

TEACHING THE ART AND CRAFT OF DRAFTING PUBLIC LAW: *STATUTES, RULES, AND MORE*

Drafting Statutes and Rules: Pedagogy, Practice, and Politics
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Overview



- How Legal Drafting Differs from Legal Writing
- Types of Drafting: Legislative, Transactional, Other
- Major Categories of Legal Rules
- Common Components of All Drafted Rules
- A Common Drafting Vocabulary
- Teaching Techniques and Examples
- Why Teaching Legislative Drafting is Important
- Why Teaching Legislative Drafting is Challenging

What We Mean by “Legal Drafting”

- As we use the term, **drafting** is not the same as **legal writing**.
- Drafting is much more specialized than legal writing.
- Unlike legal writing, drafting is neither expository nor persuasive; **drafting is structured rule-building to accomplish a specific purpose**.
- The drafter identifies a series of goals to accomplish that purpose, and then selects the right tools to carry out those goals.

Two Major Categories of Legal Rules

Public Law

- **Statutes**
- **Ordinances**
- **Administrative Rules**
- **Executive Orders**
- **Court Rules**
- **Jury Instructions**
- **Others?**

Private Law

- **Contracts**
- **Leases**
- **Trusts**
- **Wills**
- **Corporate Bylaws**
- **Deed Covenants**
- **Others?**

Rule-Drafting

Least Common Denominators

- Which drafting components are used in *all* legal rules – public or private?
- We can reduce them to **three basic tools**:
 - **Duties** (including *rights* and *prohibitions*)
 - **Discretionary Authority**
 - **Declarations**

Least Common Denominators

- Each of the three basic components can be subject to **conditions**.
- Conditions can take three basic forms:
 - **Prerequisites (Conditions Precedent)**
 - **Exceptions (Conditions Subsequent)**
 - **Tests (Elements, Factors, or Hybrid)**

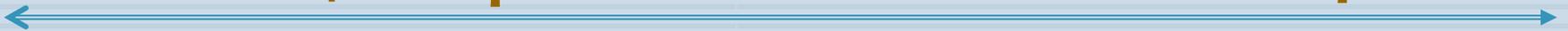
Building Blocks for All Legal Rules

Statutes

- **Duties/Prohibitions**
- **Rights**
- **Discretionary Authority**
- **Declarations**
- **Conditions/Exceptions**
- **Enforcement Terms**
 - **Civil Remedies**
 - **Criminal Penalties**

Contracts

- **Duties/Prohibitions**
- **Rights**
- **Discretionary Authority**
- **Declarations**
- **Conditions/Exceptions**
- **Representations**
- **Warranties**



Basic Building Blocks for Creating Legal Rules

Rule Components (Generally):

- Subject
- Operative Term:
 - **Shall, shall not**
 - **Must, must not**
 - **May**
- Action Verb
- Conditions or Tests

Rule Components (Definitions):

- Defined Term
- Operative Term:
 - **Is**
 - **Means**
 - **Includes**
 - **Does not include**
- Predicate Noun (the definition itself)

Operative Terms

For Duties:

- **Shall:** The modal verb *shall* signals a *duty*.
- **Shall not** or **Must not** signal a *negative duty* – the same thing as a prohibition.
- But **Must** and **Must not** are best reserved for consumer contracts.

For Discretionary Authority:

- **May:** The modal verb *may* signals *discretionary authority*.

Operative Terms

For Declarations:

- **Is:** (or any other variation of *to be*) generally signals a *declaration*.
- **Means:** For a definition, *means* is the preferred verb.



"That's a new word legal came up with. They're still working on a definition for it."

Conditions / Exceptions / Tests

Conditions and **exceptions** simply *qualify* or *limit* how each basic rule structure operates.

Generally signaled by subordinate conjunctions, such as –

- *if* for a condition
- *unless* or *except* for an exception.

Must can be used for some complex conditions, such as an enumerated list of conditions that **must** be met for a rule to apply.

