PROFESSIONAL RESPONSIBILITY FOR LEGISLATIVE DRAFTERS: SUGGESTED GUIDELINES AND DISCUSSION OF ETHICS AND ROLE PROBLEMS*

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I. Introduction

Legislative drafters should be given the responsibility and authority to engage more actively in the legislative process. Reconsidering current drafting practices,[1] and implementing guidelines of professional conduct for the drafter are two suggested ways of improving both legislation and the plight of legislative drafters.

With the American Bar Association's [ABA] review and adoption of the Model Rules of Professional Conduct [Model Rules],[2] considerable attention is again being focused on general problems of professional ethics. The Model Rules have in a variety of areas sought to encompass lawyers roles beyond that of advocates,[3] yet the variety of lawyers activities means that much conduct is still outside the clear scope of these rules. A common criticism is in the area of representing an organization.[4] Under the ABA Model Code of Professional Responsibility [ABA Model

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[1] For an understanding of current practices and problems, the author has drawn on his own experience and that of members of The University of Akron School of Law Legislative Research and Drafting Service, and interviews, observations, and discussions with practicing drafters and legislators. Drafters and legislators from twenty-five states and three countries were interviewed, mostly in person, a few by telephone. In order to preserve confidentiality and candidness, names and characteristics which would identify sources of comments on current practices have been protected.

[2] MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

[3] *See, e.g.*, Hacker and Rotunda, *Officers, Directors and Their Professional Advisers*, 6 CORP. L. REV. 269, 269-73 (1983).

[4] Bunch, DeMuth, & Hennesey, *Representing An Entity*, 9 COLO. LAW. 2588 (1980).

Code],[5] and still to some extent under the Model Rules, the primary concern seems to be with the lawyer as advocate, especially in a litigation context.[6] While such a fixation with courtroom advocacy may have detrimental impact even in litigation,[7] it provides even less guidance for lawyers outside of a pure advocacy role.[8] Related criticisms, suggesting a too-narrow, litigation-oriented view of the lawyer's world, have been leveled against law schools as well.[9]

Legislative drafting is one particular area which has been insufficiently examined.[10] Legislation has significant impact on societal growth, and control over the legislative expression, exercised to a considerable extent by lawyers, needs to be exercised in a responsible way. Although the number of lawyers acting as legislative drafters is small compared to those engaged in private practice, the impact of their ultimate product may be disproportionate. Yet, little attention or guidance is afforded these aspects of the legal system and lawyers' activities.[11]

The quality, and at times the quantity,[12] of legislation enacted by legislatures has drawn criticism from many sources.[13]

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[5] MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE].

[6] For a detailed critique of this, and other failings of the Model Rules, see Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981).

[7] *See generally* Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A.J. 639 (1977).

[8] *See, e.g.*, Wallace, *Whys and Wherefores: A Perspective on the Model Rules*, 9 COLO. LAW. 2543, 2550 (1980).

[9] *See, e.g.*, Stewart, *Foreward: Lawyers and the Legislative Process*, 10 HARV. J. ON LEGIS. 151, 157 (1973).

[10] A few attempts have been made. *See, e.g.*, J. PEACOCK, NOTES ON LEGISLATIVE DRAFTING (1961), which provides some food for thought. The Department of Legislation in the ABA Journal often has had interesting comments. *See* Nutting, *The Professional Responsibility of Draftsman*, 47 A.B.A.J. 1014 (1961).

[11] Some attention has been paid to ethical problems for legislators. For example, a variety of approaches to issues such as conflict of interest have been considered. *See* Rhoades, *Enforcement of Legislative Ethics: Conflict Within the Conflict of Interest Laws*, 10 HARV. J. ON LEGIS. 373, 376 (1973).

[12] It has been suggested that such excessive "rule density," where a growing complex of rules intervenes offensively in daily life, is often not associated with our supposedly "free" society. *See* W. TWINING & D. MIERS, HOW TO DO THINGS WITH RULES 147-48 (1982).

[13] The frustration of courts, for example, having to deal with long, involved, and unclear rules is evident. As Justice Harlan lamented when faced with such a situation, "[O]nce again this Court must traverse the labyrinth of the federal milk marketing provisions." Zuber v. Allen, 396 U.S. 168, 172 (1969).

Certainly some of this criticism is valid.[14] While critics of legislation often blame legislators, the drafters (or lawyers in general) are also made targets of attacks on ill-conceived or poorly executed legislation.[15]

The role of drafters, independent of legislators, has attracted some attention, although still in rather limited areas. Reed Dickerson[16] and others[17] have called for the "professionalization" of legislative drafting.[18] What it means to "professionalize" drafting, however, is not clear. Many state legislatures have created a special, identified group of drafters. In many states, a separate department[19] or division within a department[20] has principal responsibility for bill drafting. Such groups may be partisan or non-partisan, but they generally are institutionalized with developed, standardized operation procedures. While the type of service selected may have important political ramifications, the recognition of need for some such specialized service is widespread.[21] This progress, while valuable, hardly seems revolutionary. If, as this bureaucratic development might suggest, professionalization only means designating particular persons in

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14 Much attention has been paid to various aspects of the legislative process with the purpose of finding ways to improve the law. Examinations have been made, for example, of means of electing law makers, of improving debate, and of voting processes. For a discussion of the latter problem see Bell & Cloutier, *Voter Registration Reform: A Method to Increase New Jersey Voter Participation*, 10 SETON HALL LEGIS. J. 133 (1986).

15 *See* PEACOCK, *supra* note 10, at vi.

16 *See generally* Dickerson, *Professionalizing Legislative Drafting: A Realistic Goal?*, 60 A.B.A.J. 562 (1974).

17 *See* Kennedy, *Legislative Bill Drafting*, 31 MINN. L.REV. 103 (1946).

18 *See generally Professionalizing Legislative Drafting*, *supra* note 16.

19 For example, the Legislative Bill Drafting Commission in N.Y.; the Legislative Service Commission in Ohio; the House Drafting Office in Mississippi; and the Legislative Service Commission in New Jersey. *See generally* THE COUNCIL OF STATE GOVERNMENTS, STATE LEGISLATIVE LEADERSHIP, COMMITTEES, AND STAFF (1985-1986).

20 For example, the Legal Services and Bill Drafting Division of the Bureau of Legislative Research, Arkansas; and the Office of Bill Drafting and Research (within the Legislative Services Agency), Indiana; often, the drafters are under the auspices of the Legislative Council (e.g. Vermont), Legislative Counsel (e.g. Oregon), or Legislative Reference Bureau (e.g. Illinois), or another common staff organization. *See generally* LEGISLATIVE LEADERSHIP, COMMITTEES, AND STAFF, *supra* note 19.

21 *See, e.g.*, Wahlke, *Organization and Procedure, reprinted in* STATE LEGISLATURES IN AMERICAN POLITICS 126 (A. Heard ed. 1966). *Cf.* CUMMINGS, CAPITOL HILL MANUAL 26-32 (1976).

the legislative process as drafters, then there has been progress made towards professionalization, but the goal is trivial.

If professionalization is to have a more helpful and significant impact on improving legislation, it must mean more. Standards for competence, ethical behavior, independent judgment, and duties to society and profession are some areas which must be explored. Existing standards which apply to responsibilities of lawyers or of government employees may provide some guidance. For example, if lawyer-drafters are viewed as acting as advocate-attorneys during the drafting process,[22] then the professional codes or rules applicable to lawyers in general may provide some standards.[23] Even if such codes are not binding, (if the drafter is not a lawyer, or is not acting as an attorney), they still may provide some basis for discussion of the professional's duties, especially in the law-related position of legislative drafter.[24] Although the Model Code and the Model Rules seem primarily designed for a lawyer in other roles, in particular the role of advocate in an adversary system, broad readings of general principles seem useful to the drafter as well.[25] Such basic issues as competence,[26] balancing duties to various groups,[27] and the role

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22 Perhaps even if they are not: certain portions of the codes are designed for lawyers when serving in capacities other than advocate-attorney. *See, e.g.*, MODEL CODE, *supra* note 5, EC 8-8 (lawyer as legislator or holder of other public office); MODEL CODE, *supra* note 5, DR 8-10 (action as public official); MODEL RULES, *supra* note 2, Rule 1.11(c) (conflict of interest for public official).

23 Both the Model Code and the Model Rules contain some provisions specific to public service, others which suggest avoiding conflict of interest, and others relating to confidentiality, which may give general guidance to drafters.

24 The ABA Committee on Ethics and Professional Responsibility has suggested that a lawyer may be bound by the Code even when acting in a role that a layperson might also fill. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 201 (1940).

25 "No general statement of the responsibilities of the legal profession can encompass all the situations in which the lawyer may be placed. Each position held by him makes its own peculiar demands. These demands the lawyer must clarify for himself in the light of the particular role in which he serves." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958).

26 *See, e.g.*, MODEL RULES, *supra* note 2, Rule 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This obviously makes sense for a drafter as well as an advocate. *See* Proposed Drafting Rule 1.

27 "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." MODEL RULES, *supra* note 2 (Preamble). The drafter, in addition, is an employee of the

of the client and the professional in decision-making,[28] all critical problems for the drafter as well, are addressed at least in part by the codes. In addition, other codes, such as the Federal Bar Association's Supplemental Ethical Considerations For Government Lawyers,[29] provide general guidance for situations related to government service, often similar to those of the drafter. None of these guidelines, however, are specifically directed to the problems of drafters.

This article will focus on certain ethical and role problems in drafting, using the Model Code and Model Rules, and to some extent, the Federal Bar's Supplemental Ethical Considerations as starting points and general guides. Selected current drafting practices and problems will also be considered.

Suggested here is a set of Model Rules for Professional Drafters, maintaining much of the spirit and something of the format and content of the ABA Model Rules for Professional Conduct, but attempting to resolve conflicts peculiar to the drafting role.[30] Each Proposed Drafting Rule offered is followed by a brief Comment explaining the Rule, and then a Discussion, explaining further the meaning, background, and implications of the Proposed Drafting Rule.

II. Proposed Drafting Rules

1) Competence

Rule: A legislative drafter should provide the legislature with competent counseling and skilled drafting. This will require the drafter to have and use skills in drafting techniques, and may require knowledge of the substantive legal area and of potential political, economic, or social considerations. The drafter should not undertake an assignment he or she will not be able to compe-

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legislature, lacking some of the independence of a private attorney, and must be concerned with the danger of interfering with the democratic process through elected representatives. *See* Proposed Drafting Rule 3.

28 *See, e.g.*, MODEL CODE, *supra* note 5, EC 5-23, 5-24, dealing with employment by an organization, or by persons other than the client.

29 *See* Poirer, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A.J. 1541 (1974).

30 Most striking may be the emphasis placed on realizing duties to the legislature as a whole, and to the public, as opposed to the narrow view of representing an individual client common to much of the Model Code and Model Rules.

tently complete, but may undertake an assignment if he or she will acquire sufficient knowledge and skills before necessary to complete the assignment.

Comment: Because the professional drafter has an important role in the law making process, he or she must be adequately prepared and possess certain skills. Legislative drafting requires an understanding of "technical" matters, such as organization and use of conventional rules of construction. The drafter should have great control over, and should possess a high level of competence in, such technical drafting matters as it is that for which he or she is primarily employed. Special training or experience in drafting is helpful but may not be necessary.[31]

Drafting also calls for at least some knowledge of the substantive law. As to such substantive law, the drafter may rely partly on others' expertise, or acquire such knowledge as is necessary. In this area the drafter should more readily defer to the sponsor-legislator's wishes. Some drafters may naturally tend to develop special expertise in certain substantive areas, such as tax, but such expertise is not necessary if sufficient information may be obtained from the legislature, other drafters, or other expert sources.

Discussion: The requirements for "competence" in a drafting context must remain somewhat vague, as must rules regarding competence for lawyers generally.[32] Yet, some standards would improve our law drafting.[33] The drafter should therefore have a variety of types of knowledge and skills.

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[31] A commonly held belief is that any lawyer, or perhaps anyone elected to a legislative position, has sufficient drafting skills, but that view is suspect. *See* R. DICKERSON, LEGISLATIVE DRAFTING 3-4 (1954).

[32] *See* MODEL CODE, *supra* note 5, EC 1-1, 1-2, 6-1, 6-2, DR 6-101; MODEL RULES, *supra* note 2, Rule 1.1. MODEL CODE, *supra* note 5, DR 6-101(A) reads, in part, "A lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it. (2) Handle a legal matter without preparation adequate in the circumstances." The language of this Proposed Drafting Rule 1, is similar to MODEL RULES, *supra* note 2, Rule 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Note, however, that MODEL RULES, *supra* note 2, Rule 1.1 speaks of a "client"; whereas the Proposed Drafting Rule 1 refers to aiding the legislature.

[33] "The captive public too is entitled to the protection of a code of minimum legislative drafting standards just as much as it is to that of the Code of Judicial Ethics. The analogy is almost an exact one, and the very existence of such a code

Most obviously, the drafter should have a greater expertise than the lay person, and more than the average lawyer, in areas such as legislative grammar and syntax, interpretive rules, and drafting techniques. Certainly by providing expert assistance in such areas of drafting technique as selection of wording, style, construction, and syntax, a skilled drafter may significantly improve the drafting of legislation. To obtain such expertise, a drafter should have sufficient training to construct effectively the statutes and achieve the given legislative intent. Traditional, generalized, legal training is often viewed as an important, sometimes necessary, part of a drafter's background and experience.[34] Many legislators have a legal background,[35] and it would seem sensible that their familiarity with legislation and operation of legal rules provided by such legal education and practical training would equally benefit a drafter.[36] Arguably, however, drafting requires special skills, so that specialized training or experience would be appropriate.[37] At present, however, no state bar has set standards for such a specialization.

