

The Dialogue Between Drafters and Instructing Officials During the Drafting Process

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I. INTRODUCTION

This paper is part of the materials for the session entitled “The Drafting Dynamic: Drafting Instructions and the Drafting Process.” The focus of this paper is on the interaction between the legislative drafter and instructing officials during the drafting process after the initial instructions have been given. This paper addresses practical matters and is somewhat selective in what it addresses. It is not intended to deal, in a comprehensive way, with all that goes on between a drafter and instructing officials.

This paper is intended for new, or relatively new, drafters and instructing officials.

My particular background affects how I approach this area and for that reason it is worth explaining. I am a legislative drafter and I started my career almost twenty years ago with the Ontario Government. Although my main focus has always been legislative drafting, I have been interested, throughout my career, in the larger process of legislative development of which drafting is a very specialized part. I was fortunate enough to get some good experience in the policy development process and in working as an instructing official. Over the course of my career I was also able to work as a legislative drafter in a diverse range of jurisdictions—Nunavut, Kenya and Bermuda. Over the last four years, after having returned to Canada to work as a legislative drafting consultant in private practice, I have found that a significant amount of my work has been as an instructing official, often working with former drafting colleagues.

Section II addresses some aspects that relate to the general relationship between drafters and instructing officials. Section III deals with the instructing official’s part of the dialogue—the drafting instructions. Section IV deals with the drafter’s part of the dialogue. Section V deals with some special cases that affect the dialogue. Section VI is a short conclusion.

II. GENERAL RELATIONSHIP BETWEEN DRAFTERS AND INSTRUCTING OFFICIALS

The working relationship between a drafter and his or her instructing officials is critical to the efficient drafting of good legislation. Of course there are many factors that contribute to a good working relationship: trust, mutual respect, professionalism, etc. Some of what I will address below relates to this general relationship. But obviously there is much more about this aspect than I can address here. My focus is on the dialogue relating to the draft and the instructions.

A. The dialogue between the drafter and instructing official should cover the drafting process and the drafter's expectations

In many jurisdictions, it is often the case that the instructing officials have a great deal of subject specific knowledge and expertise, but often don't have a great deal of experience in the development of legislation or the giving of drafting instructions. There is considerable variation across and within jurisdictions but I think the trend is that instructing officials throughout Canada have become less experienced in developing legislation. Compared to a few decades ago, the work of developing legislation is spread over a larger number of instructing officials. As a consequence, those officials don't have the same opportunity to gain experience.

The result is that it is becoming more common for a legislative project to involve an experienced legislative drafter and an instructing official who has relatively little experience with giving drafting instructions. This makes it more important for drafters to share their experience.

Even if there is no significant difference in experience, different drafters work differently. A drafter should take the lead in explaining what that particular drafter's expectations are. That doesn't mean the drafter can necessarily dictate how the process will go and drafters should be flexible and reasonable in their approach. But at least dealing with this gives an opportunity to come to a mutual understanding or compromise. If the drafter and the instructing official are working at cross purposes, conflicts can arise. Also there is a real chance that matters will fall

through the cracks if the drafter and the instructing official have different expectations of what the other is doing.

Here are a number of areas that I often try to make sure that instructing officials I am working with understand. These are also matters I try to keep in mind when I am acting as an instructing official myself.

1. How instructions should be given

It is a good idea for a drafter to be clear about how they would like to receive instructions. Of course that doesn't mean the instructions will come in that form, but chances are better that they will if the instructing official knows what the drafter wants. I particularly dislike drafting suggestions without any explanation of what the proposed draft is intended to accomplish so that is something I usually address. Sometimes explaining this in a general way can be useful but I often find that addressing this, or revisiting it, when it comes up in specific cases is more useful.

2. How drafts should be reviewed

I find there are some points about how to properly review a draft that, while fairly obvious, are good to emphasize.

- Changes to a draft need to be considered in their full context
 - Of course, in practice the entire draft is not reread every time there is a change, even by the most careful of instructing officials. But an instructing official should consider the entire context when reviewing changes, even if they don't reread every word of the draft.
- A draft must be reviewed for what may be missing
 - One of the hardest things to remember, when reviewing a draft, is to consider what is not in the draft. The tendency, when reviewing a draft, is to focus on what is there. That is natural but sometimes the most critical things are what are missing.