Example of a Statutory Condition

Burglary is –

- (1) breaking &
- (2) entering
- (3) dwelling house
- (4) of another
- (5) in the nighttime
- (6) with intent to
- (7) commit a felony therein.

Which of the three basic drafting tools does the statute represent?

- **Declaration [is] +**
- **Test** – in what form?
- ***A list of elements***
- The rule could be rewritten as a ***definition***:
- Burglary **means** breaking and entering the dwelling house of another with the intent to commit a felony therein.

A Common Vocabulary

By reducing the basic components of private laws and public laws to their **least common denominators**, we can help students --

- identify the *common structural components* of all legal rules,
- understand how to **read analytically**,
- learn how to **think precisely**,
- **interpret** complex legal rules, whether public or private, and
- **draft clear, concise rules** to solve clients' problems.

Teaching Techniques

Fundamental Drafting Principle:

- A legal document is easier to understand if the drafter uses the *simplest method of expression*, unless there's a **very good** reason to vary from it.



" Take this and make it much more difficult than it needs to be. "

Steps for Interpreting a Badly Drafted Legal Rule

1. Reading the rule as a whole and in context, *what is its purpose or goal?*
2. Did the drafter use the *correct tools* for that purpose?
 - Does the rule **require someone to act or not act** (a **duty**)?
 - Does the rule **define a term or declare something true** (a **declaration**)?
 - Does the rule **give someone permission, power, or authority** to do something (**discretionary authority**)?
 - Is the rule subject to a **condition or test**?

Steps for Dissecting a Badly Drafted Legal Rule

3. For statutes, does the rule *create a remedy* or other *mode of enforcement*, such as a penalty or consequence? (A penalty suggests a duty rather than discretionary authority.)
4. For contracts, is a party *representing a fact* (a representation)? Or is a party *promising that a fact will be true* at some future time (a warranty)?
5. After answering all these questions to figure out the rule's purpose, how can it be **restructured, simplified, or revised** to make it easier to understand and apply?

Color Coding: Dissecting Badly Drafted Rules

Identify the Rule Components:

- **Duty – Red**
- **Discretionary Authority – Green**
- **Declaration – Blue**
- **Condition – Brown**

An Example – Statutory Rules

Ala. Code § 6-5-71

(a) Every wife, child, parent, or other person who shall be injured in person, property, or means of support by any intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages.

(b) Upon the death of any party, the action or right of action will survive to or against his executor or administrator.

(c) The party injured, or his legal representative, may commence a joint or separate action against the person intoxicated or the person who furnished the liquor, and all such claims shall be by civil action in any court having jurisdiction thereof.

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- (c) The party injured, or his legal representative, may commence a joint or separate action against the person intoxicated or the person who furnished the liquor, and all such claims shall be by civil action in any court having jurisdiction thereof.

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- (b) **Upon the death of any party,**
the action or right of action will survive to or against his executor or
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- (c) **The party injured, or his legal representative, may commence a joint or**
separate action against the person intoxicated or the person who furnished
the liquor, and
all such claims shall be by civil action in any court having jurisdiction thereof.

An Example – Statutory Rules

Ala. Code § 6-5-71 – Dram Shop Liability

Original

- (a) Every wife, child, parent, or other person who shall be injured in person, property, or means of support by any intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages.
- (b) Upon the death of any party, the action or right of action will survive to or against his executor or administrator.
- (c) The party injured, or his legal representative, may commence a joint or separate action against the person intoxicated or the person who furnished the liquor, and all such claims shall be by civil action in any court having jurisdiction thereof.

Translated

- (a) A person who causes another person to become intoxicated by selling, giving, or otherwise disposing of any liquor or alcoholic beverage contrary to law is liable to the intoxicated person's wife, child, parent, or any other person who is injured (1) by the intoxicated person or (2) as a result of the intoxication.
- (b) The injured person or legal representative may file a joint or separate civil action for personal injury, property damage, or loss of means of support against (1) the intoxicated person or (2) the person who furnished the liquor or beverage.
- (c) The court may award actual damages sustained and exemplary damages. Upon the death of any party, the right of action survives to or against the personal representative of the decedent party's estate.

