Book Review

Reviewed by David J. DeVries

Legislative Drafter's Deskbook

By Tobias A. Dorsey

In his introduction to *Legislative Drafter's Deskbook* (TheCapitol.Net, $150), Tobias A. Dorsey writes that drafting legislation is a disciplined, rigorous and analytical activity. No surprise there, but then he tells us that, done well, drafting can also be creative, elegant and clever. It may be a triumph of hope over experience to find elegance in legislative language – or in any legal writing – but Dorsey's excellent book has all of these qualities. It is organized and analytical, creative and clever, and the author's engaging personality shines through. This is no small accomplishment for subject matter whose mere name can glaze the brightest eyes.

How is this book wonderful? Let me count the ways. First, the book is, as its title states, a practical guide to drafting legislative materials. Many guidebooks claim to be practical. This one is not only practical; it is plain and direct. It may seem obvious, but it is positively liberating to read the first sentence of the chapter on organization: "The most basic rule for organization is that you should have one." The author does not tell you what the rule for organization is. He tells you to have your own rule.

Dorsey is quick to kick some myths to the curb. *The most important skill for a drafter is to write well.* No, the most important skill for a drafter is to be able to identify, analyze and resolve issues. *The drafting of a legal document is inextricable from the policy-making the document represents.* No, the policy-making function is "best kept distinct" from the drafting.

The third excellent aspect of Dorsey's approach is that the activity of drafting is presented as advice from lawyer to client. The product must be what the client wants, not what the drafter thinks is best. Lawyers who draft legislation have a tendency to become their own clients. They think they know best how to write the law, so they think they also know what the law should provide. Dorsey, an attorney in the Office of the Legislative Counsel of the U.S. House of Representatives, reminds us that drafters work with a client to accomplish the client's purpose.

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One of the best features of the book is that the author does not just tell you the rules for drafting legislation, he shows how they work; and, even better, he shows how they can be used to turn an acceptable draft into one that is more organized and precise.

He gives the following example:

> Not later than January 1 of each year, the
> Secretary shall submit a report on the activities
> carried out under this section. The report shall –
> cover the preceding fiscal year; include a description of X;
> contain an assessment about Y; and be submitted
> to Congress.

The deficiency of this passage is that it is not in a parallel structure that ensures that items in a list be of the "same general order of ideas." As a result, items 2 and 3 both relate to the content of the reports. Items 1 and 4 do not.

Thus, the suggestion is that the passage be drafted as follows:

> Not later than January 1 of each year, the
> Secretary shall submit a report to Congress on the
> activities carried out under this section during the
> preceding fiscal year. The report shall – include a
> description of X; and contain an assessment about
> Y.

Attention to detail is vital in drafting legislation, and this deskbook demonstrates that the term *small detail* is neither an oxymoron nor a redundancy.

Take the matter of definitions. Most of us know that definitions should be precise and concise. But consider the following convention for presenting definitions:

> In this Act:
> the term "canine" means dog.
> the term "State" includes the District of Columbia.

As Dorsey explains, the words *the term* may seem to be

unnecessary. Why not just say, "canine means dog?" But the phrase *the term* has an important task in this example. In this statute, the word *canine* is to be used without the first letter capitalized; the word *State* is to be used with its first letter capitalized. Without the lead-in phrase, it would not be clear whether either, neither or both words are to begin with a capital letter. Further, the lead-in phrase also makes it easier to add the concept "except that such term does not include. …" This convention is an elegant solution that neatly avoids the need for a cumbersome explanation.

This book is so much more than a manual. It contains any number of little essays in the form of cautionary tales. In the section titled "Arranging and Drafting Commonly Used Provisions," Dorsey addresses the topic of short titles. He explains that a short title is a "short, official nickname which identifies a statute in a catchy way." He is careful to say that the decision on what the short title will be is "almost purely a political function." By that, we take it to mean that the politicians, aided and abetted by enthusiastic legislative staffers, devise short titles the way editors concoct headlines.

In his book *The Right Word in the Right Place at the Right Time*, William Safire claims to have found the junior staff member of the House Judiciary Committee who "achieved acronymic immortality" by devising "this inspiring moniker": Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. This was joined to the Senate Judiciary Committee version called the Uniting and Strengthening America Act.

As a drafter, Dorsey believes he should avoid participating in devising the short title. However, he does say that "the short title should be short" and advises avoiding a form that expressly incorporates an acronym. The drafter should tell the clients (i.e., the legislators) when a proposed short title does not meet the criteria. As we know, however, clients do not always follow our advice. Imagine the reaction when the Judiciary Committee staffers burst into the author's office to propose proudly the USA PATRIOT Act.