- A drafter's questions are not all the instructing official must consider
 - Some drafters, including myself, set out many questions or notes to the instructing official with respect to particular points or aspects of the draft. But no matter how thoroughly a drafter has raised issues or flagged areas of concern, it is not enough for an instructing official to address only what the drafter has raised. The instructing official must do his or her own review of the entire draft.

3. Clarifying who has responsibility for what—particularly tricky areas

Drafters and instructing officials should have a good idea of who has responsibility for what. The following, while certainly not an exhaustive list, are some matters about which instructing officials can be confused with respect to their responsibilities and how to carry them out.

- Consequential amendments
 - Often a drafter can identify obvious or mechanical consequential amendments. For example, in many jurisdictions it is easy to search the entire body of statutes to identify references to the statute being amended. This can help to identify consequential amendments. But not all consequential amendments can be identified in such a mechanical way. The drafter may still rely on the instructing official to identify other consequential amendments that are not as easily located. However, if the drafter is identifying some consequential amendments the instructing official may mistakenly think that this is something for which the drafter is fully responsible.
- Transition
 - This is always a tricky area and it is even more complicated because many transitional issues don't require any special provision—the general law or provisions of the Interpretation Act may adequately

deal with the issue. Most drafters identify transitional issues for the instructing official but sometimes that requires more practical knowledge than a drafter would typically have.

- Regulation-making powers (when drafting a statute)
 - This area almost always poses special problems because often the drafter drafts regulation-making powers without a full explanation of the range of things the instructing official may want to do with the power. A good instructing official can often explain what they intend to do by regulation, though that may not be possible if a lot of the policy is not yet developed. But it is harder to articulate all that should be kept open as a possibility for the future. A further complication is the legal limits and presumptions on regulation-making powers and the difficulty of foreseeing whether they might arise and must be dealt with.

4. Testing the draft

I encourage instructing officials to use scenarios to “test” the draft—not just read the draft in the abstract. This is particularly important if the legislation is being brought forward in response to some particular situation that has come up or if the instructing official is anticipating challenging situations to arise under the legislation. The draft should work for the easy cases of course but it should also work for harder cases. So the scenarios being used should focus on the “margins” or on the areas where the application of the draft may be problematic. A particularly difficult part of testing a draft is to anticipate how behaviour will change in relation to new legislation and to assess the draft in relation to such changed behaviour.

B. Drafters and instructing officials should avoid undue deference in other’s role

It is common for drafters to complain about instructing officials who won’t let them draft or who encroach on what the drafter feels is the drafter’s responsibility. Of course instructing officials also complain,

sometimes about drafters second guessing their instructions and getting into matters of policy rather than drafting. These conflicts are familiar and I won't discuss them here. But I think it is worth identifying a related problem that affects the dialogue between the drafter and instructing officials—undue deference to the other's work.

The drafting process works best when the instructing official and the drafter work well together. While that means letting each do their own job it is not necessary, and not advisable, to give undue deference to the work of the other. Ideally, the drafter and instructing official should each be a sounding board for the other and should be a double check on the other's work. The instructing official should not assume, because the drafter is a good drafter, that the draft will do what is required. A draft should be carefully reviewed no matter who drafted it. Similarly, no matter how good an instructing official's instructions and drafting suggestions are, the drafter should not just assume, because the instructing official is a good instructor, that the instructions and drafting suggestions always make sense. Even a good instructing official sometimes asks for something that it turns out they don't really want.

Of course, this approach requires a little extra patience on the part of the drafter and the instructing official. But my experience is that while drafters can sometimes be irritated by detailed questioning of the draft, good drafters realize that this is a cheap price to pay for the benefit of having others really read the draft carefully. Instructing officials can also be irritated by having instructions or suggestions queried or probed. But again an experienced instructing official will be grateful to have another fully engaged expert thinking carefully about the draft. In the end most legislation gets scrutinized eventually and it is far better for that to happen during the drafting process, when problems can be easily corrected. If problems are found afterwards they can be more embarrassing and harder to correct.

