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COMMENT AND CASE NOTES

THE DRAFTING OF GOVERNMENT WAR CONTRACTS

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Law is the viscous fluid lubricating the functions of society so that the society will not be destroyed by the heat of its own frictions. The viscous fluid may be formed in innumerable systems, common law, codes, etc., and the various systems may be applied in diverse forms of legal practice. A system (and its practice) survives only if it successfully lubricates the society of which it is a part—rather, only if the exponents of the system and its practitioners successfully *sell* the system to the society.

Varying environmental conditions cause variations in the nature and practice of the law applicable to the special conditions. The war has caused a special variation in the current environmental conditions. A tremendous

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program for the procurement of war materiel has resulted. The war materiel consists of unique items that must be procured by negotiation, because they are not common commercial items with a value determined by bargaining and bickering in the market place.

This extensive procurement program necessitated by the war requires the production of a definitive contract for every procurement agreement that is negotiated, and requires the writing of supplementary agreements for every change in the definitive contract. Lawyers are required to prepare these contracts and the supplements thereto. A system for the practice of the law has been devised to facilitate the handling of these myriads of contracts. The purpose of this article is to analyse the system so devised.

The system is based on a centralised authority, setting up basic forms and mandatory articles to be incorporated into these forms, and field agencies in lesser degrees, for employing the furnished forms and filling in the interstitial gaps. The central fount is in Washington. In Washington lengthy compendia of instructions are developed and thence circulated down through the field lawyers. But the men in Washington do not confine their efforts to the preparation of instructions; in addition they supervise the work that is carried on pursuant to their instructions. All contracts and supplements are reviewed in Washington, and woe to the drafter who does not conform to the instructions.

In the field the organization subdivides itself until the contract drafter himself is finally reached. Each field organization, or local district, has a legal branch with a chief and his assistants. The chief and his assistants are a central supervising, advising, and reviewing body for the district. The district legal branch is subdivided into sections. Usually there is a section for each of the commodity branches in the particular district. Each section of the legal branch has its chief and his assistants. The chief and his assistants all draft contracts, but in addition to drafting contracts the section chief reviews all contracts written in his section.

Within the organization there is a constant review of all the work, first by the section chief, then by the district chief, and, finally, by Washington. It is as though every contract were judicially reviewed, whether litigated or not. As a result, every contract-drafter realises that every document he prepares is going to be reviewed and must pass inspection. Also, errors, whether they be typographical or intellectual, cannot be "settled" or explained away to a client. Whereas, a lawyer working for a client might be able to bluff slipshod work through, no careless work can pass through this reviewing system. The system has been developed for the preparation of a tremendous volume of contracts, and the constant reviewing is ad-

mirably fitted to catch the typographical and observational errors that are such a bugaboo in this type of work. The system of constant review is also admirably adapted to the carrying out of a definite policy throughout the entire system, once a policy has been determined.

Under the system a contract is produced in the following manner. Procurement authorities in Washington send out an order to procure prescribed items. Negotiators in the proper field commodity branch determine what local manufacturers are capable of manufacturing the item. Forms are sent to these prospective producers on which they are requested to submit a bid for the production of the items. The negotiator collates the bids and presents them to a board of award, which approves in the quantities required the bids necessary to accomplish the procurement of the item. The negotiator's file is then turned over to a lawyer and it is up to the lawyer to draft a contract covering the agreed transaction.

The lawyer, upon receiving the negotiator's file, does not turn to a form book and pour through reams of citations to find all the clauses favorable to his client that he can incorporate into the contract. A form book is furnished by the organization in the form of instructions, and precedents are found in the files of earlier contracts kept in the district (not unlike the office collection of memoranda and briefs and forms and legal bric-a-brac found in any law office). If like items were recently procured, the lawyer will follow the form employed therein and will substitute the facts of his case into the form. If the contract is original in the district, the lawyer will turn to the instructions furnished him from Washington. His contract will approximate thirty articles, and of these thirty twenty-nine will be prescribed to such an extent that the district will have them printed in permanent form. In the first article, which will not be printed in advance, the drafter will have to employ his rhetorical talents to describe what is to be accomplished pursuant to the contract, and for the rest he will simply make a few changes or substitutions in the other twenty-nine articles. Of the remaining twenty-nine articles, one is entitled, "Alterations," and is intended to encompass such substitutions or changes.

When called upon to add to a contract via a supplement, the contract-writer will find that the instructions from Washington prescribe when supplements may be written and what situations may be incorporated into supplements. Again, in writing supplements, the lawyer may have to exercise his rhetorical talents to couch his supplement along the lines prescribed in the instructions; but all of his authorities are encompassed in the instructions, and he need not, and cannot, have recourse to the de-

cision of courts for the construction of phrases that he may desire to use or for like assistance. The requisites for the practice of law under this situation are a set of instructions, a flair for rhetoric, and a minimum of mathematical inclination to check the financial manipulation of the negotiator.

The system constitutes assembly-line practice of law. In the department-store type of practice found in large firms, members of the firm become specialists in fields of law like trial work, patents, probate work, real estate, and so forth, but the specialists look to stare decisis, the statutes, and the precedents accumulated through their experience in the practice of law for their authorities. They are free, with the aid and guidance of the above source materials, to indulge their own ingenuity in dealing with the problems that arise within their specialised fields. But in the assembly-line practice of law the lawyer is merely one of several people who work on the facts contained in a file that has been routed through the organization. He fits these facts into forms and shapes prescribed in his instructions and routes the resulting document on its way through the organization. The chief of the section will check and review it, it then passes through the office of the chief of the district, the contractor's attorneys, and the reviewers in Washington. All along this line the reviewers may take pokes at the shape of the contract, rounding out an article here, inserting a phrase there, deleting a clause elsewhere—but always being careful to act with the instructions as the guide for their machinations.

