

CHAPTER ONE

THE BILL DRAFTER

The office of the Legislative Counsel provides Oregon legislators and state agencies with bill drafting services. Further, during each session, the legal staff prepares amendments for measures it drafted.

Despite widespread popular misconceptions, some amusing, some not, a statute-writing lawyer does try to draft statutory language so that it can be understood by laypersons as well as by administrators and other lawyers. The complexity of social problems to which the statute is addressed, the ambiguities of meaning and the enacting process combine, if not conspire, to make the drafting task difficult. The drafter is a lawyer functioning in the public arena, trying to put into statutory form what the requester (client) asked for in substance. The drafter must first isolate an idea or concept to express adequately the requester's goal and then find the language to express that idea or concept. This manual deals largely with techniques for handling the language aspect of drafting. But regardless of the facility of language a drafter may possess, there can be no substitute for cultivating the ability to see drafting problems and the wisdom to devise answers. These come from experience with the legislative process.

The first step is understanding what the substance of a drafting request is, for it is often expressed in less than adequate detail. The drafter who relies solely on the requester for complete understanding of the substance of a request will soon encounter trouble. Requesters do not always know or understand the current law or the ramifications of their requests. One advantage of the Oregon practice of assigning subject areas to particular drafters is that it allows the drafter to become familiar with the law and with developments in the subject area. The former comes in part with the drafting process. The latter comes in part from association with legislative and agency staff and with lobbyists, in part from news reports and relevant case law and other reference sources. The drafter who is knowledgeable about the subject area has two advantages: (1) Knowing the questions to ask in order to be as responsive as possible to the requester; and (2) Taking less time to think through the problems and compose the draft.

A drafting request sometimes comes into the office in the form of a draft, rather than (or in addition to) a narrative explanation of the problem to be solved and the requester's preferred solution. The drafter should not assume that the requester is wedded to the language of a draft that is submitted from outside the office. Legislative drafting is a specialized endeavor, with its own rules, and few people outside of the Office of Legislative Counsel know enough to be very good at it. Submitted drafts frequently have sloppy language, violate our form and style and, worst of all, fail to accomplish what the requester wants. A drafter who adheres slavishly to a submitted draft is not doing the client a favor.

The drafter cannot and must not become involved in deciding the wisdom or desirability of a particular course of action. That is the prerogative of the requester. But

the experiences of the drafter, the factual knowledge, the legal training, all must be called into play in advising a requester on the potential problems that a particular course may encounter. This advice may affect the policy decisions of the requester, but it must not usurp the right of the requester to make the final decision. The requester, whether legislator, legislative committee or state agency administrator, is officially charged with policymaking. The drafter is not.

The drafter has a professional responsibility to serve the requester objectively in accomplishing the requester's ends. This duty is further enforced in Oregon by ORS 173.240, which prohibits the Office of the Legislative Counsel from opposing, urging or attempting to influence legislation.

There is reason beyond the division of responsibility between policymakers and drafters for drafters to stay out of policymaking. That reason goes to the composition aspects of bill drafting. Persons highly involved in policy often "see" things in a bill draft that are not there – gaps that have been filled in the opponent's or proponent's mind but not on paper. Analysis will reveal these gaps more accurately and more quickly if it is dispassionate. The old adage concerning the lawyer having a fool for a client is not too far off the mark in describing bill drafters who become unduly involved in substantive policy.

If there is any key to distinguishing situations where policy comment is required to fulfill professional responsibilities from situations where comment is inappropriate, it lies in the drafter's attitude. If that attitude is one of accomplishing the requester's goals, one of professional service, then the drafter has a better chance of distinguishing the situations. However, a drafter who approaches a drafting request with questions concerning the wisdom of the request will often fail to make the necessary distinctions. And the price the drafter (and the office) pays for that failure is to be shunted aside, becoming unable to render any service.

Nevertheless, attorneys in the Legislative Counsel office must be mindful of the fact that they are subject to the Oregon Rules of Professional Conduct and to the jurisdiction of the Oregon State Bar in matters of legal ethics. While many of the disciplinary rules seem to be inapplicable to the work of legislative drafters, situations could arise in which there would at least be a question as to whether a course of conduct was allowed by the code. For example, Rule 8.4 says, in part:

(a) It is professional misconduct for a lawyer to:

* * *

(3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;

* * *

Formal ethics opinions of the Oregon State Bar contain little guidance for government lawyers as a group and even less for Legislative Counsel drafters. For example, there is no opinion discussing the question of whether it would be a violation of Rule 8.4(a)(3) if a drafter (following a request) were to "hide" or obscure a particular provision of a bill, or to omit from the measure summary some significant fact or to do any of a number of

other things to disguise the actual effect of a bill. Would those acts be misrepresentation? Deceit? The answer is unclear, but drafters should be aware of possible restraints imposed by the Oregon Rules of Professional Conduct. The Legislative Counsel Library contains a copy of the formal ethics opinions issued by the Oregon State Bar.

Requesters see the drafter as being heavily involved in choosing the right words. To some extent that view is reflected by the amount of space in this manual directed toward usage. The deeper problems of good bill drafting stem from determining what is apparently requested and what is actually meant. Drafting is the reduction of thought to writing, but if the drafter has not thought through the problem, the most artful drafting only tends to conceal that lack of clarity. Manuals cannot teach drafters how to sense issues, how to frame relevant hypothetical situations or how to get at the meaning. Only experience can do that. It is a difficult, challenging and rewarding task.

A perfect law never has been written, and never will be; the passage of time ultimately renders every law obsolete in some respect. However, a drafter can do much to reduce inconsistency and ambiguity and to anticipate foreseeable problems. Success as a drafter depends on the extent to which the drafter achieves these ends.

*COUNSEL'S LAMENT**

*I'm the Legislative Counsel,
I compose the sundry laws,
And of half the litigation
I'm supposedly the cause.
If I employ the kind of English
Which is hard to understand,
The members do not like it,
But the lawyers think it's grand.
I'm the Legislative Counsel,
And they tell me it's a fact
That I often make a muddle
Of a simple little Act.
I'm a target for the critics,
And they wish to see me fried--
Oh, how nice to be a critic
Of a job you've never tried.*

- Adapted from J.P.C., *Poetic Justice* 31 & 32 (1947)

