DRAFTING STATUTES AND RULES:
PEDAGOGY, PRACTICE, AND POLITICS

FOREWORD

FIFTH COLONIAL FRONTIER LEGAL WRITING CONFERENCE
DRAFTING STATUTES AND RULES: PEDAGOGY, PRACTICE, AND POLITICS

Jan M. Levine

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Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More

J. Lyn Entrikin*
Richard K. Neumann Jr.**

“[T]here are rich rewards in legislative drafting and the biggest one is the deep satisfaction that comes from wrestling with man-sized problems whose satisfactory solutions are a necessary phase of the art of government and a buttress of the public good.”

—Reed Dickerson

ABSTRACT

For centuries, lawyers have been notorious for long-winded writing filled with legalese, hyper-technical expression, and convoluted sentence structure. Legal writing in memos and briefs has been characterized as wordy, unclear, pompous, and just plain dull. Legal drafting, defined as the specialized skill of creating legal rules, is even more fraught with problems. In particular, no standardized, consistently used methodology exists in the United States for drafting federal and state statutes, agency regulations, and court rules.

In 1954, the late Professor Reed Dickerson observed, “It would be hard to exaggerate the importance of knowing how to prepare an adequate legal instrument. This is particularly true of statutes.”² Professor Dickerson called on law schools to do more to help future lawyers develop essential skills for legislative drafting as well as other kinds of “legal craftsmanship.”³ Over the last fifty years, American law schools have devoted much greater attention to objective and

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1. Reed Dickerson, How to Write a Law, 31 NOTRE DAME L. REV. 14, 27 (1955). Given the post-war times, we can perhaps forgive the author’s reference to “man-sized” problems rather than simply “challenging” problems.


3. Id. at 636.
persuasive writing, and many have added drafting courses. But few offer legislative and rule-drafting courses, and even fewer require students to learn how to draft legal rules. And the legal profession has yet to adopt a systematic method for drafting legal rules that can be easily understood by others.

This article reflects our efforts to help fill that void by demonstrating a straightforward, uniform approach to drafting legal rules of all kinds, including statutes, agency rules, and private contracts. By proposing a more unified approach to legal drafting, we hope to emulate Professor Reed Dickerson's tireless efforts to promote legal drafting as an essential component of every lawyer's professional education.

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I. INTRODUCTION AND OVERVIEW

Some of us who teach legal drafting courses consider Professor Reed Dickerson something of a national hero for his leadership in improving the art and craft of drafting—particularly legislative drafting.4 Before publishing the first of his many groundbreaking works in 1954,5 Dickerson served “in the trenches” for several years as a real-life legal drafter.6 That was certainly a most unusual career path for someone who had just earned a post-graduate law degree from Columbia Law School.7

5. REED DICKERSON, LEGISLATIVE DRAFTING (1954).
6. Thomas B. McAffee, Reed Dickerson’s Originalism—What it Contributes to Contemporary Constitutional Debate, 16 S. ILL. U. L.J. 617, 618 (1992) (“[Reed Dickerson] had at once the intensely practical mind of a craftsman who had toiled with real problems of drafting and interpretation as well as the mind of the theorist who was interested in the nature of his craft.”). After graduating from Harvard Law School in 1934, Dickerson practiced law in Chicago and Boston. In 1939, he earned an L.L.M. from Columbia Law School on a fellowship. During World War II he worked as an attorney for the Office of Price Administration and the House Office of Legislative Counsel. He later led the Codification Section of the Defense Department’s Office of General Counsel. Frank E. Horack Jr., Book Review, Legislative Drafting, 103 U. Pa. L. REV. 291, 292 (1954); see also John Gastineau, In Memoriam: F. Reed Dickerson 1909–1991, 67 IND. L.J. xii (1991). As a practicing attorney, Dickerson earned great respect for his work assisting the Pentagon in its massive effort to codify military law. Id.
7. After the war, Dickerson returned to Columbia, earning his J.S.D. in 1950. Brian Mattis, Reed Dickerson’s Contribution to SIU’s School of Law, 16 S. ILL. U. L.J. 585, 585–86
Addressing the Legislation Institute at Notre Dame University in 1955, Reed Dickerson acknowledged what unfortunately remains true to this day: “[T]he art of legal drafting in general, and of legislative drafting in particular, is only crudely developed.”8 But the dismal state of legislative drafting in the middle of the twentieth century was not for lack of concern and attention by the practicing bar.

Long before 1954, the American Bar Association (ABA) had recognized the special challenges of legislative drafting. In 1884, a practicing lawyer delivered a white paper at the Association’s annual meeting decrying the regrettable state of the legislative process, even after an era of state constitutional reform to constrain private legislation, logrolling, and undue influence by special interests.9 Simon Sterne, a New York lawyer, specifically criticized the lack of scholarly attention to legislative drafting in the United States:

The little attention that is paid to the language of legislation is somewhat indicated by the fact that there is not a single American work upon Legislative Expression . . . I venture to say that few of you remember the little treatise on [Legislative Expression], reprinted from the English work of [Sir George] Coode, which never yet found a venturesome American editor to apply it to our needs.10

The day after Sterne presented his paper, Judge C.C. Bonney, then the ABA Vice-President, delivered an eloquent response, echoing Sterne’s calls for reform.11 But while emphasizing the unique problems and challenges associated with drafting statutes, Judge Bonney also acknowledged the high calling of the legislative drafter.


8. Reed Dickerson, supra note 1, at 14; see Horack Jr., supra note 6, at 291 ("[F]ew law graduates in modern times have been prepared to draft legislation or any other legal document."). The problem of bad legal drafting has a long and colorful history. But especially in the United States, the remedy has been nearly as long in coming.


10. Id. at 292 (referring to GEORGE COODE, ON LEGISLATIVE EXPRESSION: OR, THE LANGUAGE OF THE WRITTEN LAW (1845), possibly the earliest exposition of a conceptual approach to drafting legal rules of all kinds). The Coode text originally appeared in 1843 in the Appendix to the Report to Parliament of the Poor Law Commissioners on Local Taxation. The reprinted version in pamphlet form is available at https://ia802700.us.archive.org/32/items/onlegislativeex00coodoog/onlegislativeex00coodoog.pdf.

11. C.C. Bonney, Mr. Bonney’s Remarks on Slipshod Legislation, 7 ANN. REP. A.B.A. 54 (1884).
Statute-making is not only strictly professional work, it is the very highest order of such work. The text book of [Story on Equity Pleadings] tells us that the drawing of a well constructed bill in equity requires great accomplishments, and the endowments which belong only to highly gifted minds, and yet that is a summer-day pastime compared with the difficult task of framing a wise and well constructed bill for enactment into a law by the legislature.\(^{12}\)

But it was not until the second decade of the twentieth century that the ABA appointed a Standing Committee on Legislative Drafting in an effort to follow England’s lead in “raising legislative drafting to a recognized branch of legal science.”\(^{13}\) In 1921 the Committee’s “final” report offered a number of recommendations,\(^{14}\) but the Committee continued its efforts for more than five decades to improve legislative drafting.\(^{15}\) Professor Dickerson chaired the committee and served as a member for many years, and he continued as a “special advisor” to the committee for several years more.\(^{16}\)

By 1986, things were not much better. Then in his mid-seventies and a long-time faculty member of the Indiana University School of Law, Professor Dickerson observed that despite advances in social sciences and computer technology, “lawyers have adjusted inadequately to the world of nonjudicial law making: the world of statutes, administrative rule making, and private ordering through consensual arrangements.”\(^{17}\) Nor, unfortunately, has the art and

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\(^{12}\) Id. at 57.

\(^{13}\) Final Report of the Special Committee on Legislative Drafting, 44 ANN. REP. A.B.A. 410, 410 (1921); see also id. at 413 (underscoring the value of recognizing “the status of legislative drafting as a branch of legal science”).

\(^{14}\) Id. at app. C (outlining content for development of a legislative drafting manual).

\(^{15}\) The Committee was renamed the Standing Committee on Legal Drafting in 1975. See Proposed Amendments to the Constitution and Bylaws of the American Bar Association, 61 A.B.A. J. 749, 751 (1975). The Committee was discontinued in 1981, just one year after Professor Dickerson retired. See Proposed Amendments to the Constitution and Bylaws of the American Bar Association, 67 A.B.A. J. 788, 788 (1981); see also Frank P. Grad, To Reed Dickerson: A Tribute to the Master, 55 IND. L.J. 426, 427 (1980) (expressing disbelief about Dickerson’s retirement). Professor Grad quipped about Dickerson’s participation in the Committee over the years: “All of us who served on the Committee always knew that Reed Dickerson really ran the show, and that the designated chairmen who came and went were just there to meet the technical requirements of the American Bar Association.” Id.

\(^{16}\) Reed Dickerson, Professionalizing Legislative Drafting: A Realistic Goal?, 60 A.B.A. J. 562, 562 (1974). Any scholar of legislative drafting in the United States today stands on the shoulders of Professor Reed Dickerson. See Patrick J. Kelley, Advice from the Consummate Draftsman: Reed Dickerson on Statutory Interpretation, 16 S. ILL.U. L.J. 591, 591 (1992) (“No one has had more influence on the practice and teaching of legal drafting than Reed Dickerson.”).

\(^{17}\) Blackwell, supra note 4, at 235 (quoting REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING § 1.3, at 6 (2d ed. 1986)); see also Reed Dickerson, Toward a Legal Dialectic, 61 IND. L.J. 315, 316 (1986).
craft of legislative drafting evolved much since the mid-1980s. As recently as 2013, Professors Abbe R. Gluck and Lisa Schultz Bressman accurately observed that the field of legislative drafting is “still in its relative infancy.”

Why should that be so? For the rest of his life, Professor Dickerson led a number of widely acclaimed reform efforts to improve the art and craft of legal drafting. As early as 1954, long before joining the faculty at Indiana University School of Law, he recognized that the legal academy was a big part of the problem. He urged law schools to teach students

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, [law schools'] 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.20

Regrettably, law schools were slow to respond to his call.21 But Dickerson would not give up.

In the early 1970s, Dickerson led an effort to professionalize the art of legislative drafting,22 in part by encouraging law schools to do more.23 In 1975, he hosted a conference of international experts on the teaching of legal drafting at Indiana University School of Law.24 For many years Dickerson was actively involved in the ABA's Standing Committee on Legislative Drafting, later renamed the

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20. Dickerson, supra note 2, at 636–37 (footnotes omitted).

21. Dickerson, supra note 16, at 562. Dickerson begrudged the fact that “the law schools have largely abandoned any significant effort to develop the drafting skill or, indeed, to develop anything more than the shallowest understanding of what drafting is all about.” Id. In 1986, he must have become impatient with the legal academy's snail-like pace because he made the point more vociferously: “The main culprit in this inadequate readjustment to the increasing importance of nonjudicial lawmaking has been legal education’s self-perpetuating preoccupation with litigation and case law.” Dickerson, supra note 17, at 316.


24. INTERNATIONAL SEMINAR AND WORKSHOP ON THE TEACHING OF LEGAL DRAFTING (F. Reed Dickerson ed., 1977) [hereinafter INTERNATIONAL SEMINAR] (edited transcript of conference proceedings). The Conference was co-sponsored by the ABA Standing Committee on Legal Drafting and Indiana University School of Law.
Standing Committee on Legal Drafting.\textsuperscript{25} The Committee’s more
generic new name reflected the recognition by professional drafters that “the conceptual, structural, and compositional problems of
drafting [are] essentially the same for all legal instruments,” de-
spite their many differences.\textsuperscript{26}

We agree with that premise. This article offers the first few chap-
ters of a forthcoming textbook\textsuperscript{27} that will take a contemporary ap-
proach to drafting based on the common building blocks of all legal
rules. We focus not only on statutes, constitutions, agency regu-
lations, and court rules, but also on consumer contracts, sales agree-
ments, leases, corporate bylaws, and jury instructions. All of these
legal instruments are collections of legal rules that share the same
basic components and structure. The book’s premise is that law
students who learn to effectively draft contracts and other legal in-
struments for private business transactions gain the same skills
and analytical ability they need to competently draft legislation, ad-
ministrative regulations, and other public laws. In other words, the
essential lawyering skill of drafting is readily transferable among
all kinds of legal instruments. Our book demonstrates how.

Professor Dickerson’s many textbooks for teaching legal drafting
are no longer in print.\textsuperscript{28} Over the last decade, excellent teaching
materials have become available for teaching contract drafting and
other transactional skills courses, as well as survey courses that
teach upper-level students to prepare a broad range of legal docu-
ments. But in the last thirty years, few law textbooks have been
published in the United States that comprehensively address legis-
lative drafting, which may explain in part why so few law schools
offer such a course.

