by public servants, *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455 ("*Fraser*").

impartial service to the best of the drafter's ability, to be honest in providing advice and to use his or her employer's and client's property with respect and responsibly. By adhering to the duty of loyalty, a drafter's employer is able to trust him or her both at work and outside the workplace.

For a drafter a key question arises, "Who is the client and to whom is this duty owed?"[17] For a drafter employed by government, the client includes the following.

(1) Instructing minister or ministry

The client will include the minister or ministry providing instructions. There is a duty to follow the instructor's wishes and to prepare a draft that, to the drafter's best ability, accomplishes the intended goals. In accomplishing this task, the drafter must put aside personal preferences and biases. If the proposed legislation is legally and constitutionally sound, the drafter has a duty to assist the client even if the goal of the legislation is not one that the drafter personally approves of. Deborah McNair correctly notes:

> The legislative drafter has a duty to be non-partisan. While the drafter may be putting forward legislation for the Parliament or government of the day, they must still stay out of the political fray and remain impartial.[18]

(2) Government as a whole

However, the client for a government-employed drafter extends beyond the instructing minister or ministry. It also includes the government as a whole. An instructing officer may propose legislation that conflicts with the interests or powers of other ministers or ministries. The drafter has a duty to advise the instructing officer of any potential conflicts and to encourage the instructing officer to consult with other ministers or ministries to resolve any issues. An instructing officer may also propose legislation that conflicts with priorities, guidelines or directives set by Cabinet. The drafter has a duty to point out those conflicts and to prepare a draft that is consistent with Cabinet's priorities and directives. If the instructing officer does not follow the drafter's advice, the drafter must ensure that responsible officials at the Cabinet level are made aware of the issues so that they can sort out any conflicts and see that the instructing officer complies with Cabinet's wishes.

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[17] Professor Alan Hutchinson of Osgoode Law School comprehensively canvasses the issue of who is the client in the context of the private bar. His article has helpful insights for those lawyers who work for lawyers who are employed by government. See Alan C. Hutchinson, "Who are 'Clients'? (And why it Matters)" (2005), 84 *Canadian Bar Review* 411.

[18] McNair, above n. 5 at 131. Reed Dickerson, in *The Fundamentals of Legal Drafting*, 2nd ed. (Toronto: Little, Brown & Company, 1986), trenchantly comments, at 11:

> He [the drafter] must be an emotional oyster. However deeply he may feel about the wisdom of the policy he is called on to express, he must submerge his own feelings and act with scrupulous objectivity. Within the bounds of legality and professional morality, he should do his utmost to carry out his client's purpose even when he strongly disagrees with it.

In our office, we have always stated that "our client is Cabinet". An individual minister or ministry may provide instructions. But, Cabinet, not the instructor, assigns the priority of the proposed Bill, a regulation or a statutory instrument within our office by identifying which Bills, regulations or statutory instruments are the most important and communicating how urgently a draft is required. As well, the final draft is subject to approval by a Cabinet committee and then Cabinet. A drafter from our office sits as an advisor to the Cabinet committee. In that capacity, we are able to raise issues respecting conflicts and assist in obtaining a resolution. We are also able to communicate to client ministers and ministries any priorities, directions and guidelines given by Cabinet. Being part of the Cabinet committee also gives our office an aura of authority. Individual ministries are inclined to respect our advice and accept our suggestions. They realize that we are trying to promote their best interests as well as the best interests of the government as a whole.

In several Canadian jurisdictions, the drafting office that serves as legislative counsel to government also serves as parliamentary counsel for the legislative assembly. This dual role can give rise to a conflict of interest where the drafting office is asked by a private member to draft a Bill or a motion on the same matter that the government has provided instructions. In those cases the drafting office must make every effort to avoid a conflict by, for example, assigning different drafters to work for the government and the private member and establishing procedures to prevent one party's confidential information being disclosed to the other party. [19]

(3) Legal system and the public

Beyond the government as a whole, the drafter as lawyer has a duty of loyalty to the legal system and to the public.[20] The various Codes of Professional Ethics provide some general guidance. For example, Chapter XIIII of the CBA Code says:

[19] See the rules set out Chapters 2.04 [Conflicts] of the Sask. Code.

[20] Professor Hutchinson, above, n. 17, at 412, states,

> While it is essential to identify who is and who is not a client as the triggering event for most legal and ethical responsibilities, it is also important to emphasise that lawyers' legal and ethical obligations do not start and finish with clients; there are definite obligations to non-clients. Moreover, although the primary relationship is that between lawyers and their clients, the duties to which it gives rise are not absolute; they are foundational and fundamental, but they are not all-consuming.

Following Professor Hutchinson's argument, if a ministry or Cabinet are our "client", then the drafter working for a government must consider the interests of the legal system and the general public, the "non-client". The duty to consider the interests of the general public is also founded on the oath or affirmation of office taken by each lawyer on entering the profession. The Saskatchewan oath, set out in Form A-14 of the *Rules of the Law Society of Saskatchewan*, is as follows:

> "I DO SOLEMNLY SWEAR: (or affirm)
>
> THAT I will as a lawyer conduct all causes and matters faithfully and to the best of my ability. I will neither seek to destroy any person's property nor will I promote suits upon frivolous pretences. I will not pervert the law to favour or prejudice any person but in all things will conduct myself truly and with integrity. I will uphold the Rule of Law and the interests of the citizens of Canada and of the Province of Saskatchewan".

> The lawyer should encourage public respect for and try to improve the administration of justice.

As one of the key actors in shaping legislation, the drafter has an opportunity to see that it is consistent with the rule of law, that it promotes transparency and that it incorporates principles of natural justice. The drafter must consider not only what will promote the instructor's goals, but also what will preserve public rights and protect the public interest. Deborah McNair comments:

> When the drafter works in a public sector environment there is the added expectation that part of the role of the drafter will be to act in the public interest. More than other legal practitioners, the legislative drafter's role is to ensure that the development and elaboration of the law includes respect for the rule of law and adherence to it, even though the ultimate responsibility for compliance with the Charter may rest with others.[21]

Protecting the public interest requires that the drafter carefully analyze a client's instructions and ask questions:

> (i) Does the proposed law set out clear and fair rules?
>
> (ii) Will those governed by the proposed law be given notice of any decisions affecting them or an opportunity to make representations to the decision-maker?
>
> (iii) Will those affected be provided with opportunity to appeal those decisions to an impartial body?

Several years ago, our office received instructions for a proposed law that said, "The minister reserves the right to refuse, deny or approve an application". We asked the instructing officer on what grounds would the minister make his or her decision, would the applicant be given written notice of the decision or the right to appeal that decision if the applicant felt that he or she was unfairly treated. The resulting discussions helped the client better understand the minister's responsibilities and resulted in a better law. As a former chair of our Cabinet subcommittee, Hon. E.B. Shillington, remarked:

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[21] McNair, above n. 5 at 133. The comments of Lord Reid in *Rondel v. Worsley*, (1969) 1 A.C. 191 at 227, are also relevant here:

> . . . as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.

While Lord Reid's comments were made with respect to the immunity barristers have in the context of litigation, they arguably apply to drafters. As a public law lawyer, the drafter must consider his or her duty to the public and provide advice and suggestions to his or her clients based on the public interest even if the advice conflicts with the interests of the client.

> The only proper way to interpret legislation is not how a good minister and good officials will administer a law but how a badly intentioned or badly advised minister or officials could misuse the law.[22]

His comment serves as a useful guide for all those involved in preparing legislation.

(4) Duty to decline or resign?

What is the drafter to do if he or she considers that the duty to the instructing client conflicts with a duty to the public? What if the client proposes a measure that, in the drafter's professional opinion, would be illegal, unconstitutional or contrary to the public interest? As David Marcello of Tulane University observes, "[t]hose legislative drafting personnel who are lawyers have dual ethical obligations - to the representation of a client and to the administration of the justice system - that may sometimes conflict."[23] These questions are more acute in a jurisdiction where there is no history of good governance and where respect for the rule of law is non-existent.

If a drafter believes that a conflict exists, he or she has a duty to inform the client about the perceived conflict and explain why the drafter believes the conflict exists. If the drafter has doubts about a perceived conflict, the drafter may wish to discuss the matter with a trusted and experienced colleague to obtain advice. If available, the drafter may also speak with a senior official who is in a position to understand the issues and seek a resolution.

A number of years ago, our office was asked to draft a regulation exempting a corporation from the application of an Act. The exemption was considered an important element in the government's economic policy. However, there was no authority in the Act to exempt corporations and our office declined to draft the regulation in the face of urgent requests from important decision-makers. Eventually, the government accepted our decision and chose another means to accomplish its objective.

If a client insists on following a course of action that the drafter believes is outside the law, disrespectful of the legal system or contrary to the public interest, the drafter may have to consider withdrawing his or her services or, in the case of a drafter in public employment, resigning. Speaking of a comparable situation in the public law sector, the CBA Code says:

> If the client wishes to adopt a course that would involve a breach of this Rule [Chapter IX - treating the court or tribunal with courtesy and respect], the lawyer must refuse and do everything reasonably possible to prevent it. If the client persists in such a

[22] See also Mr. Justice Stephen's remark in *Re Castioni*, [1891] 1 Q.B. 149 at 151:

> It is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.

[23] David Marcello, "The Ethics and Politics of Legislative Drafting), (1995-1996) 70 *Tulane Law Review* 2437, at 2453.

> course the lawyer should, subject to the Rule relating to withdrawal (Chapter XII), withdraw or seek leave of the court to do so.[24] [my explanatory addition]

If a drafter does withdraw or resign, it must be done "for good cause and upon notice appropriate in the circumstances".[25] When withdrawing or resigning, the drafter must respect the Duty to Hold Information in Confidence, discussed below. The drafter should not disclose any instructions, confidential information or materials provided to the drafter, unless the matter involves "an imminent risk to an identifiable person or group of death or serious bodily harm."[26] If public criticism is made, it must be true, it must be made in a responsible way, it should be made only after all internal recourses have been exhausted and it must involve a matter that is in the public interest.

But, as Seidman, *et al.*, note:

> Matters rarely come to such a pass. Drafters can almost always find a constitutional way of addressing the difficulty a ministry wants resolved. That skill makes an ingenious drafter particularly valuable to a government.[27]

C. Duty to be Confidential

In the course of receiving instructions, a drafter is privy to sensitive and confidential information. For those drafters in public employment, this may include advanced knowledge of budget measures, of the personal opinions of ministers and Cabinet on controversial subjects and of proposed plans to deal with public issues. This is one aspect of the drafter's work that makes the job interesting and rewarding.

But, the privilege also imposes a duty on the drafter to hold that information in confidence. The ability to hold information in confidence is essential to developing trust between the drafter and the instructing ministry or minister. Deborah McNair summarizes this well:

> The duty of confidentiality is one of the fundamental principles on which the solicitor-client relationship is built. It is a rule which establishes what information should be withheld or disclosed. As mentioned earlier, the confidentiality of information is crucial to the work of the drafter because of the close relationship between the drafter

[24] CBA Code at 63.