N.Y. Gen. Obligation Law § 5-332

1. No person, firm, partnership, association or corporation, or agent or employee thereof, shall, in any manner, or by any means, offer for sale goods, wares, or merchandise, where the offer includes the voluntary and unsolicited sending of such goods, wares, or merchandise not actually ordered or requested by the recipient, either orally or in writing. The receipt of any such goods, wares, or merchandise shall for all purposes be deemed an unconditional gift to the recipient who may use or dispose of such goods, wares, or merchandise in any manner he sees fit without any obligation on his part to the sender.

If after any such receipt deemed to be an unconditional gift under this section, the sender continues to send bill statements or requests for payment with respect thereto, an action may be brought by the recipient to enjoin such conduct, in which action there may also be awarded reasonable attorney's fees and costs to the prevailing party.

....

(Color-Coded)

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(Translated)

N.Y. Gen. Obligation Law § 5-332

1. **Definitions.** For purposes of this section --

“Goods” means personal property, wares, or merchandise.

“Person” means an individual, firm, partnership, association, or corporation, including any agent or employee.

“Unsolicited goods” means any goods that the recipient has not ordered or requested, either orally or in writing.

2. **Sending Unsolicited Goods Prohibited.** **A person shall not offer goods for sale if the offer includes sending unsolicited goods.** Any goods sent in violation of this section are unconditional gifts to the recipient, who may use or dispose of the goods in any manner without obligation to the sender.

3. **Injunctive Relief.** **If the sender of unconditional gifts as defined in this section continues to send bill statements or requests for payment, the recipient may file an action to enjoin the sender’s conduct. The court may award reasonable attorney’s fees and costs to the prevailing party.**

Implications of Interpretive Canons

Courts often presume that Congress and legislative staff draft statutes with canons of statutory interpretation in mind.

But legislative scholars have largely debunked this judicial assumption:

- Jane S. Schachter & Victoria Nourse, *The Politics of Legislative Drafting: A Congressional Perspective*, 77 N.Y.U. L. Rev. 575, 575-76 (2002).
- Eric Lane, *The Real Politik of Writing and Reading Statutes*, 76 Brook. L. Rev. 967, 973-75 (2011).
- Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation and The Canons: Part I*, 65 Stan. L. Rev. 901, 924-64 (2013).

Judicial Interpretation of Statutes and Contracts

Courts interpret statutes and contracts in **analogous** ways, using some of the same linguistic canons:

Statutes

Plain meaning rule

In pari materia

Legislative history

Rule of lenity

Contracts

Four corners rule/Plain meaning

Read contract as a whole

Extrinsic evidence

Contra Preferentem

Both: Presumption against surplusage

Ejusdem generis

Expressio unius est exclusio alterius

Specific terms govern over general

Punctuation is subordinate to text

Judicial Interpretation of Statutes and Contracts

Australian jurists and scholars have acknowledged common principles of statutory and contract interpretation.

Both are grounded in four basic principles:

- (1) Interpretation is objective, not subjective.
 - (2) Meaning of the text itself is paramount.
 - (3) Purpose and context inform the text's meaning (which may include extrinsic materials).
 - (4) In limited circumstances, a court will “fill gaps” in the text.
- Jacinta Dharmananda & Leon Firios, *Interpreting Statutes and Contracts: A Distinction Without a Difference?*, 89 Aust. L. J. 580, 592, 595 tbl. (2015).
 - Michael Kirby, *Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts*, 24 Stat. L. Rev. 95, 99 (2003).

Building Legal Rules into Acts or Contracts

Students must learn that legal rules do not work in isolation.