Improving training and education, and affording greater attention to drafting skills can help improve the level of these skills. Many law schools, and the ABA, seem to have recognized the need for at least some students to improve writing skills in general, and to obtain special drafting skills in particular.[38] The

would itself carry us far toward accomplishment of the common objective." PEACOCK, *supra* note 10, at 69.

34 Yet, not all legislatures require a law degree or special training of any sort. In some legislatures, drafters are selected by partisan process, while others have civil service or other systems for selection, in which a law degree plays only on part.

35 See generally M. GREEN, THE OTHER GOVERNMENT (1975), for an excellent discussion of the "revolving door" problem and other facets of lawyers and government.

36 There are those, on the other hand, who would argue that a lawyer tends to perpetuate errors of past law, and may in fact have learned undesirable drafting styles by copying extant statutes.

37 *See, e.g.*, Dickerson, *Legislative Drafting: A Challenge to the Legal Profession*, 40 A.B.A.J. 635 (1954). *But see* MODEL RULES, *supra* note 2, Rule 1.1 comment which seems to suggest that the general practitioner would have much of the requisite knowledge: "A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems." *Id.*

38 *See generally* B. LAMMERS, LEGISLATIVE PROCESS AND DRAFTING IN U.S. LAW SCHOOLS (1977). Since the Lammers report, further progress has been made: more schools have added drafting clinics, or strengthened their writing programs, or both.

American Association of Law Schools [AALS] has recently added a section on legislation, which includes a drafting component, and the legal literature evidences continuing concern with these matters. Training and workshops by groups such as the National Council of State Legislatures also demonstrate a perception of the need for these skills.[39]

Providing more helpful guidance for drafters may also improve their work and ensure competent drafting and some forms of regulation or guidance do in fact exist. In many states, the drafter has guidance in the form of state drafting manuals setting standards on formal requirements or technical matters. Moreover, some states have legal requirements controlling such matters as title,[40] format,[41] and limiting a bill's subject to a single topic.[42] Also, rules for interpretation,[43] and conventions for drafting often provide guidance.[44]

Encouraging self-regulation might also help to ensure minimal competence. A licensing scheme for drafters, or a plan similar to those which allow lawyers to hold themselves out as specialists, could aid in ensuring competence.[45] Such a plan might require advanced training, experience, or some testing in order to qualify.

Alternatively, holding drafters accountable in some way for the quality of their work might provide incentive for improvement and maintenance of high quality drafting. An attorney may

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[39] *See, e.g.*, MODEL CODE, *supra* note 5, EC 6-2 regarding continuing education. The National Council on State Legislatures [NCSL], and individual states, are making significant contributions in this area.

[40] *See, e.g.*, OHIO CONST. art. I, § 15(D): "No bill shall contain more than one subject which shall be clearly expressed in its title." *See also* ARIZ. CONST. art. IV, § 13; N.J. CONST. art IV, § 7.

[41] *See, e.g.*, OHIO CONST. art. II, § 15(B); ARIZ. CONST. art. IV, pt. 2, § 24; WASH. CONST. art. II, § 18.

[42] *See, e.g.*, OHIO CONST. art. II, § 15(D); WASH. CONST. art. II, § 19; N. DAKOTA CONST. art. IV, § 13; N.J. CONST. art. IV, § 7.

[43] Some of which may be mandatory. *See Legislative Drafting: A Challenge to the Legal Profession*, *supra* note 37, at 636.

[44] *Id.* The rules are not always followed in practice:

> Normally it is proper to assume that when Congress or a state legislature says different things it means different things, and that when it says the same thing it means the same thing. Experience shows, however, that it frequently enacts language that has been prepared by persons who pay inadequate attention to these assumptions. *Id.*

[45] *See* MODEL RULES, *supra* note 2, Rule 7.4.

be liable for a poorly drafted contract or will, regardless of the policy decisions therein, on the theory that the attorney should adequately express the client's intent. It should not be a great conceptual leap to suggest that legislative drafters might be accountable for drafting errors in the portion of the laws over which they have control. Imposing some type of liability would provide an additional incentive for assuming greater responsibility for one's work product.[46] At present, continued employment may turn on the quality of one's work,[47] or on the drafter's adherence to policies or operating procedures,[48] but civil, criminal, or disciplinary liability for poor drafting is highly unlikely.[49]

Currently, general limitations render accountability difficult. Of course, some type of immunity may exist to protect the drafter from any liability.[50] Moreover, as Dickerson has noted, "many of the things that make for bad legislation are beyond the control of

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46 Accountability is a key factor in ensuring competence in both the Model Code and Model Rules. For example, MODEL CODE, *supra* note 5, DR6-102 and MODEL RULES, *supra* note 2, Rule 1.8(h) both preclude limiting liability of lawyers, in order to avoid lowering standards and to ensure the liability incentive remains to encourage competence.

47 Interviews with drafters suggest this fear, although without justifiable and enforced employment standards for evaluating quality, it may be that other factors affect decisions, especially in partisan drafting groups. *See supra* note 1, for an explanation of interview sources.

48 For example, the drafter's adherence to rules regarding confidentiality—*see* CONFIDENTIALITY OF LEGISLATIVE RESEARCH PAPERS: A SURVEY BY THE DIVISION OF LEGISLATIVE INFORMATION RESEARCH, Office of Legislative Services, State of New Jersey (Revised 1978).

49 This issue does occasionally arise. When faced with the possibility of $200,000-$300,000 in liability to the ACLU for legal fees in testing an abortion ordinance adopted by the Akron City Council, at least some support was raised for seeking indemnification from the group drafting the ordinance. It seems, however, that this was based on a claim of "moral" rather than legal obligation. *See Life Group to Pay ACLU*, Akron Beacon Journal, June 16, 1983, at 3.

50 In *Gravel v. United States*, 408 U.S. 606 (1972), the United States Supreme Court extended some protection under the Speech or Debate Clause to federal legislative aides. The *Gravel* rule protects certain legislative personnel when they are performing some types of "valid legislative acts." The Court did not clearly define the scope of personnel eligible for immunity. The *Gravel* case involved a member of a Senator's personal staff, and therefore may be distinguished from a case involving a legislative drafter, employed by the legislature as a whole, and only serving temporarily as a nominal staff member of a particular legislator. The approach of this paper has been to suggest somewhat greater autonomy for drafters, perhaps removing them further from the protection afforded by association with individual legislators. Of course, this particular immunity also only operates in the federal legislature. Nevertheless, it seems difficult to impose liability here.

the persons charged with preparing it."[51] Perhaps the greatest difficulty is that responsibility for statutory language may be shared with legislators, other drafters, and other persons in the legislative process.

Other factors influencing drafting technique, which are discussed below,[52] may also limit the drafter's freedom to draft as clearly as desired and thus render accountability difficult.

Generally, as to the substance or policy of a bill to be drafted, the drafter should have sufficient competence to complete the work, but if the legislator (or other sponsor) assumes greater direct responsibility in these areas, then the drafter may have correspondingly less responsibility. As suggested below, the drafter may contribute significantly,[53] but will generally rely on and defer to the legislator's decisions. In those instances where the legislator has a less well-formulated conception of the bill, greater assistance may be needed than where the legislator has a nearly complete plan. At least to the extent the legislator seeks such assistance from the drafter, the assistance supplied should be competent.

Authorities have differed somewhat as to their perceptions of the need for familiarity with the substantive law of an area in which the drafter works. Reed Dickerson, for example, discussing the drafting of a bill relating to antitrust law, suggests that if asked "to choose between an antitrust lawyer who knew nothing about drafting and a skilled draftsman who knew nothing about antitrust law, I would almost always pick the latter."[54] Frank Cummings, on the other hand, seems to place a greater premium on substantive expertise. "With a few exceptions, lawyers on the professional staff of the Office of Legislative Counsel of the Senate or the House are good draftsmen but not experts on legislative substance or content. And good but contentless drafting can be worse than inexpert drafting by someone who at least understands the subject matter at hand."[55] Certainly a clear expression

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51 *Legislative Drafting: A Challenge to the Legal Profession*, *supra* note 37, at 636.

52 *See* discussion following Proposed Drafting Rule 3.

53 *See* Proposed Drafting Rule 3.

54 Dickerson, *Outline of Problem*, *reprinted in* PROFESSIONALIZING LEGISLATIVE DRAFTING: THE FEDERAL EXPERIENCE 11 (R. Dickerson ed. 1973).

55 CAPITOL HILL MANUAL, *supra* note 21, at 24. Cummings does, however, concede that the Counsel staff should be consulted for formal requirements. *Id.* at 24-

of policy drafted by experts in the substantive area would be a helpful initial step in the process. Probably a more realistic view would accept some variance in expertise according to the need of the particular legislator. Few drafters can hope to be knowledgeable on all, or even most, of the areas in which he or she drafts. In most instances, the drafter may gain sufficient familiarity from the legislator, another authoritative government source, or from basic research.

In fact, drafters often develop special areas of expertise. Naturally, legislators then tend to rely on that drafter for work in the specialized area. This should only be necessary, however, for very technical areas, such as tax law, or some types of law related to business, technology, or the environment.

In addition, to most ably assist the legislator in creating good law, the drafter ought to have general familiarity with the workings of the legislature, and at least a basic understanding of the role of legislation and relevant aspects of our legal and social systems. As to technical matters of legislative procedure, advice to the legislator may be helpful, and to some extent the drafter should assist in this area if competent. Much of this work, however, seems more suited to other legislative staff, rather than the drafter.

Since the drafter often assists legislators in designing broad programs, an understanding of matters such as how the judiciary is likely to handle enactments, or problems with affecting social behavior through the statute, can be of critical importance. Again, little training in such matters is offered,[56] and experience is generally relied upon. However, increased opportunity for clinical education in such legislative problem solving techniques promises improvement.

2) Loyalty, Duties Generally

Rule: The drafter's primary duty is to the legislative process,

25. It may be, however, that Dickerson and Cummings are speaking to different stages of the drafting process. Earlier, in the formulation of a bill, more substantive knowledge is called for to articulate the policy clearly. Once a clear statement of the policy is made, and related substantive decisions are likewise made, the need for thorough substantive knowledge diminishes.

56 *See* Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 581-85 (1983).

and the legislature as a whole. In carrying out this duty, the drafter will work temporarily for one or more legislators on individual projects, but ultimately must act in the interest of the legislature, overall, rather than individuals. Usually these duties will not conflict, and the drafter will normally assist the legislator in achieving his or her goals. Where a reasonable argument supports the action requested by a legislator, the drafter should seek to inform the legislator fully of relevant considerations, but ultimately accept the legislator's wishes.

Where a legislator, however, intends to act, acts, or seeks to have the drafter act in a way that is clearly violative of the rules of the legislature, in violation of law, substantially deceptive to the legislature, or substantially subverts or is prejudicial to the legislative process, the drafter should take reasonable steps to protect the interests of the legislature and legislative process pursuant to Proposed Drafting Rule 3.

Comment: The legislative drafter's duties do not extend just to the legislator requesting a particular bill; the drafter owes duties to the legislature, the public, and the profession as well. When drafting, the drafter really is not representing an individual client with private interests, (even the legislator is a representative of selected public interests), and because the drafter plays a special role in making public law, the drafter may, and should, play an important role in seeking improvement of our laws. The drafter may do this by helping the legislature and the legislator conceive useful legislative programs, and by formulating these concepts into well-drafted bills. The drafter will normally serve these goals by helping the legislator present his or her position most forcefully, relying on the legislative process to develop a reasonable solution. Where the legislator's actions may subvert or undermine that process, however, the drafter should, at the minimum, avoid involvement. In extreme instances, the drafter should take affirmative steps to prevent such wrongs.

Discussion: This Rule perhaps suggests the most radical divergence from current practice, and from the advocacy theme apparent in both the Model Code, and to a somewhat lesser extent, the Model Rules.

One criticism of the Model Code has been that it fails to deal adequately with the situation where an attorney represents an or-

ganization.[57] This problem seems especially pertinent to drafters. The Proposed Drafting Rule clarifies the drafter's obligations, and modifies the current practice as to this issue. The typical drafter, it seems, sees his or her role as that of advocate for the individual legislator with whom the drafter is currently working.[58] This implies that the drafter should zealously, and non-judgmentally, carry out the legislator's wishes. Much of the time this advocate role suffices as a practical representation of the drafter's role, and, if followed, provides useful assistance to the legislative process. In some instances, however, this scenario of drafter-advocate may operate contrary to optimal functioning of the legislative process.

Several inadequacies of the advocate role for the drafter suggest themselves. One of the justifications for professionalizing the drafting service is to improve the laws produced by the legislative process.[59] While better technical drafting in itself will improve our statutes, a skilled drafter can offer more. Lawyers, in general, have duties as professionals to improve the legal system.[60] Arguably, this duty extends to participating in better drafting, to seeking more carefully drawn substance in the laws, and to helping insure that the legislative process functions properly.[61]

Not only might drafters as lawyers have those same duties,

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[57] *See* Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, 67 A.B.A.J. 1116, 1118 (1981); *cf.* MODEL RULES, *supra* note 2, Rule 1.13 (organization as client).

[58] Interviews. See *supra* note 1, for an explanation of interview sources.

[59] *See, e.g., Professionalizing Legislative Drafting*, *supra* note 16, at 563.

[60] Lawyers have often come under criticism for failure to effectively discharge this duty. *See* Bok, *supra* note 56, at 575-81.