Relatively few law schools offered contract drafting courses be-
fore 2007, when Tina Stark published the first edition of her path-
finding textbook and teaching materials.\textsuperscript{29} Over the last decade,

\begin{itemize}
  \item \textsuperscript{25} Dickerson, supra note 23, at 30.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} RICHARD K. NEUMANN JR. & J. LYN ENTRIKIN, LEGAL DRAFTING BY DESIGN: A
  \item \textsuperscript{28} While several good textbooks have been published on legal drafting, few that are cur-
    rently in print and suitable for teaching U.S. law students recognize the conceptual features
    that all legal rules have in common. For one notable exception, see THOMAS R. HAGGARD
    & GEORGE W. KUNEY, LEGAL DRAFTING: PROCESS, TECHNIQUES, AND EXERCISES (2d ed.
    2004) (Australia); PETER BUTT & RICHARD CASTLE, MODERN LEGAL DRAFTING: A GUIDE TO
    USING CLEARER LANGUAGE (2001) (Australia, England, and Wales); WILLIAM TWINING &
    DAVID MIERS, HOW TO DO THINGS WITH RULES (5th ed. 2010) (United Kingdom).
  \item \textsuperscript{29} TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO
    (2007). Stark’s excellent textbook has been widely adopted because it offers a rich set of
\end{itemize}
many law schools have added elective courses in transactional drafting as a greater variety of excellent teaching materials have become available to professors. An ABA survey of curriculum developments and trends among accredited law schools revealed that legal drafting and upper-level writing course offerings increased substantially between 2002 and 2010, more than any other category surveyed. The results reflect that the publication of innovative teaching materials promotes improvement in law school curricula and legal education generally.

The increased offerings in transactional drafting courses are an encouraging sign. But legislative and regulatory drafting courses remain scarce. And legislative drafting is a uniquely challenging variation on legal drafting. As Professor Dickerson long ago observed, “legal drafting is the most difficult thing a lawyer is called upon to do,” and “legislative drafting is the most difficult form of legal drafting.”

Part II of this article sets out our perspective on legal drafting. It describes what we mean by legal drafting, distinguishes private law from public law, and defines the basic building blocks of all legal rules. Part III describes the differences in how private and public laws originate. Part IV explains why legal drafting is an essential lawyering skill. Part V provides step-by-step instructions on how to build a legal rule.

By proposing a more unified approach to drafting legal rules, we hope to emulate Professor Dickerson’s tireless efforts to promote legal drafting as an essential component of every lawyer’s professional education. We welcome your suggestions and feedback.

II. DRAFTING IS RULE CREATION

A. Drafting Is Different from Legal Writing

Law is made up of rules together with the ideas that surround them, such as the policy or goals that rules are intended to accomplish. Rules govern behavior. Drafting is creating and expressing legal rules. All drafted documents that govern people—including

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31. Dickerson, supra note 1, at 15.
statutes, contracts, administrative regulations, court rules, bylaws, local ordinances, injunctions—are collections of rules.

A public rule governs everyone within its scope. A legislature, for example, enacts a statute requiring every person who drives on a public road or street to get a driver’s license. When enacting a statute, the legislature chooses goals. Legislative drafters, typically staff attorneys, find the words to express rules that will accomplish those goals.

A private rule governs a limited number of persons or entities. A contract, for example, governs only the parties to that contract. A contract is a set of rules that the parties have agreed will govern them for purposes of their transaction. By agreeing to the contract, the parties have created the equivalent of their own private statute. The parties’ lawyers translate that mutual agreement into rules expressed in words.

Statutory rules and contract rules are similar but not identical in structure. If you know how to draft a statute, you know most of the skills needed to draft a contract. The reverse is also true. If you know how to draft a contract, you are close to knowing how to draft a statute.

Legal drafting differs from legal writing. Legal drafting is rule creation. Legal writing is rule explanation. Here are some examples of the documents in each category:

**Legal Writing**
- office memoranda
- motion memoranda
- appellate briefs
- judicial opinions
- client letters
- demand letters
- other analytical or persuasive documents

**Legal Drafting**
- contracts
- statutes
- local ordinances
- administrative regulations
- court rules
- organizational bylaws
- other governing documents

Legal writing explains legal rules that the writer did not create. An office memo, for example, explains how a court would interpret a governing document such as a statute or contract. An appellate brief persuades a court to interpret the statute or contract favorably to the writer’s client. Legal writing does not craft the rules that appear in the statute or contract. Instead, legal writing explains how these rules govern.
Legal drafting creates legal rules. A statute or contract is drafted. The legal drafter constructs the rules, while other lawyers might later write memos or briefs to explain those rules.

Drafting is difficult to learn because most law students have never created a rule. Legal education has traditionally focused on legal writing rather than legal drafting, even though drafting is an essential skill for all lawyers. Indeed, “[l]egal drafting is a form of preventive medicine.”

B. What Is a Rule?

Speaking generally, a “rule” is an idea or concept. While rules may be expressed in various ways in different disciplines, legal rules are almost always expressed in words. More specifically, a legal rule is a linguistic expression defining terms, directing conduct, granting authority, or explaining how to do something. A rule may take the form of a contract term, a corporate bylaw, a statute, a regulation, a jury instruction, a judicial order, or an appellate court’s mandate to a trial court or administrative tribunal.

When lawyers write, they generally think about communicating information to someone else in written form. But a legal rule, as this article uses that term, is neither predictive nor persuasive. Rather, a rule is a directive that tells the audience what to do and how to do it. Or a rule may tell those it governs what not to do, or what might happen if a rule is violated.

We use the term legal drafting to mean the specialized skill of creating legal rules. While many lawyers use the term in its broadest sense to describe legal writing generally, including rhetoric and narrative, we use the term in the narrower sense defined by Black’s Law Dictionary: “The practice, technique, or skill involved in preparing legal documents—such as statutes, rules, regulations, contracts, and wills—that set forth the rights, duties, liabilities, and entitlements of persons and legal entities.”

Rules take many forms and have many functions. For example, legal rules establish agencies or other organizations, authorize action, define terms, create obligations or duties, prohibit conduct, guide decisions, or impose sanctions. In contracts, rules establish and govern voluntary relationships between or among parties. In statutes, rules often represent compromises between competing public policies that result in regulating conduct or imposing affirm-
ative duties. Statutes obligate taxpayers, appropriate public revenues, regulate commerce, impose consequences, or prohibit certain behavior. A government agency’s administrative regulations, if issued according to specified procedures, govern conduct by entities within the scope of the agency’s regulatory jurisdiction. In turn, the agency’s jurisdiction is defined by the organic statute that establishes the agency and delimits its authority. Courts issue rules that govern civil litigation, criminal procedure, admission of evidence, and court records. Wills and trusts are specialized rules that govern the distribution, investment, and management of testators’ or settlors’ property. For a will or trust to give proper effect to a testator or settlor’s intent, the document must be drafted, verified, and witnessed according to statutory formalities.

The client or drafter’s goals determine a rule’s function. To solve a client’s problem, an effective lawyer must understand how to identify the client’s goals, and how to properly structure a rule that most effectively accomplishes what the client wants. Sometimes rules appear to grant discretion but in fact impose an obligation. Rules that appear to be merely declarations may actually function to prohibit certain kinds of conduct. A lawyer must be able to identify not only the structure of a rule, but also what it does and how it operates. Rules can be structured in different ways to accomplish a variety of functions, depending upon the client’s needs and the specific circumstances.

Knowing how to draft a rule well requires a deep understanding of the power and meaning of words. Drafting rules effectively requires precise thinking, careful word choice, impeccable judgment, and analytical accuracy.

C. Legal Drafting: A Specialized Skill

Rule drafting is a specialized skill, distinct from general legal writing skills. While the differences in the function and operation of various kinds of legal rules are significant, the drafting techniques for all legal rules are surprisingly similar. And those drafting techniques differ in important ways from the techniques lawyers use in objective and persuasive legal writing.

The traditional law school curriculum included few if any courses in drafting. But in the last two decades, drafting courses have taken an increasingly important place in most law school curricula. A recent survey of law schools undertaken by the American Bar Association demonstrates that between 2002 and 2010, legal drafting courses grew in number more than any other category of law school
Students and alumni alike value courses that teach fundamental skills, including drafting, that most practicing lawyers use on a daily basis.

D. Rule Sources and Categories

Rules are everywhere. Parents issue rules to govern a household. They set curfews and bedtimes, and they impose rules on where and when teenagers in the family can drive the family car. Road signs give rules of the road to protect the safety of travelers and pedestrians. Recipes list the ingredients and give the sequential instructions for preparing food. Board games come with rules that players read and follow when playing the game and keeping score. Model car and airplane kits come with instructions that explain how to build scale models. Knitting and sewing patterns are composed of rules the reader follows to reach the desired outcome.

Everyone learns to live with rules. But where do all those rules come from? We all live with many rules that nobody thinks of as legal rules. But the rules that govern daily living have the same function and underlying structure as legal rules. The drafting principles we explain in this article can be applied to analyze any kind of rule.

Legal rules may be divided into two major categories based on their origin, effect, and audience: public rules and private rules. Public rules are the products of governmental entities, and they generally reflect important public policies. Private rules, on the other hand, are the product of negotiations and agreements among private parties. Some private rules operate more like public rules than others. For example, a non-profit corporation’s bylaws govern a private organization’s internal operations, much like state statutes govern every corporation that conducts business in that state.

While the differences between public and private legal rules are significant, the drafting techniques for each category are surprisingly similar. Because both categories have much in common structurally, this article explains the general drafting skills that apply to both categories and their many variations.

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1. Public Rules

Public rules are enacted or issued by public entities. They include state and federal constitutions, statutes, local ordinances, administrative regulations, court rules, and similar rules. Public rules, by their very nature, must be enacted or adopted by authorized public bodies or entities. Most public rules operate both generally and prospectively.

Public rules are necessarily general in scope and application. While public rules sometimes represent ideas or concerns that originate in particular circumstances, often they reflect broad public policy preferences or goals. For example, if a state values its agricultural heritage and seeks to preserve the traditional way of life of small family farmers, the state legislature may enact a tax preference to reduce the property tax burden on small family-owned farms. Another state whose economy depends heavily on manufacturing and commerce might do something similar to encourage businesses to build manufacturing plants in the state and to create new jobs.

Lawmakers can never anticipate every possible future circumstance to which a statute or ordinance may apply. Once enacted, public rules are almost always forward-looking—they apply prospectively to future circumstances rather than retroactively. And those governed by a public rule may or may not be consciously aware of the rule that governs their conduct; yet the law generally presumes that everyone is on constructive notice of the law.35

In one sense, public rules also include common law judicial rulings. A court is a public entity that has jurisdiction or power to adopt common law rules, as long as they are consistent with relevant constitutional and statutory provisions. But judge-made common law rules are formulated to resolve disputes involving the litigating parties' particular facts and circumstances. At least in the sense we define the terms, United States courts do not draft rules that govern conduct prospectively. Instead, judicial decisions resolve disputes in particular facts and circumstances, and common law rules evolve over time as a result of the process used by lawyers and judges to synthesize rules from a pattern of judicial holdings in factually analogous cases.

While lawyers regularly debate the meaning and applicability of common law rules, judicial precedents are the result of inductive

35. Parker v. Levy, 417 U.S. 733, 751 (1974) (referring to "the ancient doctrine that everyone is presumed to know the law").
reasoning about the law as it evolves from litigating disputes involving particular parties and specific facts. But legal drafting is a deliberative process lawyers use to create generally applicable rules by identifying current problems, anticipating future problems, and resolving those problems without resorting to litigation. The specific individuals to whom a public rule will apply in the future are unknowable at the time the rule is drafted. Once circumstances occur that trigger its application, deductive reasoning best describes how the rule will operate.

2. **Private Rules**

Contracts, corporate and association bylaws, wills, and trusts are all governing documents based on private rules.

A contract is the equivalent of a private statute that governs the parties to the contract. It requires a party to do certain things and empowers that party to do other things. Two contract parties can agree to private rules to govern their transaction, and they gain that authority through a meeting of the minds, combined with a trade that the law calls mutual consideration. A contract generally governs only the parties, although some contracts confer rights on third-party beneficiaries. A contract cannot impose requirements on anyone who is not a party to the contract.

Corporate and association bylaws govern an organization’s internal operations. A corporation or association is controlled by three collections of rules. One is public law: federal and state statutes and regulations that govern all corporations, together with common law rules that govern everyone, including legal entities. The second is the corporation’s own bylaws that govern its internal operations. The third is the transaction-specific contracts that result from negotiations between the corporation and other parties.

A will is a set of rules that govern the conduct of an estate’s executor or administrator as well as the distribution of the estate’s assets. A trust is a set of rules that govern the conduct of the trustee for the benefit of the named beneficiaries. The rules of a will or trust are created unilaterally by the person whose property will enter the estate or trust. That person has authority to adopt those rules because anyone can dispose of her property in any way she pleases. But for the rules to be enforceable, the will or trust must follow statutory formalities and other legal requirements.
E. Defining Rule Types

A comprehensive, rule-based approach to drafting legal rules requires that we first define the basic building blocks for all rules, whether public or private.

1. Duties and Rights

Duty. A duty requires someone to do something or to refrain from doing it. Lawyers and judges sometimes use the terms obligation or mandate to describe a duty. The following phrases each impose a duty on the actor to do X:

- Actor is required to do X.
- Actor is obligated to do X.
- Actor is mandated to do X.

Duties are often expressed by using modal verbs of command, such as shall or must, combined with another verb specifying an action. In this article, we refer to modal verbs as operative terms.

A duty can be stated in the affirmative (someone shall or must do something) or in the negative (someone shall not or must not do something). A negative duty has the same effect as a prohibition.

