

**THE DRAFTING PROCESS IN THE AMERICAN LEGISLATIVE  
CONTEXT**

Maryann Corbett  
Assistant for Writing Standards  
Office of the Revisor of Statutes  
State of Minnesota

Address to  
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for the Administration of Justice

by

Maryann Corbett

Assistant for Writing Standards

Office of the Revisor of Statutes, State of Minnesota

I have been asked to speak to you about legislative drafting in the context of American state legislatures. The topic is a broad one, and it is difficult to know how to condense the facts into the time available but still provide you with useful information. To do this, I decided to follow Don Revell's lead. Two years ago, in Bloomington, I heard his review of how legislative drafting works in the provinces of Canada. I found his talk very illuminating. So, what I've decided to do is to give the reciprocal version of his address. I hope it proves as enlightening to you as his talk was to American drafters.

What I propose to do is describe our office, the Office of the Revisor of Statutes for the Minnesota Legislature. I'll compare it with other state legislatures as far as I understand the differences, but I must warn you that it is difficult to generalize about legislative drafting in American state legislatures. The differences in legislative drafting among the American state legislatures are far greater than the differences among your provinces. I'll provide some analysis of what I

believe to be advantages and disadvantages of our state's system and those of other states. Lastly, I'll provide some direct comparisons with the way your legislative drafting works.

#### **The Office of the Revisor of Statutes in Minnesota**

The Office of the Revisor of Statutes in Minnesota is a central, nonpartisan, professional, legislative staff agency. The fact that I have to use so many adjectives to describe our office should tell you something about the number of possible ways to perform the function of bill drafting in American state legislatures. This great variety has come into being simply because the states are free to create their own structures and because whatever they create grows and changes constantly and organically. I can best illustrate that change by talking about the contrast between our office's origins and its present duties.

The Revisor's Office was created by law in 1939. When it was created, it had one function: to compile a new version of Minnesota Statutes and publish it on a regular basis. Before the creation of the office, statutory publication in Minnesota had had a checkered history. In the 100 years or so from the founding of the state to the creation of the Revisor's Office, there had been numerous attempts at compiling the statutes. In turn, each of them was found to be inadequate by the bench and bar. The state had done at least three bulk revisions of the statutes in those 100 years. By bulk revision, I mean the complete rearrangement of all the permanent laws at one time and the enactment of that rearrangement into positive law by the

legislature. I think it is easy to see the destabilizing effect of having all the law changed at one time.

The legislature's creation of the Revisor's Office was intended to solve two problems. First of all, it was intended to end the history of poor compilation of statutes. Secondly, it was intended to eliminate bulk revisions forevermore. Instead, the Revisor's Office was to do continuous revision. By that, I mean that the office was to do small incremental revisions each year so that there was never a need to do a bulk revision of the entire statutes again. That is also how the office got its name. We are the "Office of the Revisor of Statutes" because our initial duty was to revise the statutes continuously.

Today, our chief duties still include continuous revision of the statutes, but they also include:

- (1) drafting bills and administrative rules;
  - (2) publishing statutes, laws, and administrative rules;
- and
- (3) providing computer services.

### **Legislative Drafting in Minnesota**

Since I know this audience is most interested in our drafting functions, I will discuss them in greatest depth. We were assigned bill drafting functions in the 1940s, not long after the office was established. Our office has a total staff, including both employees and contractors, of about 70 people. Of that number, about 50 are heavily involved with legislative

drafting. We have a total of 12 attorneys. We do two different kinds of drafting. We draft legislative bills and a variety of other directly legislative documents. We also draft administrative rules for the state agencies. The work is seasonal. Our legislature is in session in odd-numbered years from January through the end of May. In even-numbered years, it is in session from February through mid-May. The most intensive drafting starts approximately a month before each session and lasts until the day of adjournment.