[61] *Cf.* Federal Ethical Considerations, Canon 8-1, *reprinted in* Poirer, *supra* note 29:

> The general obligation to assist in improving the legal system applies to federal lawyers in such situations he may have a higher obligation than lawyers generally. Since his duties include responsibility for the application of law to the resolution of problems incident to his employment there is a continuing obligation to seek improvement. This may be accomplished by the application of legal considerations to the day to day decisional process. Moreover, it may eventuate that a federal lawyer by reason of his particular tasks may have insights which enhance his ability to initiate reforms, thus giving rise to a special obligation under Canon 8. In all these matters paramount consideration is due the public interest.

Id. at 1544.

but drafters in general, as professionals, ought to have duties to the legislative process and the drafting profession.

The typical view of drafter as mere "translator," zealously serving the legislator-client's wishes, moreover, assumes the legislator has a clear conception of the law he or she wants drafted. Often, reality differs. The legislator may have no more than a vague idea of a problem, or a simplistic complaint from a constituent. In such cases, the drafter often may end up defining, formulating, or even instilling such ideas in the legislator, then drafting them.

A limited perception of the drafter's relationship to the legislator precludes optimizing the drafter's potential contribution to the legislative process. Drafters, if permitted, can act to inform more fully the legislature, and provide initial screening and preparation of bills.[62] Excessive adherence to the non-judgmental zealous advocate model has come under increasing criticism in the broader context of practicing lawyers,[63] and in other non-adversarial situations.[64]

Worse, zealous representation taken to an extreme can permit one-sided presentations in an arena not designed with the same types of safeguards built into our adversary judicial system. Drafters do not always have an equally zealous opponent to present differing viewpoints, even though legislative debate may help to expose many flaws. Also, the potential dangers in the legislative situations are in some sense greater—the results of a poor trial will primarily be limited to the injustice done to one of the parties; a poorly drafted statute may have much wider impact.[65]

Both the Model Code and the Model Rules concentrate on a view of lawyers that either fails to guide, or misguides drafters. The Model Code, especially, seems designed primarily for a law-

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[62] *See* discussion following Proposed Drafting Rule 3. Note as discussed at text accompanying *infra* footnotes 168-76, adherence to restrictive notions of attorney-client privilege may prevent the drafter from sharing important information.

[63] *See, e.g.*, Wasserstrom, *Legal Education and the Good Lawyer*, 34 J. LEGAL EDUC. 155 (1984).

[64] Duties to third parties have been recognized in a variety of contexts; one of the more interesting ones has had to do with the responsibility of an attorney working for a corporation which may be giving out misleading information in security prospectuses. *See, e.g.*, PROFESSIONAL RESPONSIBILITY OF THE LAWYER, THE MURKY DIVIDE BETWEEN RIGHT AND WRONG, 33-39 (N. Galston ed. 1977).

[65] *See* further discussion following Proposed Drafting Rule 4.

yer as a litigating advocate, although this may ignore the diverse activities of most lawyers.[66] This litigation bias has also colored training given to lawyers, at least in the past, in many law schools.[67] The Model Code, and to a somewhat greater extent the Model Rules, do at least acknowledge that other roles exist for lawyers. For example, a lawyer may also act as counselor or advisor,[68] intermediary, negotiator,[69] or evaluator.[70] In some ways, these alternative roles present more useful models for drafters. Drafters do operate partly as counselor-advisors, helping legislators consider alternatives and find and use information. The Model Code and Model Rules, however, severely limit the type of advice which is appropriate, largely restricting it to that which is necessary to achieve the limited legal goals already envisioned by the client.[71] While legislative staff generally spend more time lobbying than do drafters, the latter also may act as negotiators or intermediaries to seek resolutions of differences between legislators. In another sense, like "evaluators" of securities, or tax shelters,[72] the drafter sometimes provides an analysis of legislation, which may be relied upon by third parties—other legislators and citizens. In this role, the drafter might owe a duty to the public, as might a lawyer preparing a prospectus or preparing an opinion as to a tax shelter. Yet, these options are not fully explored in either set of ethical rules, and the dominance of the advocate position remains.[73] Again, this may be dysfunctional, encouraging excessive loyalty to an isolated position, and discouraging behavior which would assist the legislature as a whole.

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66 *See* Brown & Dauer, *Professional Responsibility in Non-Adversarial Lawyering: A Review of the Model Rules*, 1982 AM. B. FOUND. RESEARCH J. 519, 520-21.

67 *See generally* Dickerson, *Legislative Process and Drafting in U.S. Law Schools: A Close Look at the Lammers Report*, 31 J.LEGAL EDUC. 30 (1981).

68 *Compare, e.g.*, MODEL CODE, *supra* note 5, EC 7-3, 7-8 *with* MODEL RULES, *supra* note 2, Rule 2.1.

69 *Compare, e.g.*, MODEL CODE, *supra* note 5, EC 5-20 *with* MODEL RULES, *supra* note 2, Rule 2.2.

70 *See* MODEL RULES, *supra* note 2, Rule 2.3. Note that the Model Rules give greater recognition to these alternative roles by explicitly listing them.

71 *See* MODEL RULES, *supra* note 2, Rule 2.3. *See also* Brown & Dauer, *supra* note 66, at 526-27.

72 *See* ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 346 (Jan. 29, 1982); MODEL RULES, *supra* note 2, Rule 2.3.

73 Brown & Dauer, *supra* note 66, at 520.

This rule therefore suggests a change of focus. While recognizing that much of the time the legislature will be well served by the drafter closely following the individual legislator's wishes, the proposed rule notes, as well, that limits to that type of representation must exist. The proposed rule suggests that where the legislature's interests conflict with those of a legislator, the former's interests should prevail.

Proposed rules below elaborate further how one may discharge these greater duties. This rule, however, states the basic premise that the drafter ought to serve the legislature. The rule adopts a "reasonable argument" standard for justifying acceptance of a legislator's suggestions.[74] The rule, as proposed, imposes a duty to "fully inform" the legislator of relevant considerations.[75] This should include more than legal considerations, such as explaining to the legislator the law, as well as political considerations, social impact, and other factors which will help him or her make a fully informed decision.[76] This type of information may help persuade the legislator to adopt a position more acceptable to the drafter, but if the legislator remains adamant and a reasonable argument supports his or her position, the drafter should comply.

The second paragraph of the rule refers to clear wrongs asked of the drafter. This rule reinforces the notion that the drafter's primary duties are to the legislature. While assisting the individual legislator with the presentation of his or her ideas will usually be consistent with these primary duties, if assisting the legislator would involve the drafter in clear wrongs as listed, the drafter should refuse to so act.[77] Furthermore, where the legislator will engage in such wrongs, the drafter should seek to prevent them.

3) Scope of Duties

Rule: The drafter's role is, generally speaking, to assist the legislature in preparing legislative solutions to social problems.

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[74] *Compare* the Proposed Drafting Rule *with* MODEL CODE, *supra* note 5, DR7-107(A)(1), and MODEL RULES, *supra* note 2, Rule 3.1.

[75] *Cf.* Proposed Drafting Rule 4.

[76] *Compare* MODEL CODE, *supra* note 5, EC 7-8 *with* MODEL RULES, *supra* note 2, Rule 2.1.

[77] *See* Proposed Drafting Rule 5.

(A) By using special skills, knowledge, and experience to draft and write clearly and well, and using such conventions and techniques as are appropriate, the drafter should assist the legislative process by better enabling the legislature to understand bills proposed and by helping ensure bills passed are well drafted. The drafter should exercise primary control over form, style, and language of the bill to ensure clear, unambiguous, and effective expression. He or she should seek clarity in expression and should refrain from drafting in a way that is misleading or deceptive. The drafter should recognize that the legislator is entitled to considerable deference even in technical matters and should accept a legislator's suggestion when reasonably supportable. While generally giving deference to the legislator's prerogatives, the drafter should keep in mind greater duties to the legislature as a whole to draft clear, unambiguous, and efficient bills. By actions such as those listed in (B), the drafter may assert his or her opinion. Close consultation with a legislator regarding a bill being drafted is of course desirable, and should be used whenever possible to work out mutually satisfactory resolutions of disagreements.

As to policy and substance of a bill, the drafter may also contribute expert advice and counsel, but should more generally abide by the legislator's wishes except in exceptional circumstances. The drafter may contribute to better substantive law by good drafting, which will often expose questions or issues and assist the legislature in making informed decisions. In addition, he or she may, in appropriate circumstances, seek to contribute to the legislative process in more direct ways, as described in (B).

(B) In order to assist the legislative process, to ensure well drafted bills, and to improve the law, a drafter may take necessary actions appropriate to the situation, including the following:

> (a) Advising the legislator fully as to various alternatives, and the implications and consequences of each choice. Advice in these matters need not be limited to legal matters, but might include political, societal, or other aspects as well. Such advice may be verbal, but a confidential, written memorandum may have greater impact.
>
> (b) Urging reconsideration, or abandonment, of a planned course of conduct. Again, a verbal statement may suffice, but a written statement may be stronger.

(c) Disassociating the drafter from a product with which the drafter disagrees strongly, following policies or procedures permitted by local rules.

(d) Making disclosures or statements to other persons, or to the legislature as a whole, expressing lack of agreement, or active disagreement, with aspects of a particular bill. The drafter should tailor such statements to minimize unnecessary embarrassment and to avoid breach of confidences to the extent possible. Such statements should be consistent with Proposed Drafting Rule 4.

(e) Declining or terminating the drafting relationship as regards the particular bill, consistent with Proposed Drafting Rule 5.

In deciding upon proper conduct, the drafter should seek to disrupt the legislative process as little as possible, and to minimize prejudice to the legislator. The drafter should consider the seriousness of the conduct in question, whether it is objectionable on legal, moral, or procedural grounds, and whether the resulting law would be flawed for formal or substantive reasons, or be problematic in its drafting or its policy.

Comment: The drafter can play an important role in creating good legislation. He or she can make contributions by providing skilled technical assistance, and by assisting the making of substantive or policy decisions.

Regarding "technical" drafting matters, such as organization, wording, grammar, and form, the drafter has, presumably, special expertise and should use it to create well-drafted bills. In these areas, especially, the drafter should have and use freedom to exercise his or her expertise.

The legislator should have a primary role in developing the substance of the legislation, but the drafter should ensure that the legislator is well-informed, and should aid in considering how best to achieve legitimate legislative goals. The drafter may initiate discussion of alternatives and options, but except in unusual circumstances, he or she should ultimately defer to the legislator's prerogative.

Usually, the legislative process is well served when the drafter carries out the individual legislator's wishes in the best way possible. A well-drafted and documented bill presented to the legislature, although controversial, will under normal circumstances be

processed and handled according to normal legislative procedures, as it should. These processes are responsible for developing good law, and the drafter may rely on them. In such circumstances, the drafter should act as bid by the legislator. The drafter may assist in drafting legislation if he or she feels a good faith argument can be made to justify the legislation as urged by the legislators. Drafting for legislators, of course, does not require or constitute endorsement of the political, economic, social, or moral views implied by the legislation. In exceptional circumstances, however, where these processes may be circumvented or fail, or where the drafter or legislator's conduct would itself violate pertinent rules, the drafter may have to dissuade the legislator from continuing as planned. In extreme situations, the drafter may have to act contrary to the legislator's wishes in order to fulfill greater obligations to the legislature and the legislative process.

For example, the drafter may feel compelled to suggest that the legislator consider alternatives when the bill the legislator has suggested is clearly unconstitutional, or likely to cause great and unnecessary hardship on a segment of society. In a somewhat more extreme situation, the legislator might wish a bill drafted in a way that is likely to mislead other legislators as to the bill's impact. Here the drafter should seek the legislator's cooperation in finding a way to draft the bill so that the legislature will be able to act on the bill with better insight and information. If the legislator refuses, the drafter should seek a way to avoid a fraud upon the legislature.

The options listed give the drafter a choice of actions to assert his or her will or opinion. These actions are listed, in a very general sense, in order of increasing severity. Advising the legislator is always appropriate. Urging the legislator to change his or her mind, as suggested in (b) is a bit stronger, but still depends on the legislator's cooperation. Verbal or written statements in (a) and (b) may be used. Written statements are often more persuasive, and will record the drafter's position if desired for future reference.

Disassociating oneself from a drafting product, as suggested in (c) may be a significant act. A drafter could seek to minimize association with a bill in a variety of ways. Asking to withdraw from a project is possible in some instances. Avoiding public endorsement of a bill is common practice. Some legislatures allow drafters to avoid "signing off" on a piece of legislation the drafter has not drafted, proofed, or edited. Through any of these means, the

drafter avoids adding credibility to such a bill, and if the action is published, may communicate disagreement.

Making disclosures or statements adverse to a bill, allowed in (d), should be approached cautiously. Working as a drafter on a project should not imply endorsement of the positions supported in the bill. The drafter has a right and perhaps an obligation to speak publicly on a bill once introduced, but the drafter ought to speak as a citizen, not as the drafter. The drafter should always seek to avoid disclosing confidential information to the extent possible, pursuant to Proposed Drafting Rule 4.

Refusing to draft a bill is a severe action and should only be used in the most extreme situations. In some situations, such refusal may prevent passage, at least until another drafter accedes. It may not only deprive the legislator of assistance, but may deny the drafter the opportunity to achieve a more desirable resolution, as provided for in Proposed Drafting Rule 5.

The factors a drafter should consider in selecting which action to take are listed in the rule. A drafter may be more assertive in influencing technical matters which should be within his or her control, and may therefore argue vigorously for adoption of his or her opinion. As substance is normally within the legislator's control, the drafter may advise, but should usually defer to the legislator. Because, however, a statute based on a poor policy, or having poorly designed substantive provisions may cause great harm, the drafter may take actions to mitigate these damages as well. The seriousness of the impact of the law will largely determine the seriousness of the response.