In addition to **building individual rules** using appropriate operative terms for the purpose, students must learn **how to organize the rules into a logical and workable whole.**

- Statutory Rules => Titles or Acts or Codes
- Contract Terms => Agreements

Public Law Components

(Generally Prescribed by Constitution or Statute)

- Bill Number
- Long Title
- Short Title
- Enacting Clause
- Legislative Purpose or Findings (sometimes)
- Definitions
- Substantive Provisions
- Enforcement Provisions
- Agency Jurisdiction
- Authorization of Funding
- [In]severability Clause
- Effective Date
- Sunset Provisions, if any

Private Contract Components

(Few Prescribed by Statute; None by Constitution)

Preamble

Parties

Definitions

Words of Agreement

Substantive Provisions

Closing Terms (for sales)

Housekeeping Provisions:

- Choice of Law
- Term and Renewal
- Default Remedies

Signatures and Date

Pulling It All Together

Logical Organization

Sections, subsections, and numbering

Descriptive headings

Formalities and mechanics (jurisdiction-specific):

- Single-subject rules
 - Long titles and short titles
 - Tabulation
 - Enumeration
 - Punctuation
- Amendment style and format
Titles, Section numbers
Default effective dates
Form of enacting clause
Funding mechanisms

Public Notice (upon enactment)

Codification (and how codes differ from enactments)

Rule-Drafting Exercise

Draft an ordinance that requires the City Council to appoint a Tree Board to advise the Council and make recommendations about how to best preserve native trees located on public and private land within city limits. The Tree Board has the power to make recommendations to the Council but cannot introduce city ordinances or impose any fines or other penalties on private landowners.

- How would you advise a student to begin?

Rule-Drafting Exercise

Draft an ordinance that **requires the City Council to appoint a Tree Board** to advise the Council and make recommendations about how to best preserve native trees located on public and private land within city limits. **The Tree Board has the power to make recommendations to the Council but cannot introduce city ordinances or impose any fines or other penalties** on private landowners.

- What terms must be included? What rule structures?

Draft an Ordinance

Draft an ordinance that **requires** the City Council to appoint a Tree Board to advise the Council and make recommendations about how to best preserve native trees located on public and private land within city limits. The Tree Board **has the power to make recommendations** to the Council **but cannot introduce city ordinances or impose any fines or other penalties** on private landowners.

(a) City Tree Board Established. The City Council shall appoint five city residents to serve as members of the Tree Board. Board members shall serve staggered four-year terms beginning January 1, 2017.

(b) Purpose. The Tree Board's purpose is to identify, recommend, and support measures to preserve native trees located on public and private land within city limits.

(c) Powers and Duties. The Tree Board shall study measures to protect native trees from damage by natural elements, including wind, inclement weather, wildlife, insect infestation, and disease. The Tree Board shall make written recommendations to the Council each quarter on how best to preserve native trees within city limits. With prior Council approval, the Tree Board may consult with experts to carry out its duties.

(d) Unauthorized Acts. The Tree Board is not authorized to introduce city ordinances but may request a member of the City Council to introduce ordinances. The Tree Board may not impose fines or other penalties on private landowners.

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What Legislation and Statutory Drafting Add to the Law School Curriculum

- **“Resolution of most legal disputes today is likely to involve legislative authority, either statutes or ordinances. In making their decisions, federal and state court judges must analyze statutes and apply doctrines of statutory interpretation. Despite the importance of this task, the training for lawyers and judges in analyzing and interpreting statutes remains sub-standard. . . . Reverence for tradition in law and for our common law roots seems to have exercised a deadhand control in this area, restraining any increase in emphasis in legal education on the study of legislation and its interpretation.”**

- Otto J. Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. Pitt. L. Rev. 663, 664 (1987).

The “Case-Law Syndrome” of the Law School Curriculum

“[T]he case-law method relegates statutory law to the background, and distorts students' ideas about actual legal practice. Because students become comfortable with approaching legal problems in a casebook fashion, **they find it increasingly hard to develop an appreciation for statutory law.**”

Theo I. Ogune, *Judges and Statutory Construction: Judicial Zombism or Contextual Activism?*, 30 U. Balt. L.F. 4, 8-9 (2001) (critiquing the legal academy's “case-law syndrome”).

