

Legislative Drafting: Art, Science or Discipline?

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Abstract:

The existence of a cadre of competent legislative counsel who provide expertise to Governments contributes to the protection of the rule of law. Identifying what is required of a competent legislative counsel is an important step in helping Governments recruit, train and retain capable people for law-drafting. This paper proposes a model of legislative drafting that recognizes the creative (artistic) and knowledge-based (scientific) aspects of the discipline.

Constructing a legally sound, coherent legislative document is not as simple as it seems.

- Commonwealth of Learning²

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² <http://www.col.org/PROGSERV/SERVICES/LEGDRAFTING/Pages/default.aspx>, accessed on 12 June 2011.

Why ask the question?

When I saw the call for papers for a panel for the 2011 CALC Conference to discuss whether drafting should be considered an Art, a Science or a Discipline, my first reaction was “Why would CALC want to have a panel on that?” I certainly had no interest in participating in a panel that was reminiscent of high school debating (“Resolved: that drafting is an Art, not a Science or a Discipline” replacing the most popular topic in my youth, “Resolved: that school dress codes are an infringement of our fundamental civil liberties.”) Fortunately, my great faith in the wisdom of the organizers got me past that *Back to the Future* moment, and the more I considered what might usefully be said on this topic, the more the I realized that reflection on this topic can still offer us some useful insights.

As we move into the second decade of the 21st century, the major challenge facing the drafting profession is the effort to build sufficient drafting capacity to meet the rapidly increasing demand for legislative counsel. Governments around the world struggle to:

- recruit new legislative counsel who have a genuine aptitude for the work,
- train these new recruits and integrate them into their drafting offices,
- evaluate the performance of their legislative counsel, both recruits and veterans,
- improve the quality of the legislation produced

As many commentators have noted, none of these things can be done effectively unless we have a solid understanding of the range of skills and knowledge that good drafting actually requires.³ In that context, what is useful about this particular debating question (art, science, or discipline) is that if we start by taking up some standard terminological definitions, it becomes obvious that these descriptions need not be seen as mutually exclusive pigeonholes:

Art: The expression or application of creative skill and imagination.

³ Dr. Helen Xanthaki's recent **Loophole** article is merely the latest in a long string of pieces that stress the multi-faceted nature of what legislative counsel do, and draw a connection between that richer vision of what drafting is and the structures in which legislative counsel should be trained: see H. Xanthaki, “Duncan Berry: A Visionary of training in legislative drafting” (2011) **The Loophole**, February 2011 (special issue) 18; S. Markman, “Training of Legislative Counsel: Learning to draft without Nellie” (2010) **Comm. L.B.** v. 36, no. 1, p. 25; P. Quiggin, “Training and development of legislative *drafters*” (2007) **The Loophole**, July 2007 14; D. Berry, “Legislative drafting training in the Hong Kong Department of Justice” (2005) **The Loophole**, March 2005 13.

Science: A systematically organized body of knowledge on any subject.

Discipline: A branch of knowledge, especially one studied in higher education.⁴

If we begin to see these perspectives as complementary lenses, rather than as exclusionary boundaries, then each can be very useful in helping us to move beyond stereotype and caricature to a richer understanding of the diverse set of skills that good legislative counsel need. We can begin, in other words, to recognize the full extent of the art and the science in the discipline of drafting laws.

The art of drafting

Seeing drafting as an art has long been a popular perspective.⁵ After all, who doesn't like to think of themselves as an artist? But it is very easy to have too narrow a conception of what that art encompasses. If it is true that we are not merely scribes or translators,⁶ it is equally the case that we are not simply hack poets, turning someone else's prose novel into narrative poetry. Our creativity is not confined to issues of word-choice, rhyme and meter. All too often, it seems to me, when experienced legislative counsel talk about drafting as an art, what they have in mind sounds more like a semi-skilled craft. That, I think, takes too narrow a view of the kind of creative imagination that good legislative counsel must have.

This is not to diminish the creative skill required by the crafting of instrument itself. A legislative counsel needs a very high level of technical invention to

- find clear, simple and precise language suitable for the intended audiences
- conform to the appropriate style for the particular instrument type
- establish the necessary harmony, both formal and substantive, between the new provisions and others, both within and outside the instrument being drafted

⁴ All taken from the OED, because it had the definitions that best suited my argument. See: E.P. April, "The Law of the Word: Dictionary Shopping in the Supreme Court" (1998) 30 *Ariz. St. L.J.* 275.