Discussion: The need for well-worded statutes should be obvious. As the late Leon Jaworski said,

> 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.[78]

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[78] Jaworski, *The American Bar Association's Concern With Legislative Drafting*, *reprinted in* PROFESSIONALIZING LEGISLATIVE DRAFTING, *supra* note 54, at 3, 5.

Improving, clarifying, and simplifying language to give better effect to chosen policies would seem a non-controversial goal. Yet, laws continue to be drafted in obscure, convoluted, ambiguous, hard-to-understand, ineffective language.[79] Several factors may contribute to this problem, including lack of competence, as suggested above.[80] Conflicts with a variety of goals may obscure the drafter's primary goal, which should be to draft clearly.[81] Certain constraints on legislative language are unavoidable.[82] Drafting conventions may be so ingrained among interpreting courts and agencies that variation, although preferable in an academic situation, may be impractical due to this long-standing acceptance.[83] Detailed, technical, and complex materials may necessitate wording which reflects this difficulty.[84] The need for readability, clarity, or certainty in unusual circumstances may lead to drafting contrary to standard grammatical rules.[85] Political,[86] or even financial, considerations must also be weighed. Nevertheless, the skilled drafter should at least attempt to mitigate these problems.

A major problem, however, stems from limitations on the extent to which the drafter is free to use his or her skill without interference. While generally areas of technical drafting technique are considered within the drafter's control, in fact, responsibility for a bill's form is often shared with individual legislators, committees, or other groups, rendering accountability and improvement more difficult. Not only must drafters have the essential skills, but they must

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79 "I have never seen evidence that lawyers consciously attempt to complicate statutes in order to generate legal disputes; indeed, the evidence I have seen would appear to suggest the opposite. A legally trained mind is often a traditionally oriented mind that places greater value in time-tested phraseology and approaches, and it is possible that without conscious effort to complicate laws the complication comes 'naturally.' " Lockhard, *The State Legislator reprinted in* STATE LEGISLATURES IN AMERICAN POLITICS 122, 123 (A. Heard ed. 1966).

80 *See* Proposed Drafting Rule 1.

81 *See* Nutting, *supra* note 10, at 1014.

82 *See Legislative Drafting: A Challenge to the Legal Profession*, *supra* note 37, at 636.

83 *But see* R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 33-35 (1965).

84 This excuse may, however, be overused. *See* TWINING & MIERS, *supra* note 12, at 33-37. Twining and Miers also quote Llewellyn to the effect that reliance on courts to give reasonable interpretations can simplify drafting. *Id.* at 182.

85 *See generally* Bennion, *Drafting Practice*, 124 THE SOLIC. J. 567-68 (1980).

86 *See generally* Leventhal, *How the Problem Looks to the Courts*, *reprinted in* PROFESSIONALIZING LEGISLATIVE DRAFTING: THE FEDERAL EXPERIENCE, *supra* note 54, at 25, 27. Leventhal also notes that, in fact, drafting primarily for simplicity and ease of use for lay people may create problems for courts. *Id.* at 32.

have authority and freedom to use those skills. Even for those drafters wishing to exercise developed skills to improve statutory language, lack of control over the final product often precludes close adherence to strict drafting principles.[87] In general, as legislators must ultimately vote on bills, it makes sense they should have some control over wording. Yet, abuse of this control defeats much of the value of having a skilled drafter. In most circumstances delegating enough authority to the drafter to draft bills that are clear and well-worded will not adversely affect the legislature's operation. Still, legislators, lobbyists, and others often try to control even small details of the drafter's work.

Part of this problem of ensuring that the drafter will be free to exercise good technique may be attributable to conflicting ends the bill is to serve, and inconsistencies among the wishes and needs of the legislator's various constituencies. One such conflict arises between the legislator and the "ultimate user" of the legislation.[88] On the one hand, the convenience, utility, effectiveness, and understandability of the law to final consumers or users (judges, citizens, administrators) may suggest a style peculiar to their needs.[89] On the other hand, the legislator may desire a different form or style. The legislator, in addition to the altruistic or public service goals related to simply making the clearest and best law, (or the law most convenient for the users), may be driven by a variety of other goals. A legislator's decision regarding introduction of a bill, or selection of particular wording, may be in response to pressure from a particular interest group or constituent, or a desire to make a certain appearance for political purposes, or to meet log-rolling or other compromise needs. Such considerations, besides affecting the substance of a particular bill, may result in language quite different from that suggested by traditional drafting rules. Immersed in the political process, and employed largely at the pleasure of the legislature, the drafter may feel considerable pressure to draft for political expediency rather than for grammatical or syntactic purity. Or, the

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87 *See* discussion following Proposed Drafting Rule 3. British parliamentary drafters seem to have greater control, for a variety of reasons. *See generally* R. LUCE, LEGISLATIVE PROCEDURE 575 (1922).

88 Renton, *The Legislative Habits of the British Parliament*, 5 J. OF LEGIS. 7, 10 (1978).

89 The need for cooperation between drafter and official or interpreter is discussed in TWINING & MIERS, *supra* note 12, at 181-83.

drafter may be excluded completely from the critical parts of the drafting process with legislators and staff selecting wording, making amendments, or other important decisions.[90] Language may be worked out in committee, or in other situations beyond the drafter's control, while the drafter's concern for the convenience, understandability, effectiveness, and utility of the law for other users, (citizen, consumer, judge, or administrator), quite likely would suggest very different language. Suggestions regarding "plain language," clarity, or other aspirations for drafters are likely to be overlooked in favor of such political needs.[91] Often such conflicts may be resolved to satisfy all concerned. Examples abound, however, of language in statutes responding, apparently, to needs other than clarity, simplicity, or effective communication.[92]

Worse than poor English, confusing organization, or difficulty in interpretation, similar political pressures may lead to language which is outright, perhaps intentionally, misleading. One horror story related to the author by a drafter described a practice urged by a client which involved intentionally mislabelling a bill to ensure that it would be directed to a committee containing friendly legislators rather than a potentially hostile committee which should have jurisdiction according to the real import of the bill.[93] Similarly, intentionally unclear titling or language, or misleading organization may help obscure a bill's intended meaning from potentially hostile legislators or interest groups. Legal restrictions on titles may help, but have not necessarily eliminated the problem. Apparently others have encountered these problems. For example, Kennedy notes that "a harmless-looking title may cover a vicious bill; it may be

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90 This, of course, is not a universal model. Many states at least try to include drafters in a variety of stages. The British Parliament drafting system may provide a good model. There the Parliamentary draftsman is included in amending stages of the process. *See, e.g.*, LUCE, *supra* note 87, at 575. For an interesting discussion of problems facing the British draftsman, *see* Renton, *supra* note 88.

91 *See* Nichols, *Legislative Bill-Drafting in Illinois*, 41 ILL. B.J. 136, 136-37 (1952).

92 Interviews. See *supra* note 1, for an explanation of interview sources.

93 *Id. Cf.* F. CUMMINGS, CAPITOL HILL MANUAL 14 (2d ed. 1984); "The introducer is free to devise the title of his own bill, but may wish to seek and consider the advice of the Parliamentarian or other expert, because a title may influence reference to the desired committee—particularly where the bill falls within the possible jurisdiction of two committees and could go either way." *Id.* This freedom may be restricted in those states which have a rule requiring that the subject be reflected in the title. Even where this restriction does not exist, the ethical problem of such action being misleading remains.

made the sheep's clothing for a legislative wolf. Abuses of this sort existed long before an effective remedy was devised."[94] Another drafter spoke of a particular bill, clearly intended to aid a certain community, which should therefore be considered "special" legislation. The drafter lamented, however, that the sponsoring legislator was applying extreme pressure upon the drafter to draft the bill using obfuscatory arrangement and opaque language so that it would appear to be "general" legislation, thus allowing it to be considered during a different part of the legislative session and making passage more likely.[95] Not only may such language create havoc among those attempting to interpret and apply the law, but reliance on such subterfuge corrupts the legislative process.[96] At some point, such activity may be equivalent to a misstatement of law or fact, or "conduct involving dishonesty."[97] Hopefully, such practices are rare.

Renton also described another type of conflict affecting style and language: a "conflict between simplicity and clarity on the one hand, and certainty of legal effect on the other hand."[98] Quite often these goals do not result in conflict; in fact, simplicity will usually have a greater probability of achieving the intended results.[99] However, length and complexity of language beyond that desired for simplicity and easy understanding is sometimes thought to be necessary in order to firmly establish complex rules.[100] While tax laws, for example, could possibly be improved upon, the complex nature of the subject matter will, it seems, inevitably result in complex statutes. Length, as well, may depend on the nature of the behavior to be controlled more than niceties of drafting.

Time constraints under which drafters must operate often ham-

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94 Kennedy, *supra* note 17, at 110.

95 Interviews. See *supra* note 1, for an explanation of interview sources.

96 Or as Dickerson says, it may be "usurping a function that belongs to another," THE FUNDAMENTALS OF LEGAL DRAFTING, *supra* note 83, at 9.

97 MODEL CODE, *supra* note 5, DR 1-102(A)(4)&(5), 7-102(A)(7); MODEL RULES, *supra* note 2, Rule 3.3(a)(1).

98 Renton, *supra* note 88, at 10.

99 *See, e.g.*, K. LLEWELLYN, THE BRAMBLE BUSH 46-47 (1960).

100 The idea that detail is necessary to formally fix an idea is a pervasive one. "[I]t is not enough to attain a degree of precision which a person reading [the statute] in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it." Memorandum on the Uniform Commercial Code, (1940) *reprinted in* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 526 (1973).

per the quest for better legislation. While normal work may tax the drafting service of a legislature, extraordinary situations arise to which no service can adequately respond. For example, the New York Legislature recently churned out 500 bills in a single weekend.[101] While many may already be in draft form, the revision and amendment necessary for such a task is overwhelming.

Nevertheless, trained drafters with sufficient authority to use their skills can improve drafting generally. This rule suggests that such authority should exist. Ensuring such authority, and the means by which a drafter may assert it, requires careful balancing of interests. Some existing institutional arrangements serve these ends; others may have to be developed.

Legally formalizing rules for good drafting may give drafters guidance and authority on which to rely. Many states have adopted statutory rules for interpretation, suggesting certain drafting conventions.[102] A drafter should be able to refer to these legal mandates as authority for insisting on appropriate wording. Expansion of such rules would provide further justification for a drafter to insist on good technique.

Drafting manuals adopted by states for such services vary in content, and usually have no legal authority of their own. To the extent, however, that they guide drafters in improving language, and represent adopted policy, the drafter could point to them as persuasive authority for firm stands regarding proper drafting. While enacting more statutory or constitutional provisions controlling details of style might create cumbersome statutory fossilization, adoption, in manuals or written policies, of firmer commitments to specific language improvement mechanisms might impress drafters with these duties and give them an additional source to cite in justifying strong advocacy for good drafting, while avoiding overreacting by legislators.[103]

Adopting standard procedures for drafter control, even in small ways, may help. Various means for drafters to assert influence are

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101 Barbanel, *Lawmakers Get Caught in the Albany Crush*, N.Y. Times, July 10, 1983, at 6E, col. 4.

102 The Model Statutory Construction Act provides considerable guidance as to meaning; *but see* C. NUTTING & R. DICKERSON, LEGISLATION AND MATERIALS 436-42 (1978).

103 *Cf.* Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 704 (1981).

listed in the Proposed Drafting Rule. Many states have form and style checking procedures requiring submitted bills to pass through the drafting service's office to be checked for consistency with formal requirements, such as correct citation for amendments or repeals.[104] This screening procedure helps avoid these kinds of major errors. Informally, drafters may take such an opportunity to "clean up" language in a broader sense, or in some cases, note potential problems and bring them to a sponsor's attention, or correct them *sua sponte*. Interviews conducted by the author suggest broad variance among drafting institutions regarding their use of such a procedure.[105] As might be expected, drafters who felt more secure, either individually or because of their perception of their role in the organization, said they would frequently use this opportunity to make significant changes, while others did no more than check spelling or form, such as appropriate numbering, heading, or style clauses. Use and success of this type of informal process depends largely on personality, since some legislators are perceived as being much more open to suggested wording changes than are others. A legislature might strengthen such a process by granting the person conducting such a check-off procedure explicit authority to examine more than "style" in its limited sense—the service could be given explicit responsibility for improving organization, expression, or word choice, for example.

Some legislatures have authorized drafting services to initiate bills for reform, reorganization, simplification, or other "non-substantive" changes of statutory law.[106] Such authority, however valuable for improving technical aspects of drafting, is generally limited to rewording, elimination of redundancies, and other changes not amounting to real reform of substance.

Some legislatures have means by which the drafting service may indicate lack of approval when a legislator submits a bill too late for editing, or insists on a bill which does not conform to the service's standards. For example, a legislature may have a procedure whereby the service sends a bill to the legislature marked to indicate that it was being passed on in the form submitted, without scrutiny or approval of form or substance. Such a procedure provides some

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104 *See, e.g.*, Legislative Reference Bureau, Proofreading Section, Title 101, § 3.33.

105 Interviews. See *supra* note 1, for an explanation of interview sources.

106 *E.g.*, ILL. ANN. STAT. ch. 63, para. 29.4 (Smith-Hurd 1986).

means for retaining professional integrity and avoiding participation in poor drafting, while neither halting the process entirely nor forcing an unpleasant showdown with a legislator-sponsor. Of course, it would be better to correct problems, but where irreconcilable conflicts arise, this method provides a means for avoiding confrontation and retaining integrity.[107] Expanding such a procedure to allow a drafter to more readily refuse association with poorly drafted bills could improve drafter autonomy, credibility, and influence, and encourage legislators to accept drafter suggestions.