I become most envious of Canadian drafters when I begin to describe our bill drafting load. Our staff drafts up to about 2,500 legislative bills in the first legislative session and roughly 1,500 in the second. Now it is true that not all of these bills are comprehensive, wide-ranging programs such as are found in the bills of Canadian provincial governments. In fact, "a bill" in Minnesota can be a change in a single line of text. But our bill drafting load does include a number of comprehensive bills as well as myriad shorter ones. Some of the comprehensive bills are sponsored by the governor, some by the executive agencies, and some are the annual appropriations and tax bills. When the long and the short are taken together, the average load for our attorneys approaches 200 bills per attorney for each session, with some attorneys getting as many as 300 to be produced in a single legislative session. In addition to legislative bills, our attorneys also work with a variety of other legislative documents. The list of other documents includes amendments to be offered to bills in committee and on

the floor of the house or senate, committee reports, conference committee reports, engrossments, enrollments, and an assortment of other documents. An attorney may deal with up to five or six hundred documents of all kinds during a legislative session.

The total load of documents is typical of the workload in all American state legislatures; the amount of paper generated by each of the legislatures is daunting, to say the least. There are differences, however, in the agencies that do the drafting in the various states. As I said earlier, ours is a central office. That means we serve both the Senate and the House of Representatives. There are central drafting offices in many states, but central organization is by no means the only method of organization. Some states have drafting offices for each legislative chamber. Still others rely for drafting on caucus staff from each of the two party caucuses in each house.

Besides being central, our office is nonpartisan. That means we work for both political parties. In Minnesota, they are the Democratic Farmer Labor Party and the Independent Republicans. We try to serve both parties neutrally and professionally, which means that we preserve confidentiality about bill drafting requests. It also means that drafters in our office try not to take any public stand on a partisan policy question. In other states, drafting is sometimes done by partisan staff or, more usually, by the members' personal staff who by definition are also partisan.

Our office is also professional. By that I mean the staff members are permanent career staff, not people who are hired

just for a legislative session or just by a particular legislator to work for him or her. In some states, drafting is done by partisan or personal staff, whose positions, by their nature, are more transitory.

Finally, we are a legislative staff agency. That means we work directly for the legislature, not for the governor or other officials in the executive or judicial branches of government. Since thanks to King George we have three separate branches of government, we find ourselves identified with the legislative branch and not with a combined executive/legislative branch such as you have in your parliamentary system.

I mentioned that we had a total of 12 attorneys working for the office in the legislative drafting area. I need to mention some of the other staff as well. The direct support staff for the attorneys consists of 28 people. These are drafting and editing assistants and the supervisors of the drafting and editing assistants. Our drafting and editing assistants do the keyboarding work on drafts as well as doing proofreading, checking, collation, and assembly of documents. It is an integrated system in which the drafting and editing assistants take the legislative documents completely through the preparation process. In many other states those processes are separated. So, for instance, there are keyboard operators who are separate from proofreaders, who are separate from checkers, who are separate from those that collate, assemble, and deliver the documents.

Those other states have more of an assembly line procedure

in creating the drafts. Frankly, I think our system is superior. States have a difficulty hiring people just to do proofreading. By having each support staff member do all phases of the work, we provide variety that keeps them from being bored and, consequently, getting sloppy.

We also have about ten other administrative staff members including receptionists, secretaries, and messengers. I have not included in any of these numbers staff who work primarily in statute and rules editing or in computer services.

Now that I have described our office and other states' systems, I want to look at differences between our system of drafting and the Canadian provincial system.

The first difference has to do with sources for drafting services. While our office is charged with doing legislative drafting, we are by no means the sole source of drafting in the legislature. A legislator may turn for drafting to a senate agency called Senate Counsel and Research, or to a house agency called House Research. Each of these agencies was originally intended to provide legal counsel and research for the legislators. Each has extended its domain to legislative drafting as well. Especially in the case of complex legislation that develops over several sessions, committee counsel from these offices are extensively involved. There is also a caucus staff for each of the four caucuses in the legislature. Many of the legislators have personal staff as well. Committee chairs, in particular, all have administrative assistants working for them. In addition to many other duties, some of the assistants



try their hand at drafting too. As a result, a legislator in Minnesota can choose among nine or ten different places, including our office, to get drafting done. Some of those alternatives include going to executive branch agencies, to lobbyists, and to constituents. There are also some drafts which, although sponsored by legislators, actually represent the programs of the governor and are drafted by the governor's staff, and some which come from the agency and are drafted by agency staff. All drafts must come through the Revisor's Office regardless of the originating source. On many of the drafts we do extensive revision work, but sometimes professional courtesy requires us to leave a draft alone. This creates some frustrations, which I will discuss further in my talk this afternoon.