A duty is completely expressed only if a reader knows exactly who has the duty and exactly what that person must do or must not do. To impose a duty properly, the legal rule must identify the actor who has the duty, as well as the action required. We can write a duty using a basic formula:

\[
\text{Duty} = \text{Actor} + \text{Operative Term} + \text{Action (of command)}
\]

Right. If a duty is for someone else’s benefit, that person often (but not always) has a right to have the duty performed.

In a contract, every duty has a corresponding right because contract parties mutually agree on rules for each other’s benefit. For example, in a lease for an apartment, a tenant has a duty to pay rent to the landlord no later than the first of the month. And the

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36. Modal auxiliary verbs, also known as “helping” verbs, join with basic verbs “to add specific shades of meaning” that indicate mood or tense. Altizer v. Commonwealth, 757 S.E.2d 565, 568 (Va. Ct. App. 2014) (citing Mary Barnard Ray & Jill J. Ramsfield, Legal Writing: Getting It Right and Getting It Written 452 (2010)).
landlord has a right to receive the money by that date each month. In return, the landlord has a duty to keep the hallways safe and to maintain kitchen appliances in good working order. And the tenant has a right to safe hallways and a functioning stove and refrigerator to prepare and store food.

In contrast to contract duties, not all statutory duties create corresponding rights. For example, statutes generally require homeowners to pay property taxes every year to help finance public schools. The homeowner has a duty to pay property taxes, even if no school-age children live in the household. But the homeowner’s duty to pay taxes does not give her a correlative right to attend public school. Nor does it give schoolchildren a right to the homeowner’s tax payments. To give another example, a criminal statute might prohibit a pedestrian from crossing a street against a red light. But that negative duty does not give a driver the right to proceed into the intersection without taking precautions to avoid hitting someone who happens to step into the crosswalk against the red light.

In general, the best way to draft a rule creating a right is to impose a duty on someone else. A rule that simply creates a right for someone cannot be enforced unless the rule has identified an actor who must do something for the person the drafter intends to benefit. The rule need not express the right nor identify a specific beneficiary as long as the rule properly imposes the duty on an appropriate actor.

2. Discretionary Authority

Authority is the power to act, but without the duty to act. Discretion is the power to decide whether to act or not. The combined term discretionary authority is the power to decide whether or not to do something, but without an obligation either way. Discretionary authority is sometimes expressed as permission. The operative term may grants the actor discretionary authority.

A drafter can grant discretionary authority using the following formula:

\[
\text{Discretionary Authority} = \text{Actor} + \text{Operative Term} + \text{Action (of authority)}
\]

To illustrate, suppose you drive 63 miles per hour on a highway with a posted speed limit of 55. A police car comes up behind you, lights flashing. You pull over and stop at the roadside. A police
officer walks up to your car window, and you anxiously await the consequences. If police officers generally have a duty to issue a speeding ticket to any driver who exceeds the posted speed limit, this officer has a duty to give you a ticket.

But if the officer has discretionary authority, she has the power to give you a ticket but also the power not to do it. She has the power to elect what to do and then act on her decision either way. You might receive a ticket, or you might not. The officer might say, “We’re real tough on speeders in this county. This time, I’m giving you a warning rather than a ticket. But don’t do it again.” If she says that, you will be relieved by the way she exercised her discretionary authority. But that does not give you any right to avoid being ticketed; the discretion rests with the officer alone.

Discretionary authority is not the same as a legal right in the sense that we use that term. Authority is power to do something or not; it conveys neither a right nor a duty to anyone. In contrast, a right is the counterpart of a duty. Drafting a rule that creates a right necessarily means that someone else must have a duty to give effect to the right. Giving someone discretionary authority does give anyone a right—not even the person who has the discretionary authority.

3. Declarations

A declaration is a sentence declaring that something is true. Declarations can take several forms. One example is a definition—a rule that explains the meaning of a legal term. Another is a rule specifying the minimum or maximum prison term a judge must impose on someone who has been convicted of a crime. While the definition of a declaration appears straightforward, a declaration in the form of a legal rule can have a powerful effect when used in conjunction with other rule structures. For example, statutes that define crimes are declarations, and they are usually accompanied by other statutes, also declarations, that specify penalties for those convicted of certain crimes.

California is a state because Congress declared it to be one by statute in 1850:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the State of California shall be one, and is hereby declared to be
one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.37

Every other state, except for the original thirteen, was created the same way.

To create a declaration that defines a legal term, the proper operative term is *means*. For other declarations, use *is* or *are*, or some other form of the verb “to be.” For example, “New Year’s Day and the birthday of Martin Luther King, Jr. *are* national holidays.” “Fracking in this state *is* a misdemeanor.”

A declaration can be written using the following formula:

**Declaration = Subject + Operative Term + Predicate Noun**

(“*means*” or a form of the verb “*to be*”)

### 4. Tests, Conditions, and Exceptions

Tests and conditions are two names for the same concept: a contingency—or group of contingencies—that must be true or must occur to activate a rule.

Many tests and conditions are expressed as clauses beginning with the word *if*. The following terms all mean the same thing: *provided that*, *conditioned on*, *conditional on*, and *subject to* a test or condition (or group of conditions). In a contract, contingencies are called conditions; they are not called tests, even though the two words mean essentially the same thing. In other fields of law, both words are used to describe the same concept. If the test or condition is not met, the rule does not operate. Another way of saying the same thing is that the test or condition is a prerequisite for the rule to apply.

An exception operates as a reverse condition: It deactivates the rule. If the facts satisfy an exception, the rule does not apply. Many exceptions are expressed by adding a clause beginning with *unless* or *except* to the general rule.

A rule may be subject to a test or condition *and* an exception. If the test or condition is satisfied, the rule is activated. But if the exception is satisfied, the rule is deactivated.

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Let's go back to the example on pages 25 and 26 and the police officer who stopped you for speeding. Suppose she says, “I can give you a warning because you exceeded the speed limit by less than 15 miles per hour. If you had been driving 70 miles an hour where the posted limit is 55, I’d have to give you a ticket because yesterday we got a departmental policy directive saying that.”

The departmental policy imposed a duty on the officer to issue a ticket, but only if a specific condition is met: If a driver exceeds the speed limit by 15 miles per hour or more (condition), the officer must issue a speeding ticket (duty). The same departmental policy allows the officer to skip giving a ticket, but only if another condition is met: If a driver exceeds the speed limit by less than 15 miles per hour (condition), the officer may issue a speeding ticket (discretionary authority—the power but not the obligation to act).

A test or condition can be rewritten to become an exception to a rule. For example, a departmental directive might generally require a police officer to issue a speeding ticket (duty) when a driver exceeds the speed limit (condition), unless the driver exceeded the posted speed limit by less than 15 miles per hour (exception).

At first, it might seem that conditions and exceptions have the same effect, but the distinction between them is important in legal drafting. For example, assume a statute authorizes a civil claim for injunctive relief if a plaintiff’s facts satisfy a list of elements. Each element would be a condition for securing the injunction. If one of the elements is not satisfied, the statute authorizing the court to grant an injunction never operates, so the plaintiff cannot obtain the desired injunction. That means a defendant could challenge the plaintiff’s entire claim simply by arguing that one of the elements cannot be satisfied. Each element acts as a condition for stating a claim for injunctive relief.

But now consider the statute of limitations for the civil claim. The plaintiff does not have to demonstrate that her claim was filed within the statute of limitations to state a claim for injunctive relief. All she must do is allege facts to support each element—each condition—for stating the claim. The statute of limitations has the same effect as an exception to the statutory rule. The exception deactivates the statutory rule giving the plaintiff a claim for injunctive relief. In this example, the statute of limitations is an affirmative defense because the defendant must assert and prove each element of the exception.

As a general rule, a condition in a rule must be satisfied by the party who wants the rule to operate. An exception must be satisfied by the party who wants to defeat the rule’s operation.
5. Distinguishing Duties from Conditions

Duties and conditions are easy to confuse because both appear to require action. The difference between the two can be determined by the consequences of not complying.

**Consequences of breaching a duty.** A person who has a duty but fails to comply can expect something bad to happen as a direct result. The bad consequences differ from one duty to another.

Recall a first-year law student’s courses in torts and contracts. Tort law imposes a common law duty to behave with reasonable care. Someone who breaches that duty may owe damages in negligence to anyone who was proximately injured by the breach of duty. Or suppose you sign a contract that gives you a duty to do X by a certain date. If you do not, you will owe damages to the other party for breach of contract.

Even before law school, you understood the consequences of breaching a duty. Suppose you earn taxable income. You have a duty to pay the federal income tax no later than April 15 of the following year. If you breach that duty, you will owe interest and penalties to the Internal Revenue Service.

**Consequences of not satisfying a condition.** When a condition applies to a duty, discretionary authority, or a declaration, nothing bad happens as a direct result if the condition is not satisfied. The failure to satisfy the condition simply means the rule is not activated. For example, take a look at this city ordinance:

To obtain a parade permit, an applicant must pay a $300 fee to the city clerk.

If you want to hold a parade, you might assume from reading the ordinance that you are obligated to pay the fee. You may feel obligated to pay and worry what might happen if you don’t. But this rule does not give you a duty to pay. Paying the application fee is simply a condition for obtaining a parade permit. If you fail to pay the fee, the city will not give you a parade permit, but you would not be in trouble like you would if you decide not to pay your taxes. The city clerk will not sue you or attach your assets. You just will not get the parade permit you want.

The fundamental difference is this: You owe taxes to the Internal Revenue Service because you have a duty to pay them, and if you do not, bad things will happen. But you do not “owe” anything to the city clerk for the parade permit you want. In fact, most likely
the city clerk has a duty to issue you the parade permit, conditioned on your payment of the fee.

Another ordinance might contain a sentence like this one:

The city clerk shall issue every permit, license, public record, or other document to which a person is entitled.

Reading both ordinances together, the city clerk is legally required (duty) to issue you a parade permit, as long as you pay the $300 application fee (condition). When you pay the fee, that conduct activates the city clerk’s duty. If the clerk does not perform that duty after you pay the fee, you can sue for a court order requiring the clerk to issue the permit to you.

To distinguish a duty from a condition or test, consider the consequences if the actor does not comply. Failing to perform a duty leads to a bad outcome because the duty can be enforced or its violation sanctioned. But failing to perform a condition just means the rule that is subject to the condition never takes effect.

F. Four Things You Can Do in a Statute

A statute can do any of the following:

1. Impose a duty or a prohibition on someone
2. Give someone discretionary authority
3. Make something true with a declaration
4. Attach a test, condition, or exception to a duty, discretionary authority, or declaration

When asked to draft a statute, the drafter will translate everything legislators want to accomplish into one or more of these four kinds of rules. Each is a tool for accomplishing legislative goals. They make up the drafter’s legislative toolkit.

Each type of rule is represented in statutes. For example, if you want to drive on a public street, a statute requires you to obey the speed limit (duty). A public street is defined as a government-owned passageway for vehicles that is open to the public (declaration). You are permitted to park your car on a public street (discretionary authority). But on certain public streets, parking is limited to drivers who pay in advance at a meter (condition).

Each rule type is also represented in the common law. Every case you read in law school involves some combination of duties, discretionary authority, declarations, and conditions or tests. Any single
case might not include them all, but every case involves at least one rule type, and often more.

Statutes are drafted, but the common law is not. Common law is the sum of all the relevant cases, written by judges acting in different years and sometimes different centuries. On the other hand, a statute is a single document drafted by one or more people working together in one effort, and ultimately enacted by a legislature. The statute might be amended later, but each amendment would be a single drafting effort.

In the process of drafting a statute, legislators explain what they hope to accomplish, and the drafter uses a combination of duties, discretionary authority, declarations, and tests or conditions to create a document—the statute—that does what they want. A statute drafter solves all legislative problems with these four tools and no others. The limited number of available rule types can make statute drafting seem deceptively easy because the drafter must master only four tools. But that actually makes statute drafting more difficult because learning how to apply each one effectively is both strategically and analytically challenging.

A drafter must use the four tools wisely and express them perfectly. Otherwise the statute can misfire. For example, if the statute imposes a statutory duty when it should have imposed a condition on discretionary authority, fewer people will probably comply with what the legislature wanted them to do. Or if the statute expresses a rule ambiguously, litigation is likely between those who think the statute’s words mean one thing and others who think the same words mean something else. After the legislature has enacted the statute, courts will ignore a drafter who tries to tell them what the legislature meant.

Legislative drafting is not limited to Congress and state legislatures. Every county, city, town, and other local government with the power to enact local ordinances has lawyers on staff or on retainer to draft them. And administrative agencies at all levels of government adopt rules and regulations to carry out the authority that statutes confer on them.

G. Six Things You Can Do in a Contract

Think of a contract as something like a private statute. By reaching an agreement—a meeting of the minds, often through offer and acceptance—the parties create rules to govern themselves. A legislature can enact rules governing everybody because a constitution
gives it that power and because voters elected legislators. Similarly, contract parties have the power to create rules governing their own transaction because they mutually agreed to make them.

When drafting a contract, the drafter can do the same four things a statute drafter can do. A contract can impose duties (or prohibitions) on the parties. It can give them discretionary authority. It can make things true by declaring them. And it can limit any of these others with conditions, the term commonly used for tests that appear in contracts.