III. INSTRUCTING OFFICIALS

The most important part of the dialogue between the instructing officials and the drafter are the drafting instructions provided by instructing officials. When drafting instructions are discussed it is usually the initial drafting instructions that people have in mind. But no matter how good the initial drafting instructions are they are almost never the

only instructions that are given to the drafter. As the draft develops and is reviewed by the instructing official, further instructions will be provided to refine the draft. Also, it is almost always the case, except for some small projects, that gaps are identified that were not addressed by the initial instructions or that changes are made from what the initial instructions provided. Instructions will be given to fill those gaps or explain those changes. This section addresses the giving of these drafting instructions.

A. Same principles apply as for initial instructions

In practice, instructions given during the drafting process are often not as fulsome as the initial instructions. Usually they are much more specific and are prepared more quickly. However, the same general principles apply. Those general principles are explained in many different ways but they generally involve the following elements, which I think are also generally applicable to instructions given during the drafting process:

1. Problem/background

The problem should be explained and enough background provided so that the drafter understands it. It may be the case that the policy or previous instructions have not changed but the instructing official feels the draft needs refining or correcting. In such a case there should be an explanation of what the problem with the current draft is.

2. Proposed solution

In addition to explaining what the problem is, the instructing official should also explain what they want to do about the problem. If there is a drafting suggestion it is okay, in my view, to give it. But the drafting solution should be in addition to the explanation of what the proposed solution is, not instead of it.

3. Miscellaneous matters

It is hard to exhaustively list all the other things that ought to be included in instructions because there can be a lot of special cases. For example, there may be other Acts or provisions with which consistency is

particularly important, there may be useful sources or precedents that the instructing official has identified or there may be special concerns or sensitivity about a particular issue that may affect the wording of the draft.

Of course the drafting instructions given during the drafting process can range from the introduction of new and complex schemes to the correction of spelling mistakes. Good instructions for the former may be very similar to the initial instructions, covering the same things in the same level of detail. On the other hand, instructions to correct typos or make very minor changes, do not require the same level of explanation or detail. However, I think the same fundamental principles apply: the drafter should be given enough information so that he or she fully understands what the instructing official wants.

B. Instructions should be in writing

It is common, at least in some jurisdictions, to provide feedback on drafts and follow up instructions verbally, either by telephone or in meetings. I have received instructions in this way in all the jurisdictions I've worked in. However I have become a strong advocate of written instructions. There are significant advantages for both the drafter and the instructing officials and few reasons, in my view, not to give instructions in writing.

The advantage of written instructions for complicated matters seems obvious. Providing them in writing will force the instructing official to carefully consider what they want and to communicate it in an organized way. Receiving them in writing will ensure that the drafter has something to refer to when they are drafting.

If instructions are simple, even absolutely trivial, it is still easier, I believe, to give written instructions. An instruction to fix a spelling mistake can usually be typed in less time than it would take to get the drafter on the phone, let alone direct him or her to the typo in question, point out the typo and wait while he or she fixes or makes a note of it.

Other advantages of written instructions include the following:

- Written instructions become a useful checklist, for both the drafter and the instructing officials, to make sure that all of the instructions have been addressed.

- Written instructions make it much easier to keep others in the loop. It also makes it easier to explain to others what a particular change is all about. (This is especially the case if the instruction is not just in the form of a drafting change but is a good explanation of the problem, proposed solution, etc.)
- Written instructions are a useful explanation, for later, as to why something was done the way it was done. (Again, this is especially so if the instruction is not just in the form of a drafting change.)
- Written instructions are better if a project is interrupted or delayed or changes hands. Unwritten loose ends are easily lost if a project is taken up after a delay, especially if it is taken up by new people. Even written instructions that have been carried out can be very useful if it is ever necessary to understand why a particular change was made. They can be a useful reminder for those who were involved and a useful source of background information for anyone new coming into a project.

Providing written instructions is relatively easy when drafts and feedback are exchanged by e-mail. As a drafter I encourage instructing officials to comment right on the face of the draft and e-mail the marked-up copy back. Comparison software makes it easy to find the comments.

C. Giving instructions—my personal approach

The following describes the way I typically give instructions during the drafting process:

1. I put all my instructions directly into the draft following the provision they relate to or at the place in the draft where the instruction is most relevant. I preface my instructions with my initials (to make them easy to search for) and put them in a different colour. As noted, I include instructions even for typos.