[25] CBA Code Chapter XII, at 85. See also the Sask. Code, section 2.07(1) at 70.

[26] CBA Code at 17. See also the Sask. Code, section 2.03(3) at 33. The Treasury Board of Canada Secretariat, based on the *Fraser* case, that a public servant's duty to refrain from public criticism is displaced where:

1. the Government is engaged in illegal acts;
2. Government policies jeopardize life, health or safety; or
3. the public servant's criticism has no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability.

[27] Seidman, above n. 5 at 282.

> and the legislative assembly, or Parliament, in the case of parliamentary counsel, and Cabinet, in the case of a government drafter.[28]

How far does the duty to be confidential extend? Can a drafter working for government share proposed plans of one ministry with other ministries? The practice of our office is to not communicate the proposed plans of the "lead ministry" with other ministries or agencies unless the lead ministry has given its permission. If asked by a ministry whether another ministry plans to introduce legislation on a subject, we direct them to officials of that ministry.

Can the drafter discuss work with family or friends? My practice has been to maintain silence. The Code cautions:

> A lawyer should avoid indiscreet conversations and other communications, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified.[29]

And, it goes almost without saying, that confidential information should never be disclosed to the public. The duty to maintain confidentiality exists not only while the drafter is employed by his or her public employer. It remains even after the drafter has retired or resigned.[30]

D. Duty to be a Good Servant

The drafter also has a duty to provide clients with service "that is competent, timely, conscientious, diligent, efficient and civil."[31] A drafter must be more than competent. He or she must act and think as a servant and provide the best possible service to his or her client.

Service is arguably not a fashionable topic. Many may aspire to be masters, few aspire to be servants. We no longer conclude our letters, as Dr. Johnson did, with the formula "Your most Humble and Obedient Servant."[32]

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[28] McNair, above n. 5 at 149. The commentary on this issue in the Sask. Code says the following, at 30:

> A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

[29] Sask. Code at 31.

[30] The commentary to rule 3.03(1) of the Sask. Code states, at 30:

> A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

The duty to maintain confidentiality even after ceasing to be an employee raises some interesting issues. For example, if a drafter resigns his or her position with one government and obtains employment with another government, can he or she disclose confidential information obtained during the former employment? I would argue, no.

[31] Sask. Code at 22.

But drafters fit within the definition of a servant, being "a person who is employed by another to do work under the control and direction of the employer."[33] The drafter aids, supports, advises and carries out, but does not lead or direct. As a good servant, the drafter will succeed only if those who instruct and employ him or her succeed. A drafter must adopt and maintain a servant's attitude when dealing with instructing clients.

What are some qualities that make for a good servant? Each drafter could compile factors that he or she considers essential. My list would include the following.[34]

(1) Promptness

A drafter must respond promptly to requests for assistance. Phone calls, emails and other messages should be handled in a timely fashion. If a client requests immediate assistance, the drafter must try to either do the requested work or explain why it cannot be handled on short notice and work with the client to investigate possible solutions to the client's needs to ensure that the client is not prejudiced.

(2) Full reporting

The drafter should keep the client informed about the progress of the drafting work and give the client a full explanation of any decisions made by the drafter. If the drafter has access to critical or helpful information that is not otherwise confidential, the drafter should communicate it to the client.

(3) Honesty and candour

The drafter must provide the client with an honest opinion about the client's instructions. The Sask. Code counsels: "The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results."[35]

In providing advice, the drafter must consider what is in the true best interests of the client, not what the drafter thinks the client may or may not want to hear. Francis Bacon is candid about the trap that kings may fall into:

> A king, when he presides in counsel, let him beware how he opens his own inclination too much, in that which he propoundeth; for else counsellors will but take the wind of him, and instead of giving free counsel, sing him a song of placebo.[36]

A drafter must not provide placebos.

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[32] See, for example, Dr. Johnson's 1755 Letter to Lord Chesterfield, http://www.johnderbyshire.com/Readings/chesterfield.html.

[33] *Black's Law Dictionary*, 9th ed. (St. Paul, Mn: West, 2009) at1490.

[34] This list is developed in part based on the Sask. Code (see 21) and the CBA Code (see 7 and 8).

[35] Sask. Code at 22.

[36] Francis Bacon, "Of Counsel", *Essays* (1601): http://www.bartleby.com/3/1/20.html.

(4) Integrity

Tell the truth. If the drafter has made a mistake, be honest and admit it. Hiding errors makes a tangled web. As Mark Twain remarked, "If you tell the truth, you don't have to remember". Telling the truth adds to the drafter's reputation. Honest admission of mistakes makes the drafter believable, encouraging others to place their trust in him or her. It also helps the drafter to sleep better.

(5) Courtesy and respect

Clients must be treated with respect.[37] Tact and diplomacy are important qualities. There is a story about a former drafter in our office who was increasingly vexed by a particular client's pickiness and demanding approach. After enduring much vexation, the drafter boiled over, rose up and began to chase the client around his desk. I am sure that we have all had times when we have been irritated to the point of frustration by a client. In those circumstances, the drafter should call a break and give himself or herself an opportunity to calm down. A drafter who works hard at understanding human nature has the capacity to be even-tempered.

As well as treating clients with respect, the drafter must develop good relations with colleagues and make an effort to treat support staff with respect. A drafter depends on the good work of support staff and his or her success depends on the support staff doing their job well. If someone outside the office unfairly disparages or disrespects support staff, the drafter should come to their defence.

E. Duty to be a Good Counsellor ("policy conundrum")

Perhaps no issue is more vexing, troublesome and frustrating for drafters than the issue of how involved they should be in helping to formulate policy for their clients. Our drafting office is increasingly asked for help in making policy choices. Drafting instructions arrive in an incomplete state with many issues unresolved or not addressed. As well, instructing officers are now more likely to be drawn from those who were active in the field and not trained in policy development.[38] They lack expertise in policy development, are novices in preparing legislation and have limited familiarity with legislation. As a result, they have difficulty in providing good instructions and in understanding the questions being raised by the drafting office. Anecdotal evidence suggests that this is a common challenge for drafters working in other jurisdictions.[39] Moreover, because of restraint in government financing, many instructing officers find themselves performing other duties. There are few full-time

[37] Clause 6.02(1) of the Sask. Code states "A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice".

[38] One of our drafters recounts receiving instructions respecting fisheries legislation from an instructing officer who told our drafter, "Last year I was in a boat [administering the legislation]". Now, he was being asked to help write it without any policy or procedural experience.

[39] See Walsh, above n. 3.

legislation officers and, for many, dealing with legislation has become a side-of-the-desk project to be completed when other duties have been attended to.

Additionally, drafting offices are being asked to produce legislation under greater time pressures. A crisis or public controversy arises and governments face the demand to react at once. Social media and outcries through the public media force elected representatives to respond now and to respond with wisdom and clarity. In turn, elected representatives ask public servants to help them in formulating a quick response. Great trust is placed on the public service's ability to understand the issues, sort through the possible alternatives and recommend a satisfactory solution. For drafters, this can mean receiving instructions that have been quickly prepared, that have not had the added value of wide consultations and that have gaps.

Here is the conundrum for drafters. They are asked for help and advice in formulating policy for subjects in which they have little or no expertise. Drafters are not policy experts. The traditional view, called "the drafter's myth" by Seidman, et al., is that drafters "never deal with policy."[40] Being asked to help set policy creates unease. The average drafter probably asks himself or herself, "Who am I that I should be making policy choices"? Yet, someone has to help establish the policy and make recommendations to the elected representatives. If the instructing officers and client ministries cannot do so, then who should?

The first thing a drafter should do is be realistic. Drafters have always been looked to for advice in shaping the contents of legislation and will continue to be looked to. It is part of the job we are paid to do. Over 100 years ago, Lord Thring commented:

> The sum of the matter is this, that to prepare a good Bill that draftsman must receive sufficient instructions, but they will necessarily be short, and he must exercise a large discretion in filling in the gaps.[41]

The drafter's role in exercising discretion has remained.

The second thing a drafter should do is recognize that a drafting office brings significant skills and resources to the task of drafting legislation. These make the drafter's role essential and valuable. What are some of the unique skills and resources that a drafting office can offer?

(1) Analytical skill:

One of the chief skills a drafter offers is his or her ability to undertake a detailed and expert examination of a proposed piece of legislation. Drafters are trained to think carefully and to spot potential issues. It is often not until pen is put to paper and a first draft is prepared that

[40] Seidman, above n. 5 at 30.

[41] Thring, above n. 4 at 25. For the concurring opinion of contemporary drafters see Stephen Laws, "Giving Effect to policy in legislation: how to avoid missing the point", (2009) *Loophole*, Special Edition 9 February 2011 at 66; and Justice V.C.R.A.C. Crabbe, "The Role of Parliamentary Counsel in Legislative Drafting", United Nations Institute for Training and Research (UNITAR): Geneva, 2000, Document No. 11.

important issues are discovered. As Geoffrey Bowman observed:

> The popular belief is that the drafter's main function is to turn policy into some kind of special statutory language. This is a misconception. The drafter's main and most valuable function is to subject policy ideas to a rigorous intellectual analysis. It is no good putting onto the statute book something that will not stand up. It has to stand up to scrutiny in Parliament and (once enacted) to scrutiny by practitioners and the courts. If the analysis means that ideas collapse, the client will be sent away to think again or might even conclude that the particular project should be abandoned.[42]

(2) Familiarity with the statute book and relevant cases:

A drafter will have more knowledge of the statute book and relevant cases than his or her instructors. He or she will also be acquainted with similar legislative initiatives that have been or are to be followed within his or her jurisdiction. And, in our era when drafters have access to electronic versions of legislation and cases throughout the world, the drafter can also search for useful precedents and ideas in other jurisdictions.[43] As a result, the drafter is able to advise on possible alternative provisions, on useful precedents that can be adopted with or without modification, and on consequential and transitional matters that the instructor may not have thought about.

(3) Knowledge of the procedures for enacting legislation:

Many instructors have limited or no previous experience with legislation. An instructing office may find the process bewildering and intimidating. A drafter can help by guiding the instructing officer through the process, explaining the steps that are required to have their legislation enacted, advising about the time lines involved and providing assistance with the explanatory materials that the instructing officer may be required to prepare.

(4) Knowledge of government and Parliamentary preferences:

The government and Parliament (or the local Assembly) set preferences for matters they expect to see incorporated in legislation. These include notice requirements, respect for private property, limits on powers that may be delegated to individual ministers or public bodies, standard regulation making powers and how regulation making powers are exercised. The drafter is able to make the instructing officer aware of these preferences and help shape provisions that will enable the proposed legislation to be acceptable to decision makers. As Lord Thring is reputed to have said, "Bills are made to pass as razors are made to sell."[44] In doing his or her work, the drafter can advise on the appropriate wording to

[42] Sir Geoffrey Bowman, "Why is there is Parliamentary Counsel Office?" (2005), 26 *Statute Law Review* 69 at 70.