But a contract can also do two other things. One party to a contract can represent a fact. And a party can warrant a fact. Every transaction is a mixture of both opportunity and risk. Contract parties use representations and warranties along with other tools to manage risk in various ways. The details about how contract parties manage risk are beyond the scope of this article. But representations and warranties often appear in contracts, a feature that distinguishes contracts from statutes.  

III. WHERE RULES ORIGINATE — PRIVATE LAW AND PUBLIC LAW

A. Private Rules

As we explained earlier, private rules include contracts, leases, covenants, bylaws, conveyances, wills, and trusts. Unlike public rules, private rules are the product of voluntary relationships or transactions. Most private rules take the form of contracts—consensual agreements between private parties.

Private rules take many more specialized forms as well. A lease, for example, is a contract through which a property owner agrees to grant a tenant a possessory interest in real property for a specific term, limited to certain purposes, in exchange for periodic rent payments. A restrictive covenant is a condition in a deed or other conveyance that restricts the use of real property, and in some instances runs with the land to bind future purchasers. A different kind of covenant refers to an employee’s agreement not to compete.

38. Statutes sometimes include legislative findings, which might appear similar to representations. However, legislative findings are simply declarations that help explain the legislature’s policy reasons for enacting the statute. They are not representations in the contract sense that we mean here.


with her employer for a certain period of time after terminating the employment relationship.\textsuperscript{41}

Bylaws are rules adopted by private corporations, associations, and other organizations to govern their operations. Conveyances are instruments that operate to transfer interests in real estate or mineral interests, such as oil and gas leases. Trust agreements transfer assets from the property owner, known as the settlor, to a third party trustee, who holds and manages the assets as a fiduciary for the benefit of specified beneficiaries, subject to conditions imposed by the settlor in the trust agreement. And a will is a set of rules prepared by an individual, known as a testator, giving directions to a personal representative to govern the distribution of the testator’s assets upon death.

Different kinds of specialized agreements between private individuals have one thing in common: All are composed of legal rules that create duties, rights, discretionary authority, declarations, conditions, and exceptions. In most cases, these agreements are put into written form, often by a lawyer. Drafting skills apply in much the same way to all these instruments because all are fundamentally made up of legal rules.

B. Public Rules Generally

As explained earlier, public law includes constitutions, statutes, codes, ordinances, administrative rules and regulations, executive orders, and court rules. They typically reflect broad public policies and priorities that result from executive, legislative, or judicial compromise.

1. Public Laws of General Operation

Public rules are enacted, issued, or adopted by public bodies or entities with authority to issue legal rules. They include electors, legislatures, judicial officers, state governors, and administrative agencies. In that respect, public rules differ from private law, which is negotiated by individuals or organizations to govern impending transactions or current and ongoing relationships.

Most often, public rules operate generally; they reflect broad public policy goals or preferences, which often compete with other policies. For example, a state may enact a statute imposing limits on how law enforcement officers conduct strip searches, balancing public safety interests against the privacy rights of the accused.

\textsuperscript{41} \textit{E.g.}, Runzheimer Int’l, Ltd. v. Friedlen, 862 N.W.2d 879, 882 (Wis. 2015).
2. Public Laws of Narrow Application

Most statutes apply generally, but not all do. Although no longer common today, state legislatures historically enacted “private” or “special” laws as well as public laws.\(^{42}\) A “private law” in this sense is legislation that benefits particular individuals rather than the public generally. The term “special law” refers to both private and local statutes that apply to certain localities rather than the entire state.\(^{43}\)

In fact, until the second half of the nineteenth century, state legislatures enacted relatively few laws of general application.\(^{44}\) For example, a legislative body in those days might pass a private bill granting a divorce, or a bill issuing a charter to an individual or company to operate a ferry on a particular navigable river. Even today, Congress and many state legislatures enact private laws that grant specific benefits or privileges to private persons.\(^{45}\) A private law may be enacted to legislatively resolve an individual’s claim against the government, or to grant a citizen of a foreign country relief from a deportation order issued by a federal administrative agency.

A combination of factors in the late nineteenth century led many states to amend their constitutions to prohibit or strictly limit state legislatures from enacting special or private laws. These factors included an increasing proliferation of special laws, constituent pressures, and concerns about political favoritism.\(^{46}\) But these constitutional restrictions do not apply nationwide. The U.S. Constitution and about twenty state constitutions impose no restrictions whatsoever on special legislation.\(^{47}\)

For drafting purposes, even private and special laws as described here are subcategories of what we broadly define as “public rules.” The source of special statutes, like all other public rules, is a public entity with constitutional or statutory authority to enact or issue law, even though the special laws themselves are typically narrow


\(^{43}\) Id.

\(^{44}\) Id.


\(^{46}\) See generally Schutz, supra note 45, at 44–48 (summarizing history of special-legislation provisions).

\(^{47}\) Id. at 41, 48 & nn.37–38.
in scope and application. Once enacted, private and special laws, as well as other public laws, are subject to constitutional challenge under the Equal Protection Clause.

3. **Prospective v. Retroactive Application**

Most, but not all, public rules operate prospectively to future circumstances and events within their scope, unless a different intent is clearly expressed in the rule itself. As a general rule, courts presume that statutes operate prospectively, unless the legislature clearly expresses its intent that a particular statute apply retroactively. But sometimes a court will apply a law retroactively even without a clear statement from the legislature, if the law affects only procedure and does not implicate any vested substantive rights.

The lesson for public law drafters is to always clearly express the client’s intent about whether the proposed legislation will apply prospectively or retroactively. Default rules on retroactive application vary from state to state and from time to time. But in close cases, courts will first consult the language of the public law itself to determine whether the legislative body clearly expressed an intent on the issue. The best course of action for the drafter is to always include a provision that spells out exactly whether, and to what extent, the law applies retroactively.

C. **Constitutions**

The U.S. Constitution is the supreme law of the land. All other public laws, whether federal, state, or local, must be consistent with the U.S. Constitution. The Supremacy Clause guarantees that in case of a conflict, federal law preempts contrary state or local law.

For most lawyers, especially those who draft public law at the state level, state constitutions are more important than the federal constitution in the drafter’s day-to-day work. State constitutions include many procedural and format requirements for state statutes, and a state legislative drafter must be aware of those restrictions and draft accordingly. State constitutions are also

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48. See, e.g., I.N.S. v. St. Cyr, 533 U.S. 289, 316 (2001); Bailey v. Spangler, 771 S.E.2d 684, 687 (Va. 2015) ("Absent an express manifestation of intent by the legislature, this Court will not infer the intent that a statute is to be applied retroactively.").


50. U.S. CONST. art. VI, cl. 2.
amended much more often than the federal constitution, and those amendments are drafted by lawyers, generally legislative staff. In an initiative or referendum state—in which voters, in general elections, can legislate and amend their own constitution—some amendments are drafted by private lawyers who represent individual clients or advocacy groups. In recent years, for example, advocacy groups have proposed state constitutional amendments to allow for the sale and purchase of marijuana for regulated medical uses.

The United States, unlike many other nations, has a strong tradition of judicial review of legislation. The separation of powers doctrine, including the power of the court to review statutes for consistency with the Constitution, is steeped in judicial tradition in the United States. The drafter must always keep in mind that anything in a bill draft that might be interpreted as inconsistent with the state or federal constitution puts the client at risk of litigation. The legislative body itself may debate whether a proposed enactment is constitutional or not. But most legislators are not lawyers, and they are not necessarily persuaded by constitutional arguments. Upon enactment, if a statute can be reasonably challenged on constitutional grounds, its opponents are likely to institute litigation.

As a public arena, the legislative process is designed to invite controversy, which is an inherent aspect of deliberating on questions of public policy. But for public law drafters, the ever-present risk of

51. For example, the most recent amendment to the U.S. Constitution was the 27th Amendment ratified in 1992. Relatively speaking, state constitutions are amended much more frequently. While separately numbered amendments to the United States Constitution are appended at the end, most state constitutions are amended by interlineation in much the same way as codified statutes.

52. In 2016, for example, advocacy groups sponsored a state constitutional amendment to legalize the medical use of marijuana in Arkansas consistent with state statutes and regulations, while recognizing that use of the drug remains illegal under federal law. A majority of the voters approved the initiative amendment in the November 2016 general election. Arkansas Medical Marijuana Amendment of 2016, Ark. Const. amend. XCIII; see also Colo. Const. art. XVIII, § 14 (authorizing adults to possess or transfer limited quantities of marijuana for medical use), invalidated in part by People v. Crouse, 388 P.3d 39 (Colo. 2017) (4–3 opinion) (striking down § 14(2)(e) as preempted by federal Controlled Substances Act).


54. One of the co-authors worked for several years as a member of a state legislature’s nonpartisan professional staff. If anyone raised constitutional arguments about a pending bill, some legislators were fond of saying, “A law isn’t unconstitutional until some court says it is.” Courts generally agree. A longstanding canon of statutory interpretation gives challenged statutes a strong presumption of constitutionality. See, e.g., Regan v. Time, Inc., 468 U.S. 641, 696 (1984) (“There is a presumption in favor of the constitutionality of an Act of Congress.”).
constitutional challenge by opponents is an occupational hazard that generally does not apply to drafters of private law.\footnote{Of course, a contract or other private rule cannot contradict applicable public law, including statutes and constitutional provisions. However, if the parties to the agreement want the relationship to continue, neither one is likely to challenge a mutual agreement as contrary to law.}

Because federal and state constitutions are amended much less frequently than statutes, most lawyers are not likely to draft many constitutional amendments in their legal careers. However, understanding how to effectively draft legal rules will help any lawyer interpret constitutional provisions and understand how they limit the reach of other drafted rules.

Most importantly, a drafter must be thoroughly familiar with constitutional constraints on the format and substance of all public rules. Every state constitution includes provisions that govern the work of the legislative drafter. Usually they appear in the article that governs the legislative process.

D. Legislation: Statutes, Codes, Ordinances, and Appropriation Acts

Legislation at the federal, state, or local level is the most common form of public law. A statute’s life begins as a bill prepared by a drafter for introduction and consideration by the legislative body. The form of a bill differs, sometimes substantially, from the form of an enacted statute. A bill’s format, organization, and substantive contents are governed by the constitutional and statutory requirements of the jurisdiction in which the bill originates.

1. Statutes

Upon enactment, a bill generally becomes a public law. Laws enacted by a legislative body go by different names and may take several forms. At the federal level, an enacted bill is known as a slip law, which is assigned a unique number. Enacted legislation is transmitted to the Archivist of the United States, who is required by law to preserve the originals.\footnote{1 U.S.C. § 106a (2012).} Both public laws and private or special laws are numbered in the order enacted, beginning with the congressional session number. The laws Congress enacts in each congressional session are compiled in chronological order and published in the \textit{Statutes at Large}. At the state level, a similar process
is used to number, compile, and publish laws enacted at each legislative session. These uncodified state statutes are generally known as session laws.

For more than a century, the Statutes at Large was the only source available for a lawyer to research federal statutes. No codified version existed as we know it today. To find current statutory law, a lawyer had to search every volume to determine whether a statute enacted years ago had been amended or repealed at some later date. Because the Statutes at Large published laws in chronological order, they were not organized or searchable according to subject matter. Indexing was generally inadequate. Therefore, neither the Statutes at Large nor any other published version of enacted laws was a satisfactory source for finding current statutes on any specific subject matter.

In the country’s early years, researching federal statutes in the Statutes at Large was not especially onerous because Congress enacted so few statutes of general application. As the nation grew in size and complexity, the federal government took on more complex functions, which underscored the need for improved access to current federal law. The lack of codification and systematic organization of statutory law profoundly influenced not only the process of legislative drafting, but also the way courts interpreted enacted law. The courts approached early legislation as “situational edicts” overlaying a common law canvas, and traditional canons of statutory interpretation treated them accordingly.

2. Codes

Beginning in the early 1800s, the codification movement advocated for a compilation of enacted laws by subject matter to make them more accessible. In 1874, Congress published the Revised Statutes at Large, consolidating and replacing all prior enactments. While that publication represented an important step toward codification, it was not organized by subject matter. By the late 1800s, several states had embarked on their own efforts to codify state statutes.

58. See supra notes 44–46 and accompanying text.
59. Stevenson, supra note 57, at 1141.
60. Id. at 1141–42.
61. See, e.g., Douglass v. Lewis, 131 U.S. 75, 85 (1889) (“[S]tatutes, if in derogation of the common law, ... should be construed strictly.”).
63. See, e.g., Leonard A. Jones, Uniformity of Laws Through National and Interstate Codification, 28 AM. L. REV. 547, 560 (1894) (observing that about one fourth of the states had
Publication of the *United States Code*, as we know it today, was not approved by Congress until the mid-1920s. Even now, the best evidence of federal statutory law is not necessarily the *United States Code*. Congress has enacted only about half the Code’s fifty-four current titles as “positive law,” which replaces and supersedes all previous enactments compiled in each title. But the rest—fully half of all codified federal statutes—have not been enacted as positive law. The best evidence of statutes organized and published in those titles remains the original and amended versions of the statutes that appear chronologically in the *Statutes at Large*.

The difference is critical when a drafter is preparing a bill to amend federal statutes. If the bill would amend a statute in a title that has been enacted as positive law, the bill would simply refer to the codified version of existing law and amend it further. But if a bill would amend a statute published in a title not yet enacted as positive law, the drafter must refer to the original enactment by its public law number, as well as each subsequent public law that has amended the original enactment.