Examples (instructions to fix typos):

Contents of the request

(4) The request must set out the basis for a the person’s request and all relevant facts.

MS Comment: Typo: See highlighted text.

(a) respecting appeals under this section 10, including prescribing rules of procedure for the appeal boards;

MS Comment: Typo: “boards” should be singular.

Amendment of order

10. The Minister may amend an order under section 9 if the Minister considers it in the public interest to do so.

MS Comment: Typo: The cross reference should be to section 8.

2. I don’t make a change in the text of the draft. If I think it useful to show a suggested drafting change, I copy the provision and show any drafting changes there.

Example (instruction with provision reproduced to show drafting suggestion):

Further consultation

(7) If, after rejecting a plan, a patient requests further consultation, the administrator shall consult with the patient to attempt to come to an agreement on the same or a revised plan.

MS Comment: This subsection should be changed so that if further consultation is requested the further consultation is as per subsection (4) - i.e. the further consultation is with everyone who is supposed to be consulted under that subsection, not just with the patient who requested the further consultation. Something like the following might do:

Further consultation

(7) If, after rejecting a plan, a patient requests further consultation, the administrator shall consult further in accordance with subsection (4) to attempt to come to an agreement on the same or a revised plan.

3. If a precedent is being used as the basis for the instructions, I try to make that clear. If possible I try to explain how the precedent must be adapted rather than making drafting changes to the precedent itself. I also try to make clear whether the precedent is being used just because it seems to do what I think is needed or if there is some other reason why there should be consistency between the precedent and the draft being worked on.

Example (instruction to use precedent, with adaptations):

MS Comment: The client would like to provide for a one time review of the Act by a committee. The ABC Act, passed earlier this year, has a provision (s. 20) that we have looked at as a precedent. The Ministry wants a few changes from that provision but, except where changes are necessary, we think that differences should be minimized so as to avoid raising any unnecessary questions.

Here are the changes needed:

1. S. 20(1) of the ABC Act provides for the review to commence after the fifth anniversary of the coming into force of the ABC Act. Our bill will come into force at different times so that approach poses some problems. Also our bill will require more lead time before it can be brought into force. Accordingly the Ministry would like the review of our Bill to commence after the seventh anniversary of the assent of our bill.

2. S. 20(8) of the ABC Act specified certain bodies that must be consulted as part of the review of that Act. Such a provision is not needed for our bill. The Ministry does not want to specify any particular bodies that must be consulted. (The general duty to consult under s. 20(7), which the Ministry wants, will be sufficient.)

4. If I have identified other parts of the draft that may need changes in consequence, I reference them and put notes there as well.

Example (instructions with consequential changes elsewhere):

Hearing of appeals

39. An appeal under this Part shall be heard by a person appointed by the Minister to hear that appeal.

MS Comment: The policy has changed. Instead of the appeal being heard by a single person appointed by the Minister, appeals are to be heard by a three person panel, one of whom will be the chair...

...

References in sections 40 to 50 to the person appointed to hear an appeal will need to be changed because appeals will be heard by a panel. In a few places the reference to the person appointed to hear an appeal should be changed to a reference to the chair of the panel. I've noted those places.

...

Extension of time for filing a reply

44. The person appointed to hear an appeal may extend the time limit for filing a reply under section 43.

MS Comment: The Ministry wants extensions of this time limit to be made by the chair of the panel, not by the entire panel. (The Ministry wants the chair to be able to do this independently without convening the entire panel.)

5. If there is an issue that, in the end, does not require a change to the draft I often note it, with the reasoning for why nothing is needed, for the drafter. (For example, an issue may come up but there may be another Act that already deals with the issue.) Including instructions that don't require changes serves a few purposes.

- It helps to keep the drafter fully informed about how the scheme is intended to work. Apart from keeping the drafter better informed it gives one more chance for someone else to spot a flaw in the instructing official's reasoning.
- It forestalls any questions the drafter may have on that issue and may avoid further wasted time if the drafter is

particularly proactive and drafts something to address the issue.

- It will serve to inform others who are working with the instructing official and form a record of why nothing was needed to deal with a particular issue.