[43] In Saskatchewan, we regularly check other Canadian and Commonwealth jurisdictions for precedents and ideas.

[44] For the origin of the aphorism, see G. Engle, "Bills are made to pass as razors are made to sell" (1983), 4 *Statute Law Review* 7.

make the Bill saleable and on a logical arrangement of provisions to make the legislation clear and comprehensible.

(5) Access to other professional help

When faced with questions beyond his or her expertise or experience, a drafter in government employment is not alone. Colleagues in other branches and ministries can provide help on legal, scientific and technical matters. These are contacts that a practitioner in private practice is less likely to ~~not~~ have.

(6) Editorial and support resources

The drafter does not work on his or her own.[45] A drafting office also includes one or more editors who can review the legislation for grammatical and mechanical matters and who can provide suggestions to enhance consistency of wording and logical presentation of provisions. As well, a drafting office has administrative support staff who can attend to formatting, developing forms and publishing legislation. These are of considerable benefit to every drafter and to their instructors.

(7) Using language clearly, concisely and accurately

The drafter learns through training and experience the "basic discipline"[46] of using language clearly, concisely and accurately. Writing is what drafters do for a living. An experienced drafter is able to advise his or her client how to organize the provisions of a proposed Act or regulation and to write the proposed legislation to avoid inconsistencies, vagueness and ambiguities. He or she will aim to make the final product consistent, readable and effective. Instructors rely on the drafter for these skills.

In light of the drafter's skills and resources, the drafter has a duty to assist a client with the contents of proposed legislation and not just the final wording. But how far should the drafter's role extend? One commentator, Paul Delnoy, argues that "the legislative drafter should be responsible for not only the norm's form but also its substance."[47]

With respect, I suggest that the drafter's duty does not extend to being responsible for the substance of legislation. The drafter is a guide and an advisor, but not the final decision maker. It is the client who will be responsible for administering and enforcing the legislation and who will bear the final consequences of the policy choices that are made. It is the client who must make the final decision. As Elizabeth Grant cautions:

[45] "No man is an island entire of itself" (John Donne). It is wise to remember how much we need and rely on the support of others to do our work well.

[46] Reed Dickerson, above n. 18 at 353-354, calls legal writing ". . . a basic discipline, the most basic of all disciplines. ('Skill' is the academician's semantic putdown)".

[47] Paul Delnoy, "The Role of Legislative Drafters in Determining the Content of Norms", (Ottawa: Justice Canada).

> [. . .] when a legislative drafter is asked to become the policy maker, it is especially important that the drafter recognises the situation and eschews any temptation to become the one who decides what the law should be.[48]

The drafter has a duty to keep the client fully informed about the proposed legislation and to explain matters sufficiently so that the client can make an informed decision[49]. Tobias Dorsey provides a good summary of the drafter's duty:

> The process of drafting is, more than anything else, a process of spotting, presenting and resolving issues. Every drafting assignment has issues; some are policy issues, some are technical issues, but all require judgment and decision. Policy issues are for the client to resolve, but the client can't resolve an issue without being aware of it.
>
> And so, the most fundamental part of the drafter's job is to spot issues, present them to the client, and help the client think through them in an informed way.[50]

The drafting office does, though, stand in a unique position compared to others who may be advising an instructing officer. A drafting office has independent status.[51] Its position as advisor to the Attorney General gives it the authority to refer any issues or conflicts to the Attorney General for consideration. It also makes the drafting office the "internal guardian" of values related to the law, including respect for individual rights and liberties and the rule of law. In Saskatchewan as in a number of other jurisdictions, the drafting office sits with various Cabinet committees as an advisor. This adds to the office's influence and results in the office's advice being sought after and respected.

The client makes the final policy choices. But, a wise client will heed the advice and recommendations of his or her drafter.

Summary

Drafters and drafting offices have a duty to act ethically. This duty includes the duty to be competent, to be loyal to the client, to hold the client's proposals in confidence, to provide quality service and to act as a guide, educator and counsel, including acting as a guide on the policy content of legislation. Ethical practice develops trust and is practical. It is in the drafter's self-interest to be ethical. A drafter who has a reputation for candour, honesty, fairness, expertise and professionalism will find it easier to develop a close working relationship with clients. Clients are more likely to accept the advice of an ethical drafter and to understand that the advice the drafter is providing, even if unwelcome, is in the clients'

[48] Elizabeth Grant, "The Wavering Line between Policy Development and Legislative Drafting" (2011) *The Loophole*, 58 at 62.

[49] David Marcello, above n. 23 at 2460.

[50] Tobias Dorsey, above n. **Error! Bookmark not defined.** at 4.

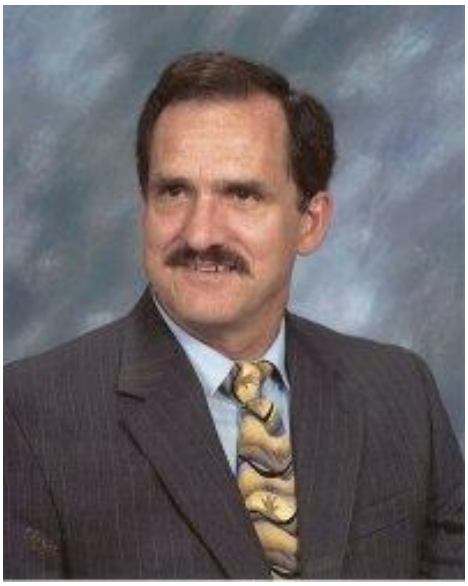
[51] See Edward Page, "Their Word is Law: Parliamentary Counsel and Creative Policy Analysis" [2009] *Public Law* 790 at 809.

best interests. Ethical practice helps one to sleep better and it also helps to enjoy the waking hours.

In my experience, being a drafter can be rewarding. It involves hard work and discipline. But it also provides the opportunity to be involved with significant public issues and to help in shaping public policy. As drafters, let us dedicate ourselves to improving our skills and to serving our colleagues and clients faithfully and expertly.

Changes in Legislative Drafting and Procedure in the US Senate over the Last 30 Years

Gary Endicott[1]



Abstract

This article describes the significant changes in legislative drafting and procedure that have taken place over the past 30 years in the Senate Office of Legislative Counsel of the US Congress.These changes principally relate to the Office's increasing workload, the introduction of computer technology, improvements to recruitment and training and the adoption of a uniform drafting style.

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Introduction

Helen Dewar (a famous Washington Post reporter who covered the Senate for 25 years) once said "The United States Senate has three basic speeds: slow, slower and stop." Although she may have been accurate in describing the normal pace of legislative activity in the Senate, her observation doesn't really apply to changes in legislative drafting and procedure over the last 30 years. During the 34 years I've drafted legislation for the Senate working for its Office of Legislative Counsel, I've witnessed and been a part of remarkable changes in legislative drafting and procedure in the Senate.

Increased Workload

The growth in the Senate's use of its Office of Legislative Counsel has been anything but slow, slower, or stop over the last 30 years.

[1] Legislative Counsel, Senate Office of Legislative Counsel, US Congress.

In the 97th Congress (1981-82) (my first Congress), the Office received 9,221 requests for legislative drafts that were drafted by 20 attorneys for an average of 460 drafts per attorney for that 2-year period.

In the most recent full Congress (113th Congress; 2013-2014), the number of requests received by the Office increased 522% over the previous 30 years as the Office prepared 50,698 requests during that Congress. During 2015 when the Senate returned to regular order, our final file count indicates that the Office prepared over 31,501 files for the Senate, which is 29% more than the Office prepared during 2013 (the comparable latest year). Interestingly, the number of full-time Senate staffers has remained relatively constant over that period, with 6,097 full-time Senate staffers in both 1981 and 2009.

Although the number of Senate staffers may have remained the same, the dramatic growth in the use of the Office by the Senate is probably due to several factors, including -

- the increase in the use of computers to generate and prepare requests;
- increasing partisanship in Washington;
- the growing size and complexity of Federal law and legislation;
- the increasing rate of turnover among Congressional staff outside the Office; and
- the ability of the Office to meet the growing demand with a high quantity of professionally drafted legislation and institutional knowledge.

Although Senate offices are not required to use the Office, all authorizing committees of the Senate and over 90% of other Senate offices use the Office to draft their legislation.

Improved Productivity

If "necessity is the mother of invention" as the English proverb tells us, the Office of the Legislative Counsel of the Senate has virtually reinvented itself over the last 30 years to meet the tremendous 522% increase in the demand for its legislative drafting services with a relatively modest 70% increase in the size of the Office . This transformation has included everything from changing the structure of the Office to the tools attorneys use to draft legislation and interact with Senate clients.

Teams

When I learned to draft legislation for the Senate over 30 years ago, the Office was really more like a collection of independent contractors with individual attorneys who had primary responsibility for drafting legislation dealing with specific subject matter areas. If this approach was workable when the demands placed on the Office were relatively small, it was ill-suited to the new demands placed on the Office during the Reagan presidency and beyond, to draft voluminous legislation such as the 576-page Omnibus Budget

Reconciliation Act of 1981 (Public Law 97-35, 95 Stat. 357) with multiple titles covering a wide range of subject matter areas and eight subsequent annual reconciliation bills.

To deal with its increasing workload, the Office established 6 teams composed of 5 to 8 attorneys per team that were responsible for drafting legislation under the jurisdiction of one or more Senate committees (e.g. a natural resources team). The establishment of teams of drafting attorneys allowed the Office to have the flexibility and resources to respond to, and meet, the growing demands placed on the Office for ever-changing areas of active legislation.

Drafting Legislation On-Screen

Although some of the younger attorneys in the Office may think I originally drafted legislation using stone tablets or quill pens, the Office did use a more traditional approach for drafting legislation in the past whereby attorneys wrote or dictated their drafts and staff assistants prepared drafts on the Office computer system.

If this approach was feasible when the volume and speed of demands for legislation were relatively modest, it was too cumbersome to meet the growing demands placed on the Office to prepare numerous budget reconciliation, tax, and other bills and seemingly countless amendments.

To help attorneys meet the growing demands for legislation, the Office installed a computer with word-processing software at the desk of each attorney for their use as drafting tools to craft legislation directly on their screens, using staff assistants only to input large quantities of new text or edits.

Conversion to Windows-based XML Word Processor

When I first started in the Office, the staff assistants of our Office used the same word processing software as Government Printing Office (GPO) to manually insert GPO printing codes for each paragraph of new text. This enabled the GPO to easily print legislation prepared by the Office, This word processing and printing system allowed staff assistants to create documents for the sole purpose of printing documents; however it was not optimal for highly trained attorneys to be forced to enter numerous printing codes to draft legislation. The current system was also not well suited to multiple uses by other offices of legislation prepared by the Office.

