

**The Fifth “Colonial Frontier Legal Writing Conference
Drafting Statutes and Rules: Pedagogy, Practice, and Politics**

***From Self-Determination to Self-Regulation:
Teaching Legal Drafting through Negotiating and Writing Class Rules***

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I. Context — Why it’s important to our students and our law schools to teach a “*real-realistic*” drafting exercise

- ABA Standard 303(a) and Standard 304 — Law schools must incorporate “simulation courses” that are “primarily experiential in nature” and that are “reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks.” A Class Rules exercise is at once a “simulation” and representing an “actual client” in the students themselves, thereby satisfying both Standards 303(a) and 304 if incorporated into a full course devoted to either Standard.
- This exercise matters, so it works — Creating an exercise that actually matters to the students’ own lives makes them care about both the process and the outcomes, and the result is that the exercise works: the students fully engage in the exercise, and comply with the terms that they’ve negotiated and drafted. The converse is equally true — if the exercise does not ultimately regulate the students’ lives and is just taught as a “simulation,” it will not be effective as a learning tool.
- Pedagogical models — This Class Rules exercise draws on the flipped model of learning as well as the testing effect. As a flipped teaching method, this exercise asks students to negotiate and craft the very documents that will regulate them, learning the skills of regulatory negotiation, drafting, and compliance in the process. And in terms of the testing effect, this exercise allows students to experience the principles that they will be learning in greater detail in the regulatory or drafting course that follows.

II. Effect — My experience incorporating a Class Rules exercise, and its effect on students outcomes.

- Accelerating the learning curve — My experience is that every time I include a Class Rules exercise in a course devoted to drafting [whether it be a drafting course focused on transactional, regulatory or corporate documents], this initial crash-course in the negotiation, drafting, and brain-storming processes allows the students to learn the core materials in the course much more quickly and thoroughly. We hit the substantive ground running at top speed, and so it makes the main part of the course more successful.
- Touchstone — Having negotiated, drafted and lived with their own Class Rules, the students have a touchstone that we can return to throughout the drafting course. This experience serves as a comparator for the issues that we address in later documents, such as how to format a document, the unintended consequences of a regulation, or navigating the shoals of group action. Having created a regulatory instrument that they must live with, the students have an intense understanding of the legal, social, and drafting issues that they meet in their assignments.
- Achieving higher mastery — In terms of the students’ skill set, the quality of their work product on the course’s main documents is far superior when I’ve included a Class Rules exercise at the outset. Perhaps this higher mastery is due to their having started with the accelerated learning curve, or perhaps it’s due to their understanding the process and effect of drafted documents more intimately because they have had to live with their own negotiated and drafted Class Rules. Whatever the reason, the effect is that the students’ work product is several notches higher in quality when the course begins with a Class Rules exercise.
- Compliance — I have never experienced such extraordinary levels of compliance with course procedures as when I include a Class Rules exercise. The students comply almost perfectly, and when they don’t, they don’t complain about the consequences they’ve established for their own non-compliance.

III. Implementation: Steps in the Exercise

1. Introduction

- Explain the exercise — what we will be doing, and why.
- We can negotiate and agree to any lawful choice and I, as the professor, will abide by our choices.
- Freedom of contract and freedom to self-regulate as background principles in U.S. law and society
- The legal weight of the syllabus — it's an “offer” [if a transactional drafting class] or a prior “Bylaws” [if a corporate drafting class] or a “House/Senate Rules” [if a legislative drafting class].

2. Brainstorming

- Ideas for self-regulating in this course — EVERY idea can be put on the table.
- Reflect and analyze every idea for practicality, legality, and acceptability to others in the class.
- *Examples* —
 - Class hours [including breaks]
 - Deadlines [including extensions]
 - Topics to be covered in the course, and work-product to be produced
 - Attendance [including tardiness]
 - Grades [including penalties]
 - Decision-making procedures

3. Guided Negotiation

- Consider the constraints on freedom of choice, whether legal or institutional
- Talk through the effect of a given choice, in terms of intended and unintended consequences
- Talk through the collective effect of a choice
- Uncover the interests that may be behind a particular proposal and brainstorm whether there might be better ways to achieve those interests
- It's best to allow for *some negotiation chaos* — this is the reality of regulatory documents!

4. Procedures and decision-making

- It soon becomes clear that decision-making cannot occur until the group *decides how to decide*
- The group will need to address the following collective decision-making issues:
 - Quorum
 - Voting procedures
 - Voting decisions [majority / super-majority / unanimity / veto power]
 - Proposing issues to decide [e.g. motions or bills]

5. Drafting

- Cluster ideas and solutions that have been agreed to.
- Create a macro-structure using Articles and create the relevant headers
- Search examples for this type of document, to establish the relevant drafting norms
- For norms, consider structure, layout, phrasing.
→ at this point it's usually useful to divide the drafting tasks into teams, giving groups of students the responsibility to draft agreed upon sections of the Class Rules.

6. Re-drafting, editing and polishing

- Students test-drive what they've drafted, verifying that it accurately reflects their agreement, and ensuring that it will achieve the outcomes that they intended.
- Each group of drafters will test-drive a different group's drafted section, crash-testing it to ensure that it cannot fail, and suggesting solutions for potential failure-points.
- Every section of the document should be editing by at least 2 other groups of students; the edits are then themselves negotiated and agreed upon just as the original terms were negotiated.
- The finalized document is printed and signed by everyone, and becomes the governing Rules.