Simply persuading the legislative sponsor that his or her bill is nonconforming can effect change in many situations. Various types of such comment, or disclosure, are considered more fully in Proposed Drafting Rule 4.

Where the disagreement is more serious, and is not resolved by other means, drafters should be able to resort to more definite action in order to prevent abuse of the legislative process, or enactment of bad law. Where the legislator insists on drafting that is misleading or approaches fraud, as in the examples described above, the drafter ought to have greater duties, and the authority to discharge them effectively. As with other situations, providing information to dissuade the legislator would be a first step in avoiding undesired consequences. Additionally, in extreme situations where the legislator's position clearly is not supportable, the drafter ought to minimize his or her participation and perhaps take active steps against the bill. One possible action would be speaking publicly against the bill, or making further information available to the legislature.[108] In general, such statements should, in form and substance, be designed to achieve the goals of informing the necessary persons, while avoiding unnecessary embarrassment to the legislator, or breaches of confidentiality. Related disclosure possibilities are also considered in Proposed Drafting Rule 4.

In some situations, it may be necessary for the drafter to with-

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107 *See infra* notes 195-97 and accompanying text. This procedure may give legislators a means of satisfying their conflicting needs as well: by cooperating in such an indication of non-support, a legislator may introduce a bill to satisfy a constituent, but minimize the chance for passage. Whether this behavior is ideal legislative behavior is, of course, another question. According to drafters, it seems to be an accepted practice in at least some legislatures. Interviews. See *supra* note 1, for an explanation of interview sources.

108 *See, e.g.*, MODEL CODE, *supra* note 5, DR7-102(B)(1) (requiring an attorney to prevent a fraud); DR7-102(B)(2) (requiring an attorney to reveal a past fraud).

draw from participation in the drafting assignment, or reject such assignment altogether. (This option is discussed more fully in Proposed Drafting Rule 5 and the material following.) In general, the drafter should be reluctant to take this approach, as it may only pass the burden to another drafter. The greatest power of this alternative is probably in its threat. Also, by continuing to work with the legislator, the drafter may be in the best position to change the bill.

The drafter's role in the making of decisions regarding the policy or substance of a bill also begs for reform. Most drafters interviewed claim that they purposely avoid involvement in the development of policy in bills that they draft, and deny any role in shaping of substance of those bills. They suggest, instead, that they only act as "translators" of legislative ideas into statutory form and legislative language.[109]

This view could be seen as somewhat analogous to the practicing advocate zealously representing the client's position, without judging the merits of that position.[110] Ethical rules for litigators recognize tensions between zealous representation and duties to third parties or the public, but leave much of the decision-making power, at least regarding major substantive decisions, to the client.[111] Still, even advocates have limitations on zealous representation.[112] In spite of various pressures to abdicate larger responsibilities, and contrary to common views, the drafter, as a professional, should not be able to deny all responsibility in the name of representation.[113]

The vision of the drafter as an unquestioning, willing tool of the legislators is pervasive.[114] Luce, for example, in his work *Legislative*

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109 Interviews. See *supra* note 1, for an explanation of interview sources.

110 *See* MODEL CODE, *supra* note 5, EC 7-1, 7-7; MODEL RULES, *supra* note 2, Rule 1.2(a), (b).

111 *See, e.g.*, MODEL CODE, *supra* note 5, EC 7-7; MODEL RULES, *supra* note 2, Rule 1.2. *See also* MODEL RULES, *supra* note 2, Rule 1.2(e), which takes a rather weak position on action to avoid violations.

112 *See, e.g.*, MODEL CODE, *supra* note 5, DR 7-102(A); MODEL RULES, *supra* note 2, Rules 1.2(d), 3.3(a), (c), and (d), 3.4, 4.1, 8.4.

113 *Cf.* Richards, *Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. OF LEGAL EDUC. 359 (1981).

114 British Parliamentary drafters also claim restriction to "word juggling" as opposed to substantive control. The British, however, have the additional filter of the barrister and solicitor system which provides further insulation of the barrister/drafter from policy making members of the administration. The solicitor typically works closely with the client agency, and sends the barrister/drafter a more

Procedures, quotes an earlier authority who devised rules for drafting in the Wisconsin legislature, among which were the following: " '3. The draftsman can make no suggestions as to the contents of bills. Our work is merely *clerical* and *technical*. We cannot furnish *ideas*. 4. We are not responsible for the *legality* or *constitutionality* of any measures. We are here to do *merely* as directed.' "[115] While some drafting organizations may have specific authority to initiate reform under their enabling legislation,[116] such authority, in fact, is seldom exercised.

A variety of reasons may explain why many drafters are shy about accepting responsibility for any role in policy and substantive decision-making, and for the persistence of a perception that drafting is substance-neutral.

Some argue that not only drafters, but lawyers in general,[117] are by training, if not disposition, ill-suited for the type of decision-making necessary for policy formulation.[118] This reasoning would suggest that the participation of drafters in policy-making would hinder the process.

The drafter serves by appointment, not by election. Therefore, drafter involvement in policy-making and development of substantive law would partially remove these important legislative processes from direct access by the electorate. Inasmuch as this leads to more decisions being made by "staff" and rubber-stamped by the legislature, it raises valid concerns regarding "invisible lawmakers" and usurpation of legislative authority.[119]

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completed brief of the legislative ideas. This allows the drafter greater independence from any administration interference in drafting, and also minimizes opportunity for the drafter to participate in or assist the policy makers in their decision-making. These appearances may mislead, however. As the parliamentary draftsman enjoys great freedom for creating a legislative program effectuating broad policy mandates, in fact he or she can exercise significant powers to shape the substantive provisions. *See* Renton, *supra* note 88.

115 McCarthy, *The Wisconsin Idea*, *reprinted in* LUCE, *supra* note 87, at 574 (emphasis in original).

116 *See generally* Kennedy, *supra* note 17, at 103.

117 Thereby suggesting exclusion from legislative service of the single largest group of professionals currently serving. Although probably suggested at least part tongue-in-cheek, Representative Jim Green may have struck a popular chord when he introduced a bill to ban members of the Arizona State bar from serving in the State Legislature. *See* Frank, *'Silly' Bill*, 70 A.B.A.J. 31 (1984).

118 *See* H. EULAU & J. SPRAGUE, LAWYERS IN POLITICS 22-28 (1964).

119 Sheler, *The "Shadow Government" Operating on Capitol Hill*, U.S. NEWS & WORLD REP., June 27, 1983, at 63.

Participation in policy and substance formulation by drafters potentially also threatens the integrity of the legislative process in another way. Providing staffing for legislators on an unequal basis may increase the relative capability of well-staffed legislators. Thus, certain legislators, and by representation, certain constituencies, would be favored, thereby infringing upon pure notions of equal representation.[120] Of course, to the extent that each legislator has equal access to the drafter-pool, unequal impact diminishes. In fact, provisions for competent drafting service on an equal basis to all elected representatives may foster greater equality of representation, by mitigating unequal constituent power caused, for example, by inequality of seniority or staffing.

Denying involvement in, or responsibility for, the laws drafted serves to make the drafter's job easier, and perhaps more secure. A drafter who avoids involvement in decisions on the merits, or who avoids judgment on bills he or she is requested to draft may avoid potentially awkward conflicts with legislators, and may avoid difficult decisions regarding the substantive or ethical merit of bills presented. As with lawyers, for whom the role of "technician" divorced from the merits of their clients' claims provides "an expedient escape from contexts of ethical complexity,"[121] so too, do many drafters desire to shun responsibility and difficult decision-making. Passing judgment on a proposal sponsored by a legislator who also is an employer can create conflict of interest problems, as can seeking to balance the legislator's wishes with broader perspectives of ethical values, constitutional requirements, or social good.[122] Such conflicts make for difficult decisions, uneasy compromise, and stress, which the drafter may seek to reduce by avoiding participation, and by avoiding rules imposing responsibility. As one experienced drafter notes, in Congress, "the unwritten political rule that you do not embarrass your party's president, your friends in agencies, or fellow congressional colleagues may conflict with the responsibilities of both the committee and personal staff attorney to fully evaluate a legislative issue or proposal."[123]

Taking responsibility for considering the substance of a bill

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120 Rosenthal, *Professional Staff and Legislative Influence in Wisconsin*, in STATE LEGISLATIVE INNOVATION 192 (J. Robinson ed. 1973).

121 *Cf.* Rhode, *supra* note 103, at 701.

122 *See* Hill, *Ethics for the Unelected*, 68 A.B.A.J. 950, 953 (1982).

123 *Id.*

would also mean more work for drafters. Merely drafting a bill in comprehensible language under the time pressure of a busy session can discourage even the most diligent drafters from undertaking more responsibility.[124]

Examination of actual drafting practices, however, suggests that the drafter necessarily plays a role in formulating substance, and shaping the implementation, if not the policy itself, of laws drafted. This role should be recognized, if for no other reason than ignoring it continues to create dilemmas for drafters, and precludes regulating or guiding that existing discretion and power. It is suggested here, moreover, that some drafter control not only exists, but is desirable, and should be expanded and guided to aid in improving the legislative process.

Several arguments support the claim that drafters do have, and should have, considerable control over substance.[125] The drafter does not have the individual legislator as his or her sole client in the sense that the litigating advocate does. The advocate in the individual case is likely to have immediate effect only on the parties in the case, but the drafter's product will usually have a much wider impact. Thus the drafter's responsibilities more clearly extend beyond the legislator, and suggest a greater duty which should include attention to substance.

The legislative process differs from the judicial, or litigative, system. The legislative process, although based partly on resolution of differing views of legislators, relies much more on cooperation, compromise, and consensus than does the adversarial system of litigation. Therefore, strict adherence to "advocacy" of an assigned position, ignoring its merits, is misplaced.

Moreover, the distinction between form and substance in drafting is a fleeting one at best. Choice of language, organization, and clarity, not only make for elegance and readability; they also affect the meaning and operation of the law.[126] The courts tend to rely on standard rules of interpretation. Drafters, therefore, use conven-

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124 In fact, several drafters interviewed suggested this might be their primary objection to assuming broader roles in law-making. Interviews. See *supra* note 1, for an explanation of interview sources.

125 *See generally* Hill, *supra* note 122, at 953.

126 This should be self-evident. For a worthwhile collection of materials related to this topic, see generally FUNDAMENTALS OF LEGAL DRAFTING, *supra* note 83, at 8-15.

tions, such as the one which holds that choice of word order determines relationships, or the principle of *ejusdem generis* limits the meaning of a broad phrase, along with general language conventions[127] to express intended meanings. Merely by use of such conventions, therefore, the drafter has significant control over the meaning of a law.

Because the drafter often participates in the early stages of the lawmaking process, by having some control over the information flow to the legislator, and by formulating legislative environment options among which the legislator may choose and within which the law will be shaped, the drafter (or other staff) can have a significant role in determining the direction in which a bill evolves.[128] In addition, the drafter and other staff often have greater access to information, and considerable control over the flow of information to the legislative body, than do many of the legislators.[129] Especially in legislatures with relatively centralized power and high partisan cohesion, the role of individual legislators, or even committees, in closely reviewing bills before passage tends to diminish.[130] Thus, the drafter may exert considerable influence by forcefully presenting his or her opinion. Where decentralized legislatures exist, and other factors limit the legislator's control, drafting assistance may even add to the complexity of the process, and control of detail by the drafter may mean control of substance.[131] The drafter may be one of the last persons to subject the bill to careful scrutiny before the vote is taken.[132] Thus the drafter, and the staff as well, can affect the ability of the individual legislator to make a knowing and intelligent vote, by controlling the clarity of the language and the accompanying information. In addition, as has been suggested above, the mere creation of a drafting service, by altering the opportunity for

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127 *Id.* at 43-48.

128 S. ROSENTHAL, LEGISLATIVE PERFORMANCE IN THE STATES 151 (1974).

129 H. FOX & S. HAMMOND, CONGRESSIONAL STAFFS: THE INVISIBLE FORCE IN AMERICAN LAW MAKING 2 (1977).

130 STATE LEGISLATIVE INNOVATION, *supra* note 120, at 200 *passim*.

131 *See* Stewart, *supra* note 9, at 170.

132 As Littell suggests, commenting on the rush of legislative sessions, historical procedures and problems, "[w]hatever the reason, the point I'm trying to make is that in many instances a draft submitted by an executive department or agency may go through both houses with no or perhaps only cursory, examination as to the equality of its drafting." Littell, *How the Problem Looks to the Legislative Branch: Congressional Practices that Affect Executive Responsibility, reprinted in* PROFESSIONALIZING LEGISLATIVE DRAFTING: THE FEDERAL EXPERIENCE, *supra* note 54, at 23.

obtaining information and drafting assistance, can shift the power balance in a legislature and thereby modify the operation of the representational process and affect the substance of laws made.[133]

Often a legislator will, intentionally or unintentionally, delegate much of the decision-making power to the drafter.[134] Typically, drafting requires substantive decisions just as translating does, for if the original idea was fully expressed, there would be little or no work left for the drafter. At least in the early stages, the policy guidance given to the drafter does not fully anticipate the detailed problems which may arise in typical situations. Often, the drafter must take general guidance from the policy decisions the legislator has made, and extrapolate or interpolate extensively, to formulate a coherent legislative program.[135] Through discussing options and working them into legislative form, the drafter makes, or forces the legislator to make, substantive decisions.

Alienation from the decision-making processes would put the drafter at a disadvantage when he or she is seeking to understand the law to be drafted, and attempting to effectively implement the legislator-client's wishes.[136] Early involvement enables the drafter to understand better the substance and prepare for drafting.[137] Among the more difficult problems the drafter faces is developing an adequate conception of the project—one cannot formulate good language in a bill whose substance is undecided.[138] The drafter, if involved early, may avoid later drafting problems by identifying issues, helping organize thoughts, and indicating necessary policy decisions. Frequently, the legislator has an inadequate understanding of how to conceptualize a legislative program; early assistance will often show that clients "are not sure, beyond general objectives, what they themselves want to accomplish."[139] This early work is

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133 *See* STATE LEGISLATIVE INNOVATION, *supra* note 120, at 223.

