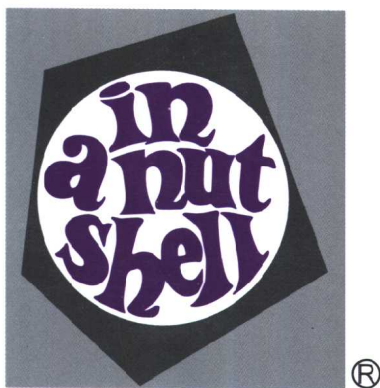




West Nutshell Series
美国法精要·影印本

THOMSON
WEST

Legal Drafting 法律写作



Thomas R. Haggard

【美】托马斯·R·哈格德 著



法律出版社
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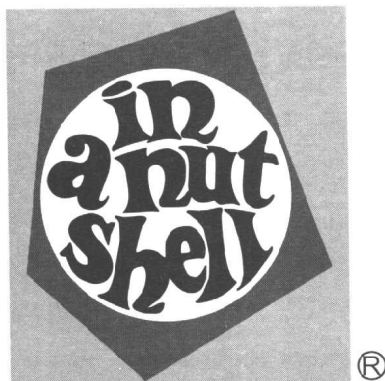


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总 序

许传玺*

在美国法律教育界与律师实务界,这套“美国法精要”(Nutshell Series)是颇具特色的一套丛书。这套书最突出的特点当推它们的简捷明快、深入浅出。每种书均由富有教学经验的法学教授执笔,在三、四百页的篇幅内介绍某一法律部门的基本原理、主要法规和重点案例。

由于这些特点,这套丛书受到了无数美国读者的欢迎和喜爱。众多法学院的学生将这套书作为课外的辅助教材,由此掌握美国各主要部门法的精义。执业律师也经常借助这套书,以迅速了解自己尚未熟习的某些部门法,或者温习过去曾经学过的某些课程。

相信这套丛书也能赢得国内读者的欢迎。无论是法律专业的本科生、研究生,还是执业律师或其他人士,都能从这套丛书中获得有关美国法律的大量知识,对自己的学习和工作有所助益。此外,通过阅读原汁原味的英文来学习美国法律也应能提高读者的法律英语水平,促进与美国同行的直接对话与交流。

* 美国哈佛大学法博士(J. D.); 耶鲁大学社会文化人类学博士; 现任中国政法大学中美法学院院长、教授。

应原出版者的要求,这套丛书的国内版增加了中文前言,以介绍美国各部门法的概况、每种书的内容及原书作者等等。这些前言作者都是在美国受过专业教育或从事专门研究的法律学者甚或专家。相信他们的介绍会对读者有所帮助。

Happy reading!

1999 年 4 月
于哈佛法学院

前言

郭 强*

我们靠语言和文字谋生,创造和解释法律规范。我们是法律人,是法官、律师、检察官、立法者和执法者。我们运用文字的过程叫做法律写作。

我们驾驭语言,也被语言操纵。大法官霍尔姆斯说,“文字不是水晶,透明不变,它是鲜活思想的外衣,其颜色和内容都会随着情势的变化而大异其趣。”更有著名的圣三一堂主义说,“法规中规定的未必就在该法规中,因为它或许不在该法规的精神中。”

我们的笔决定了我们是魔鬼还是天使。职业的特点使得我们在进行法律写作时无法不慎重。

尽管如此,你依然在著名的皮尔里斯案里见过我们(见第 106 页);在 1964 年民权法案中见过我们(见第 108 页)。你听到过我们断言“1940 年 9 月 16 日至 1950 年 6 月 27 日”(某一联邦法中摘出的定义,见第 207 页);读到过我们用数十个动词、十数行冗长文字来阐述“严禁损害树木”的简短规则(见第 89 页,国家公园署法规)。

* 中国政法大学法学学士、法学硕士;美国纽约大学法学院法博士(J. D.);现任美国德普律师事务所(Debevoise & Plimpton)律师。

我们有时选择模糊。1890 年的谢尔曼法案禁止对商业的一切“不合理”的限制行为,法院因此用了过去一百年的时间来解释“不合理”这一概念。

我们也时常面对尴尬,请翻到第 204 页,欣赏佛罗里达州某郡我们的同事对人体某一部位的精心定义。

1977 年开始兴起的朴实英文立法运动对法律写作特别是立法文件的起草产生了深远的影响。沃伦·巴菲特在美国证券交易委员会《朴实英文手册:怎样制作清晰的披露文件》的前言中说,“恐怕最常见的问题是,一个用意良好、掌握必要信息的作者却未能将信息传递给一个有理解力的、有兴趣的读者。”