Example (“instruction” for information purpose):

<p>Chair</p> <p>25. The member of the Board who receives the most votes in the election of the members shall be the chair of the Board.</p> <p style="color: blue;">MS Comment: We have considered whether anything is needed to deal with ties. We don't think anything is needed. The Local Elections Act, which applies under s. 22, deals with this situation under s. 90 and 91 of that Act.</p>

6. I give the draft with my written instructions to my policy clients (i.e. the departmental officials from whom I am working or taking instructions). I do this before it goes to the drafter if time allows or at the same time if it does not. The policy client can then read my instructions and get back to me if they have questions or concerns. (Usually by adding their comments to mine.) This gives an opportunity for some refinement before the drafter begins work. Even if the instructions go to the policy clients and the drafter simultaneously, which may happen if time is pressing, the instructions can often be more easily understood than the resulting drafting change.

Example (policy feedback on instruction):

<p>Hearing of appeals</p> <p>39. An appeal under this Part shall be heard by a person appointed by the Minister to hear that appeal.</p> <p style="color: blue;">MS Comment: The policy has changed. Instead of the appeal being heard by a single person appointed by the Minister, appeals are to be heard by a three person panel, one of whom will be the chair...</p>

...

References in sections 40 to 50 to the person appointed to hear an appeal will be need to be changed because appeals will be heard by a panel. In a few places the reference to the person appointed to hear an appeal should be changed to a reference to the chair of the panel. I've noted those places.

Policy comment: Can this be drafted so that the Minister can appoint either a single person or a three person panel?

7. When I get the draft back from the drafter I electronically compare the new draft to the previous draft with my written instructions. The resulting document shows my instructions (as deleted text) and the drafter's changes. I find that very convenient to review changes fairly quickly. I can go automatically from change to change and be sure of not missing anything. (I do a lot of reviewing on screen but even if one uses a printed document it is very useful to have the electronic text to find things and to see all the changes.)

Example (showing comparison of new draft to instruction draft):

(a) respecting appeals under this section 10, including prescribing rules of procedure for the appeal board;

IV. THE DRAFTER

A. Responding to instructions—my personal approach

The following describes the way I typically respond to instructions during the drafting process:

1. I don't automatically have a meeting or telephone call to discuss instructions I receive. I only do so if it is necessary or useful. There is no point in discussing things if you already understand them. (Though in some cases it may be a good idea to verify what you think you understand.)

2. If I feel the need to discuss the instructions I often try to narrow the issues to be discussed. I like to give the instructing official a list of what I need clarification on. This helps the instructing official to be better prepared.

3. Usually I like to give the instructing official the chance to respond in writing to my questions because I find that any questions that can be dealt with in advance makes any subsequent meeting or discussion that much more efficient. Even a partial explanation can narrow and focus the subsequent discussion. (Occasionally, particularly if an instructing official has a history of being badly prepared, I insist on a written response before meeting.)

4. If some of my questions are going to be more efficiently dealt with by giving them in the context of a draft then I include them as written comments in my draft. (My drafts are heavily annotated with questions and comments to the instructing official.) But if they are more efficiently dealt with before I draft I deal with them before I produce the draft or, if appropriate, I leave parts of the draft out pending further clarification, etc.

B. Little things that really help instructing officials

As an instructing official I have found the following particularly helpful.

1. Avoid renumbering during drafting process

As both a drafter and an instructing official I have found it to be a good idea if renumbering is avoided until the very end of the drafting process. I suspect that most drafters avoid this for their own purposes but there is a temptation, every now and then, to straighten out some numbering, especially if it doesn't affect other parts of the draft.

Drafters are, of course, well aware of how much work renumbering can be and how easy it is for mistakes to crop up at that stage. But they may be less aware of the advantages that not renumbering brings to instructing officials and those with whom the instructing officials work. Those advantages are considerable:

- References to provisions in memos, e-mails, charts, notes, drafting instructions, etc. are more likely to still be understandable if renumbering is avoided. The amount of such supporting material can be considerable and there can be many references to parts of a draft. There is also sometimes a time lag in getting internal feedback or

responses on certain issues and if the numbering changes in the meantime that can make the feedback, etc. harder to understand.