134 *See* Kennedy, *supra* note 17, at 118.

135 D. HIRSCH, DRAFTING FEDERAL LAW 2 (1980).

136 *Cf.* PROFESSIONALIZING LEGISLATIVE DRAFTING: THE FEDERAL EXPERIENCE, *supra* note 54, at 10. Cummings, speaking of the problems of the legislative counsel drafting a bill without being involved in or familiar with the background, suggests "legislative counsel rarely 'conceives' an idea and is rarely quite certain of what the authority had in mind, what objectives he seeks, what substantive problems have or have not been anticipated." CUMMINGS, *supra* note 93, at 25.

137 Littell, *supra* note 132, at 18-19.

138 *See* Bennion, *supra* note 85, at 567-68.

139 HIRSCH, *supra* note 135, at 2.

critical to preparing the drafter. "The last of your tasks as a legislative draftsman assigned by a federal agency to prepare a major draft bill for submission to Congress, is actually writing the bill. If you have done the necessary preliminary work it is the task that is the least time consuming."[140] This early involvement cannot be wholly passive. In casting about for legislative solutions, the legislator ought to have the assistance of the drafter's expertise as to what types of bills have dealt with the same or similar problems in the past, what costs to expect, and what can be effectively expressed legislatively. There is, of course, no sense in "reinventing the wheel" if adequate legislative models already exist. Or, if similar bills have been tried and have failed, the legislator should be aware of such failure and, if necessary, this information should come from the drafter. By providing information and participating in this part of the process, the drafter inevitably contributes to the content.

Part B of this Rule suggests that because the drafter has a role in forming content, he or she also has some duty to avoid bad law, and to improve the substance of laws proposed by a legislator.[141] When or how that duty may be discharged, as suggested, depends upon an analysis of the seriousness of the flaw in the bill, the effectiveness of a variety of possible preventive or corrective measures, and a balancing of costs and potentially conflicting obligations, such as confidentiality. Much of the consideration, and potential action, the drafter undertakes will be the same as when he or she asserts control over technical drafting matters, yet the potential impact here may be more significant. The drafter should therefore be more cautious in asserting his or her position regarding the substance of a bill.

Offering advice alone will often suffice to improve the law or at least to discharge the drafter's duty. It should always be appropriate to advise the client fully of alternatives and the consequences of various bills, even if such advice touches on policy or substance.[142] Many of the staff currently serve this function either as partisan advi-

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140 *Id.*

141 Arguably a drafter might have a duty to actively seek change or to initiate reform as well. Because of the drafter's special skills and abilities, and access to knowledge and influence, there may arise a special obligation to suggest and initiate reform. *See* Poirer, *supra* note 29, at 1544, especially Federal Ethical Consideration 8.1 which imposes such a special obligation on federal employees generally.

142 Nutting, *supra* note 10, at 1014.

sors or simply as objective assistants.[143] In such a setting, the drafter acts much as a lawyer in a more typical practice, assuring that the decision-maker is well informed.[144] The advice the drafter provides may be wide-ranging, as decisions regarding the content of statutes should contemplate a variety of social, economic, and other factors.[145] Often, the drafter should be able to persuade the legislator to modify his or her plan to achieve a better result, to accept a better bill, or to abandon a bill that would simply be poorly advised, or unjust, immoral, fraudulent, or otherwise undesirable.[146]

When the drafter contemplates going beyond simple advice to the individual legislator, he or she should compare the seriousness of the legislative flaw with the seriousness of the possible remedy. Where the proposed law seems merely ineffective, and the danger to society seems minimal, the drafter may have a duty to seek a better law, but only limited action should be considered. The drafter might try to discourage the sponsoring legislator, or try to assist in reformulating the bill, but would have little duty to take stronger action to prevent the bill from becoming law.

The drafter faces a more difficult situation where he or she concludes that a requested bill would be immoral, irresponsible, or extremely undesirable for some other reason. For example, the legislator could suggest a bill that might very well withstand a constitutional challenge, but would still encourage obnoxious racial or

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143 *See* Rosenthal, *supra* note 120, at 208.

144 *Compare* MODEL CODE, *supra* note 5, EC 7-8: "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. . . ." *with* MODEL RULES, *supra* note 2, Rule 1.4(b): "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." and MODEL RULES, *supra* note 2, Rule 2.1.

145 *See* MODEL RULES, *supra* note 2, Rule 2.1: "[I]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

146 *Compare* MODEL CODE, *supra* note 5, EC 7-8: "In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions." *with* MODEL RULES, *supra* note 2, Rule 1.2: "When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct."

gender discrimination, working an unequal hardship on some unprotected group,[147] detract from the integrity of the legal system,[148] conflict with the drafter's personal ethics, or transgress some more widely held societal mores. In such a case, the drafter may have some affirmative duty to seek a change in the bill. If that fails, the drafter may take further action to help prevent passage of the law. Ethical rules for lawyers provide some analogy. Because such rules regard the lawyer more as litigator, however, they leave great leeway for the lawyer-litigator to continue to carry out the client's wishes.[149] As described in the discussions following Proposed Drafting Rules 4 and 5 it may be appropriate, if negotiation fails, for the drafter to take stronger measures. While the drafter should not simply substitute his or her judgment for that of the legislator, greater duties as a drafter, or even as a citizen, legitimize some steps which may be taken to avoid bad law. One possibility may be to make public statements which disclose the drafter's disagreement, or the drafter may simply expose the problems in a more neutral way.[150]

Constitutionality of a bill is often not easy to predict; therefore, the drafter should not take extreme actions where he or she simply disagrees with the legislator as to likely rulings on constitutionality. Moreover, at least if a challenge seems likely, the drafter should defer to the judicial process to test a law. Where, however, the drafter concludes that the proposed legislation is clearly unconstitutional, or harmful to a person or group, and lacking counter-balancing benefits,[151] a strong argument can be made, if other measures fail, for

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147 MODEL CODE, *supra* note 5, EC 7-10, criticizes the infliction of needless harm. *See also* MODEL CODE, *supra* note 5, EC 7-14; MODEL RULES, *supra* note 2, Rule 4.4.

148 *See generally* MODEL CODE, *supra* note 5, EC 8-1 to 8-5. The Model Rules do not stress this role as clearly. *But see* MODEL RULES, *supra* note 2, Rules 8.4, 6.4.

149 *See, e.g.*, MODEL CODE, *supra* note 5, EC 7-6, 7-7; MODEL RULES, *supra* note 2, Rule 1.2.

150 A distinction should be made between pre-introduction of a bill, where extreme caution is warranted to avoid breach of confidence and to encourage free exploration of ideas, and post-introduction, where comment as a citizen is more appropriate. *See* discussion following Proposed Drafting Rule 4.

151 *Compare* MODEL CODE, *supra* note 5, DR 7-102(A)(1): A lawyer should not "assert a position . . . when it is obvious that such action would serve merely to harass or maliciously injure another," *with* MODEL RULES, *supra* note 2, Rules 3.1 prohibiting "frivolous" positions, and 4.4, prohibiting a buyer from using "means that have no substantial purpose other than to embarrass, delay or hinder a third person. . . ." *See also* MODEL CODE, *supra* note 5, EC 7-9.

not drafting the legislation, because of the drafter's responsibility to seek improvement of the legal system. Arguably, the drafter could draft, in good conscience, a statute challenging current constitutional interpretation, if a good faith argument for upholding the statute, "through extension, modification or reversal of existing law"[152] could be made. Where the constitutionality is merely suspect, advising the client of this reservation would be in order, but a drafter should be very reluctant to refuse to draft the bill.[153] A law which is constitutional, but unfair or extremely harmful for certain segments of the population may create more problems for society. In such situations, the courts will not be able to strike down the law on the constitutional grounds, so the drafter should seek to have the legislative process preclude or minimize harm. To assist this process in extreme cases, careful disclosures might be made.

In very rare situations, participation in drafting a truly unconscionable bill may be tantamount to participation in a fraud upon the legislature, violation of a procedural rule, or violation of law or a disciplinary rule. In such situations, the drafter ought to have a right to withdraw or refuse to draft. As previously discussed, some legislatures already have more or less formalized procedures which allow a drafter to avoid endorsing a bill he or she has not approved.[154] Refusing to "sign-off" on a bill may at least help to avoid the drafter's active participation in any wrong implied by the bill's introduction. Adoption of stronger rules permitting refusal or withdrawal are unlikely to be popular.

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152 MODEL CODE, *supra* note 5, DR 7-102(2), may be somewhat analogous, suggesting that the litigating lawyer should not "knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such a claim or defense if it can be supported by good faith argument for an extension modification, or reversal of existing law." *See also* MODEL RULES, *supra* note 2, Rules 1.2(d) (also allowing a "good faith" effort to challenge a law) and 3.1.

153 Drafters encounter such situations frequently. Drafters working on the recodification of civil service law in Massachusetts raised questions regarding the constitutionality of the veteran's preference provisions. When the clients insisted on retaining the provisions, the drafters had to wrestle with this problem. Concluding that a good faith argument could be made for its constitutionality, the statute was drafted as requested. *See* Personnel Adm'r of Mass. v. Feeny, 442 U.S. 256 (1979).

154 *See* comment following Proposed Drafting Rule 3; *see also infra* note 193 and accompanying text.

4) Confidentiality and Comment

Rule: (A) A legislative drafter should encourage and engage in free discussion with legislators regarding legislative matters. Free discussion will be encouraged by an atmosphere in which each party feels uninhibited in expressing and exploring a spectrum of ideas. To encourage legislators to explore ideas fully, the drafter should seek to maintain confidentiality. While the drafter may offer differing opinions, may maintain independent views, and may under appropriate circumstances comment on a bill whether or not he or she has drafted it, the drafter can and should refrain from referring to or disclosing a legislator's statements if obtained with the expectation of confidentiality.

The drafter should provide the legislator with full information, and should also assist the legislature by providing information. The drafter should normally refrain from revealing to third persons information obtained in discussions regarding potential legislative proposals, except for disclosures (1) authorized by the legislator after consultation, (2) impliedly authorized to carry out the drafter's assignment, or (3) made after the submission of the bill, subject to conditions in paragraph (B).

(B) Once a bill is submitted to the legislature, a drafter may comment on the drafting of it with the purpose of assisting the legislative process. The drafter should, however, take all reasonable steps to avoid unnecessary disclosure of confidences or secrets disclosed to the drafter. In addition, a drafter may, as may any citizen, comment on the merits of a bill once it is submitted. In doing so, however, the drafter should avoid disclosure of information not available to or discoverable by other citizens, and should avoid any appearance of an attack on any legislator.

(C) Where failure to disclose information regarding a bill would amount to participation in serious deception, fraud, or a violation of law or legislative rule, the drafter may disclose only such information as is necessary to prevent that wrong, and must limit the disclosure to those persons to whom disclosure is necessary to prevent the wrong.

Comment: A primary goal of this rule is to encourage free exploration of ideas to enhance the legislation process. Just as various laws, rules, and even Constitutional provisions are designed to allow free discussion in the legislature, so also

should a legislator feel free to discuss legislative ideas with a drafter. To allow free discussion, this rule protects discussion regarding proposed legislation from disclosure where possible.[155]

On the other hand, the drafter, acting as a drafter, as a lawyer, and as a citizen, should assist the legislature in passing desirable law. The drafter may participate as any citizen might, but in addition, he or she has an additional duty to use his or her special expertise and the responsibility of the drafter's position to further the legislative process. Much can be accomplished by artful consultation with the legislator who is considering sponsoring a bill. The audience, the context of the statements, and the form in which they are presented should be limited to that required to provide essential information to those needing it for informed decisions on the proposed legislation. Brief comments may be made to the relevant committee, or to the legislature as a whole. Such comments should be limited to the necessary information, avoiding disclosure of protected confidences or secrets, and avoiding personal reference to the legislator.

Discussion: In order to encourage free discussion between attorney and client and to enable the attorney to provide better assistance, lawyers' ethical codes protect confidentiality of information revealed in consultation with an attorney for purposes of obtaining legal advice or representation.[156] Similarly, it could be argued that a better law will be drafted if the legislator feels free to discuss ideas fully with the drafter. The drafter should also feel free to speak openly to the legislator, and in some situations, to others. Creating rules to guide discussion and disclosure may help achieve both goals—clarifying protection so legislators will know how freely they may speak, and giving drafters authority to which they may refer to justify speaking freely to legislators, or in infrequent situations, others. At present, most states have taken a very restrictive view as to the propriety of drafter comment or revelation of information obtained while preparing a bill.[157] This

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155 The drafter, as lawyer, of course, may be approached with other legal problems. Problems relating to individual legislator's legal interests, etc., are not considered here. *But see* Poirer, *supra* note 29, at 1544.

156 *See* MODEL CODE, *supra* note 5, DR 4-101, EC 4-1, and MODEL RULES, *supra* note 2, Rule 1.6 and comment following.

157 CONFIDENTIALITY OF LEGISLATIVE RESEARCH PAPERS, *supra* note 48.

Proposed Drafting Rule suggests some relaxation of that position in an attempt to balance goals.