⁵ Perhaps the best-known expression of that view, and certainly one of the most congenial, is Sir Geoffrey Bowman's well-known lecture, "The Art of Legislative Drafting" (2006) 7 *Eur. Jour. L. Ref.*

⁶ Although I do remember meetings at which, after a long explanation in English about a complex point of law, including much wrangling over the precise terminology to use, my francophone colleague was asked to please "write that in French".

- ensure the equivalency of various language versions⁷

However, the modern legislative counsel's creative imagination is engaged well beyond the four corners of the drafting table. Always operating within the labyrinthine structures of the modern governmental bureaucracy, frequently taking instructions from multiple sources, and all too often charged to do more with less time and fewer resources, the art of the modern legislative counsel extends to

- understanding, clarifying and harmonizing policy (listening, questioning, explaining),
- conceiving a legislative scheme (instrument choice and structure),⁸
- working in a team (negotiation, conflict management),
- managing scarce resources (time, people).

This is why I think that although the artificial intelligence gurus have developed chess-playing programs that can match the play of world champions, no one has even made even the first tentative steps toward software that can actually draft laws (as opposed to intelligent systems that provide research and technical support to human legislative counsel).⁹ Chess playing is an enormously creative activity, but that creativity is circumscribed within fairly narrow limits. The modern legislative counsel can only envy those who have a work environment with unchanging rules, clearly defined time limits, a narrow focus and only two participants.

In fact, even just to have a process with a fixed end-point is sometimes little more than an aspiration, as this somewhat over-elaborate paraphrase of Yogi Berra's famous exhortation¹⁰ makes clear:

[T]he elaboration of a policy proposal during the drafting process may produce a legislative scheme that covers a wider range of matters, or provides for more complex arrangements, than initially envisaged. In those

⁷ See: <http://eur-lex.europa.eu/en/techleg/1.htm> (accessed 12 June 2011).

⁸ In this area, especially, the breadth of the context that legislative counsels are called upon to consider to ensure the workability and suitability of a legislative scheme can be quite daunting. See, for example: K. L. Rosenbaum, *Legislative Drafting Guide: A Practitioner's View*, www.fao.org/legal/prs-ol/lpo64.pdf (accessed 12 June 2011), esp. at. 5-8.

⁹ As Voermans, Fokkema and van Wijk have noted: "There are only very few of these [artificial intelligence] systems that have made it from the drawing board into the actual drafting offices or services and...most of them are only indirectly related to the legislative process as such." See "IT-Induced Redesign of the Legislative Cycle", (Paper presented at the 2011 CALC Conference, Hyderabad) at. 5.

¹⁰ "It ain't over 'till it's over."

circumstances, further, second-level policy verifications may be appropriate after a draft is completed.¹¹

The science of drafting

Seeing drafting as a science – “a systematically organized body of knowledge” – pushes us to recognize that the knowledge base a legislative counsel puts to use with every draft extends far beyond a list of drafting conventions. Producing workable legislation requires the application of at least three distinct knowledge sets:

- legal (constitutional, statutory, substantive, international),
- governmental and political (formal legislative process, Cabinet process, government policy),
- technical (drafting conventions, research methods and tools).

Traditionally, when we thought of the body of knowledge that a legislative counsel was obliged to master, it was only the last set, the technical aspect, that came to mind. Departmental counsel were seen as the members of the drafting team required to know the substantive legal context for the proposed legislation, and other public servants were responsible for managing the policy and process aspects of the drafting exercise. If that view ever accurately reflected the reality of the drafting process, it no longer corresponds to the actual division of labour amongst the members of the drafting team in any modern bureaucracy.

To begin with, the level of substantive legal knowledge required of legislative counsel should not be underestimated. In some jurisdictions, the complexity of the law in certain areas dictates that they specialize and acquire expertise in the substantive law (taxation springs to mind). However, even generalist legislative counsel must always understand enough of the state of the law as it stands before the proposed legislation to ensure that the legislative instrument being drafted actually effects the desired change in the law (assuming that that desired change has been elaborated – with the help of the legislative counsel using their arts and crafts skills). In the complex regulatory environment of the modern state, even a superficial familiarity with the substantive area may require considerable learning.