Over time, congressional staff continues to compile and propose titles for enactment as positive law, but the process is not likely to be completed for many years to come.

3. **Ordinances**

State statutes must conform to the state and federal constitutions, and they may be preempted by federal law. Similarly, local governments in most states have the power under state law to enact local laws governing local affairs. States vary greatly with respect to the scope of authority granted to local governments. All states grant at least some power to local authorities to enact local legislation, as long as it is not contrary to generally applicable state law. Some states grant home rule authority to local governments, which allows certain localities to adopt their own local charters that set out the basic organization and administration of local government.

Given the wide variation among states regarding the power conferred on local governments, it is difficult to generalize about the
lawmaking authority of United States municipalities. In general, however, a municipality or other local government unit has only the authority the state constitution or state statutes confer on it.

In most states, municipalities are authorized to act by adopting ordinances and resolutions. Only ordinances have the force and effect of law. Resolutions are used primarily to make policy statements, or to direct administrative or ministerial functions. Few formalities are required for resolutions, and they are typically temporary in nature.

Local ordinances are analogous to state and federal statutes. They differ from resolutions in several respects, which vary from state to state. In general, an ordinance is required for municipal action that involves persons or property, and that imposes a penalty for a violation. State laws sometimes require municipalities to take certain actions by local ordinance. And an ordinance is necessary to repeal or amend any other ordinance.

An ordinance’s form and content are dictated by state law. In home rule states, local charters may add required formalities for enacting ordinances. Every ordinance is typically assigned a unique number reflecting the chronological order of its enactment. Some municipalities codify their ordinances, but others do not. In general, an ordinance cannot take effect immediately unless the legislative body declares an emergency. And every ordinance must comply with certain publication requirements, which also vary from state to state.

4. Appropriation Acts

Appropriation acts are essential to government operations because they are the legislative vehicles for financing public services. Tax legislation is enacted to raise revenue for the government on an ongoing basis, but separate legislative action is required to specifically appropriate funding to provide for public schools, police protection, welfare programs, and other essential public services.

Constitutional provisions dictate the format and content of appropriation acts, just as they do for substantive legislation. Often

they also provide special procedures for enacting appropriation bills into law. In some jurisdictions, for example, appropriation bills must be introduced in the House of Representatives. Some state constitutions require a super-majority vote of both chambers to enact appropriations. Legislative drafters must be aware of these unique requirements for appropriations because no new program, however meritorious, can succeed without suitable operational and financial support.

Most state constitutions restrict the number of subjects in any one bill to help prevent legislative “logrolling.” For that reason, appropriations typically do not appear in the same enactment that establishes a new government program. While the U.S. Constitution does not restrict bills to one subject, other House and Senate procedural rules have the practical effect of requiring separate bills to appropriate federal money. Standing congressional committees must “reauthorize” federal programs from time to time, and those authorization bills generally include multi-year limits on the funding amounts authorized for each federal program. Other committees are then responsible for considering separate bills each year to appropriate specific amounts of money to finance each agency’s programs.

At both the state and federal levels, appropriation bills have a limited life span and do not become part of the permanent law. For that reason, unlike public laws, they are not codified. They generally appropriate money for specified government programs for one fiscal year. Some state appropriation bills may appropriate funding for more than one year, especially when the state legislature meets only once every other year.

Legislatures have adopted a variety of sometimes innovative techniques for drafting appropriation bills to restrict the use of government funding for specific purposes, or to otherwise limit the discretion of government agencies. For example, “riders” attached to

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68. *E.g.*, MASS. CONST. pt. 2, ch. 1, § 3, art. VII.
69. *E.g.*, ARK. CONST. art. 5, § 31 (requiring a two-thirds majority vote in each chamber to appropriate money).
70. “Logrolling” occurs when several legislators combine unrelated proposals in a single bill. The bill gains sufficient political support as a whole based on the combined votes of the legislators who support each component proposal in the bill. Logrolling is perceived as an evil practice because it often allows a group of provisions to pass that would fail if each stood alone. *E.g.*, Kan. One-Call Sys., Inc. v. State, 274 P.3d 625, 631 (Kan. 2012).
appropriations bills sometimes bar agencies from spending appropriated funds to carry out programs that are otherwise authorized by substantive law. As a general rule, a legislature may impose conditions and restrictions on appropriations, but it cannot enact or amend substantive law in a general appropriation bill, even temporarily.\footnote{Susan Rose-Ackerman, Judicial Review and the Power of the Purse, 12 INT’L REV. L. & ECON. 191, 192 (1992) (arguing to restrict “widespread” congressional practice of amending substantive statutes through appropriations); see S.D. Educ. Ass’n/NEA ex rel. Roberts v. Barnett, 582 N.W.2d 386, 392 (S.D. 1998); see also State ex rel. Stephan v. Carlin, 630 P.2d 709, 710 (Kan. 1981).}

But if Congress renews funding restrictions or conditions in an appropriation bill year after year, those provisions can have the same practical effect on government services as permanent legislation.\footnote{See Gluck et al., supra note 71, at 1832–33 & n.242. Another appropriations rider, renewed every year since 1996, has restricted the use of federal funds for stem-cell research. Id.}

Everyone is familiar with the long-standing custom of Saturday mail delivery, which offers a perfect illustration of the technique. Since 1987, Congress has used appropriation bills to mandate that U.S. Post Offices deliver mail on Saturdays. Every year Congress has included a “proviso” (a kind of condition) in each U.S. Postal Service appropriation bill requiring that “6-day delivery and rural delivery of mail shall continue at not less than the 1983 level.”\footnote{U.S. GOVT ACCOUNTABILITY OFFICE, B–324481 2 (Mar. 21, 2013), http://www.gao.gov/assets/6660/653188.pdf.} In 2013, the Postal Service proposed to save funds by eliminating Saturday mail delivery. But Congress stymied the plan once again by adding a proviso to the 2013 Continuing Appropriations Resolution.\footnote{See id.}

The effect was to create a recurring annual exception to the discretionary authority granted by substantive law, which empowers the Postal Service to deliver mail “as it finds appropriate to its functions and in the public interest.”\footnote{39 U.S.C. § 403(a) (2012).}

Appropriations are an essential legislative tool for getting things done, preventing things from getting done, and controlling how things are done and how much they cost. An experienced legislative drafter once observed, “The real guts of much legislative effort are the control and careful manipulation of the state purse. No class of
bills is subject to greater need of careful analysis of constitutional limits.”

5. Agency Rules and Regulations

A rich source of legal rules in the United States consists of administrative regulations issued by numerous federal and state agencies. For regulations to be enforceable, the agency must have express statutory authorization to issue substantive regulations to implement a government program or regulatory framework. If issued according to proper procedure, agency rules and regulations have the force and effect of law.

The federal procedure for issuing agency rules and regulations is outlined in the federal Administrative Procedure Act, which also provides generally for judicial review of agency regulations. The federal courts are generally quite deferential to agencies when a litigant challenges regulations for exceeding statutory authority or for inconsistency with authorizing statutes. On the other hand, state courts vary with respect to the deference they give state agency regulations when challenged for exceeding statutory authority.

New or amended federal agency regulations are initially published in the Federal Register and later codified in the Code of Federal Regulations. Similar notice and publication requirements apply to state regulations. In content and form, a regulation is indistinguishable from a statute. Regulations are an essential component of primary legal authority, and every practicing lawyer must be familiar with them and how they relate to other sources of law.

81. Compare, e.g., Denning v. Kan. Pub. Emps. Ret. Sys., 180 P.3d 564, 568 (Kan. 2008) (“An agency’s interpretation of a statute is not conclusive; final construction of a statute always rests within the courts.”) with, e.g., United Ins. Co. of Am. v. Md. Ins. Admin., 144 A.3d 1230, 1249 (Md. 2016) (“We accord great deference to the factual findings and legal conclusions of an administrative agency that are ‘premised upon an interpretation of the statutes that the agency administers and the regulations promulgated for that purpose.’” (citation omitted)).
6. Executive Orders

Executive orders are issued by the President or a state governor. They have been used to implement a variety of executive policy decisions with relatively little judicial oversight. During times of legislative gridlock, they can be used by executive officials to implement controversial policy decisions without legislative endorsement. While executive orders have sometimes drawn political controversy, they have been issued throughout U.S. history.

In general, courts give executive orders the effect of law to the same extent as administrative rules and regulations. In some cases, specific statutes authorize the issuance of executive orders, and those orders have the force and effect of a statute. On the other hand, a court will not enforce an executive order that conflicts with the chief executive’s constitutional power or any statute. On rare occasions, courts have vacated presidential executive orders for exercising power inconsistent with the authority granted by the Constitution.

The Federal Register Act requires publication of all presidential executive orders, except those that have no general applicability and legal effect. Gubernatorial executive orders are sometimes published and sometimes not. Practices vary from state to state.

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82. See, e.g., Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632 & n.1 (5th Cir. 1967) (citing 40 U.S.C. § 486(a) (recodified at 40 U.S.C. § 421(a)), authorizing the President to adopt policies and directives for procuring government property and services); United States v. R.I. Dep’t of Corr., 81 F. Supp. 3d 182, 187 (D.R.I. 2015) (citing Reorganization Act, 5 U.S.C. § 906, which permits the President to reorganize government agencies, subject to congressional veto); id. at 188 (citing cases for the principle that an executive order authorized by a specific statute has the effect of a statute enacted by Congress).

83. See, e.g., Washington v. Trump, 847 F.3d 1151, 1162 (9th Cir. 2017) ("[N]either the Supreme Court nor our court has ever held that courts lack the authority to review executive action [including Executive Orders on matters of immigration and national security] for compliance with the Constitution.").

84. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588–89 (1952) (invalidating President Truman’s executive order authorizing Secretary of Commerce to assume control over national steel industry).


7. Court Rules

Court rules are another form of legislation. Courts routinely draft and adopt rules to govern their proceedings. Rules of evidence, criminal and civil procedure, and appellate practice are all forms of judicial legislation. In addition, each state supreme court has adopted a code of professional conduct that governs every lawyer licensed to practice in that state.

Every law student learns about court rules. They are drafted and amended in much the same way as statutes, administrative rules, and executive orders.

At the federal level, new court rules, and amendments to existing court rules, are annually proposed to and debated by the Judicial Conference of the United States. Among other duties, the Conference is required to study the general rules of practice and procedure used in the federal courts and recommend changes and additions it considers appropriate. In carrying out its duties, the Conference makes recommendations to the Supreme Court, which may accept, modify, or reject any recommendation. The Conference also has the duty to review other court rules authorized by the Rules Enabling Act, and it may amend any court rule found inconsistent with federal law.

In addition to the duties prescribed for the Judicial Conference, the Rules Enabling Act authorizes the Supreme Court and all other federal courts to prescribe rules for conducting business. Any rules proposed under this discretionary authority must be consistent with federal statutes and with Supreme Court rules governing practice and procedure in the federal district courts. Those procedural rules may not “abridge, enlarge or modify any substantive right.”

The Rules Enabling Act requires the Judicial Conference to prescribe and publish procedures governing its consideration of proposed court rules, and the process has many parallels to those used by the legislative and executive branches to propose and deliberate

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87. See Jack B. Weinstein, Reform of Federal Court Rulemaking Procedures, 76 COLUM. L. REV. 905, 916 (1976). “[T]he [courts’] rulemaking power is more legislative than advisory and falls within that twilight area created by practical necessity where activities of the separate branches merge.” Id.
89. Id.
90. Id.
94. Id. § 2072(b).
on statutes and administrative rules. The Conference has established various committees to handle its work.

Before May 1 of each year, the Supreme Court is required to submit to Congress any new or amended rules that have been proposed under the Rules Enabling Act. Unless Congress enacts a law to the contrary, the rules automatically take effect on the following December 1.

Each state has adopted its own procedures for proposing and amending court rules. In many states, rules of evidence and court practice are enacted by the state legislature and codified along with other state statutes. Other court rules, especially those governing practice in state trial courts, may be separately published by the state supreme court and amended from time to time by administrative order.

IV. DRAFTING: AN ESSENTIAL LAWYERING SKILL

“[D]rafting is the most important phase of the average lawyer’s work.”

—J.G. Thomas

A. Drafting and Professionalism

For a practicing lawyer, drafting is an essential professional skill. Reed Dickerson, internationally renowned for his leadership in professionalizing legal drafting, underscored its importance to the practicing bar:

[L]egal drafting, . . . is probably the single most important intellectual skill now being used by lawyers, even those who never allow themselves to be seen in the company of a statute. Far more professional hours are spent in the kind of legal planning or other preventive lawyering that culminates in developing definitive instruments such as contracts, wills, leases, mortgages, and corporate agreements than are spent in litigation.

The legal profession and its clients are increasingly demanding practice-ready law school graduates. And today’s law students are more and more aware of the importance of learning professional
skills as part of their academic legal education. Knowing how to draft legal rules clearly and effectively is central to a lawyer's role as a professional.

B. Client Goals

The primary obligation of a professional drafter—whether drafting a contract, statute, or other legal instrument—is to carry out the client’s goals.