A distinction should initially be made between comment to the requesting legislator, which should seldom present any real ethical problem, and comment to third parties, such as other legislators, which should be more reluctantly approached. Also, there is a difference between disclosure to third parties of information obtained or statements made during the drafting relationship, and comments based on the drafter's own ideas. A variety of currently available communicative devices are being used by drafters to influence the content of legislation, to indicate disagreement or non-participation, or to attempt to prevent passage of unacceptable laws. Free discussion with a requesting legislator, as one such device, should be encouraged. Most drafters interviewed, for example, said they would normally notify a requesting legislator of constitutional, practical, or political problems the drafter perceived regarding a suggested bill. Some, however, so notified only those legislators they were certain would be receptive, and carefully avoided potential conflict with other legislators whom they perceived might be overly sensitive.[158] This type of "chilling," of course, may extend beyond those who actually would react adversely; the more cautious drafter may avoid any legislator whom he even suspects may take umbrage. Such reluctance is understandable, as the drafter is employed largely at the will of the legislators. Yet the drafter should be encouraged to inform the legislator fully if the legislator is to make the best decisions.[159] Where the drafter disagrees with the legislator's decision or proposal, even on policy, the drafter should be able to express this disagreement to the legislator. The choice of form into which one places reference to this type of disagreement should vary according to the scope of the disagreement and the receptivity of the legislator to suggestions.

Some drafters would limit such notification to a verbal com-

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158 Interviews. See *supra* note 1, for an explanation of interview sources.

159 *Cf.* MODEL CODE, *supra* note 5, EC 7-8:

> A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. . . .

ment, in order to avoid antagonizing clients with a more formal written notification. Even a verbal notification can be effective in many instances, as the drafter may thus save a legislator embarrassment arising from sponsorship of a poorly conceived or politically dangerous bill. Skill in presenting such an argument can achieve significant results. Many drafters have used arguments based on political feasibility, the likelihood of undesirable appearance to constituents arising from sponsorship of a controversial bill, or the possibility of creating unwanted litigation to persuade a client not to go forward with a bill.[160]

On the other hand, some drafters put comments of this type in writing, either in the hopes of making them more persuasive, or, more frequently, to have documentation of the drafter's objection. A poor bill may reflect poorly on the drafter;[161] therefore a drafter may wish to be disassociated from such a product or retain evidence of objections. The practice of notifying the client of objections, and of retaining a copy of the notifying memo, has arisen to protect the drafter's credibility from later unwarranted criticism.[162]

Extending comments beyond those to a requesting legislator, however, has proved far more controversial. This could be compared to provisions allowing attorneys to disclose necessary information to defend against allegation of wrongdoing.[163] Confidentiality policies adopted by many state legislatures preclude distribution of a memo except to the legislator requesting a bill.[164] Confidentiality is ensured to encourage free and full discussion of proposed legislation. Because of confidentiality policies, and the fear of antagonizing legislators, most drafters said they avoided voicing opinions to anyone other than the request-

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160 Interviews. See *supra* note 1, for an explanation of interview sources. *See* MODEL CODE, *supra* note 5, EC 7-8; MODEL RULES, *supra* note 2, Rules 1.4(b) and 2.1.

161 Even in situations where the legislator insisted on the wording of the statute, the drafter may still be held responsible.

162 While many drafters interviewed referred to such a practice, no drafter cited an instance where a retained memorandum of this type was later used. See *supra* note 1, for an explanation of interview sources.

163 *See, e.g.*, MODEL CODE, *supra* note 5, DR 4-101(C)(4); MODEL RULES, *supra* note 2, Rule 1.6(B)(2).

164 *See* CONFIDENTIALITY OF LEGISLATIVE RESEARCH PAPERS, *supra* note 48.

ing legislator, even verbally.[165] Such restrictions are thought to avoid putting drafters in awkward conflict of interest situations, and to avoid discouraging free discussions and innovative brainstorming by proposing legislators. Such policies, however, preclude use of notification or distribution of such information as a means of affecting the legislative process.

Some drafters felt that they were bound by attorney-client privilege, or by confidentiality provisions of professional ethical codes from disclosure of communications, or even ideas, to third parties.[166] The drafter-legislator relationship, however, is not quite the classic attorney-client relationship. Not all drafters are lawyers; hence it is difficult to argue that an attorney's related privilege would apply generally, especially to lay drafters.[167] The consultation between the drafter and the legislator is for drafting purposes, which is not the same as consultation for legal advice in the traditional sense.[168] The drafter has characteristics more like those of an employee, rather than an independent private attorney.[169] Because the "client" of the drafter, the legislature,[170] is not a private client, there is authority suggesting that traditionally the privilege might not have applied.[171] In somewhat different circumstances, however, courts have begun to extend the privilege to some government attorneys,[172] but in areas with less effect on the public than legislation. Also, as legislation is intended to become public, the privilege would not necessarily apply to all aspects of the conversation.[173] Finally, the privilege protects only *communications*, not original ideas.[174] The drafter's

165 Interviews. See *supra* note 1, for an explanation of interview sources.

166 *Id.*

167 *But see* E. MCCORMICK, EVIDENCE 210 (3d ed. 1984).

168 *Id.* Privilege may not extend, for example, to tax consultation, even though it is quite close to legal advice. *Id.*

169 For example, the paying entity, the legislature, is not the same as the person for whom the work is more immediately completed. *See* discussion of loyalties, following Proposed Drafting Rule 2.

170 *See* PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 64, at 27-48.

171 MCCORMICK, *supra* note 167, at 210 n. 19-20 and accompanying text.

172 *Id.* at 209 n. 9 and accompanying text. *See also* Proposed Federal Rule of Evidence 503(a)(1) (which takes an expansive view of "client").

173 *See* Proposed Federal Rule of Evidence 503(a)(4); MCCORMICK, *supra* note 167, at 217.

174 While this seems the general rule, some authority suggests protection of any information obtained while acting as attorney. *See* MCCORMICK, *supra* note 167, at 212.

own ideas may not be privileged.[175] Therefore, some carefully controlled comment to third parties should be permitted.

Confidentiality requirements of lawyer's professional codes,[176] ought not to unduly restrict comment in the legislative setting. Unless and until all drafters are lawyers, it seems incongruous to restrict only some drafters. Even if applicable, the Model Code provides numerous exceptional circumstances in which a lawyer may disclose. Of particular interest may be those permitting, or even mandating disclosure to prevent fraud upon a tribunal.[177] While it is not clear the legislature is a tribunal, as envisioned in the Model Code, candor towards the legislature, as suggested above, ought to be at least as highly regarded. Thus, fraud upon the legislature might require disclosure as well. The Model Rules have taken a rather narrow view of disclosure requirements in adversarial situations.[178] This position has aroused considerable discussion.[179] New Jersey, the first state to adopt the Model Rules, radically modified this provision to allow more liberal disclosure.[180] Whatever reasons may justify such an extreme position in an adversarial context, especially in defense of a criminal defendant, these reasons seem less relevant and less useful in the legislative context,[181] and are outweighed by other considerations.

The legislative process allows debate, but it is not adversarial in the same sense that the judicial process is, and often only one drafter assists the sponsoring legislator as well as the rest of the legislative body. Therefore, perhaps a better analogy may be

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175 An argument might be made, however, that such discussion or revelation of ideas or feelings hostile to the bill would represent a conflict of interest, or undermine zealous representation.

176 MODEL CODE, *supra* note 5, DR4-101, DR4-102; MODEL RULES, *supra* note 2, Rule 1.6.

177 *See* MODEL CODE, *supra* note 5, DR 7-102(B) (requiring disclosure of fraud committed during course of representation).

178 MODEL RULES, *supra* note 2, Rule 1.6 allows disclosure "to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;" or to protect the lawyer's own interests.

179 *See, e.g.*, Comment, *Proposed Model Rule 1.6: Its Effect On A Lawyer's Moral and Ethical Decisions With Regard To Attorney-Client Confidentiality*, 35 BAYLOR L. REV. 561-82 (1983).

180 NEW JERSEY RULES OF PROFESSIONAL CONDUCT, Rule 1.6.

181 Few situations in a legislature, if any, would ever meet the "death or substantial bodily harm" requirement, for example.

made to the unitary representation in an *ex parte* proceeding. In such situations both the Model Code and Model Rules impose a greater burden of full disclosure of relevant information, including adverse facts.[182] Similarly, inasmuch as the legislature may be relying on a single source of information for its decisions, the drafter should present all sides of an issue.

Legislators, apart from the sponsor of a bill, often need assistance to understand fully the content of a bill upon which they must act. Dissemination to persons other than the sponsoring legislator of commenting memos, and encouragement of comment by drafters would make the benefits of drafter expertise more widely available,[183] thus aiding the other decision-makers. This type of comment may, of course, also have the undesirable effect of discouraging full disclosure to drafters, or full cooperation between drafters and legislators. Therefore, such comment should be tailored carefully.

Of course there would be no problem with disclosures explicitly authorized by the legislator.[184] Moreover, some disclosures ought to be treated as impliedly authorized in order to carry out the drafting function.[185] For example, explanations of phrases or word choice, summaries of contents, or memoranda on legal background are typical drafting products, and careful use of these should provide opportunities for revelation of much useful information in a non-confrontational way.

Moreover, some justification by analogy could be argued for drafter revelation of information necessary to protect the drafter's own professional interests, if these should be questioned.[186] The lawyer-drafter may have reason to protect his or her interests through revelation of client statements. To the extent a drafter's integrity is impugned by attacks on the legislation, it would be in the drafter's interest to disclose the legislator's

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182 MODEL RULES, *supra* note 2, Rule 3.3(d).

183 In addition, it could be argued that the potential for such publicity may act as a deterrent to legislators who would otherwise be more willing to submit undesirable legislation, or to attempt to push through legislation which is not clearly understood by other legislators.

184 *Cf.* MODEL CODE, *supra* note 5, DR 4-101(c)(1), EC 4-5; MODEL RULES, *supra* note 2, Rule 1.6(a).

185 *Cf.* MODEL RULES, *supra* note 2, Rule 1.6(a). Note that the Model Code does not have quite an equivalent provision.

186 *See supra* notes 161-62 and accompanying text.

role in making the legislation, and in misrepresenting it. Theoretically, such a situation could arise internally, where a drafter's employment is in question, but because the drafter has virtually no public accountability, litigation is unlikely and much public criticism is unlikely as well. Criminal acts resulting in death or substantial bodily harm[187] are not likely to result from legislative behavior, but the implication seems to be that the lawyer *may* preserve confidences except in the most extreme situations. Following these extremes would seem a step backward in attempts to produce, through openness, better legislation.

While a drafter should still try to protect information made known to him or her confidentially by the legislator, fair comment on an already introduced bill, ought to be permitted, as the bill is then public.[188] After the introduction of the bill, very little information relevant to the merits of the bill would deserve continued protection in view of the great interest in preventing fraud and enhancing the legislative process.[189] Nevertheless, at least some legislatures seem to find any activity by a drafter in supporting or offering comments on legislation to be an unacceptable conflict.[190]

If the problem is one merely of confidential communications, a drafter could criticize a bill on its merits without necessarily revealing private communications, speaking instead only as

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187 MODEL RULES, *supra* note 2, Rule 1.6(b)(1).

188 MODEL RULES, *supra* note 2, Rule 1.9 would permit "use of information relating to the representation . . . of the former client . . . when the information has become generally known." In the legislative situation, the bill has become public, statements of the legislators have not, and therefore a useful distinction could be made. *Cf.* Hatch Act, 5 U.S.C. § 7324(a)(2) (1976), which, while restricting some political activity, would allow such comment.

189 The general exhortations of MODEL CODE, *supra* note 5, Canon 8, perhaps especially EC 8-4 where the distinction between representing a client and the public interest is drawn, may be most relevant. *See, e.g.*, MODEL CODE, *supra* note 5, EC 7-17:

> While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client, in a matter he is then handling, he may take positions on public issues and spare legal relations in favor without regard to the individual views of client.

It is not clear whether the drafter ought to be viewed as still "handling" a bill once submitted. *See also* MODEL CODE, *supra* note 5, EC 8-1 suggesting the lawyer propose and support legislation "without regard to the general interests or desires of clients or former clients." The Model Rules do not, however, seem to stress this duty nearly as strongly as the Code did.

190 Interviews. See *supra* note 1, for an explanation of interview sources.

to the drafter's own ideas, although that line may be difficult to draw.[191] The need for disclosures, of course, varies depending upon the seriousness of the flaw in the legislation. As suggested in the Proposed Drafting Rule, where the bill approaches a fraud upon the legislature, comment and public disavowal by the drafter may be necessary to avoid participation in the wrong. Where the bill is clearly unconstitutional, pre-empted by federal laws, in violation of rules of the legislature, or otherwise contrary to law, the drafter may arguably have an affirmative duty to speak out, similar to the lawyer's duty of candor to a tribunal.[192]

The notion that disclosure by an attorney is required to prevent fraud has been extended in some situations to information revealing corporate wrongs which may work harm on third parties.[193] The analogy here seems apt—the individual legislator misrepresenting a bill is in effect working a fraud upon the legislature and public. Public criticism of a product of the legislative process in which one is involved, or criticizing one's employers, may create working conditions that would become awkward or impossible. The drafter in such a situation must consider his or her own feelings, which might lead to resignation to avoid contributing further to a law with which the drafter disagrees. In addition, such an open disagreement may lessen the drafter's effectiveness and likewise lead to termination of employment.[194] Some of these dangers may be minimized by limiting the dissemination to those persons necessary in the circumstances, and by

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191 For example, drafters often are called on to report to a committee the potential impact of a bill. This would not necessarily require disclosure of confidences. The fact that a sponsoring legislator had one particular effect in mind could still be protected.

192 *See, e.g.*, MODEL CODE, *supra* note 5, DR 7-106(B)(1); *cf.* MODEL CODE, *supra* note 5, DR 7-102(B)(1), EC 7-23; MODEL RULES, *supra* note 2, Rule 3.3(a)(3).