As I said, our drafting load is extremely heavy compared to what I understand is the load of individual drafters working for Canadian provinces. That is largely due to the fact that we do not have a parliamentary system. There is no "government" whose bills are worked on, perfected, and passed. Any legislator can and does request any bill. Some legislators request hundreds of bills in a legislative session; others, only a few. Only a small percentage of these bills ultimately pass, but that does not stop legislators from asking for them. Because there are many bills, the amendment load and the consequent committee report engrossment and enrollment load are also very heavy. Thousands of amendments are considered on the various bills that are acted on in each legislative session. In our system,

individual legislators are very much independent. To be sure, there is a majority party in each house and there is such a thing as party discipline, but the party control is weaker than in your parliamentary system. Leaders cannot directly control anything that other legislators do; they have to rely on persuasion.

Another difference you may find of interest is the scope of authority given to our legislative drafters. When the legislators request bill drafts, they seldom provide any detail. This is true whether they request drafting from us or from any of the other sources that are available. Often, the legislators will only specify a result, so that our legislative drafters find themselves creating the draft out of whole cloth. This power is important because selection of the scope of the bill and its details may go a long way toward determining whether a bill is popular. It will often be determinative of the final scope of the bill, although the details may change by amendment in the course of the legislative session. I understand that you in Canada receive very detailed instructions from the government as to what is to be included in the bill and how the implementation is to take place. This detail in requests is rare not only in the Minnesota Legislature but in most American state legislatures. Freedom to influence policy in this way may be one of the drawing cards that attracts attorneys to legislative work. Attorneys can find themselves very much determining policy, or at least the scope of policy, on public issues. They also value the working relationships

they build with legislators individually.

### **Administrative Rules**

The last item regarding drafting that I want to talk about is the drafting of administrative rules. Administrative rules are a delegated lawmaking function. The legislature, by law, authorizes state agencies to adopt rules to implement certain statutes. The law that sets up this structure also directs us to provide drafting services to state agencies for their rules. This work is fairly recently added to our agenda. We only got it about seven years ago. Before that time, all the state agencies were on their own in the drafting of administrative rules.

Because of their independence, two problems had been occurring on a regular basis. Many smaller agencies only drafted rules or amended their rules every few years. As a consequence, they had no staff who were skilled in drafting administrative rules. The other problem was with the bigger agencies. The bigger agencies did have staff. However, the drafting of administrative rules was usually delegated down until it got to somebody who couldn't delegate it any further. As a result, the drafting quality was not high. Our office was asked to help draft administrative rules as a reform measure. We have been drafting administrative rules ever since.

The administrative rules drafting load is small compared with the legislative workload. Each year, administrative rule drafts number between 200 and 300. Of our staff of attorneys,

about six or seven do practically all of the administrative rule drafting, so the average drafting load for those attorneys is about 30 to 50 administrative rule drafts a year. Unlike legislators requesting bill drafts, the agencies are fairly definite as to what they want drafted. Many often supply rough drafts of what they want. Almost all the drafts require extensive work and revision by our staff.

Our involvement as a legislative staff agency with administrative rules drafting is unique among the states. Many states have legislative staff involved in some oversight functions on agency administrative rules, but they are not doing the actual drafting. I think our role in the rulemaking process has improved the quality of drafting for administrative rules.