您手头的这本小册子可以帮助您解决或避免诸如此类的问题。它指出好的法律写作的特点是精确、明晰、简短、简洁和语气职业化。它详述了写作的过程特别是其中涉及的诸多具体问题,包括如何开头、如何确定写作的内容、如何选择正确的概念、怎样组织结构、怎样避免模糊、写作的风格和惯用语、如何定义、产生法律后果的用语以及当法律写作造成模棱两可时所适用的法律解释规则等。同时单独讨论了合同和立法文件的写作以及用计算机写作和写作的道德等问题。本书大量使用了包括以上所引范例在内的生动例子,同时语言刻意浅显易懂,因而非常适合具有一定英语基础的法学院学生和包括律师在内的法律从业人员阅读。

作者托马斯·哈格德是南卡罗莱纳大学法学院教授,主讲劳动法、合同法和法律写作。于 1964 年和 1967 年分别获得得克萨斯大学文学士和法学士(相当于今天的法律博士)学位。他是一系列关于法律写作的畅销书的作者。

法律写作是所有以法律为业者的面包和奶油。这本小

册子是一本相当好的烹饪手册,但是正如哈格德教授所告诫读者的,好的法律写作必须从反复练习中得来。这个反复练习的过程不仅包括在读法学院的几年时间,而且可能伴随你我从职业生涯的始终。谨此与您共勉。

2003年12月于香港

**In Memory of My Father
George W. Haggard
(1908-1951)
Teacher, Journalist, and Public Servant**

and

**In Honor of My Mother
Laytha Johnston Haggard
In Appreciation For Her Love and Support**

PREFACE

When I entered law school in 1964, my wife Nell and I purchased a small house. A lawyer friend drafted the contract of sale and other documents. They were full of strange words and obscure phrases, typed on an odd-sized paper, and bound in a blue cover which, when folded into quarters and held vertically, cleverly displayed the caption, in Old English type, **Contract of Sale and Deed**. At the closing, these magic papers were initialed, signed, witnessed, notarized, and otherwise treated with the highest degree of respect. I was impressed and confidently told Nell, "Three years from now I will be able to draft these papers myself!"

In 1967, when I graduated from law school and sold the house, this same lawyer friend again drafted all the necessary documents. Although the terms of the transaction were essentially the same, the mysteries of drafting had never been revealed to me in law school. I was terrified of even using the old papers as a model, fearing that the slightest deviation in wording would have horrible legal consequences. Drafting was like a secret order, into which I had not been initiated, with its own rituals, incantations, and paraphernalia.

Unfortunately, many young lawyers of today are as daunted at the prospect of drafting a first contract as I was. The most common question I hear is, "What do I say first?" — as if the document will fail unless the prefatory chant has a particular pitch and intonation.

Of course, every lawyer is forced to draft something eventually. And when that document, no matter how poor it is in form or substance, does not precipitate an immediate end to the world, the pendulum often swings to the opposite extreme. Unnecessary fear is replaced by dangerous indifference or unwarranted confidence. Drafting is regarded either as an inherent lawyering ability or merely a mechanical function that can be performed by emulating what is contained in form books or the yellowing files of the long-departed founder of the firm.

Lawyers must discard both misconceptions. Drafting is neither a secret order into which one must be initiated by long and painful steps nor a skill acquired by osmosis from the label *attorney-at-law* on your stationery; and it is certainly not a matter of mindless imitation of the past. Drafting is a critical lawyering skill. Like other lawyering skills, drafting can be done well or poorly. Doing it well is something that can be taught and learned.

Fortunately, the profession is making progress in that direction. Legal writing, including drafting, has enjoyed a rebirth of emphasis in the last fifteen years. Legal drafting courses are now commonplace in law schools. The skill is also often taught in conjunction with contracts, trusts and estates, business associations, real estate transactions, legislation, administrative law, and other courses that deal with drafted documents.