- It will be easier, if renumbering is avoided, to go back through successive drafts/instruction drafts to find the previous version of something or the instruction that explained why it was changed.
- If a draft is renumbered a conscientious instructing official may feel the need to check that all the cross references have been properly updated. That is a lot of work.
- On a big project people get to the point where they remember some section numbers, which can be convenient. Whenever the numbering changes, that convenience is lost.

Instructing officials sometimes ask to have drafts renumbered. I usually resist such requests and explain the benefits of not renumbering. That generally works though if the instructing official wants the draft for external purposes it may be harder to avoid renumbering.

2. Tables of contents are very useful to navigate through a large draft

As a drafter I have often found a table of contents to be very useful for drafting purposes. It is just as useful for instructing officials.

I often do a quick and dirty table of contents by copying the entire draft to another document and deleting all the text other than headings and marginal notes for each section. As I go I move the section number to the same line as the marginal note for the section. I find this method to be an easy and quick way to produce a working table of contents, especially if you have support staff to assist. I generally do this as a drafter and when I'm acting as an instructing official I also do it, or have it done, if the drafter does not.

3. Comments/questions in the draft

As a drafter I find it easy and convenient to put my comments/questions for the instructing official directly into the draft and

to receive instructions in the same way. As an instructing official I find that quite convenient as well. A second document that must be referred to in conjunction with the draft can be a little troublesome at times. As an instructing official I sometimes use a separate document if the instructions are significant and relate to something new to be added to the draft. But normally I put the instructions into the draft itself.

If a memo is desirable to create a more formal record of a concern, or to isolate a concern to bring it to the attention of higher ups, that can, of course, be done. In such a case the comments from the memo can be referred to or reproduced in the draft as well.

4. Amendments—show as marked up versions of the parent Act

Drafts are often a difficult read. Amending bills are particularly so. Both as a drafter and as an instructing official I have found it much easier to consider proposed changes reflected directly in the parent Act rather than prepared separately as amendments. That is a much more useful working document. (I think that can be more convenient for translators as well.) This is easily illustrated in the following:

Example (Amendments shown as change in provisions to be amended):

<p>...</p> <p>When notice is in effect</p> <p>(3) A notice is registered and in effect <u>A notice shall be registered by the Registrar General and is in effect</u> when the Registrar General has matched it with the original registration, if any, of the adopted person's birth or, if there is no original registration, when the Registrar General has matched it with the registered adoption order.</p> <p>Exception</p> <p>(4) Despite subsection (3), a notice registered <u>a notice submitted</u> by an adopted person with respect to a birth parent does not come into effect if, before the match is made, the Registrar General has</p>

already given that birth parent the information described in subsection 48.2 (1).

Same

(5) Despite subsection (3), ~~a notice registered~~ a notice submitted by a birth parent does not come into effect if, before the match is made, the Registrar General has already given the adopted person the uncertified copies of registered documents described in subsection 48.1 (1).

...

Example (Same amendments in normal amending language):

...

(2) Subsection 48.3 (3) of the Act is amended by striking out “A notice is registered and in effect” at the beginning and substituting “A notice shall be registered by the Registrar General and is in effect”.

(3) Subsection 48.3 (4) of the Act is amended by striking out “a notice registered” and substituting “a notice submitted”.

(4) Subsection 48.3 (5) of the Act is amended by striking out “a notice registered” and substituting “a notice submitted”.

...

Preparing an amending bill from a marked up parent Act when the drafting is settled is a fairly mechanical process. (But not entirely mechanical as I have found.) I find this approach useful both for amending bills or regulations as well as for motions to amend a bill.

My preferred method is to show text being repealed as struck out text and additions in a particular colour. However, this approach, while useful, takes a fair bit of discipline. The danger is overlooking or garbling changes when the marked up parent Act is converted into an amending bill (or when the marked up bill is converted into motions).

I believe some jurisdictions may have automated this part of the process.

V. Some special cases that affect dialogue between drafters and instructing officials

A. Projects under extreme time pressure

While there may often be broad consensus about how the drafting process ought to go, sometimes the realities of a particular project make achieving the ideal difficult. An especially difficult challenge is preparing legislation under very tight deadlines. In such circumstances, instructing officials may feel that it is not possible, for example, to give instructions in writing, or to fully explain what an instruction is about.