### **Publications**

I would now like to turn my attention back to our publication functions. We have three principal publications. The first is the compiled permanent and general statutes of the State of Minnesota, which is called Minnesota Statutes. We also publish the session laws of the legislature for each legislative session. That book is called Laws of Minnesota. The third major publication is the compiled administrative rules of the state. That publication is called Minnesota Rules.

Minnesota Statutes is a ten-volume unannotated set of compiled permanent and general laws. Of the ten volumes, one consists of the rules of the trial and appellate courts and another is the index and tables volume. So there are eight

volumes of statutes, each approximately two inches thick. We publish an entire new set of statutes each two years. In the intervening year, we publish a pocket-part supplement of the laws amended in the most recent session. We are granted extensive editorial powers by law. So in each new edition, there are some chapters of statutes that are renumbered and rearranged to some extent. In addition, we incorporate technical and stylistic changes that were approved by the legislature in bills we submitted and had passed in the previous session. Because our database and editorial process are computerized, we are able to complete and publish a new set of statutes within six months after a legislative session is completed.

Approximately 20 states have a system of publication similar to ours. The size of the statutes set varies from state to state as does the publication schedule. A few of the states produce annotated sets, not unannotated sets like ours. The majority of states, however, play no role in the publication of compiled statutes. The publication in those states is done by a private publisher, as ours was in Minnesota before 1939. The majority of those states have some sort of cooperative arrangement with the legislature by which data or paper copies are furnished to the publisher for compilation and publishing. A few of the states have absolutely no involvement with the private publisher. Those publishers get the material on their own and compile and publish the statutes as they believe best.

There are advantages, I think, in combining the drafting

and publishing functions in one office. Having the legislative staff actually involved in the compilation of statutes produces a result that is far more compatible with the legislature's and the public's needs than it is in states where the private publisher alone is involved. In those states, the sole audience intended by the publisher is the bench and bar, not the public. Moreover, the work of editing or compiling the statutes fits in well with the drafting process. It keeps our attorneys knowledgeable about the statutes in their area, and I think there is a good deal of cross-fertilization between what they learn from drafting and the recommendations they make in the compiling process.

Our legislature is in session for half the year or less. During that portion of the year when the legislature is not in session, the staff is involved with the editing and publishing work. Our staff is reduced by about one-third of the drafting and editing staff during the interim period because the workload is obviously less.

Two projects regarding the publication may be of interest to you. Some years ago, the legislature enacted a law providing that we must rewrite all of the statutes to make them gender-neutral. We were required to not only change gender-specific nouns, but also to remove pronouns. There was to be no linguistic presumption, for instance, that a commissioner was "he." But the legislature also required that we must accomplish the changes of pronouns without simply doubling them. That means we could not simply change every "he"

to "he or she." This took a lot of ingenuity. To do it, we developed about ten strategies for the rewriting of pronouns. I am pleased to say that the result is excellent. No one reading our statutes would find them artificially structured to avoid gender-specific references. It took us about two years to complete this project. We now maintain a policy of gender-neutral drafting.

The second project is still under way. We are reindexing our entire statutes. The existing index to statutes was taken by the original compilers in 1939 from the previously existing privately published set. It, in turn, was based on an index from the turn of the century. That strange hybrid was maintained by attorneys with little interest and less training in indexing who simply patched a product together every year. The resulting index was deficient in many respects.

Starting three years ago, the legislature required us to prepare a new index. It will take us approximately six years to complete, using mostly outside contractors who specialize in indexing. The important point about our reindexing project is the care with which it is being done. We have an indexing specialist on our staff who prepared detailed instructions as to how the indexing was to be done. Included in the instructions is a statutory thesaurus that controls the depth and breadth of all of the indexing. This thesaurus is, I think, unique among the states. Because of it, we believe the completed index, when it is published in approximately three years, will be the best statutory index in the country.