How does a drafter ascertain and effectuate the client’s goals? The first step is to identify the client. The second step is to ask questions to clarify the client’s overall objectives. The third step is to research the legal background and context, including any existing legal relationships that need to be considered. The fourth step is brainstorming alternatives to accomplish the client’s goals, as well as anticipating possible roadblocks and how to overcome them. The fifth and final step is consulting with the client to fine-tune the strategy for accomplishing the client’s goals.

The drafting process is highly interactive. Only rarely can a drafter do the job effectively without several meetings with the client to clarify goals. Drafting is also recursive in nature: Competent legal drafting requires multiple drafts, edits, amendments, and revisions.

1. Identify the Client

One of a legal drafter’s greatest challenges is ascertaining exactly who the client is for a specific drafting project.

In drafting private documents, the client could be one of the parties to a contract, who are both motivated to work out the terms of a deal so they can engage in a productive business relationship for an indefinite time. Or the client may be a property owner who wants to structure a sales transaction to allow for repossession in the event of default by the buyer. Or the client may be an organization—for example, a homeowners’ association or non-profit corporation—with conflicting institutional goals. The objectives of the organization as a whole may not coincide with the goals of any individual member or officer of the organization. Is the drafter’s client the association, or its individual members? A lawyer who serves as general counsel for a corporation may think of her client as the corporation itself. But what about the shareholders who own fractional interests in the corporation?

A lawyer who drafts statutes may be tasked with carrying out the goals of an advocacy group—to lobby for legislation that advances
the organization’s objectives. Or the client may be an administrative agency whose mission is to carry out one or more government programs created by statute, subject to detailed regulations adopted by the agency. Or a drafter may be asked to prepare a bill for introduction by an individual legislator who has political motives that may or may not be disclosed to the drafter. Often government agencies or corporations retain outside counsel to represent the organization with specialized projects. Even associates in private law firms may find themselves representing institutional clients.

Before a lawyer can effectively draft any document to serve a client’s goals, the drafter must determine just who the client is. The person who explains the client’s goals to the drafter may or may not be in the best position to communicate the goals and objectives of the real client. That is particularly true when the client is an organization or institution.

2. Ask Questions to Clarify the Client’s Objectives

At the initial meeting, the client generally does not have a crystal-clear idea what she wants to accomplish. Maybe she just agreed to purchase a used car from a distant relative and has asked the drafter to draw up the bill of sale. She may not realize that she needs a contract to protect her against certain risks inherent in the transaction. Or a city commissioner may request a draft ordinance permitting a nonprofit religious organization to erect a Christmas display in the town square. The commissioner may not recognize the constitutional issues involved.

Most every client will rely on the drafter to ask the right questions to clarify the client’s objectives. Most clients will not be lawyers and will not understand the legal context that must be considered in drafting a document to carry out the client’s goals. Before embarking on the next step, a drafter should ask plenty of questions to fully understand the client’s true objectives, not just what the client says she wants the drafter to do.

3. Research the Legal Background and Subject-Matter Context

Every legal instrument or document has a legal context that a competent drafter must thoroughly understand before beginning the drafting process. And if the drafter knows little about the subject matter, one aspect of doing an effective job is to learn enough factual context to draft the document competently.
Parties to a private contract are free to tailor the agreement to carry out their mutual goals. But they cannot agree to terms contrary to the law of the jurisdiction that will govern any contract disputes. For example, a provision for binding arbitration to resolve any contract dispute may not be enforceable under state law if a party has a change of heart. Parties to a private agreement may have a prior business relationship that may need to be considered in drafting the agreement. Does one party have a history of reneging on prior deals—or failing to perform in a timely manner? The parties’ prior relationship may prompt suggestions by the drafter about how best to allocate the business risk between the parties.

A lawyer who drafts public rules has even more context to consider. Any statute, regulation, or court rule takes its place within a larger and more complex legal framework. For example, an agency regulation has no effect unless consistent with the scope of authority the legislature granted by statute to the agency. And the legislative grant of authority to issue agency regulations has no legal effect if it exceeds the legislature’s constitutional power to delegate lawmaking authority to the executive branch. A statute enacted without reference to other related statutes may lead to litigation if its substance is inconsistent with those laws. A state statute enacted to bar judicial enforcement of mandatory arbitration agreements in consumer contracts may be unenforceable if preempted by the Federal Arbitration Act. And if one section of a statute is successfully challenged on constitutional grounds, the drafter must determine whether the client wants to preserve the rest of the statute without the unconstitutional clause.

Of course, a legislator has the option of sponsoring legislation that may be challenged on constitutional or other legal grounds. However, the drafter has the responsibility to identify any potential legal issues raised by the bill draft, to discuss them with the requesting legislator, and to document those concerns for the record.99

Thorough research is essential before embarking on any drafting assignment. The drafter must fully understand the nature of the parties’ relationship and the business context before drafting a private agreement. For both contracts and public laws, the drafting process begins with researching the existing legal context. In the public arena, the drafter’s research may even reveal that a legal framework already exists relevant to the client’s objective, but for

some reason the current law is not working effectively. For example, perhaps a statute grants an agency discretionary authority to regulate an industry, but the legislature has not provided the agency with adequate financial resources or personnel to exercise that authority.

Whether drafting private or public law, the drafter must always take existing law into account, including relevant case law interpreting current statutes and regulations.

4. Brainstorm Alternatives

As the drafter researches the larger legal context and the parties' prior relationship, if any, the drafter should develop alternative strategies the client might not have considered, always keeping the client's overarching goals in mind.

In the example above, the drafter might suggest amending the statute that grants the agency discretionary authority to regulate the industry so that the statute will impose a duty to regulate. If the statutory amendment is successful, the agency will be in a better position to request adequate budget resources to carry out the regulatory program.

If asked to draft legislation for a new government program, the drafter might consider adding a "sunset provision" that would terminate the program after a set time unless the legislature amends the statute to extend the program or make it permanent. Or the drafter might consider establishing a pilot program in an appropriation bill, allowing the legislature to consider the merits of the program after one year before debating permanent substantive legislation.

In a private agreement, the drafter might suggest alternative wording or enforcement provisions that will protect the client if the other party attempts to avoid its contract obligations. If the agreement is designed to operate for the indefinite future, the drafter might suggest an initial term of short duration, subject to renewal if both parties agree, or renegotiation of the contract terms if they do not.

Any legal document is highly unlikely to be executed or enacted in a form identical to the drafter's final version. Contracts and statutes alike are always subject to negotiation and amendment before they become final. The drafter's efforts to brainstorm alternatives will provide the client with helpful information to facilitate the ne-
negotiation process that is inevitable in reaching an agreeable compromise with other parties and, for public laws, multiple constituencies.

5. Consult with the Client to Fine-Tune Strategy

Subject to any time constraints, the drafter should always discuss the results of the preliminary research and alternative strategies with the client before devoting too much time to drafting. If the drafter’s research into a legislative proposal has disclosed legal or constitutional barriers, the client may decide to drop the matter or change course entirely. In researching a private agreement, the drafter may discover that a different jurisdiction’s law would be more favorable to the client, or that the courts have interpreted a specific contract provision in a manner contrary to the client’s objectives.

If the drafter has kept the client’s overall goals in mind while doing the necessary background research, she should be well prepared to suggest other alternatives for the client to consider. The drafter’s job is not to make the decision for the client, but to competently research alternatives and the pros and cons of each. A drafter will serve the client well by laying out workable strategies as well as their probable consequences so that the client can make an informed decision about which alternative to pursue.

Only after following each of these five steps will a drafter be adequately prepared to competently draft the document to achieve the client’s goals.

C. Multiple Audiences

Identifying the audience for a drafted document might seem obvious. In the first instance, the audience for the draft is the client. But every legal document has multiple audiences, and that is especially true for statutes, ordinances, regulations, court rules, and other public documents. The audiences for every document are diverse and may include members of the public, consumers, in-house corporate counsel, judges, juries, and even law students.

For a private legal document, the parties to the transaction comprise the primary audience. Others who rely on the document, such as employees, accountants, beneficiaries, or subcontractors, make up the secondary audience. Still others constitute the “unexpected”
audience—those who might use the document in ways not anticipated by the drafter.\textsuperscript{100} For example, an attorney may use the document as precedent for drafting another contract. Or if a party to a lease agreement later dies, the personal representative may use the document to establish a value on a leasehold interest for purposes of dividing the estate among the heirs.

Public law has an even broader and more diverse set of audiences. For example, an enactment’s proponent might be an individual constituent who has a problem with a neighbor’s fence, or a special interest group that represents hundreds of stakeholders. By its very nature, a public law’s audience is as broad as its scope. Lawyers, judges, regulators, law enforcement personnel, and many others are prospective audiences for public law. Even those who never actually hear or read about the statute or regulation will be treated as if they have. Law enforcement officers, prosecutors, and courts presume that everyone is on constructive notice of the law.\textsuperscript{101} Thus, as a practical matter, an “unexpected” audience may not exist for public law. Instead, the audience is everyone.

Generally, the drafter can anticipate the nature of the primary and secondary audiences and how they may rely on the drafted document. Sometimes those interests conflict, but clear drafting meets all possible audiences’ needs, anticipated or not, for rules that are easily understood.

D. Unforeseen Consequences

For private law, the drafter’s primary goal is to translate the client’s objectives into legal language that is clear, concise, and comprehensive enough to resolve any issue that the drafter can reasonably anticipate during the life of the parties’ relationship. Some agreements have a short life, such as real estate sales contracts. While the relationship governed by a sales contract may have a short duration, the contract terms will continue to govern any disagreements about the bargain, especially if something goes wrong with the subject matter of the transaction. Other private rules govern ongoing business relationships, and for that reason the drafter may have a greater challenge anticipating potential disputes over the life of the agreement and drafting accordingly.

\textsuperscript{100} Karen Sneddon & David Hricik, Three General Principles of Good Drafting, 16 Ga. B.J. 62, 63 (Oct. 2011).

The parties to a contract are generally free to mutually agree to its terms. But a court will refuse to enforce contract provisions that are contrary to law or public policy. Classic examples include restrictive covenants in deeds that discriminate on the basis of race or religion, as well as non-compete clauses in employment agreements. Even one unenforceable clause in an otherwise enforceable contract poses a risk that the entire contract will be invalidated. Or a court might refuse to enforce the unlawful term and enforce the rest of an otherwise valid agreement, but only if the deficient term is not an essential part of the agreement.\footnote{Mark L. Movsesian, \textit{Severability in Statutes and Contracts}, 30 GA. L. REV. 41, 47–48 (1995).} If a client requests provisions in a private agreement that are unenforceable, the drafter has a responsibility to advise the client about the risks and suggest appropriate alternatives.

In contrast to private rules, most public laws have an indefinite life. It is nearly impossible for the client or the drafter to anticipate every possible issue that may come up during the life of a public law. But the drafter has the professional responsibility to include provisions in the bill that will address those issues, to the extent reasonably possible.

Without careful research, planning, and revision, unintended consequences may defeat the client’s objectives for even the most carefully drafted law. The greatest risk of an unintended consequence is that a court might invalidate the statute or rule as a whole. If the drafter has failed to identify and resolve possible constitutional challenges or federal preemption arguments, the entire statutory scheme may fail.\footnote{State laws and local ordinances may be preempted not only by federal statutes, but also by federal regulations. \textit{See Hillsborough Cnty. v. Automated Med. Labs., Inc.}, 471 U.S. 707, 713 (1985).} Or the court may sever an unconstitutional provision from the rest of an enactment and effectively amend the statute by enforcing the rest. Perfectly precise wording and immaculate organization will not save the legislation from substantive failure on constitutional or preemption grounds.

Similarly, the drafter must be familiar with the process for enacting the statute or issuing the rule, as explained earlier. Constitutional and statutory requirements for the form of a bill and the process for its enactment must be followed faithfully, or the legislation may never take effect in the first instance. When drafting proposed legislation, a full understanding of the jurisdiction’s procedural and format requirements is essential. Some requirements are constitutional, but others are found in statutes. At the local level,
the form and process for adopting ordinances may be governed by a charter ordinance or by state statutes.

Proposed legislation or other public rules are frequently revised (before introduction) and amended during the deliberation process (after introduction). Every revision or amendment raises the risk that other aspects of the proposed rule will be inconsistent with the amendment, which in turn may raise contextual ambiguities that complicate how the law is interpreted or implemented.

The most common kind of unintended consequence for any drafted rule or instrument is litigation to resolve a dispute about its meaning or intended effect. While litigation may not ultimately change the meaning or application of drafted language, it always causes uncertainty, confusion, delay, and expense to the contract’s parties and to everyone within the scope of a challenged public law. For the drafter, the most important measure of effectiveness is whether the parties governed by a drafted rule can resolve disputes by consulting the document’s language, without resorting to litigation.