The Office evolved through a couple of DOS-based word processing systems and today uses a Windows-based system customized by the Senate called LEXA to draft legislation. LEXA appears to be much like MSWord to new attorneys, with formatting on the screen that resembles printed bills but with no printing codes appearing on the screen (making it easier for attorneys to focus on drafting rather than printing codes) but with XML tags inserted in

the background so that the Library of Congress and other users of our electronic files can exchange data with the Office and use the XML tags to enhance their databases.

Conversion to Internet and On-line Legal Research Databases

Mark Twain once said "Good friends, good books, and a sleepy conscience: this is the ideal life". Mr. Twain would have felt right at home in the Office 30 years ago when the halls of the Office were lined with law books which Office attorneys used to draft legislation.

Although the halls of the Office are still lined with law books, the reality is that the attorneys in the Office now heavily use online legal research databases to do the research necessary to draft Federal legislation. They can now use powerful online tools to retrieve and search up-to-date versions of the United States Code and regulations, cases that interpret or affect Federal law, and access legislative support, executive agency, and other websites that provide useful information on the myriad subject areas in which they draft Federal legislation.

Electronic Communication with Clients

When I first arrived in the Office, Senate clients made their legislative requests to the Office by phone, memoranda, or drafts or in meetings and Office attorneys prepared printed versions of legislation, which were delivered or faxed to clients, or picked up by them.

As technology advanced and the workload increased, most of the communication between Senate clients and the Office has now become electronic. The Office receives most of the requests from Senate clients via email and the Office uses email to send the clients PDFs of requested legislation. In addition, attorneys may attach MSWord-lock versions of their legislation (that enable clients to use MSWord to indicate desired edits) and redlines showing differences between versions of legislation prepared by the Office.

Improved Recruitment and Training

In the past, the Office had a more informal and personal method of recruiting and training. Limited recruitment and interviewing of new attorneys would be conducted and new attorneys would be trained exclusively by assigning them mentors for their first two years.

To hire and train the high quality attorneys that are needed to deal with its increasing workload, the Office has improved its recruitment process by establishing a Recruitment Committee to recruit candidates nationwide and evaluate the huge number of applications the Office receives. An Interviewing Committee uses uniform criteria and interviews applicants in panels before offers are made.

Once new attorneys start in the Office, each new attorney begins their training with a 4-week training program in which current and past attorneys in the Office provide training to

the new attorneys in drafting, Senate procedure, and other areas for which training is needed to draft legislation for the Senate.

Uniform Drafting Style

The novelist Charles Morgan once said "If Moses had gone to Harvard Law School and spent three years working on the Hill, he would have written the Ten Commandments with three exceptions and a saving clause." Although Moses never worked in the Office or drafted Federal legislation to my knowledge, when I arrived at the Office, the previous 200 year-history of Members and others drafting Federal law had produced a body of Federal law that was not always clear, consistent, or well written.

In the early 1990s, the Senate Office and the House Legislative Counsel's Office both began to use a uniform drafting style to improve the quality and consistency of Federal legislation and Federal law. Whenever possible, drafters in both Offices use plain English, brevity, consistent organization and terms, and captions and subdivision to organize drafts and make the drafts more readable. Consistent use of the uniform drafting style by both Offices has led the vast majority of committees, Members, and staff in Congress to draft in, prefer, and use that style. As Congress amends law written in traditional style, an increasing percentage of Federal law is being converted into the uniform drafting style.

Laptops and Telework

After the tragic events of 9/11 and anthrax attacks on the Senate occurred, Congress understandably insisted that terrorists would not be allowed to shut down Congress and was adamant that Congress and its support offices (like my Office) should continue to operate after any attacks on Congress. To enable the Office to continue to produce legislation even if employees couldn't get into the Office, the Senate supplied to each employee of my Office, a laptop, necessary software, and (for attorneys) a Blackberry.

To enable Office employees to become proficient at using their laptops for drafting legislation in the event of emergencies and to help reduce congestion and pollution in the area, the Office allows employees to telework on a limited basis. This arrangement allows the Office to remain ready to produce legislation during and after emergencies. Laptops also allow attorneys who would otherwise have to remain in the Office to cover the frequently unpredictable late night or weekend demands of the Senate to go home and use their laptops to draft any high priority legislation if and when it is needed. Laptops and telecommuting have improved the work-life balance of employees of the Office while serving the needs of the Senate and have contributed to remarkably low rates of turnover in the Office.

Conclusion

Bismarck once said "Laws are like sausages. It's better not to see them being made." Although it still may be true that it's better for the faint-hearted not to see laws being made,

there have been remarkable changes in legislative drafting and the procedure my Office has used to help draft those laws for the Senate over the last 30 years.

Some Reflections on *Yates* and the Statutes We Threw Away

Tobias Dorsey[1]

Abstract

In many jurisdictions it is accepted that the legislature has the power to enact guidelines or rules on how statutes are to be interpreted. For example, the legislature may provide that a particular statute is to be interpreted narrowly, or broadly, or to reflect certain specific purposes. This article considers this topic in terms of instructions in US statutes that headings cannot be used as interpretive guides. The author – a former member of the Office of the Legislative Counsel of the U.S. House of Representatives – points out that, while these instructions exist in some statutes, the legal community seems to have forgotten them, as demonstrated by the recent United States Supreme Court opinion in Yates v. United States. How the problem might be fixed is left open. including whether the legal community would even have any interest in fixing it.

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Introduction

There have been a lot of articles about *Yates v. United States*,[2] the recent US Supreme Court case about whether it is a federal crime to throw away undersized fish. Some have been written to make serious points about criminal justice: there are too many crimes; the penalties are too high; the range of penalties is too broad; the prosecutors have too much

[1] Toby Dorsey is the special counsel of the United States Sentencing Commission and was an assistant counsel in the Office of the Legislative Counsel of the U.S. House of Representatives.

[2] 135 S. Ct. 1074 (2015).

discretion (or too much zeal). Others have been written to poke fun, because throwing away fish is the sort of thing we can all smile about. The puns almost write themselves.

This article has a serious point to make, but it's not about criminal justice or fish. It's about those of us in the United States, as a legal community, and how when it comes to statutes we increasingly have lost our way.

It's trendy to write about statutory interpretation these days – the "legislative purpose" crowd and the "plain meaning" crowd, dictionaries and canons, all the doctrines and devices we have developed over the years. But we are blissfully unaware of the instructions laid down by Congress on how to read statutes; we have forgotten they exist. That, I submit, is the lesson of *Yates*. And it is a profound one. As recently as 1996 the Solicitor General stood up and told the Court it was bound by a congressional instruction (even though it worked against the government's argument to do so). Those days are gone. There was a congressional instruction in *Yates*, but the Solicitor General did not mention it. Neither did anyone else.

Congressional instructions can take many forms, such as "this Act is to be construed broadly" or "this Act shall not be construed to create a private right of action." Just as Congress can fix rules of evidence and rules of procedure, Congress can fix rules of interpretation.[3] And Congress has done this with enthusiasm. The word "construed" appears more than 4,000 times in the United States Code; the phrase "rule of construction" more than 500 times.

Did you know it is the policy of the United States to use all practicable means and measures to stimulate a high rate of productivity growth, and "the laws, rules, regulations, and policies of the United States shall be so interpreted as to give full force and effect to this policy"? See 15 U.S.C. § 2403.

Did you know that no Act of Congress shall be construed "to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance," unless the Act specifically relates to the business of insurance? See 15 U.S.C. § 1012.

Did you know that Congress has forbidden the use of some specific pieces of legislative history? Section 105(b) of the *Civil Rights Act* of 1991 provides:

> No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15726 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying,

[3] *See generally* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

any provision of this Act that relates to *Wards Cove* – Business necessity/ cumulation/alternative business practice.[4]

Chapter-and-Heading Instructions in Statutes

My topic here is a congressional instruction with a fairly ancient pedigree. In 1873, when Congress enacted the very first federal code – the Revised Statutes of the United States of America, or simply the Revised Statutes – it included a section 5600 as follows:

> The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed.[5]

Simply put, when we are trying to determine the meaning of a provision of the Revised Statutes, we are not to consider the title under which it was placed. Section 5600 is approaching 150 years old, and it is still in force, because a handful of sections of the Revised Statutes are still in force (although most of us have forgotten they are part of the Revised Statutes). Section 1979 of the Revised Statutes, for example, is litigated just about every day in the federal courts; chances are you know it as "section 1983," its unofficial number in title 42 of the United States Code. While you can find a version of section 1979 in the Code today (as 42 U.S.C. § 1983), you can't find section 5600. The Office of Law Revision Counsel decided many years ago to drop it from the Code, but it has never been repealed. It applies only to section 1979 and the other sections of the Revised Statutes that are still in effect today – but it applies. Unless, of course, we forget it's there.

Congress has included similar congressional instructions for many titles of the United States Code, including the first two titles to be enacted into positive law - titles 18 and 28 on June 25, 1948. The one for title 18 is contained in section 19 of the 1948 Act. It says:

> No inference of a legislative construction is to be drawn by reason of the chapter in Title 18, Crimes and Criminal Procedure, as set out in section 1 of this Act, in which any particular section is placed, nor by reason of the catchlines used in such title.[6]

We can still find this language in the small print at the beginning of title 18. It has no official title 18 section number – but it has the same force as section 5600, and it has the same meaning. Simply put, when we are trying to determine the meaning of a provision of title 18, we are not to consider the chapter in which it was placed. And more than that – in this

[4] Pub. L. 102-166; 105 Stat. 1075; 42 U.S.C. 1981 note.

[5] 18 Stat. 1085. The Revised Statutes contains 74 subject matter "Titles". Section 1979, for example, is in title XXIV, "Civil Rights".

[6] *See* Act June 25, 1948, ch. 645, § 19, 62 Stat. 862. For the corresponding title 28 provision, *see* Act June 25, 1948, ch. 645, § 33, 62 Stat. 869.

regard the instruction in section 19 goes beyond the instruction in section 5600 – we are not to consider the section or chapter headings (the "catchlines") in title 18, either.

Congress has included chapter-and-heading instructions in other codes, too. The Judicial Code of 1911 has a provision similar to section 5600.[7] The tax code of 1939 has an unusually broad chapter-and-heading instruction:

> The arrangement and classification of the several provisions of the Internal Revenue Title have been made for the purpose of a more convenient and orderly arrangement of the same, and, therefore, no inference, implication or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion thereof, nor shall any outline, analysis, cross reference, or descriptive matter relating to the contents of said Title be given any legal effect.[8]

Congress hasn't stopped creating chapter-and-heading instructions. Instructions have been included in other projects, from 1949 with title 14 (Coast Guard) through 2002 with title 40 (Public Buildings, Property, and Works).[9]

Each of these instructions can be found in the small print at the beginning of the positive-law title to which it relates, with one exception.[10] In the Internal Revenue Code of 1954 is a chapter-and-heading instruction with a title 26 section number. It shows up in our code books not in the small print but as 26 U.S.C. § 7806(b). This is the most prominent chapter-and-heading instruction of all, and also perhaps the most sweeping. It forbids us from considering chapter placement and headings ("descriptive matter"); it forbids us from considering the table of contents and other tables; and it even forbids us from considering the notes and tables in the legislative history:

> No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar

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[7] *See* section 295 of the Judicial Code of 1911, 36 Stat. 1167-1168.