Of course drafters and instructing officials must cope, somehow, with the demands that are put upon them. A way to cope with extreme time pressure may be to give very abbreviated verbal instructions—delete this subsection, strike out those words, rephrase this way, etc.—without a discussion of the background, what the problem is and what the instructions are intended to achieve. I have a few comments on this way of coping with extreme time pressure.

First, I suspect that this approach is sometimes not as efficient as some might think. Providing full instructions is not just a procedural step given for bureaucratic reasons—it is a way of ensuring that a draft that works can be efficiently drafted. If moving extremely quickly results in the draft not working then more time will be needed to fix the draft. And in drafting, as with many things, it is often quicker and more efficient to do things correctly in the first place, than to do them incorrectly and fix them up later. So moving quickly may not result in an issue being dealt with more quickly. This, of course, presumes that problems are discovered in time so that they can be addressed during the drafting process. If a problem is not discovered in time it may only be possible to fix it during the legislative process or by subsequent legislation.

I also am skeptical that providing instructions by talking things through in a meeting, rather than providing written instructions, is a good way to save time. The problem is that such a meeting often involves significant down time by different participants. Drafters must sit while instructing officials discuss and decide what they want to do and instructing officials must sit while drafters try to analyze instructions on the spot. I have generally found it quicker and more efficient to break up a project into parts so that the instructing officials are working on instructions for one part while the drafter is dealing with their instructions on another part.

Finally, if corners are cut to meet very tight deadlines it is important for decision-makers to recognize, and take responsibility for, the risks such corner-cutting produces. If the drafter does not have adequate drafting instructions then their ability to ensure the draft works is significantly impaired, particularly when there is also insufficient drafting time as well. In cases where the instructing official is, essentially, just dictating drafting changes, the draft is, in effect, being finalized by a non-drafter working under very tight time lines. If experienced drafters bring value to legislative development then they are especially needed in extreme situations. If instructions at the end of the process are inadequate because of time pressure, then the drafter is being sidelined from the process when they are most needed. (The professional responsibilities of the drafter in such situations, while important, are not something I can address here, other than to note that the drafter may need to ensure that they are adequately addressed and any reservations, etc. are clearly documented.)

B. Instructing official as conduit with outside body

Sometimes the drafter will find that they are dealing with an instructing official who is acting more like an intermediary conveying instructions or suggestions from someone else. This can sometimes happen, for example, on a private member's bill, if the instructing official has no specialized knowledge about the matter in question but is working with an outside body that has a great deal of specialized knowledge. But this can arise in other situations, such as when a department is consulting or negotiating with an outside body.

In such cases it can be particularly important for the drafter to give their questions and comments in writing so there is less chance of

important points being lost on their way to the outside body. Similarly, an instructing official in such a position should take particular care not to garble feedback from the outside body. If the outside body's feedback is in writing (and it should be) it should be passed on to the drafter. Of course, this does not mean the instructing official can or should abdicate the instructing role. The instructing official must still give proper instructions and take responsibility for what the bill is to do.

C. Negotiation of wording from outside body or others

The instructing official may be dealing with an outside body, or other person, including other government officials, who want to negotiate (or dictate) wording of the draft.

Of course this is a situation that the instructing official should try hard to avoid. Where it cannot be avoided the instructing official should emphasize that wording can't be guaranteed and should stress the need to be clear as to what the legislation should do, not how it should read.

If the instructing official must request or require the drafter to include specific wording it is still important for the instructing official to fully explain what the instruction is all about. This includes not just what the hoped-for legal effect of the suggested wording is but also why the particular words that are being suggested have been chosen. Such information may allow the drafter to find compromise wording if the suggested wording is problematic. If the legislation being drafted will be bilingual this may also be very important for the other language. (The reality is that many who dictate precise wording do so in only one language.)

VI. Conclusion

This paper addresses very practical aspects of the dialogue between the drafter and instructing officials. Good communication between the drafter and the instructing officials is critical to the drafting of good legislation. Both the drafter and the instructing officials have a role in fostering such communication and making sure that it is as efficient and as comprehensive as possible.