E. Career Advantages of Drafting Skills

An often-cited 1993 survey of practicing lawyers in both urban and rural areas identified legal drafting as one of the top five most highly valued professional skills in the practice of law. Yet only sixteen percent of the respondents reported that they had learned legal drafting skills in law school. Nearly eighty percent believed that law schools paid insufficient attention to teaching legal drafting skills. The authors concluded,

Legal drafting is “legal.” It can be taught in law school. But it has not been successfully incorporated into academic scholarship. We cannot point to a recognized legal theory or science [of legal drafting] that academics can invest in to promote their careers. The result is that, unlike negotiation and probably ADR, drafting has made very little progress in legal academia

105. Id. at 479 tbl.4.
106. Id. at 496 tbl.15, 501. The disparity had not substantially changed since a similar survey was conducted in the 1970s.
despite the admitted gap between what is taught and what the graduates ought to know.\textsuperscript{107}

More recent surveys have underscored the value of legal drafting skills in the practice of law.\textsuperscript{108} In today’s job market, a graduating law student who knows how to effectively draft legal rules has a distinct advantage.

\textit{F. Transferability}

Many drafting skills are transferable across contexts. For example, a student who learns how to create duties in a contract is also learning the fundamentals of creating duties in a statute. The core skills are transferable, although the student must also learn skills uniquely relevant to specific kinds of legal rules and documents.

Although a few drafting concepts, such as representations and warranties, are unique to contracting, most parts of a contract are the equivalent of private legislation created by the parties to govern their transaction. In a contract, the parties make their own legally enforceable rules that, with few exceptions, trump the law’s generally applicable rules.

Contract drafting and interpretation are everyday work for a large proportion of practicing lawyers. Even litigators engage in contract drafting. Most litigation ends in negotiated settlement agreements, which are contracts. They are drafted that way, and courts interpret them that way.\textsuperscript{109} Litigators regularly interpret court rules and draft jury instructions, which are structured and interpreted in the same way as other legal rules. Other lawyers draft wills and trusts, both private instruments that incorporate rules to carry out the client’s wishes for distributing assets.

Drafting and interpretation skills are especially transferable among public law documents. Statutes are legal documents that are collections of interrelated rules. A statute begins as a bill, which a legislative drafter writes. Every legislature employs lawyers who draft bills and amendments for introduction and debate. Many other lawyers work in state or federal administrative agencies,

\textsuperscript{107} \textit{Id.} at 506. The authors identified “substantial gaps in what the recent graduates think could be taught in law school in the practical areas, including especially oral and written communication, and legal drafting.” \textit{Id.} at 508.


\textsuperscript{109} \textit{E.g.}, Rothstein v. Am. Int'l Grp., Inc., 837 F.3d 195, 205 (2d Cir. 2016) (explaining that settlement agreements, like consent decrees, are construed as contracts).
county or city law departments, law firms representing local government clients, or law firms that draft legislation for clients to propose for enactment. Lawyers are often asked to consider legislative and administrative solutions to client problems. And to learn legislative and regulatory drafting is to learn more deeply how to interpret legislation and regulations, which all lawyers must understand.

Private organizations govern themselves and others through collections of legal rules drafted similarly to public legislation and regulations. Examples are bylaws for corporations, nonprofit organizations, homeowner associations, and industry associations, as well as private regulatory standards, including the ABA accreditation standards that govern law schools.

The heart of drafting is creating rules inside a legal document. Creating a rule involves both substantive decisions about which rule or rules will best accomplish the client’s goals, and expressive choices about the most effective words to accomplish those results. Drafting also includes related provisions that are not rules per se, but are essential to a workable drafted document.

G. Why Lawyers Draft Badly

“Traditional legal language will be a long time dying.”

—Peter Butts

For centuries, lawyers have been notorious for bad writing. Lawyers have an unfortunate reputation for long-windedness, legalese, hyper-technical expression, and convoluted sentence structure. A noted legal language scholar once characterized legal writing as wordy, unclear, pompous, and just plain dull.

Over the last fifty years, law schools have devoted much greater attention to objective and persuasive writing, and many law schools have added drafting courses. But the legal profession has yet to adopt a systematic method for drafting legal rules that can be easily understood by others.

One reason for lawyers’ bad reputation for clear writing is that legal pleading predates literacy and the age of the written word.

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From its beginning, legal pleading was steeped in an oral tradition.\textsuperscript{112} As late as 1640, most English citizens were illiterate.\textsuperscript{113} Written pleadings were unknown in common law courts until the early 15th century, and they were not used routinely until the 16th century. Before then, pleadings written in Latin were more commonly used in chancery courts because of the influence of the educated clergy.

A second reason for the notoriety of English legal language is its evolution over the centuries as an amalgam of Old English, Latin, and French. Both the common law of England and the language of the law have “countless collateral relatives as well as a polyglot parentage.”\textsuperscript{114} Vestiges of the multilingual heritage of legal English remain with us today in redundancies such as “will and testament,” “devise and bequeath,” and “goods and chattels,” representing Old English, French, and Latin influences on legal language carried over from centuries ago.\textsuperscript{115}

In medieval times, court proceedings regularly used “law Latin” and “law French” in lieu of English, which obscured the meaning of legal proceedings to the lay public. In 1362, the Statute of Pleading ordered all oral pleas in the King’s courts to be “pleaded, shewed, defended, answered, debated, and judged in the English tongue,” but all court documents still had to be written in Latin.\textsuperscript{116} Ironically, the Statute of Pleading itself was written in French. Lawyers resisted the mandate, generally ignoring the statute by continuing to use French, Latin, or a combination in what were then primarily oral court proceedings.

Not until 1650 did Parliament enact a statute that required all court proceedings, including written pleadings, to be in English. This time the reformers meant business. Anyone who violated the Act was subject to a £20 fine, a very substantial amount even for barristers in the mid-17th century. The Act also required all court reports, statutes, and other law books to be translated into English.\textsuperscript{117}

Unfortunately, the bad writing habits lawyers adopted during that era are still all too common among lawyers today. They have been handed down from generation to generation through precedent and ancient form books. The way lawyers often write has a

\begin{itemize}
  \item \textsuperscript{112} \textit{Id.} at 41, 116, 138–39.
  \item \textsuperscript{113} DAVID CRESSY, LITERACY AND THE SOCIAL ORDER: READING AND WRITING IN TUDOR AND STUART ENGLAND 75–76 (1980).
  \item \textsuperscript{114} MELINKOFF, supra note 111, at 35.
  \item \textsuperscript{115} \textit{Id.} at 58.
  \item \textsuperscript{116} \textit{Id.} at 111–12 (quoting Statute of Pleading, 36 Edw. III, Stat. I, c. 15 (1362)).
  \item \textsuperscript{117} \textit{Id.} at 126–27 (quoting II Acts and Ordinances of the Interregnum 455 (1650)).
\end{itemize}
long and fascinating history, but the historical causes stopped mattering long ago. The world has changed. Clear, succinct legal writing is the modern norm, and clients expect lawyers to draft rules they can readily understand.

H. Legal Drafting and Legal Education

Only in the last decade have large numbers of students learned drafting skills in law school. Before that, drafting courses were offered infrequently, if at all. Nearly all lawyers have taken at least one legal writing course as part of their legal education. But among lawyers who graduated from law school more than a decade ago, very few ever took a drafting course.

Good drafters have advantages in the job market. The overriding purpose of a well-drafted contract, statute, or legal instrument is to prevent litigation. A new lawyer’s marketability is greatly enhanced by understanding how to draft clear, cogent, concise rules that advance clients’ objectives. And one of those objectives, whether explicit or implicit, is to avoid the uncertainty, delay, and expense of litigation. That is a drafter’s ultimate professional duty.

V. BUILDING A RULE

“It is too bad that no one has yet invented a calculus for drafting.”

—Reed Dickerson

Most rules are created and expressed in a single sentence. A rule sentence is built around the operative term that specifies the type of rule and what it does.

A. Building a Duty or Discretionary Authority

The following steps are the easiest way to draft a rule creating a duty or discretionary authority. In some situations, however, these will not produce the rule you need, and you will have to build it differently.

Step 1 — Make the sentence’s subject (the actor) the party or person who has the duty or discretionary authority.

The seller . . .

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118. Dickerson, supra note 23, at 31–33.
119. Dickerson, supra note 1, at 20.
Step 2 — Add the operative term. For a duty, the term is usually shall or shall not, although in some situations you will use a different operative term. For discretionary authority, the operative term is usually may.

\[\ldots \text{shall} \ldots \] [duty]

\[\ldots \text{may} \ldots \] [discretionary authority]

Step 3 — After the operative term, concisely describe the duty or discretionary authority.

\[\ldots \text{tender the goods} \ldots \]

Step 4 — If the duty or discretionary authority is subject to a condition or test, add a clause concisely describing the condition or test.

\[\ldots \text{if the buyer pays the purchase price.}\]

\[\ldots \text{if the buyer offers a price acceptable to the seller.}\]

If you include a test or condition precedent—one that activates the duty or discretionary authority—try to express the condition in a clause beginning with the word if, as shown above. If the test or condition is an exception—one that deactivates the duty or discretionary authority—express the exception in a clause beginning with unless or except.

Do not place a clause introduced with if, unless, or except in the middle of a rule sentence. If you do, it will interrupt the operative words that create the duty or discretionary authority. Think of a condition as qualifying or limiting a duty or discretionary authority. Decide whether to place the clause at the beginning or the end. In making that decision, consider the following:

A condition precedent—an if clause—logically precedes the words describing the nature of the duty or discretionary authority. It is a condition “precedent” because it must be satisfied first before the duty or discretionary authority is activated. If the condition is met, the rule operates. If not, the rule has no effect.

An exception—an unless or except clause—logically follows the words describing the nature of the duty or discretionary authority. The rule is already active and will stay active unless the exception is satisfied, which deactivates it.
A short and simple condition precedent can be placed at the beginning of the rule. A more complicated one should be at the end, as shown in the example above, because a reader will better understand the rule if it is written that way. But an exception, however simple, is hard to understand unless the reader already knows the general rule. Placing an exception at the beginning usually forces the reader to read the sentence twice—once to figure out the main part (the general rule) and again to understand the qualification (the exception). For that reason, place an exception at the end of the rule sentence, unless it is so short and simple that it seems odd to place it there.

Condition precedent:  
*If the buyer pays the purchase price,*  
the seller shall deliver the goods.

Exception:  
The seller shall deliver the goods,  
*unless the buyer fails to pay the purchase price.*

Why would a drafter decide to express a qualification as an exception rather than a condition precedent? In the examples above, they both seem to mean the same thing. But conditions and exceptions operate differently. A drafter may choose one or the other as a matter of strategy, depending on the client’s goals. As explained on page 27, the party who wants to *activate* a rule must satisfy a condition, while the party who wants to *deactivate* the rule must satisfy an exception. When the drafter decides whether to write a condition or an exception to qualify a rule, the drafter effectively allocates the burden of persuasion among the individuals or entities within the rule’s scope.

Most conditions can be expressed clearly in the same sentence that creates the duty or discretionary authority. But sometimes several conditions apply that are so complicated that they cannot be clearly expressed in the same sentence that creates the rule itself. In that case, the conditions might be expressed in a second sentence, or in very complex situations, several additional clauses or sentences.

**B. Building a Declaration**

Like duties and discretionary authority, declarations are usually created using a single sentence. But a declaration is not built the
same way as a duty or discretionary authority. Someone (the subject or actor) has either a duty to act or discretionary authority to act—some kind of action is required or authorized. That is not so with a declaration, which is simply a statement of what is.

**Step 1** — Make the statement using the appropriate operative term—a present-tense verb. For a definition, use *means*.

**Step 2** — If the declaration is subject to a condition or test, add a clause concisely describing the condition or test.

If the declaration’s condition or test is expressed in a clause beginning with *if, unless, or except*, the same considerations apply as when qualifying a duty or discretionary authority. But in a declaration, the drafter has other options for including a condition or test. Consider the following rule:

A person who takes another’s property wrongfully is guilty of common law larceny.

*declaration*  
A person . . . is guilty of common law larceny

*test*  
who takes another’s property wrongfully

The same declaration could be expressed in an *if* clause, but not as artfully:

A person is guilty of common law larceny *if he takes another’s property wrongfully*.

Using a male pronoun in the rule may suggest gender bias to some readers. On the other hand, substituting *she* when referring to the perpetrator also seems odd in this context. And it would be awkward to simply repeat “the person” in order to avoid the pronoun issue.

**C. Revising the Rule Sentence for Clarity**

Once you have the basic rule structure in place to accomplish your client’s goal, consider how to revise the rule for readability, clarity, and conciseness. You’ve built the rule structure; now it’s time to add the finishing details.
1. *Get the Reader to the Subject and Verb as Soon as Possible.*

An English-language sentence makes no sense until the reader finds the verb, preferably placed as close as possible to the subject. The verb brings everything together and reveals the sentence’s logic. And the verb doesn’t make much sense to the reader unless the subject is nearby.

When you try to figure out a long and complicated sentence written by someone else, you may have the feeling you are wading through glue. When that happens, you are looking for the verb—either consciously or subconsciously. Whether you realize it or not, that complex sentence begins to make sense when you’ve found both the verb *and* the subject. When a rule you have drafted seems too dense to be easily readable, figure out a way to move the subject and the verb closer to each other, and closer to the beginning of the rule.

2. *Use the Active Voice (Unless You Have a Very Good Reason to Use the Passive).*

In a sentence using active voice, the subject *acts*. In a sentence using passive voice, the focus shifts to the verb and the direct object of the action, rather than the subject who acts:

- active
  
  Smith *drove* the car.

- passive
  
  The car *was driven* by Smith.