The practicing bar has awakened too, realizing that the drafting habits and style of yesterday are no longer adequate in the computer age. Clients appreciate and even demand documents that are clearly and simply written, that are captioned and organized with the user in mind, and that are free of all the hoary and obscure legalese that has made lawyers the butt of so many jokes.

The courts are also growing increasingly impatient with the unnecessary litigation that follows the trail of a badly drafted document. The courts are especially critical of statutes and regulations that are so obscure — and often intentionally so — that what they mean and the impact they have on the citizenry remains unknown until they have undergone judicial divination. And in response to after-the-fact and somewhat far fetched claims about the meaning of a contract, courts are not hesitant to point out, testily, *Well, if you had meant that, why didn't you say so?*

Even the legislatures have stepped in, passing laws that require certain kinds of documents to be written in *Plain English* or satisfy some readability formula. Indeed, some legislatures have required that their own legislation and the administrative regulations adopted pursuant to that legislation also be drafted according to specific readability criteria.

These changes in law school curricula and in the practice of the law have generated a growing demand for books on legal drafting. The purpose of this book

is to help satisfy that demand — for both law students and busy practitioners.

This book deals with process, techniques, and forms of expression used in drafted documents. The book does not deal with substance. It focuses on *how* one drafts legislation and private-law documents, not on the details of the substantive law that the drafter must deal with. Exactly *what* should be contained in a will, lease, partnership agreement, construction contract, contract for the sale of residential property, landlord-tenant statute, or any other type of drafted document is determined by substantive law of the jurisdiction, the subject-area expertise of the drafter, and the desires of the client. Specialized texts, which focus on substance rather than form, exist for drafting these specialized documents.

The objective of the book is to enable the reader to produce documents that serve the needs of the client, that solve existing problems efficiently, that foresee and forestall future problems, that make for efficient governance, and that ease the tensions and uncertainties that are inherent in all forms of social and economic intercourse. The accomplishment of those goals is the lawyer's highest calling.

The book reflects the drafting insights I have gained from my more than twenty-five years of teaching and doing legal drafting. But in a greater sense it also carries forward to a new generation the *collective wisdom* of the legal drafting community.

Over the years I have taught from or consulted many texts, but those that contributed the most to my drafting skills (and the contents of this book) are as follows:

J.K. Aitken, *Piesse, The Elements of Drafting* (9th ed. 1995).

Susan L. Brody, Jane Rutherford, Laurel A. Veitzen, & John C. Dernback, *Legal Drafting* (1994).

Scott J. Burnham, *Drafting Contracts* (2d ed. 1993).

Scott J. Burnham, *The Contract Drafting Guidebook* (1992).

Howard Darmstadter, *Hereof, Thereof, and Everywhereof—A Contrarian Guide to Legal Drafting* (2002).

Robert L. Dick, *Legal Drafting* (1972).

Reed Dickerson, *The Fundamentals of Legal Drafting* (2nd ed. 1986).

Reed Dickerson, *Materials on Legal Drafting* (1981).

Barbara Child, *Drafting Legal Documents — Principles and Practices* (2nd ed. 1992).

Carl Felsenfeld & Alan Siegel, *Writing Contracts in Plain English* (1981).

Lawrence E. Filson, *The Legislative Drafter's Desk Reference* (1992).

Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2nd ed. 1995).

Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* (1997).

Robert J. Martineau, *Drafting Legislation and Rules in Plain English* (1991).

M.E. Mullins, *A Handbook for Legislative Drafters* (1996).

William Statsky, *Legislative Analysis and Drafting* (2nd ed. 1984).

I want to thank the many students and practitioners who purchased the first edition of this book and whose substantive suggestions contributed enormously to the revision. In addition, a special word of thanks is owed to my friend and administrative assistant, Nancy Shealy, whose careful proofreading and formatting skills, her patience, and her unfailing sense of humor have made the production of this book possible.

This book contains the full text of my *Legal Drafting — Process, Techniques, and Exercises*

(2003), but with the exercises omitted. Students should not purchase both books.

THOMAS R. HAGGARD

Lake Wateree, South Carolina
June 2003

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