Such a system reduces the drafting attorney to a lesser status than that of the attorney in private practice. His pride may be hurt and his ego flattened—according to the instructions. Work under the system is comparable to that of a mechanic carrying out work prescribed in a blueprint. The mechanic must be skilled, he must be precise, and he must work hard. But, comparatively speaking, the work of the lawyer in private practice is like that of the engineer, the inventor, the creative man who conceived the blueprints. In private practice experience and age are to the advantage of a lawyer. But under the government system youth is preferred. Under that system all of the experience required has been condensed into a couple of volumes of instructions, and the lawyer merely needs a sharp and strong pair of eyes and endurance to turn out a volume of work.

In judging a system for the practice of law the welfare and contentment of the practitioners are not of prime concern in evaluating the system. What is of concern is the service rendered to the societal environment by the system. When the results are analysed it will be found that the system presently considered accomplished the following:

1. It speeds up the production of contracts, imperative in the war effort with its tremendous volume of procurement, by reducing the lawyer's research to a minimum and by furnishing all of his authorities and forms in a couple of handy loose-leaf volumes. (Of course, much of the handiness of these depends on the quality of their index.) But index or no index, the lawyer writing contracts soon becomes familiar with all of his instructions, and develops a technique for fitting the facts he receives into a prescribed pattern.

Yet it must be realised that the volume of contracts produced and accepted is enhanced by the nature of contemporary conditions. In many instances the lawyer working for the government under the system is, in actuality, serving the contractor too. This is true because many contractors, needing the business to exist, and because of the urgency of the situation or out of a sheer desire to prosecute the war effort, accept the contracts without consulting an attorney of their own as to their rights and liabilities under the document. The situation is one-sided, and even if a prospective contractor should be advised to object by counsel, he may find the government telling him to accept the contract as it is or to forget about the work. There have been a few exceptional cases where the contractor's skills were required in the war effort, and in such cases the contractor's objections retarded the production of contracts.

Thus, it can be seen that the volume of contracts resulting from the system may be a result of the exigencies of the situation, rather than of the efficiency of the system. The efficiency of the system under ordinary conditions is therefore questionable.

2. The system leads to a uniformity in the contracts. If any article is proved to be unfair or unsatisfactory, the fault is quickly located, a change circulated in the form of a circular correcting, adding to, or changing the instructions, and the fault is remedied. The remedy is throughout the system. Of course, this uniformity and correction of errors means that the quality of the contracts is entirely dependent on those who formulate the instructions. Since the inclusion of the articles prescribed by the instructions is mandatory, the quality of the articles depends on those who prepare the instructions expounding the articles. Brilliant instructions prepared in Washington will enable ordinary draftsmen throughout the country to prepare brilliant contracts.

Clear instructions that spell everything out will definitely facilitate and simplify the drafting of the contracts. But if the instructions are inadequate or muddled, the drafter will be restricted. The work will have de-

stroyed his initiative and talent for research. Besides, with the instructions serving as the beginning and end of the applicable authority, there is no place left for the drafter to look for guidance and authority.

While the system provides for wide circulation of its good points, it also provides for wide circulation of its faults. It is double-edged. With good instructions its beneficial results may be legion, but the harm resulting from poor instructions will likewise be tremendous.

3. The system changes the basic activities of lawyers. The three basic activities of attorneys in contemporary private practice are contacting of clients, keeping a finger on the pulse of the judicial temperament, and studying law. Under the system the client is an ever present haunting hulk who needs no pursuing and whose minions are constantly demanding the production of legal documents in great haste. There is no judicial temperament to cultivate. And the law is set out in simple form in a couple of handy loose-leaf volumes. The law has been reduced to a common denominator readily handled by persons of average intelligence with a reasonable amount of application.

It may be seen that the public benefits from such a system, mechanically. All the ideas that individuals on the legal assembly line may develop are soon spread throughout the system and are not hoarded by any such individual. The contracts are uniform, and the contractor knows that each is getting a like contract and that some do not have an advantage over others by having the advice of more skilled lawyers. By the reduction of the drafting of contracts to such a system the legal branch turns out many more documents per lawyer than lawyers in private practice could do, and the public's legal expense per contract is reduced. The constant checking via review and the relieving of the drafting lawyer of the burden of legal research facilitate the turning out of accurate contracts to the public advantage because the possibility of friction and dispute over errors of fact is reduced. In other words, the public has the advantage of judicial review of every document without the expense of litigations. Further, in each contract there is an article providing for the settlement of disputes by a board set up by Washington. Thus the system completely encompasses the legal problems of the undertaking within its operations. The system is self-sufficing.

When it comes to disadvantages, the biggest disadvantage depends on whether or not the biggest advantage—simplification of procedure by explicit and complete instructions—will be applied. It is a question of theory versus actuality. First, it is dependent on those in the centralised

control being skilled. Second, it is dependent on the lawyers in the lower hierarchies retaining sufficient acumen in spite of their mechanical function to think up improvements that can be radiated throughout the system. The system, like so many current systems, reduces the drafting lawyers to automatons. If the young men become automatic and forsake all individuality, research, and thought, when the present generation of thinkers in Washington die out who will there be to move to Washington to perform the duties of cerebration required of those who prepare the instructions?

It must be realised, however, that the system is a product of the war, destined probably to disappear within "the duration and six months." It was designed to cover a particular phase of the war effort, the preparation of contracts. It has served its purpose well. It is a manifestation of the flexibility and adaptability of man and his ability to develop devices to further group living.