- “This mediocre attitude towards statutory law is more so fortified by the absence of courses in statutory construction What is ironic about this gap in law school instruction is that **most legal disputes today are likely to concern legislative enactment – statutes, regulations, or ordinances.** . . . Yet most lawyers, and even trial judges, are not properly attentive to interpretation issues.”

The Need for Legislation Courses

“The enormous growth of American government in this century has generated **an explosion of legislation**; as a result, the creation and interpretation of statutes are now paramount concerns of the legal profession. Law schools recognize this to the extent of offering numerous courses built around statutes **But about the nature of the legislative process, and about the enormous difficulties of statutory interpretation, the typical law school curriculum is practically silent. . . .**

“What is needed is a good course on legislation.”

Richard A. Posner, Book Review, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy*, by William N. Eskridge, Jr. and Philip P. Frickey, 74 Va. L. Rev. 1567, 1567-68 (1988).

The Need for Legislation Courses

- “There is little dispute among legal academics that lawyers must be skillful and effective in a variety of decision-making settings. **Legal academe has a duty to the lawyers it educates to improve their ability to serve in settings where the decisions are made by legislators and regulators.** The recommendations made . . . over several decades provide the framework for effective change at any law school dedicated to such reform.”

Muriel Morisey, *Liberating Legal Education from the Judicial Model*, 27 Seton Hall Legis. J. 231 (2003).

The Need for Drafting Courses

- “Isn't it true that **drafting and interpretation are symbiotic** and that a person can never fully understand one without understanding the other? If so, shouldn't there be more **emphasis on contract (and statutory) drafting in law school**, and wouldn't that improve students' understanding of how to interpret contracts (and statutes)?” . . .
- “Why is it that scholars and teachers have spent so much time studying judges' decision-making, but have very rarely suggested how lawyers might influence judges' decision-making in advance **by drafting documents in a way that avoids judicial intervention in the first place?**”
- Preston M. Torbert, *Contract Drafting: A Socratic Manifesto*, 14 *Scribes J. Leg. Writing* 93, 99-100 (2012).

The Law Schools' Responsibility

- “The law schools, too, have an important responsibility. They can help to develop **those general skills which form such an important part not only of legislative drafting but of many other kinds of legal craftsmanship.** Unfortunately, their justifiable preoccupation with the disciplines of analysis have led them to neglect the **disciplines of synthesis, the skills involved in weaving complicated materials into an intelligible whole.**
- “Filling this gap does not necessarily mean adding new subjects to already overloaded curricula. What is needed is to work into existing subject matter the kind of **legal engineering** for which brief writing, term papers and law review experience are an inadequate substitute. **There is no better gymnasium for flexing this kind of intellectual muscle than the field of drafting documents that mark out legal rights, privileges, duties and functions.”**
- Reed Dickerson, *Legislative Drafting: A Challenge to the Legal Profession* , 40 ABA J. 635, 636-37 (1954).

The Challenges of Teaching Legislative Drafting

1. Many statutes are poorly drafted and are most certainly not a “gripping read.” They have no stories. For students unfamiliar with them, statutes can be dull.
2. Statutes must be read slowly and carefully, with attention to every word, and read in the context of the entire Act. It is dangerous to take a statutory section out of its statutory context.
3. Beginning law students are so immersed in case law that they resist reading abstract statutes, where text is paramount.
4. **Law schools’ undue concentration on cases assumes (erroneously) “that our legal system revolves around the court.** It is almost as if nothing is real law until it has been pronounced on by a court. . . . Yet, as we all know, most provisions of most statutes never get anywhere near a court. Some entire statutes never do. Yet they are the law”

John Burrows, *The Difficulties of Teaching Legislation to Students*, The Loophole 18 (Aug. 2010), <http://www.calc.ngo/sites/default/files/loophole/aug-2010.pdf>

Conclusion

- Questions?
- Comments?