[8] 53 Stat. 1a.

[9] *See* Act August 4, 1949, ch. 393, § 3, 63 Stat. 557 (title 14 (Coast Guard)); Act August 31, 1954, ch. 1158, § 5, 68 Stat. 1025 (title 13 (Census)); Act August 10, 1956, ch. 1041, § 49, 70A Stat. 640 (chapter 47 (Uniform Code of Military Justice) of title 10 (Armed Forces)); Pub. L. 89-554, § 7(e), Sept. 6, 1966, 80 Stat. 631 (title 5 (Government Organization and Employees)); Pub. L. 90-620, § 2(e), Oct. 22, 1968, 82 Stat. 1306 (title 44 (Public Printing and Documents)); Pub. L. 91-375, § 11(b), Aug. 12, 1970, 84 Stat. 785 (title 39 (Postal Service)); Pub. L. 95-473, § 3(e), Oct. 17, 1978, 92 Stat. 1466 (title 49 (Transportation)); Pub. L. 97-258, § 4(e), Sept. 13, 1982, 96 Stat. 1067 (title 31 (Money and Finance)); Pub. L. 98-89, § 2(e), Aug. 26, 1983, 97 Stat. 598 (title 46 (Shipping)); Pub. L. 105-354, § 4(e), Nov. 3, 1998, 112 Stat. 3245 (title 36 (Patriotic and National Observances, Ceremonies, and Organizations)); Pub. L. 107-217, § 5(f), Aug. 21, 2002, 116 Stat. 1303 (title 40 (Public Buildings, Property, and Works)).

[10] I do not mean to suggest that these are the only chapter-and-heading instructions in federal law, but they are the only ones in positive-law titles of the Code. For an example of a chapter-and-heading instruction in a non-positive-law title of the Code, see section 6001(c) of the *Oil Pollution Act* of 1990 (33 U.S.C. § 2751(c)).

> outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect. The preceding sentence also applies to the sidenotes and ancillary tables contained in the various prints of this Act before its enactment into law.[11]

Chapter-and-Heading Instructions in Case Law

Statutes like these fly somewhat in the face of conventional wisdom, to be sure. Courts ordinarily view headings and chapter placement as fair game when interpreting statutes. In 1998, for example, the Supreme Court held in *Almendarez-Torres v. United States* that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute."[12] But here's the rub: the statute in *Almendarez-Torres* (8 U.S.C. § 1326) is in the *Immigration and Nationality Act*, which has no chapter-and-heading instruction. Neither did the two cases it relied on, *Trainmen*[13] and *National Center for Immigrants' Rights*.[14]

We used to honor chapter-and-heading instructions. Consider *United States v. Dixon*, a Supreme Court case from 1954. The defendant was convicted of a crime, but he argued that the statute authorized only a forfeiture, not a criminal prosecution, because (among other things) the heading was "Forfeitures and seizures," with no mention of creating a new crime. The Court rejected the argument, finding that Congress had forbidden it from considering the heading:

> The only suggestion on the face of the statute that § 3116 was meant to be remedial and nothing more comes from its caption, "Forfeitures and seizures", supplied by the codifiers in 1939. But in enacting the Code Congress provided that "The arrangement and classification of the several provisions of the Internal Revenue Title have been made for the purpose of a more convenient and orderly arrangement of the same, and, therefore, no inference, implication or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion thereof, nor shall any outline, analysis, cross reference, or descriptive matter relating to the contents of said Title be given any legal effect."[15]

Before *Dixon*, the Court acknowledged the force of such provisions in a number of other cases involving a number of different codification projects.[16]

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[11] 26 U.S.C. 7806(b).

[12] 523 U.S. 224, 234 (1998) (internal quotation marks omitted).

[13] *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519 (1947).

[14] *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991).

[15] United States v. Dixon, 347 U.S. 381, 385-386 (1954).

[16] *See, e.g., Ex parte Collett*, 337 U.S. 55, 59 (1949) ("To accept this contention, we would be required completely to disregard the Congressional admonition that 'No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 * * * in which any section is placed * * *."); *United States v. Gradwell*, 243 U.S. 476, 481 (1917) ("no inference or presumption of legislative construction is to be drawn

But the Court has not recognized the force of a chapter-and-heading provision since *Dixon* in 1954. The Court had a clear opportunity to do so in a tax case in 1996, when the Solicitor General argued that a statute imposed an "excise tax." Though it would have been helpful to the Solicitor General's position to rely on the chapter heading ("Miscellaneous Excise Taxes"), the Solicitor General declined to do so, drawing the Court's attention to the congressional instruction in section 7806(b). It was an astute gesture but ultimately a quixotic one, because the Court merely noted the instruction without addressing the merits of it.[17] The Court then ruled against the Government. Perhaps that is where we really began to veer off course.

The lower federal courts have acknowledged the force of the tax code provision, even in some very recent cases. In litigation over the *Affordable Care Act*, for example, the Eleventh Circuit declined to consider the chapter placement or heading of the so-called "individual mandate" in determining whether it was a "tax".[18] Other appellate decisions have also acknowledged the force of the tax code provision.[19]

But other chapter-and-heading instructions have faded from memory. Perhaps they simply don't have the same visibility; they are found only in the small print. You have to be comfortable with the statute book to find them (or to know in advance they are there), and as a legal community we no longer are.

The title 18 provision has not been applied by a federal court of appeals since 1960, when the Ninth Circuit gave it effect in *Duncan v. Madigan*, declining to consider an argument that a criminal provision should be read as limited to youthful offenders because it was placed into a chapter generally relating to youthful offenders.[20] It should be noted that the

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from the chapter headings under which it is found in the Criminal Code (§ 339) ..."); *United States v. Cress*, 243 U.S. 316, 331 (1917) (declining to consider the chapter placement and heading of a section in the Judicial Code of 1911); *Hyde v. United States*, 225 U.S. 347, 360-361 (1912) (declining to consider the chapter placement of a section in the Revised Statutes); *Doyle v. State of Wisconsin*, 94 U.S. 50, 51 (1876) (same).

[17] *See United States v. Reorganized CF & I Fabricators of Utah, Inc.,* 518 U.S. 213, 222-223 (1996) ("...although the section occurs in a subtitle with a heading of 'Miscellaneous Excise Taxes,' the Government has disclaimed reliance on the subtitle heading as authority for its position in this case, recognizing the provision of 26 U.S.C. 7806(b) that no inference of legislative construction should be drawn from the placement of a provision in the Internal Revenue Code.").

[18] *See Florida ex rel. Atty. Gen. v. United States Department of Health and Human Services*, 648 F.3d 1235, 1319 (11th Cir. 2011) ("The Code itself makes clear that Congress's choice of where to place a provision in the Internal Revenue Code has no interpretive value").

[19] *See, e.g., Security State Bank v. C.I.R.*, 214 F.3d 1254, 1257-58 (10th Cir. 2000) ("The Commissioner correctly points out that, when examining the Internal Revenue Code, '[n]o inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of [the Code].'"); *In re Juvenile Shoe Corp. of America*, 99 F.3d 898, 901 (8th Cir. 1996) ("We are not guided by the placement of the statute because the placement of a provision in the Internal Revenue Code gives no inference of legislative construction.").

[20] *See Duncan v. Madigan*, 278 F.2d 695, 696 (9th Cir. 1960).

statute in *Madigan* wasn't in the original title 18 in 1948, but was added to the title in 1952.[21]

The companion provision in title 28 has not been invoked by a majority opinion of a federal court of appeals since 1951, when the Sixth Circuit gave it effect.[22] Interestingly enough, the code of the Virgin Islands also has chapter-and-heading instructions, and the courts of appeals have diligently applied those instructions.[23] But there are only a handful of appellate cases, other than cases involving the tax code, in which a court of appeals has ever applied a federal chapter-and-heading instruction.[24]

District court decisions applying a congressional chapter-and-heading instruction (other than the instruction in the tax code) are equally rare. A case from 1978 involving the postal service code (title 39) appears to be the most recent example.[25] It's been more than 50 years since a district court applied the title 18 instruction.[26]

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[21] Perhaps an argument could be made that the chapter-and-heading instruction for title 18 applies only to the 1948 original text, but the Ninth Circuit in *Madigan* did not limit it in that way. The fact is that chapter headings and section titles are very rarely settled by policymakers for policy reasons; they are almost always left to the judgment of the congressional drafting offices, either the Office of the Law Revision Counsel (in the case of codification projects) or the Offices of Legislative Counsel (in other cases). It would be odd to distinguish between law revision headings and legislative counsel headings, and it would be odd, within the same text, to say that some headings have value and others do not.

[22] *See Steckel v. Lurie*, 185 F.2d 921, 923 (6th Cir. 1951). *But see Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1058 (9th Cir. 2013) (Tashima, J., dissenting) ("Congress provided equally definitive guidance in the actual text of the 1948 Act. In an uncodified provision, Congress instructed, "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 ... in which any [ ] section is placed.") & *id.* at 1078 (Bea, J., dissenting) (referring to the congressional instruction and stating that the majority "simply ignores this Act of Congress, perhaps because it cuts directly against the majority's desired result: interpretive value based on the statute's placement. [] Congress clearly stated that the placement ... was not intended to change the way it should be interpreted.").

[23] *See, e.g., Coffelt v. Fawkes*, 765 F.3d 197, 203 n.7 (3d Cir. 2014) (identifying the instruction in the Virgin Islands Code and stating, "Thus, we afford no weight whatsoever" to the heading of the statute at issue in the case); *Todman v. Todman*, 571 F.2d 149 (C.A. Virgin Islands 1978).

[24] The cases involving titles 18 and 28 were mentioned above; the remaining cases, in reverse chronological order, are: *International Ass'n of Independent Tanker Owners v. United States*, 148 F.3d 1053, 1059 n.5 (9th Cir. 1998) (the chapter-and-heading provision in the *Oil Pollution Act* of 1990, 33 U.S.C. § 2751(c)); *United States v. RSR Corp*., 664 F.2d 1249, 1251 n.3 (5th Cir. 1982) (title 49); *Johnson v. United States*, 38 App. D.C. 347, 1912 WL 19482 at *5 (D.C. Cir. 1912) (the Federal Criminal Code of 1909); *Schmidt v. United States*, 133 F. 257 (9th Cir. 1904) (section 5600 of the Revised Statutes); *United States v. Marsh*, 106 F. 474 (5th Cir. 1901) (same).

