

## INTRODUCTION

Poorly drafted statutes are a burden upon the entire state. Judges struggle to interpret and apply them, attorneys find it difficult to base any sure advice upon them, the citizen with an earnest desire to conform is confused. Often, lack of artful drafting results in failure of the statute to achieve its desired result. At times, totally unforeseen results follow. On other occasions, defects lead directly to litigation. Failure to comply with certain constitutional requisites may produce total invalidity. Menard, "Legislative Bill Drafting," 26 Rocky Mt. L. Rev. 368 (1954).

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It is hard to put a price tag on badly constructed legislation. How can we measure the cost of litigating the uncertainties of meaning that are brought about by language that is ambiguous or needlessly vague? And how can we evaluate the cost of finding legislative provisions that have been obscured by inept legislative placement? And, I might add, how frustrating is the effort when ambiguities exist and the search for legislative intent becomes fruitless, as is so often the case. L. Jaworski, "The American Bar Association's Concern with Legislative Drafting" in *Professionalizing Legislative Drafting*, p.5 (R. Dickerson, Editor, 1973).

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The legal drafter must write for unidentified foe as well as known friend. The drafter must write so that not only a person reading in good faith understands but a person reading in bad faith cannot misunderstand.

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In formulating any legislation, three phases are involved. The first phase is to secure accurate factual information about a problem. The second phase is to find an approach to meet the problem, to resolve the policy issues. The third phase is to produce a bill that reflects the policy accurately in a form consistent with constitutional provisions and other laws.

The first two factors are inherently and exclusively legislative, but in practice are only as effective as the language in which they are clothed. An accurate expression of the legislative will requires skill in the mechanics of bill drafting.

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Until courts chart their statutory construction course, legislative drafters would be wise to take certain defensive measures. One is to recognize that they cannot draft so as to determine absolutely the results of litigation. In fact, it is not desirable to determine results absolutely; a drafter cannot foresee all the situations to which the law may apply, so courts must have some flexibility. Rather than conceiving of their task as ensuring that cases will come out a certain way, drafters should conceive of it as determining the boundaries of, and the terms of, the future judicial discourse that will be construction of the statute being drafted. In order to prevent further usurpation by the courts of legislatures' authority, drafters should pull in those boundaries and more fiercely defend them. They can do those things by constantly remembering a draft's main purpose while creating its details, by imagining possible facts to which the statute may apply, by seeing the new statute in relation to current statutes, and especially by frequently and carefully using definitions.

Some of the carelessness and imperfection seen in adopted legislation reflects lack of skill on the part of the drafter. Unfortunately, some of the problems of poorly drafted legislation result from the failure to recognize that good drafting requires time and a specialized skill.

Drafting is a craft in which one becomes proficient only by experience, which includes much trial and many errors. However, this manual can assist a drafter in avoiding many of the errors that others have experienced. Although it is designed primarily for use in drafting legislative measures in Oregon, most of the principles set out in this manual apply equally to measures drawn for local governments and other states, and even to the preparation of legal instruments generally.