193 *See, e.g.*, Block & Burton, *Attorney's Responsibilities—Professional Ethics and the Federal Securities Laws*, 8 SEC. REG. LAW. J. 333 (1981).

194 *Cf.* Federal Ethical Considerations Canon 8-2, *reprinted in* Poirer, *supra* note 29, at 1544: "The situation of the federal lawyer which may give rise to special considerations, not applicable to lawyers generally, include certain limitations on complete freedom of action in matters relating to Canon 8." *Id.* The problem of resigning or threatening to resign to present fraud or perjury has been extremely problematic. The United States Supreme Court has quite recently spoken, apparently encouraging attorneys to take steps to prevent perjury, even to the extent of threatening withdrawal and revelation of the lies in a criminal defense. *See* Nix v. Whiteside, — U.S. —, 106 S. Ct. 988 (1986).

limiting the form and content of the criticism to that of fair comment on a bill, rather than an attack on a sponsoring legislator.

As has been mentioned previously, some drafting services have developed other means of communicating non-participation in developing particular legislative products. Where a client has submitted a bill which the drafter has not corrected for form, style, or language, these drafting services allow the drafter to pass the bill on to the legislature marked "as submitted" or some other variation indicating the drafter's distance. Generally this occurs when a bill is submitted late in the session, or when the service lacks the time to check the bill. Some drafters, however, contend that this device was also used to indicate that the client had insisted on non-standard form or a style or language contrary to drafter suggestions.[195] At times a legislator will submit a bill that he or she does not personally wish to endorse or support in order to appease a constituent. Reportedly an "as is" marking or similar indicator by the drafter is sometimes used, with the legislator's tacit consent, to identify such a bill and ensure that it will not pass.[196]

Such a communicative device, allowing the drafter to distance himself or herself from the bill and at least avoid explicit endorsement, could be used to a greater extent to protect the drafter's integrity. This would allow the drafter to minimize confrontation with the sponsor while still taking a position. It would allow the drafter to avoid participation or appearance of endorsing the bill, while communicating lack of approval. The ambiguity of this approach, however, while advantageous in certain instances, may also be viewed with reservation. It would remain unclear whether the drafter has not checked for style, has merely passed on a legislator's bill submitted half-heartedly to appease a constituent, or wishes to express disapproval of the substance of the bill. Thus, by failing to indicate clearly the drafter's reasons for disapproval, this method may not have the intended effect of preventing bad law.[197]

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195 Interviews. See *supra* note 1, for an explanation of interview sources.

196 *Id.*

197 *Cf.* comment to MODEL RULES, *supra* note 2, Rule 1.6 comment, discussing use of a notice of "withdrawal."

5) Declining or Terminating Representation

Rule: A. A drafter who feels an offered bill is inappropriate may take steps to dissuade the legislator, but except in extreme circumstances should draft the bill.

A drafter should, however, refuse to draft or withdraw from drafting a bill (taking steps to protect the legitimate interests of the drafter), where alternative means have failed, and

(1) the bill is clearly illegal or unconstitutional, and is intended to achieve illegal ends, or

(2) the drafter is not sufficiently competent to render adequate assistance, because of mental or physical condition, or lack of skill, training, or experience in the necessary areas, or

(3) the legislator persists in a course of action involving the drafter's services that the drafter reasonably believes is criminal or fraudulent.

B. The drafter may also request permission from a supervisor to decline an assignment, or seek to withdraw from drafting a bill if the legislator's interests will not be substantially prejudiced, and

(1) the drafter feels he or she cannot adequately perform his or her duties because of intense personal feeling regarding the bill, or

(2) a conflict of interest or potential conflict of interest makes the drafter's completion of the assignment difficult or would create the appearance of impropriety, or

(3) other good cause exists.

Before withdrawal or refusal to accept an assignment, the drafter should seek alternative means to serve his or her various duties. The drafter should seek the legislator's cooperation in finding an alternative legislative solution to satisfy the legislator's wishes and the drafter's responsibilities. The drafter should also ensure that the legislator is informed of the reason for withdrawal, and seek to avoid unnecessary prejudice to the legislator.

Comment: The drafter's primary purpose is, of course, drafting. The drafter should provide that service in all but the most exceptional circumstances. In some circumstances, however, the drafter's duties to the legislature or society should override loyalty to the legislator, and, if alternative means of avoiding participation in a flawed process fail, the drafter should refuse the

assignment, or withdraw. The circumstances justifying such an extreme action are limited to those where the law clearly should not pass, (5(A)(1)), where the drafter cannot do the work (5(A)(2)), or where the drafter's participating would amount to assisting in a crime or fraud (5(A)(3)). Even in these situations, the drafter should seek to protect the legislator's interests.

The first situation should be approached very carefully—the drafter should be absolutely certain that no court could reasonably disagree. Only if no good faith argument exists to support the law should the drafter refuse to draft. This rule is intended to further the goal of minimizing the enactment of laws with very serious substantive flaws.

To minimize laws with substantive or technical flaws, the rule also suggests withdrawal or refusal where the drafter cannot provide the expert assistance expected. As with lawyers in other types of practice, this may result from temporary or permanent incapacity, of any type. Or, it may simply be the drafter's unfamiliarity or lack of experience with the particular area.

It should be self-evident that the drafter should not assist a crime or fraud.

In some situations (also very few), the drafter may find drafting very difficult because of personal beliefs or interests. In such situations withdrawal is not required, but the drafter should have the opportunity to suggest that another drafter may provide better assistance, or may avoid the appearance of impropriety. The drafter should not pre-judge bills, but should consider whether his or her personal feelings will hamper the work. Similarly, where the drafter's interests will create difficulties such that they will hinder the work, or would appear improper, the drafter ought to have the option of minimizing embarrassment and preserving professional integrity.

Discussion: The drafter lacks some of the freedom that enables private lawyers to refuse a client more freely, or to terminate a relationship with a client. Drafters indicated that refusing to draft a requested bill was rare.[198] This is not surprising. Arguably, the drafter has a duty to provide drafting service, much as a lawyer has a duty to provide legal assistance.[199] This implies

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[198] Interviews. See *supra* note 1, for an explanation of interview sources.

[199] *See, e.g.*, MODEL CODE, *supra* note 5, EC 2-26: "A lawyer is under no obligation

that the drafter should seldom seek to avoid drafting, since this may make obtaining assistance more difficult. Withdrawal may be prejudicial to the legislator's interests, causing delay and duplication of effort.[200] Neither declining nor terminating a relationship with a legislator necessarily serves the purpose of avoiding bad laws; the problem may simply be passed on to a new drafter. At least while the original drafter retains the relationship, it would seem that he or she has an opportunity to influence the legislator's decision in a more favorable way, if such influence is desired.

For the drafter, refusing or withdrawing from a drafting assignment may strain relations with the legislator, one of the small class of persons with whom the drafter works. This may make future work with that legislator more difficult, putting the legislator at a disadvantage if only a small group of drafters is available. The drafter might also be affected: in extreme situations, refusing to draft a bill may lead to termination of his or her employment.

In a more pragmatic sense, the drafter may feel that as an employee, rather than as a truly independent professional, his or her livelihood may depend upon acceptance and completion of assignments. The drafter's situation is not unlike that of corporate attorneys for whom refusal to carry out the wishes of the board of directors as requested would likely lead to termination of employment.

One of the most dramatic positions that the drafter could assume would be one of refusing to draft a particular bill as proposed. Where a drafter is so opposed to a bill that he or she cannot adequately serve the client's interests, or where he or she feels that participation would be fraudulent or wholly in bad faith, further participation may be extremely difficult. By anal-

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to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment." Note that the Model Rules do not seem overly concerned with this issue.

200 *Compare* MODEL CODE, *supra* note 5, EC 2-32: "A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client. . . ." *with* MODEL RULES, *supra* note 2, Rule 1.16(b): "withdrawal can be accomplished without material adverse effect on the interests of the client," or one of a list of good reasons exist.

ogy, an attorney in private practice in a similar situation could withdraw.

Withdrawal, of course, may not by itself solve the entire problem. While it may allow the drafter to remove himself or herself from participation, it may neither prevent the legislation from proceeding, nor indicate the drafter's displeasure with the bill. Notifying the legislature of the withdrawal might be a way of publicizing such disagreement with the bill without breaching confidence.[201] As with the attorney in private practice, this should be seen as a last resort for a number of reasons.[202]

The drafter should be careful to avoid interfering with the legislative process. It is the legislature which has the responsibility for passing upon the wisdom of laws, and while the drafter should assist in making that process function smoothly, the drafter should not forestall the process by refusing to draft bills, except in exceptional circumstances.

To the extent that free expression of ideas with legislators is desired, then the drafter's appropriate role would be to enhance that freedom, not hinder it by refusing to draft proposed bills. Drafters are not elected officials; therefore, one might suggest that drafters should primarily act as technical assistants, much like the advocacy position of non-drafter lawyers. In this sense, again, the drafter might feel that without the legitimacy of an elected position he or she lacks the authority to make decisions regarding whether or not a particular bill should be drafted.

For these reasons, refusal or termination of a drafting relationship is disfavored, and the drafter should seek first to find other ways of avoiding or mitigating the underlying problems.

Where the drafter cannot competently serve as a drafter then all interests involved—those of the legislature, the legislator, and the public—are better served if the drafter does not undertake

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201 *See* MODEL RULES, *supra* note 2, Rule 1.6 comment: "Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like." There seems to be no equivalent portion of the Model Code.

202 *Compare* MODEL CODE, *supra* note 5, EC 2-32: "A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances. . . ." *with* MODEL RULES, *supra* note 2, Rule 1.16(b) allowing withdrawal whenever "withdrawal can be accomplished without material adverse effect on the interests of the client."

the assignment. Often the drafter will be in the best position to make such a determination; thus, the responsibility should fall on him or her. The level of competence necessary should be that enabling the drafter to reasonably assist the legislator—the drafting skills should be well-honed, but the knowledge of the relevant area of substantive law may vary according to the available sources upon which the drafters rely.[203] Where the drafter has a mental or physical disability rendering him or her incompetent, he or she should cease the practice until such disability is removed.

Other situations exist, as well, in which a particular drafter may not be the most appropriate person to complete a project. Where there is a conflict of interest,[204] or the appearance of impropriety,[205] or where strong personal feelings might interfere with the drafter's work,[206] the drafter may seek to have another drafter assume the work, if the legislator and the legislature's interests are protected.

Where other alternatives have failed, however, there remain certain circumstances sufficiently serious to require that the drafter refuse to assist in drafting a bill. For example, if the bill is not supportable by a good faith argument, and is clearly illegal or unconstitutional, the drafter ought to help prevent its passage, or at least should maintain professional integrity by not participating. In some ways this may be analogous to a lawyer's duty to avoid filing frivolous or harassing claims.[207] Of course, the drafter should not lightly conclude that the bill has such fatal flaws. The legislative and the judicial process will screen out most bad laws. Only in extreme cases where the drafter can conclude that the bill is unsupportable should this position be taken.

Least likely, and perhaps most clearly, the drafter ought to stop short of participating in a crime or fraud.[208] A drafter's activities would amount to a fraud only in rare instances, of course.

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203 *See* Proposed Drafting Rule 1 and discussion following.

204 *See* MODEL CODE, *supra* note 5, DR 5-101, 5-105; MODEL RULES, *supra* note 2, Rules 1.7-1.9, 6.4.

205 *See* MODEL CODE, *supra* note 5, DR 9-101.

206 *See* MODEL CODE, *supra* note 5, DR 5-101(A), EC 5-2, 5-11.

207 *See* MODEL CODE, *supra* note 5, DR7-102(A)(1). *Cf.* MODEL CODE, *supra* note 5, EC 7-9, EC 7-10. *See also* MODEL RULES, *supra* note 2, Rule 3.1.

208 *See* discussion following Proposed Drafting Rule 4.

It can and does occur, however, that a drafter may be asked to deceive the legislature. This should be prohibited.

III. Conclusion

The guidelines proposed here outline the drafter's goals and the relationship between the drafter, the legislator, and the legislature.

These guidelines suggest that legislative drafters should assume a greater role, and greater responsibility, in controlling both form and substance of the laws they draft. It is hoped that this will help the legislative process function more efficiently and effectively, without seriously undermining the democratic and political processes.

The proposed rules help define, for the drafter, appropriate behavior in difficult situations. While, of necessity, the rules are somewhat general, an attempt has been made to describe in the rules, comments, and discussions, more concrete problems and resolutions to afford practical guidance. The generalities may make enforceability difficult (as is often the case with ABA guidelines for professional ethics), but the general import should provide assistance to the conscientious drafter.

While adoption of such rules in their current form might suggest radical policy changes, perhaps they will at least inspire critical reviews of current policy.

At the very least, adoption of such rules would provide a reference for legitimizing decisions that the drafter may make—even if the rules are unenforceable. At least one critic has claimed that the Model Rules serve no more than a legitimizing function, justifying actions that lawyers are already taking.[209] Nevertheless, if the rules can be used to support and justify desirable action, this type of legitimation seems useful. A drafter may more readily resist orders of legislators to subvert the legislative process through fraudulent means, and may feel freer to exercise the skills at hand if there is an external authority to which he or she may refer.[210]

Perhaps the most useful function of such rules would be to

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209 *See generally* Abel, *supra* note 6, at 667-86.

210 *Cf.* Rhode, *supra* note 103, at 709 (suggesting the Model Code or Model Rules may serve such a function for attorneys).

focus attention on a much neglected but important factor in the legislative process, and stimulate consideration of means to assist the drafter in his or her work. This alone should justify consideration of such rules by a legislative or drafting body.