## Computer Operations

I would lastly like to pay a little more attention to our computer operations. We started computerizing in the early 1970s. Now, we find ourselves providing computer services not only for our own use but for many other agencies in the legislature. This is not unlike what occurs in many business corporations, where the accounting department provides computer service simply because the accounting department was the first to computerize. The accounting department got computers first in order to do things like payroll and accounts receivable. When other departments asked for help, the accounting departments gave it, and soon, they found themselves doing all kinds of computer work that had nothing to do with accounting. So it is with us. We were the first to computerize in the Minnesota Legislature, and as a result we have found ourselves doing computer work far removed from our own basic duties. Our computer system was developed to facilitate the drafting of bills. This system, when it was created in the 1970s, was one of the first systems of its type in the country. We are one of the few states that still have a "homegrown" computer system. The system used for drafting is a very specialized word processing system. It is structured for the specific needs of legislative drafting. This includes the retrieval of existing statutory text and the use of strike throughs and underlines to indicate amendments. Because we have our own computer staff, they have found countless ways to use computers to speed our



work and make it more accurate. For example, we have a program that will automatically apply a page and line amendment to a bill and turn out a new version. So, if an amendment says to go to page 14, line 19, and delete ten words and insert five different words, the computer will find the page, line, and words and automatically make the substitution. Since, as I said, we have thousands of amendments and hundreds of committee reports, this has taken a lot of the drudgery out of doing engrossments and speeded them up tremendously.

The computer system was also used early on to facilitate the editorial process. So, for instance, the entire statutory database is computerized. We can take data out of the session laws and strip it; that is, we can remove stricken words and remove underlining from new words added to the statutes. We can then automatically place the changed text in the master data base of Minnesota Statutes. This computerization is the chief reason why we are able to publish statutes within six months. When the statutes were first published in the 1930s and 1940s, it took approximately two years to get the new books in the hands of the purchasers.

The computer has made it possible - although not easy - to perform a number of tasks that would otherwise be overwhelming. One such task was the production of the compiled set of administrative rules. Seven years ago, when we were given the job of reviewing rule drafting, we were also instructed to prepare the first complete compilation of all of the state's administrative rules and to publish them in a format similar to

that of the statutes. It took us about four years to locate, edit, compile, index, and publish those administrative rules. The state has been using the rules compilation for about seven years now.

The chief advantage to the publication is that it is comprehensive. Previously, the decision to publish the rules or not was made by each state agency. Some agencies found it inconvenient to keep the public advised of what their rules were. Only about half of all of the administrative rules existed in a published form by gathering and publishing all of the administrative rules. Compiled administrative rules are available in about ten of the other states but few of the agencies responsible for publishing are in the legislative branch. The computer system facilitated this entire compilation and publication process. It probably would've taken us ten years to compile and publish that first set if we had not had computers available.

Our computer staff, now consisting of about ten people, is involved in many other functions beyond supporting our work. For example, our computer system is used for editing and publishing the journals of the senate and house, editing and publishing the calendars and agendas, and the maintenance of the bill status indexing system. All of these were major undertakings.

Our computer staff now has another major project under way. I mentioned that we are still using a computer system that dates from the 1970s. Within three years we hope to replace that

system with a new, state-of-the-art system. That system would resemble the word processing systems now available on personal computers such as Wordperfect for Windows, or Word for Windows. People would be able to do drafting by lifting and copying text physically as opposed to dealing with text directly. We have high hopes for this new system, although I will confess that we are nervous about its cost, both in dollars and in programming time.

In general, we have been happy to have in-house involvement of computer staff. Having the computer staff as part of our own staff has resulted in much closer working relationships and a better computer system than we would have had, had we had to depend on a central service bureau for our computer work.

That then concludes my recitation of how our drafting, publishing, and computer systems work in the Minnesota Legislature and in the other American state legislatures. There is much that we do that could be emulated in other states, particularly in how we do our publication and provide computer services. I must admit, however, some envy at your drafting system where, I'm told, the load is much lighter, and you're able to pay a lot of attention to the art of expressing policy as well as constructing it.

There is not time now to take questions regarding our system. However, I will be available to talk with you for the rest of the day and at this evening's reception. If any of you have questions about our operations, I would be pleased to hear from you. I expect to learn a lot from you as well.