[25] *United Parcel Service v. United States Postal Service*, 455 F. Supp. 857, 876 n.21 (E. D. Pa. 1978) (referring to the title 39 instruction and concluding, "Congress has expressly forbidden us from treading this uncertain path of statutory interpretation").

[26] *See United States v. Grieco*, 25 F.R.D. 58, 60 (S.D.N.Y. 1960) ("The catchline of the section ... might lend some color to [the defendant's] theory but section 19 of the act adopting title 18 U.S. Code provides that no inference of a legislative construction is to be drawn by reason of any such catchline."); *but see Feliciano v. United States*, 297 F.Supp. 1356, 1358 (D.C. Puerto Rico 1969) (mentioning the title 18 provision in passing).

No One in *Yates* Discusses the Instruction

This brings us to Yates, the ship captain, who threw away his fish so he wouldn't have to face the consequences. He was convicted under a statute, 18 U.S.C. § 1519, which makes it a crime to destroy a "tangible object," among other things. The Supreme Court agreed to review whether destruction of fish falls within the purview of the statute. Relying heavily on the chapter placement and section heading, a divided Court concluded that no crime was committed; a fish is not a "tangible object."

I take no position here on whether *Yates* was decided wrongly or rightly. I am frankly not sure whether following the congressional instruction would have changed the outcome (though it would have changed the analysis). I simply observe that while a congressional instruction on how to interpret title 18 exists, no one mentioned it (and everyone violated it). Congress put the instruction in our statute book, but we have thrown it away.

The statute of conviction in *Yates* was signed into law as part of the *Sarbanes-Oxley Act* of 2002.[27] Section 802 of that Act added two new sections to chapter 73 ("OBSTRUCTION OF JUSTICE") of title 18. It begins this way:

> **SEC. 802. CRIMINAL PENALTIES FOR ALTERING DOCUMENTS.**
>
> (a) IN GENERAL.—Chapter 73 of title 18, United States Code, is amended by adding at the end the following:
>
> **"§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy**
>
> "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.
>
> **"§ 1520. Destruction of corporate audit records**
>
> . . ."

After trial, Yates moved for acquittal, arguing that section 1519 is "a records-keeping statute aimed solely at destruction of records and documents," and fish are not records.

You might think someone at some point in the process would point out that Congress has forbidden us from considering the headings and placement of provisions in title 18. In a world where we were comfortable with our own statute book, someone would do this,

[27] Pub. L. 107-204; 116 Stat. 745.

surely. We would have learned about congressional instructions like this in law school or very early in federal practice. But we no longer live in that world, and no one did.

The trial judge mused about the inferences that could be drawn from the heading of section 1519:

> ... [I]f you look at the title for at least a clue as to what Congress meant, it talks about destruction, alteration, or falsification of records in federal investigations. It might be a stretch to say throwing away a fish is a falsification of a record.[28]

Yates, in the Supreme Court, relied heavily on the heading of section 1519. "Congress could not have meant for the destruction of fish to fall under section 1519," he wrote. "Section 1519 [is] entitled 'Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy ...."[29] He continued:

> The statute's title, in its entirety, applies *exclusively* to records (whether paper or electronic). Not only is the word *records* specified to be the subject of the statute, the overall context of the title makes clear that the words *destruction*, *alteration*, and *falsification* can be understood only as applying to records and the like."[30]

The Solicitor General's office, rather than pointing out (as it had done in 1996) that we are forbidden from considering headings and chapter placement within title 18, argued the converse - that the headings and chapter placement were not only relevant, but *decisive*:

> Chapter 73 sets forth criminal offenses encompassing "Obstruction of Justice." 18 U.S.C. 1501 et seq. It addresses a wide array of activities calculated to thwart the administration of justice or to improperly influence official proceedings. Ibid. Within Chapter 73, Section 1519 targets one particular method of obstructing justice—destroying evidence. ...
>
> The objective of both Chapter 73 and Section 1519 is to protect the integrity of government operations, promote fairness to all parties in official proceedings, and ensure that government determinations of factual matters are accurate and true. Those goals are threatened by the destruction of any relevant evidence, regardless of its particular form. ...
>
> In short, the unambiguous meaning of the statutory language fully comports with the structure and purpose of Section 1519 and Chapter 73. *That is enough to resolve this case.*[31]

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[28] Petition for Writ of Certiorari, 2013 WL 8350082 at *6 (quoting from transcript).

[29] Yates' cert petition at 9 (emphasis in original). *See also id.* at 14 (reiterating the heading of section 1519, re-emphasizing the term "records," and arguing that "it is evident that the statute is concerned only with records ...").

[30] *Id.* at 15 (emphasis in original).

[31] Brief of the United States at 17-18, 2014 WL 4089202 (emphasis added).

The Supreme Court split 4-1-4, but tilted in favor of *Yates*: the captain did not violate section 1519 when he threw away the fish. Justice Ginsburg, writing the plurality opinion, invoked *Almendarez-Torres* and proceeded to rely on the heading and placement of section 1519:

> We note first § 1519's caption: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." That heading conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records. ... If Congress indeed meant to make § 1519 an all-encompassing ban on the spoliation of evidence, as the dissent believes Congress did, one would have expected a clearer indication of that intent.
>
> Section 1519's position within Chapter 73 of Title 18 further signals that § 1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence of every kind. Congress placed § 1519 (and its companion provision § 1520) at the end of the chapter, following immediately after the pre-existing § 1516, § 1517, and § 1518, each of them prohibiting obstructive acts in specific contexts. ... But Congress did not direct codification of the Sarbanes-Oxley Act's other additions to Chapter 73 adjacent to these specialized provisions. Instead, Congress directed placement of those additions within or alongside retained provisions that address obstructive acts relating broadly to official proceedings and criminal trials ... Congress thus ranked § 1519, not among the broad proscriptions, but together with specialized provisions expressly aimed at corporate fraud and financial audits. This placement accords with the view that Congress' conception of § 1519's coverage was considerably more limited than the Government's.

Justice Alito, concurring in the judgment, indicated that to him the case turned on three factors – "the statute's list of nouns, its list of verbs, and its title" which combined to tip the case in favor of Yates. After addressing the nouns and verbs, he wrote:

> Finally, my analysis is influenced by § 1519's title: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." (Emphasis added.) This too points toward filekeeping, not fish. ... The title is especially valuable here because it reinforces what the text's nouns and verbs independently suggest—that no matter how other statutes might be read, this particular one does not cover every noun in the universe with tangible form.

But if the chapter-and-heading instruction for title 18 means anything, it means we are not permitted to do what the plurality and concurring opinions did.

Writing for the dissenters, Justice Kagan argued that headings and chapter placement should not be given so much weight. Had she been aware of the congressional instruction, she could have argued that headings and chapter placement in title 18 should be given no weight at all. But she wasn't, and she didn't.

The Silence of the Deep

Again, I am not sure *Yates* was wrongly decided. Rather than building a case for Yates on the heading of section 1519, the case could have been built on the heading of section 802 of Sarbanes-Oxley ("CRIMINAL PENALTIES FOR ALTERING DOCUMENTS").[32] But we do not read section 802, because we do not trouble to read the Statutes at Large.[33]

A recent book co-authored by Justice Scalia - who joined Justice Kagan's dissent in *Yates* - observed that legislative drafters sometimes provide a disclaimer that headings are for convenience only and do not affect interpretation. Accordingly, the book says, "Be sure to check your text or code or compilation for such a disclaimer."[34] But in *Yates* no one did this - not even Justice Scalia - and everyone did what Congress told us not to do. That's how we operate these days.

Check the text for a disclaimer? Read the statute book? I guess we have bigger fish to fry.

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[32] The chapter-and-heading instruction in title 18 applies only to title 18. If section 802 of Sarbanes-Oxley inserts a new provision into title 18, we are forbidden from considering the title 18 headings and placement – but the heading of section 802 and the arrangement of Sarbanes-Oxley are fair game.

[33] *Cf.* Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283 (2007).

[34] *See* Justice Antonin Scalia and Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 221 (2012).

High Quality Legislation and How to Get It

David Elliott[1]

Abstract

The challenge: to introduce a non-English speaking parliamentary democracy, with no experience of legislative drafting services, to "high quality legislation" and the value-added benefits of a legislative drafting unit. This paper, originally written in 2012 in the early days of the Arab Spring, addresses how to achieve the goal of high quality legislation and suggests ways to implement a legislative drafting unit as part of the law-making process.

Part 1: What is "High Quality" Legislation and Why is it Important?

What is "high quality" legislation?

There are 3 basic components of high quality[2] legislation:

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[2] I recognize that ultimately whether legislation is seen to be of "high quality" is subjective. Even so, legislation will more likely be seen as high quality if the proposed law has been the subject of policy analysis, is well drafted, and has been the subject of appropriate consultation. See Ross Carter, "'High Quality' legislation – (How) Can Legislative Counsel Facilitate It?" *The Loophole*, November 2011.

- sound policy analysis and policy development – the policy underlying the legislation must be sound;
- well-drafted legislation;
- effective implementation of the policy – after enactment, the legislation must actually work well.

If any of these components is inadequate, the legislation will fail to meet the policy objective or not meet the policy object as well as it could or should.

This paper concentrates on the first two components of high quality legislation.

Why is high quality legislation important?

There are 5 principle reasons why high quality legislation is important.

1. Respect for the law

High quality legislation enhances respect for the law, improves the likelihood of compliance, and gives credibility to the rule of law.

2. Respect for the Constitution, human rights, and international agreements and conventions

High quality legislation will be designed to respect the constitution, human rights, and treaty and other international obligations. This will enhance respect for the law and the rule of law and adds credibility to the country's international reputation.

3. Efficiency and effectiveness

High quality legislation creates law that is

- *efficient*: it is easier and less expensive to administer
- *clear*: the legislation is as clearly drafted as the subject matter allows, resulting in fewer administrative uncertainties and less litigation over the interpretation and application of the legislation
- *effective*: the legislation implements the policy underlying the legislation, encourages compliance, and creates enforceable laws that achieve the policy objective.

Policy analysis and development help design efficient and effective law. This should usually include a regulatory impact analysis to systematically and critically assess the positive and negative effects of proposed legislative and non-legislative approaches to policy development.[3]

[3] OECD website – http://oecd.org. *Principles for Regulatory Quality and Performance* were adopted by the OECD in 2005, updating 1997 principles. The OECD has useful material for specific regions, see for example OECD paper: *Good Governance for Development in Arab Countries Initiative – Working Group IV:*

4. Stability for commerce

High quality legislation creates a stable economic and business environment. Business is enhanced when the law is clear and administered fairly. If the rules are unclear or uncertain, investment and businesses are less inclined to do business in the country.

5. Well-drafted law is kept up-to-date

Once enacted, laws must be tended. The legislation needs to be periodically checked to see that it actually works and, as necessary over time, amended to keep it up-to-date. Reviews of the legislation will check to see that the policy objective of the legislation continues to be relevant and met. If the law is no longer needed the legislation should be repealed.