¹¹ OECD, *Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe* (1997), *Sigma Papers*, No. 15, OECD Publishing <http://dx.doi.org/10.1787/5kml6g2zl0bw-en> (accessed 12 June 2011) esp. at 13, 26.

In addition, all legislative counsel, whether specialists or generalists, must try to shape a legislative instrument to create a good “fit” with its surrounding legal context. This context starts, of course, with other statutes in the same subject area within the jurisdiction, but it reaches beyond that, not only to legislation on other subject-matters in the same jurisdiction, but also to legislation in other jurisdictions. The pressure for harmonization of legal regimes between nations requires legislative counsel to scan ever more distant legal horizons in their evaluation of the legal context for their work.

Finally, in an era when personnel – particularly senior personnel – in even the most stable government departments turn over on a regular basis, the legislative counsel often must also serve as the key resource on the nuts and bolts of the legislative process. They may be the only person on the drafting team with any real experience of the complex interaction between the Cabinet process, the formal legislative process and the underlying bureaucratic and political policy imperatives.

The discipline of drafting

Seeing drafting as a discipline – “a branch of knowledge...studied in higher education” – supplies a much-needed corrective for two great competing (but equally counter-productive) myths about the training of legislative counsel.¹²

The first myth is that drafting skills cannot really be taught in any formal way, and especially not in an academic setting. Drafting skills can be learned only by service in a long apprenticeship to experienced practitioners. In the more extreme versions of this view, experienced legislative counsel are sometimes described in terms better suited to priests in an ancient cult, slowly initiating their acolytes into the semi-mystical rites of the religion, than to modern professionals engaged in professional training.

The second myth is that the drafting skill-set is purely a subset of the skill-set that all lawyers are trained to have. Specialized training for legislative counsel, whether by long periods of apprenticeship or through dedicated academic programs, is simply a waste of time. When new legislative counsel are needed, they can simply be taken from other government departments or straight from the private sector, handed a precedent book, and set to work. In the more extreme versions of this view, legislative counsel begin to look more like assembly-line workers who can be

¹² See S. Markman, “Training of Legislative Counsel: Learning to draft without Nellie” (2010) **Comm. L.B.** v. 36, no. 1, p. 25 and the other articles cited above n. 1.

hired off the street than experts who have acquired a very distinctive combination of knowledge and abilities through a rigorous program of specialized professional training.

In different ways, each of these myths is a serious impediment to meeting the challenge of the world-wide drafting shortage. Those who deprecate the role of formal academic training effectively throw up their hands and tell the governments of the world: "Sorry. You'll just have to wait. The process can't be rushed." Those who see no real need for dedicated specialized training are equally unhelpful. They toss untrained neophytes into drafting offices and shrug off the howls from Parliamentarians, judges and counsel about the poor quality of legislation as unjustified quibbles. After all, the laws were drafted by lawyers. What else could have been done?

In fact, drafting skills can be studied and learned very successfully in a formal academic setting.¹³ Indeed, much of what a legislative counsel needs to know about the work of the profession is best addressed in that environment. It is certainly true that no professional is ever fully functional without some period of hands-on experience in the field. However, a sound formal training program can give a new legislative counsel a solid professional foundation that allows those first months and years of on-the-job training to be put to use in honing skills and developing mature professional judgment, rather than in acquiring basic competencies and understanding.

Why ask the question? (Reprise)

The Rule of Law has always been a fundamental prerequisite to social and economic growth. The skills required to create coherent and effective laws have therefore always been in demand. However, in a global economy there is an even more acute need for capable legislative counsel to supply the legislative framework that allows societies to develop and prosper as their people wish.

Looking at drafting through all three of the lenses of Art, Science, and Discipline, instead of just any single one, allows us to see the profession in all of its dimensions. That fully rounded view of what we legislative counsel actually do, and how we do it, will help us develop more efficient and effective training

¹³ By "drafting skills", I mean the full range of skills that legislative counsel use. The 2010-11 syllabus for the Advanced Diploma in Legislative Drafting offered at the Honourable Society of King's Inns in Dublin included a module on file management, legal analysis and synthesis, listening and questioning, conflict resolution, negotiation, team work, time management and attention to detail.

programs to meet the urgent need for competent legislative counsel all over the globe.