The book has an extensive chapter on the courts and statutory interpretation. After the client, the most important audience is the courts. If a bill becomes law, it will also be interpreted by public officials, private parties, industry leaders, lobbyists and scholars. The courts, however, have the last word. The drafter must be familiar with and employ the rules of statutory interpretation. She must also know which courts may be interpreting the statute and how they are likely to rule. The courts presume that legislatures are aware of existing laws and are aware of how the courts will read statutes in conformity with court precedents. As a result, the drafter must know all of these things when she proceeds. As Dorsey points out, however, this is not an easy task.

For example, has anyone ever been able to distill from court decisions a consistent principle about how the judiciary uses legislative history to interpret statutes? Dorsey says using legislative history as evidence of legislative intent is problematic. Although his discussion of the courts' use of legislative history is respectful, the cases cited show how inconsistent the courts have been. Judges are obviously in a quandary. As impartial arbiters of the law, they do not want to dismiss information that may have a bearing on interpretation. As sentient human beings with an intimate knowledge of how legislation is enacted, they know that most of what happens before and after the enactment of the statute itself is misleading, irrelevant, incomplete or self-serving.

In *Kosak v. United States*, cited by Dorsey, the Court interpreted a provision of the Federal Tort Claims Act to deny recovery for damage to private property that occurred when the property was in the custody of the U.S. Customs Service.

To reach its interpretation, the Court examined the 15-year history preceding the passage of the statute in 1946 and found persuasive a report written by Alexander Holtzoff in 1931. Mr. Holtzoff was a lawyer assigned to coordinate the positions of the federal government departments concerning the tort claims bill.

The report was not referenced in any of the legislative history of the 1946 congressional proceedings. Justice Marshall, for the majority, acknowledged that Mr. Holtzoff may not have drafted the crucial language, that there was no evidence the report was ever read by the congressmen deliberating the bill, or that the interpretation of the report was ever embraced by Congress. Despite this, the Court found it persuasive that the "apparent draftsman believed the statute barred the suit."

In his dissent, Justice Stevens concluded with a rule that the author says all drafters should take to heart: The worst person to construe the words of a statute is the person who drafted it. "He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed." And, further, Justice Stevens wrote, "If the draftsman of the language in question intended it to cover such cases as this one, he failed."

In his discussion of how the drafter should think through the policy to be implemented by legislation, Dorsey says that drafts can be failures of communication or failures of imagination.

If the first, the draft is not clear, but that can be cured by additional editing and refining. If there is a failure to imagine, however, there is a more serious problem because the draft may be clear, but it is not adequate. It is then that the drafter must think through the policy.

Dorsey identifies a variety of perils of ineffective thinking: problems in applying a statute, administering it, enforcing it and others. The main difficulty is not in how words are written but in what the drafter failed to address or did not think through.

One of the best examples is the law proposed to require a train to stop at a rail intersection if another train is approaching. This seems like a straightforward safety measure. The law also provided that once a train has stopped, it is not to start forward again until the oncoming train has passed. Again, that seems obvious. Thinking through the operation

of this proposal will lead us to conclude, however, that the law would apply not only to the first train but also to the second. If both comply with the law, neither can start forward again.

To avoid this result, Dorsey sets forth these elements for thinking through the policy: listen to the client, identify the problem and the objective, collect the facts, research the facts and the law, construct a solid solution, analyze the alternatives, and, finally, consider whether the policy can be given practical and legal effect.

This procedure is a pretty good prescription for how to address any client's legal matter. It reinforces the theme of the book: Always put the advice-giving in the service of the client's objectives.

Although there is a welcome emphasis here on problem solving and analysis to produce the legislative draft, Dorsey does not neglect the business of writing effectively.

Writing ineffectively leads to all of the reasons courts invalidate statutes: ambiguity, inconsistency, arbitrariness, vagueness, imprecision, overprecision, overbreadth and a few other things. A law may just be unreadable. So, be simple, be ordinary, be brief, be consistent, be readable and arrange words with care. Dorsey advises that we not draft a law like the revision Congress once passed that prohibited the taking of any sponges offered for sale at any "port or place in the United States of a smaller size than four inches in diameter."

Finally, this guide is thoroughly entertaining. Dorsey is wry and witty. When he serves up a critique of some hapless work, he does so with a twinkle in his eye and tongue well in cheek.

In a section titled "Beware 'Plain Language,'" he calls to task the Plain Language school predilection for using examples in legislation. He writes, "The use of examples in legislation is – how to put this delicately? – a horrible, frightening idea. … When you have one clock you know what time it is, but when you have two you never know what time it is."

Dorsey on parts of speech:

> Do not "verb" a noun. The results are nasty. You can "task" an employee to do something and the employee can "effort" it, but it is less cheeky if you require the employee to do something and the employee did it. What you gain in pith comes at the expense of dignity and clarity.

This is good stuff. When was the last time you found the words *cheeky* and *pith* in a legal textbook?

It may go too far to say that this is a book you can read on the beach this summer. On the other hand, if you need a tome that will impress all for your devotion to the study of the law while you enjoy the madcap adventures of the characters making the laws that govern us all, this is just the volume for you. ■