Part 2: How to Get High Quality Legislation

Components of high quality legislation

As noted in Part 1 above, there are 3 basic components of high quality legislation. The first two involve action before the legislation is enacted by Parliament, namely:

- sound policy underlying the legislation; and
- well-drafted legislation.

Although the components for creating high quality legislation are relatively easy to identify in general terms, it is much more challenging to embed those components into the law-making process of a democratic parliamentary system.

Before addressing how the components of high quality legislation can be incorporated into the law-making process.[4] I will briefly describe what each component of the law-making process requires in order to produce the best legislative product.

Policy analysis and policy development

Every legislative proposal starts with some kind of issue or opportunity and an idea

- to do something new;
- to resolve an existing or foreseen problem or challenge;
- to take advantage of an opportunity; or
- to change a law that currently exists by amending or repealing it.

The issue or opportunity and the idea for legislation should be subjected to an assessment to clearly identify the issue to be dealt with or the opportunity to be taken advantage of. This is the *issue identification stage*. It is an important stage because if the issue to be addressed is

Public Service Delivery, Public Private Partnerships and Regulatory Reform – Building a Framework for Conducting Regulatory Impact Analysis.

[4] See below Part 5: How to Structure the Law-Making Process to Attain High Quality Legislation.

not clear the policy response may be skewed. What initially seems to be the issue may well not be accurate or complete without a careful assessment.

Once the issue or opportunity that stimulated the idea is identified, the process moves to a policy analysis and development stage during which

- various policy options are considered to address the issue or opportunity and implement the idea, including whether a new or amending law is needed or is the best option;
- a range of tools to implement the policy options are considered with an assessment of the effectiveness, cost, and the advantages and disadvantages of each option;
- the social, legal, and economic effect of the policy options are considered;
- the effect on existing legislation and the amendments required are considered;
- the capacity of existing government agencies to implement the law is considered;
- the new or additional education, training and resources that will be required, are considered;
- transitional issues are examined;
- consequential amendments to other legislation are identified; and
- implementation issues are considered.

The more thorough and complete the policy analysis and development is, the easier it is to draft any legislation that is required, and the better the final legislative product is likely to be.

During the policy analysis and development stage, it is preferable

- to consult internally with government departments and agencies that will be affected by the legislation, and
- to consult externally with those who will be affected by the legislation and the general public.

For various reasons, advance consultation is not always possible or desirable. In these circumstances, consultation should then occur or be invited after the legislation is introduced into Parliament.

If the result of the policy analysis and development is that new or amending legislation is needed, the decision should result in written *legislative drafting instructions* approved by political decision-makers. The legislative drafting instructions are the basis on which the draft legislation is prepared.

Well-drafted legislation

Specialists in drafting legislation, commonly known as parliamentary counsel or legislative counsel,[5] can provide advice and expertise to help produce well-drafted legislation.

The role of legislative counsel is to prepare draft legislation that will meet the requirements of the policy that is to be implemented by legislation. Their knowledge, training and skill can add considerably to the quality of draft legislation.

Well-drafted legislation includes

- a common basic structure for the legislation;
- clarity in the words used;
- simplicity in the legislative design;
- adherence to guidelines for legislative drafting, unless there are reasons to depart from the guidelines;
- attention to transitional issues – dealing with questions arising about the change from the current situation to the situation that will exist under the new legislation; and
- amendment of other legislation as required to resolve conflict or inconsistency between Acts.

Legislative drafting is part mechanics, part art. The mechanics include

- knowing what questions to ask, how to ask them, and what to do with the answers;
- knowing how to structure the ideas for the new or amended law into proposed legislation;
- knowing how Acts should work together and how to amend them so that they work as a coherent whole;
- following and contributing improvements to guidelines for legislative drafting; and
- knowing the Constitution, parliamentary processes, how legislation works, and good legislative drafting practices.

The art of legislative drafting includes

- the ability to think creatively to design the legislation to meet the policy objective in the most efficient, effective, clear and simple way;
- the ability to put various and often complex ideas into a form that will be most understandable;
- continuing to think of the various users of the legislation and, as far as possible, to draft the law to meet their needs;

[5] Referred to as legislative counsel in this paper.

- a keen sense of political issues while maintaining strict impartiality and independence, and patience; and
- the ability to consider all the things that should have been considered during the policy analysis and development stage, but may not have been, and to ask appropriate questions in a respectful and timely way.

The skills required of a legislative counsel can, in part, be learnt, particularly the mechanical aspects, but those skills must also be practised in real-life or simulated situations in order for legislative counsel to gain experience and develop the art of legislative drafting.

Legislative counsel should have an opportunity to participate in a legislative drafting program that should

- provide education and training on the mechanical aspects of legislative drafting; and
- provide simulated drafting opportunities and arrange for mentoring programs where students can gain experience in the various aspects of legislative drafting.

Part 3 - Two Models for Providing Legislative Drafting Services

English-speaking western parliamentary democracies have developed two basic models for providing legislative drafting services:

- the system originally established in the United Kingdom (the *Westminster model*); and
- a system based on the United States Federal system (the *US Federal model*).[6]

Each system is designed to meet the particular needs of the historical and political system it serves. While there are lessons to be learned from both systems, perhaps the most critical lesson is that whatever system is adopted, it should be designed

- to ensure the components of high quality legislation are incorporated into the law-making process, and
- to meet the interests of the users of the service, keeping in mind the ultimate goal of enacting high-quality legislation.

The Westminster Model

Under the Westminster model, one political party usually, but by no means always, has a majority in Parliament and so the proposed legislation that the majority party introduces, usually through its Ministers, will, most often, be supported by members of the same party and will usually be enacted, with or without amendment. In the Westminster model, if a

[6] There are other models and variants of them, but the two models described in this Part highlight the differences and similarities between two basic English-speaking systems.

government is a coalition of two or more parties, there is usually negotiation and agreement before a particular piece of legislation is introduced into Parliament.

In the Westminster model

- the executive branch of government will usually have engaged in an issue-identification and policy analysis, and a policy-development process, based on political direction to do so;
- the policy or initial drafts of the legislation will be subjected to internal government department and agency scrutiny and often external consultation can also take place as part of the policy analysis and development;
- the legislation will have been the subject of legislative drafting instructions approved by the Cabinet or a high-level political committee;
- the legislative drafting instructions will then be sent to an office, usually known as the Parliamentary Counsel Office or the Legislative Counsel Office, that is typically located within a government department, composed of lawyers specializing in drafting legislation – known as legislative counsel (or parliamentary counsel);
- the legislative drafting instructions form the basis for the legislative counsel to draft the legislation; and
- the legislative counsel works with the instructing department or person to prepare the draft legislation that, once approved by the sponsoring Minister, is introduced into Parliament.

If, under the Westminster model, an individual member of parliament, or an opposition political party in Parliament, wishes to introduce legislation, they may seek assistance from the Parliamentary Clerk's Office.[7] Often a person experienced in parliamentary practice and procedure, but not a full-time legislative counsel, will assist the member or party. These Bills do not usually have much or any policy analysis or development and are rarely enacted as law. If it appears a bill so introduced will be passed, a legislative counsel is likely to review it and suggest any needed amendments.

The Westminster model works reasonably well because the governing political party has a significant degree of control over the contents of bills, usually has internal rules requiring policy analysis and development, and requires the proposed legislation to be drafted by legislative counsel. Sometimes the law-making process, or aspects of it, is also supported by legislation.

The Westminster model is not a perfect system:

- sometimes policy analysis and development is weak or non-existent, especially if the legislation is, or is seen to be, urgent;

[7] Some Commonwealth jurisdictions provide this service through the Legislative Counsel Office, but the majority of jurisdictions do not because of potential or perceived potential conflicts of interest.

- the time allowed for legislative drafting can be inadequate, resulting in legislation that is less than well-drafted;
- consultation may or may not occur; and
- a specialized legislative drafter does not guarantee a well-drafted product.

Where these deficiencies do appear, a policy decision or additional training can rectify the problem.

The Westminster model was first instituted in England in 1869 when all new legislation was required to be drafted by the then newly established Office of the Parliamentary Counsel to the Treasury. The Parliamentary Counsel Office in the United Kingdom is now part of the Cabinet Office.

Sir Stephen Laws, KCB, formerly First Parliamentary Counsel, United Kingdom, described 5 important reasons why the work of the Office is important:

- government policy which depends on the enactment of legislation will not be delivered unless the legislation is properly drafted and effective;
- unless legislation is clearly expressed and simple to apply, large amounts of both public and private resources can be wasted on unnecessary litigation;
- proposals for legislation are at the heart of Parliament's business and of the democratic process, with Government Ministers spending much of their time in both Houses defending and explaining the policy and wording of Government Bills;
- the drafting of primary legislation sets both the context (by providing the powers) and the standard (by example) for the drafting of all other legislation, including, in particular, statutory instruments; and
- the way legislation is structured and expressed is essential to the preservation of a stable constitutional relationship between Parliament and the courts; it is important that the way legislation is drafted does not debase the coinage of communication between Parliament and the courts, for example, through obscurity or the inclusion of extraneous, unnecessary matter.[8]

In other Westminster-based Commonwealth jurisdictions, the drafting office is typically part of the Attorney General's Office, the Ministry of Justice, or on occasion has a dual role attached to a legal ministry and to Parliament. As British colonies gained their independence, in one form or another and often with some modifications, a significant majority of them adopted the Westminster model of having a centralized legislative drafting office for legislation sponsored by the governing political party with that office also sometimes providing legislative drafting services or advice to individual parliamentarians and opposition parties.

[8] Stephen Laws, "Giving effect to policy in legislation: how to avoid missing the point", *The Loophole*, February 2011.

United States Federal Model

The United States Federal legislative drafting process is a product of the strongly held belief in the United States in the separation of powers of the executive branch of government (for the purpose of this paper this is the equivalent of the government in Westminster systems), the legislative branch (in Westminster terms, the Parliament) and the judiciary.

The United States Federal executive has never had, nor has now, the same kind of control of what legislation is introduced in the Congress and the Senate nor the same degree of control over what legislation is passed (subject to Presidential veto) as the UK governing party has over legislation introduced into the UK Parliament. Consequently, whether a legislative proposal introduced into Congress or the Senate has had sufficient, or any, policy analysis and policy development depends on the sponsor of the legislation and what support he or she has obtained from the executive branch (if the US administration supports or has initiated the legislation), by outside agencies, or by personal research.

Senior counsel in the Office of the Legislative Counsel, United States House of Representatives, Douglass Bellis, describes the process of getting agreement on a legislative proposal that is likely to pass, as follows:

> … multiple drafts (of legislation) are used as tokens in the negotiation process at arriving at a consensus that can obtain a majority vote … [and] … what seems to a member of Congress like a huge political success may seem to the courts like an inexplicable hodgepodge.[9]

Within this process, a legislative counsel within the Legislative Counsel Office of either Congress or the Senate, seek to address the interests of the sponsor of the legislation and the ultimate users of the legislation, and seek to craft legislation that will be effective and enforceable. What appears to be often missing in this process is policy analysis and development before the legislation is introduced. The extent to which the legislation is the subject of analysis and development after the legislation is introduced is uneven and dependent on the interest of the sponsor and committee to which the legislation is referred, and the expertise of staff.

In the US Federal Model, legislative counsel are in offices established in the Senate and in the House of Representatives. Those offices are independent of and separate from the executive branch of government, but provide drafting services for the executive.

Because legislation introduced into Congress and the Senate is the product of an individual's views (which may or may not be supported by the executive), the negotiation that subsequently takes place can result in legislation that is an amalgamation of often quite diverse subject matter – which may serve the interests of the politician-negotiators but often

[9] Douglass Bellis, "The Role and Efficiency of Legislative Drafting in the United States", *The Loophole*, November, 2011.

does not, in terms of technical completeness and cohesion, serve the interests of the ultimate users of the legislation.

US legislative counsel are also involved in preparing drafts for negotiation purposes and so a great deal of their drafting time is often unproductive except in the sense that a draft may assist in the negotiation process and counsel's ideas may aid in reaching a consensus.

Part 4 - Items to Consider in Designing a Legislative Drafting Unit

Value-added by legislative counsel

Both the Westminster model (legislative counsel offices housed within the executive branch of government) and the US Federal model (legislative counsel offices housed in the legislative branch of government) add value to the quality of legislation. That value could be significantly enhanced if, in designing a process to involve legislative counsel in the drafting of legislation, important elements of policy analysis and development are included within the design of the law-making process.

The questions to be answered

Assuming a Parliament, the executive branch of government and the judiciary all want high quality legislation, the questions are:

- what institutions need to exist or should be used to achieve high quality legislation?
- what systems or processes need to be embedded in the law-making process to support the goal of high quality legislation?
- what capacity building is needed to provide information and educate and to train those involved in issue-identification, policy analysis and development, legislative drafting, and the after-care of legislation?

Creation or use of institutions

Legislative Drafting Unit (LDU)

While other models could be envisaged, for the purpose of this paper I will assume an LDU should be established within the Parliament.[10]

The functions and operation of an LDU should be designed to best meet the interests that the Unit is intended to serve and within the over-riding goal of creating high quality legislation.

[10] My own experience and bias tends to prefer the Westminster model but many more recently created democracies have a system more similar to the United States. Consequently I chose to explore how the US Federal model, with modifications, might be incorporated into the law-making process.

Design elements of an LDU

In designing an LDU, the following elements should be considered:

- what should be the functions of the LDU?
- what should be the particular role of a legislative counsel in the LDU?
- to whom should the LDU report?
- how should the LDU be established?
- what should its legal status be?
- who should appoint the Chief of the LDU and staff of the LDU?
- what operational procedures should be established by the LDU or to govern the LDU, in particular
  - to establish its integrity and independence?
  - to guide it in its priorities in work flow and work overload situations?
  - to establish sound working relationships with other offices in Parliament and the executive branch of government?
  - to guide legislative drafting practices and seek to ensure the best legislative drafting practices?
  - to resolve potential conflict or disagreement between the LDU and others?
- how will the LDU be funded and resourced?
- whom should the LDU serve:
  - every parliamentarian?
  - only Committees of Parliament (and not individual members of Parliament)?
  - executive-sponsored proposed legislation (potentially yes, unless the executive has its own legislative drafting capacity)?
  - some combination of the above?

Suggestions for the design elements

Functions

The following is an outline of some of the possible functions of an LDU:

- drafting acts and proposed amendments to acts;
- drafting regulations or law-making orders and amendments to them;
- advising on or assisting with issue-identification, policy analysis and policy development where there has not been any, or sufficient, policy analysis or development;
- supervising printing and publication of legislation and when enacted;
- maintaining a computer database of legislation;
- consolidating amendments into Acts to provide an up-to-date text of the law;
- revising current legislation to keep it technically up-to-date; and

- working to establish and then maintaining an orderly "statute book".[11]

Policy-making is the preserve of parliamentarians, but inevitably legislative counsel are asked to advise on many issues and to raise questions or suggest alternatives that policy-makers may not have considered, or identify practical problems and implementation issues. They may also be expected to advise on enforcement issues that arise during the legislative drafting process.

Role of a legislative counsel

The particular role of legislative counsel should include the following duties:

- to prepare drafts to give effect to drafting instructions and implement the policy intention;
- to ensure the draft is as complete and coherent as possible – to see that all matters that need providing for are provided for – or to report on incompleteness if circumstances make it impossible to complete the drafting task in the time available;
- to ensure consistency with the Constitution, international agreements and treaty obligations;
- if drafting regulations or other law-making instruments, to ensure that the regulation or instrument is within the scope of the legal authority to make it;
- to draft the legislation as clearly and simply as the subject matter allows, following guidelines for legislative drafting adopted by the Unit;
- to give independent, respectful and frank advice on
  - potential difficulties with the drafting instructions or with aspects of the draft as it is developed and, when appropriate or possible, to suggest alternative measures for consideration by decision-makers;
  - parliamentary and other procedure;
  - the likely interpretation of draft legislation;
  - the probable effect of court decisions on legislative provisions;
  - issues or difficulties that may be caused by the draft if enacted;
- to maintain confidentiality – it should be clear that the instructing person (a parliamentarian, the executive, or Parliamentary Committee) is the client of the legislative counsel and, subject to the overall obligations of the LDU, the legislative counsel should maintain strict confidentiality in the same way a lawyer must keep in strict confidence the affairs of a client; and
- other duties approved by the Chief of the LDU.

[11] Building trusted relationships is a hallmark of the US Federal Model – essential because the legislative counsel provide services to both democrats and republicans, and can be called on to draft amendments for both parties on the same bill.

Reporting

Based on the experience of other jurisdictions, it appears that most LDUs are either attached to a permanent office – for example, the Office of the Speaker or the Parliamentary Clerk's Office – or are established as their own independent office reporting to Parliament, the Speaker or a committee of Parliament.

Establishment

The establishment of the LDU may depend on the person or entity to whom the LDU is to report. There are significant advantages to establishing the functions of a LDU and the role of legislative counsel by legislation or by specific Parliamentary Rules upon which the Unit can then rely.

Appointments

Typically, the person to whom the LDU reports will appoint the Chief of the Unit. There may be specific provisions dealing with how the person appointed as Chief can be terminated, and a term of office specified.

The Chief of the Unit will typically appoint staff, and terminate them if necessary, and set salaries within the budget allocation for the Unit.

Funding and resources

An assessment of the number of legislative counsel needed, with support staff, will be required based on the functions of the LDU with appropriate equipment and research capacity. If the LDU is to have the capacity to undertake appropriate issue-identification, and policy analysis and development, full-time or contract staff will also be needed to provide that service in a timely way.

Who the LDU should serve

The answer to this question will also inform other design elements of the LDU, including the number of legislative counsel needed and the number of other policy-development, research and support staff required. As noted above, the options include the LDU serving

- every Parliamentarian;
- all or some committees of Parliament;
- the executive branch of government; or
- some combination of the above.

It will be critical to staff in the LDU to meet the functions it is expected to perform.

Education and training of legislative counsel

As noted earlier, legislative drafting is both mechanics and art. A number of legislative drafting programs currently exist from which experience and ideas could be drawn to create a suitable program, perhaps in concert with other like-minded jurisdictions.

Part 5 - How to Structure the Law-making Process to Attain High Quality Legislation

This paper has identified a variety of activities that can help to enact high quality legislation. If the components of high quality legislation are generally accepted, namely, sound policy analysis and development and well drafted legislation, the challenge then becomes how best to embed these components in the law-making process while respecting parliamentary democracy.

Starting point

The starting point to attaining high quality legislation is a commitment by the Parliament that high quality legislation is in fact desired and that Parliament wishes to work towards attaining that goal.

The law-making process

With the commitment to working towards attaining high quality legislation, the law-making process should be reviewed to see how the components of high quality legislation can be embedded in the process.

The best choices will require careful and considered analysis. The following basic suggestions are intended to help guide that consideration -

1. When possible, issue-identification and policy analysis and development should occur before legislation is introduced into Parliament.

[It is much easier to discuss, work through, and resolve problems before proposed legislation is introduced into Parliament than it is after it is introduced. Assurance that the appropriate analysis and development has occurred could come from the sponsor of the legislation or be subject to review by a 3rd party auditor or a Parliamentary Committee.]

*2. If legislation is introduced that has **not** been the subject of issue-identification or policy analysis and development, the legislation should be*

- *referred to the LDU for that analysis and policy development (if the LDU has that capacity);*
- *referred to another entity capable of conducting the analysis and policy development; or*

- *referred back to the sponsor with a request that an appropriate report on issue-identification and policy analysis and development be prepared by the sponsor or by someone on the sponsor's behalf. The legislation should not proceed through Parliament before a satisfactory report is received.*

3. The LDU, or a legislative counsel within the executive, should draft or advise on the proposed legislation.

[The sponsor of the legislation could be required to certify that the legislation has been drafted by a legislative counsel satisfactory to Parliament (for example, a legislative counsel in the LDU) or to disclose that a legislative counsel did not prepare the draft legislation.]

4. If the legislation introduced has not been drafted by legislative counsel, the legislation should be referred to the LDU for re-drafting, using the introduced legislation as the legislative drafting instructions.

5. If legislation is introduced without internal government department or agency review and comment, the legislation should be referred for that review and comment as soon as possible after introduction, within a period time set for a response.

Parliamentary rules could be modified to reflect these basic requirements as one means of incorporating the components of high quality legislation into the law-making process.

These suggestions will only succeed if there is also

- an on-going commitment by Parliament and the executive to attaining high quality legislation;
- education and training is provided to develop capacity in issue-identification and policy analysis and development;
- education and training is provided to those who wish to become legislative counsel;
- sufficient staff are hired to provide the necessary policy development and legislative drafting services, with sufficient support staff and research capacity to assist them; and
- appropriate guides and procedures are developed for policy analysis and legislative drafting to establish and maintain a consistent and sound approach to the work on which Parliament can rely with confidence.

Conclusion

This paper proposes ways in which high quality legislation can be enacted. To achieve this goal

- Parliament should commit itself to high quality legislation as a goal;
- institutional capability should be created to produce high quality legislation;

- education and training to build capacity in issue-identification, policy analysis and development, and legislative drafting will be required and the necessary staff hired with appropriate resources; and
- parliamentary processes and rules should be enacted that will support the institutions and processes required.

The process should be tested and a period of transition anticipated and expected to create the infrastructure, processes, rules and hire and train the personnel required. The goal of high quality legislation, with all its benefits, is achievable.