In the passive example, the subject of the sentence is the car, and something was passively done (by Smith) to the car. In the active example, the subject is Smith, and he did something *active* to the direct object—he drove the car.

Here is what passive voice looks like in a statute or contract:

> Improvements to the licensed design made after the effective date of this section must be disclosed within 10 days of an improvement.120

Improvements made by whom? And who has the duty to disclose, and to whom? It’s all a mystery. The reader feels confused, just like you probably felt when you read the sentence. Passive-voice

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120. *ME. LEGISLATIVE COUNCIL, MAINE LEGISLATIVE DRAFTING MANUAL* 77 (2009).
sentences are frustrating to understand because the reader cannot instantly comprehend who (the subject) is doing what (the verb) to whom or what (the direct object). When the direct object becomes the focus of the action rather than the subject who acts, the reader gets lost.

To solve the reader’s frustration, rewrite the sentence in active voice, using shall to denote the duty—and an if clause to clearly express the condition precedent:

If [the actor] makes an improvement to the licensed design after the effective date of this section, [the actor] shall disclose the improvement within 10 days.

Now consider another example. These two sentences appear together in a statute:

Each physician shall file the required statement with the department. Copies of each statement shall be made available to any interested person. ¹²¹

In the first sentence, the physician has a duty and knows exactly what to do. But in the second sentence, who has the duty to make the statement available—the physician or the department? Both the physician and the department have copies after the physician complies with the duty to file. But neither one knows whether its copy must be produced. If you are an interested person, do you ask the physician for a copy—or do you ask the department? If the statute doesn’t make that clear, everyone will be confused. If you ask the physician, she will tell you to go ask the department for a copy. If you ask the department, its employees will send you to the physician. If both refuse, what do you do next?

Even when a passive-voice sentence does identify who has the duty, it seems lifeless compared to active voice: ¹²²

### Passive:
The required monitoring frequency may be reduced by the commissioner to a minimum of one sample analyzed for total trihalomethanes per quarter.

### Active:
The commissioner may reduce the required monitoring frequency to a minimum of one

¹²¹. FLA. SENATE, MANUAL FOR DRAFTING LEGISLATION 11 (2009).
¹²². Both examples are from MAINE LEGISLATIVE DRAFTING MANUAL, supra note 120, at 77 (emphasis added).
sample analyzed for total trihalomethanes per quarter.

Sometimes, you have no choice but to use the passive voice. For example, here the passive verb is the only way to get the reader to the verb quickly:

The application may be made by the prosecuting attorney of the county in which the offense was committed, the parole board, or the chief executive officer of the facility or sheriff of the county from which the person escaped.123

3. **Place Modifiers Close to the Words They Modify.**

Misplaced modifiers are a very common source of ambiguity in drafted rules. To prevent confusion, place a modifying word—especially an adverb—as close as possible to the term it modifies.

For example, the following sentences all mean different things just by moving the modifier *only* to a different location:

The police may arrest **only** the person named in the warrant.  
*They aren’t authorized to arrest anyone else—just that person.*

The police may **only** arrest the person named in the warrant.  
*They aren’t authorized to deport him, or do anything else but arrest.*

**Only** the police may arrest the person named in the warrant.  
*Civilians aren’t authorized to arrest—the police alone have that power.*

A drafter’s work requires precise use of words to avoid confusion that leads to litigation. If you do not know how to identify a modifier in a rule sentence, learn how from a good grammar book.124 Professional drafters must understand the rules of the English language because all readers rely on them to comprehend legal rules.

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Courts generally assume that a modifier applies to whatever words follow the modifier, unless nothing follows it. If nothing follows—because the modifier appears after the last item in a list—courts assume that the modifier applies only to the last item on the list—the one that immediately precedes the modifier, and nothing else on the list. This is best known as the “last antecedent rule.”

If you want a modifier to apply to everything in a list, you have two alternatives. First, you could place the modifier at the list’s beginning and use wording or punctuation to make it clear to the reader that the modifier applies to the whole list. Your second alternative is to place the modifier at the end of the list with some punctuation or wording that plainly separates the modifier from the list’s last item. You want a court to understand clearly that the modifier applies to everything in the list, not just the last item. Edit for absolute clarity because ambiguity associated with modifier placement is a significant reason for litigation.

D. Formatting Rule Sentences

Many rules express complicated concepts. Many can be structured as lists. For example, every rule with elements or factors includes a list.

If a duty requires doing several things, the duty itself is a list. If someone has discretionary authority to do several things, the available alternatives may be expressed using a list of options stated in the alternative. Sometimes a rule includes a list within another list.

Legal rules are probably the most intricately organized form of verbal expression. (Classical music might be more intricately organized, but it is not expressed verbally.) The drafter has several techniques to organize collections of rules to make them more understandable to the reader.

1. Enumeration and Tabulation

*Enumerating* means identifying or marking items in a list using numbers or letters to distinguish each listed item from the others. In contrast, *tabulation* means arranging a list on the page to make the internal organization obvious.

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125. See, e.g., Lockhart v. United States, 136 S. Ct. 958, 962 (2016) (“[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.”) (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).
**no enumeration or tabulation**

Common law burglary is breaking and entering the dwelling of another in the nighttime with intent to commit a felony therein.

**enumerated but not tabulated**

Common law burglary is (1) breaking and (2) entering (3) the dwelling (4) of another (5) in the nighttime (6) with intent to commit a felony therein.

**enumerated and tabulated**

Common law burglary is (1) breaking and (2) entering (3) the dwelling (4) of another (5) in the nighttime (6) with intent to commit a felony therein.

When enumerating, lawyers enclose the number or letter in parentheses. It’s a legal convention. Don’t just add a single parenthesis, period, or other punctuation mark before or after the number or letter.

<table>
<thead>
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**Parallel Wording in Lists.** The wording of every item in an enumerated or tabulated list must be grammatically consistent with the wording of every other item in the list. If some items are complete sentences and others are not, redraft the list so that each one is a complete sentence, or none of them are. If some items include both a noun and a verb and others include only a noun, redraft the list so that all items include both a noun and a verb, or all of them are nouns without verbs.

**Consistency between Words That Introduce the List and Each Listed Item.** The wording that introduces the list, sometimes known as the “stem,” must make sense grammatically when
read with each item in the list independent of the others. For example, if words introducing the list end with a verb, every item in the list that follows must grammatically qualify as an object of that introductory verb. To test your rule draft for this all-too-common problem, read the stem words together with each enumerated item on the list, without reading anything else. This is the best way to spot problems with syntax and parallelism in a list.

**right**

The following personal property is not subject to tax in this state: (1) farm vehicles, (2) livestock, (3) growing crops, (4) boats and boating equipment used to harvest fish for commercial sale, (5) aircraft used to spray pesticides on field crops; and (6) greenhouses used to grow flowers and vegetables for commercial sale.

**wrong**

Personal property in this state is not subject to tax if used for any of the following purposes: (1) farm vehicles, (2) livestock, (3) unharvested crops, (4) harvesting fish for commercial sale, (5) aircraft that sprays pesticides on field crops; and (6) greenhouses only if used to grow flowers and vegetables to sell.

The first example shown above correctly introduces the enumerated list by first referring to the general category of tax-exempt personal property. Accordingly, every numbered item on the list begins with a noun describing a particular category of personal property, and some also include descriptive modifying phrases. Each of the six listed items can stand alone with the introductory words, independent of the other enumerated items. For example,

The following personal property is not subject to tax in this state: 

. . . (4) boats and boating equipment used to harvest fish for commercial sale . . .

The following personal property is not subject to tax in this state: 

. . . (6) greenhouses used to grow flowers and vegetables for commercial sale . . .

The second example introduces the enumerated list “of the following purposes”’ These words suggest that the list refers to various worthy purposes that warrant a tax exemption for personal property when used for those purposes. But the enumerated list in the
second example includes a number of nouns and phrases that do not qualify as “purposes,” as revealed by the following illustrations:

Personal property . . . is not subject to tax if used for any of the following purposes: . . . (3) unharvested crops . . .

Personal property . . . is not subject to tax if used for any of the following purposes: (6) greenhouses only if used to grow flowers.

Neither “unharvested crops” nor “greenhouses,” qualify as purposes for using personal property. Rather, crops and greenhouses are specific kinds of personal property. For the enumeration to make sense, every item on the list must be written as an example of a purpose, not a thing.

Here is one way to redraft the second example so that each listed item is grammatically consistent with the introductory word purposes:

Personal property in this state is not subject to tax if used for any of the following purposes: (1) farm vehicles farming, (2) raising livestock, (3) unharvested harvesting crops, (4) harvesting fish for commercial sale, (5) aircraft that sprays spraying pesticides on field crops; and (6) greenhouses only if used to growing flowers and vegetables to sell.

By editing each of the enumerated items to include a gerund, the structural problem is resolved. Each of the six enumerated items follows logically when read in conjunction with the introductory words referring to purposes, and the rule’s parallel structure is much more clear and understandable after one reading.

E. Drafting Techniques That Should Become Part of Your DNA

Drafting is the art of creating rules wisely and expressing them perfectly. A rule can go wrong in two ways: A rule can be unwise in substance or imperfect in expression. Unwise rules accomplish little and create problems. Even if a rule is wise in substance, it will fail if expressed imperfectly.

The following drafting tips should become second nature to you. They should dominate your thinking throughout the drafting process.
1. **Think Like a Lawyer — Don’t Just Imitate Noises You Assume Lawyers Make.**

Imitating is creating only an appearance or an illusion of lawyering. Good legal drafting requires using your brain to construct rules that get results. Clients pay lawyers to think, not to imitate.

2. **Say Precisely What You Mean — and Say It So Clearly That Everyone Will Know Exactly What You Mean.**

A drafter’s first duty is to communicate precisely and clearly. If words can reasonably be interpreted two different ways, the words are ambiguous and the drafter has failed.

Some lawyers might say, “I don’t need to worry about the fine points. Courts will be able to figure out what I mean.” That is bad lawyering because a client will not want to pay the high cost of going to court to figure out what a rule means. If you have ever been a party to a lawsuit, you know that lawyers’ fees and other court costs can be bank-breaking, and the disruption, uncertainty, and anxiety can be overwhelming for your client. You have a duty to your client to draft so clearly and so precisely that nobody can disagree about the meaning.

Every disputed issue about meaning costs money. If reasonable people can disagree about what your drafted words mean, they will litigate the issue if they believe it is in their interests to do so. Don’t make the reader guess. If you do, your client will be unhappy with you, and for good reason. Litigation should never be necessary to resolve a drafted rule’s meaning.

Your drafted rules must be so clear that everyone will know what you mean. Most people will do what is required of them—but only if they know what it is. The reader who wants to do the right thing should be able to learn from your drafting exactly what to do. And the reader who wants to do something unless it is prohibited should be able to understand clearly whether it is prohibited or not. Do not frustrate good people by failing to tell them what they need to know.

3. **Predict — and Draft Accordingly.**

Casebooks are about the past. Drafting is about the future. What events will happen in the future? What will people do? How will market conditions and technology change? You are drafting now to govern events in the future. If you do not foresee the future, your drafting will govern badly.
If you are drafting a statute, how will people react ten years from now to your words? How will courts interpret them? How will people change their behavior?

If you are drafting a contract, what could go wrong? If your client is buying an asset, what can you do now to increase the odds that the asset will work properly next year? If your client is concerned that the other party might want to get out of the deal next month, how can you draft now to make that outcome less likely? If your client might want out of the deal, how can you draft now for that possibility in case your client needs an escape hatch?

4. *Never Include a Provision without Knowing Why.*

Never put something in a statute or contract just because you saw it in a different statute or contract, and it looked good there. First, the provision you include might have caused a problem in the statute or contract where you saw it, and you might not know that. Second, the provision might have worked wonderfully in the statute or contract where you saw it, but because your situation is different, adding it without thinking might cause trouble.

For every provision you include, ask yourself exactly what you want it to accomplish. And decide how the provision or sentence accomplishes your client’s goal. Know exactly what you are including and why. If you can’t answer these questions, leave it out.

5. *Never Use a Word or Phrase Unless You Know Exactly What It Means.*

Assume that you are drafting a contract. You represent the buyer, and the seller has a duty to deliver the goods by June 19. When drafting the seller’s duty, you throw in the words “best efforts.” You have heard and read those words many times. They sound good when you hear them and look good when you write them. What could be better than “best efforts”? How can you go wrong by including them?

Including these words in your client’s contract creates the risk of disaster. They do not require the seller to deliver by June 19. They require only that the seller *try very hard* to do it. If the goods have not been delivered to your client by June 19 and the seller points to your “best efforts” clause as an excuse for failing to deliver on time, your client will be understandably unhappy with you.

The lesson is to be absolutely sure you understand every word you include in your drafted document and why you put it there. Don’t include window dressing just because it looks lawyer-like. It’s
unprofessional to include words without carefully considering what they mean and what specific purpose they accomplish for your client’s best interests.


Assume your client wants to buy a factory that was built in 1981. The original owner sold the factory to the current owner in 1988. You and your client are concerned about the possibility that toxic materials have contaminated the premises. You are not worried about steel barrels with warning labels on them. Your client has examined the place thoroughly, and none can be found. Instead, you are worried about chemicals that might have been used in the past and that might have seeped into the soil, where they would be invisible. Under federal law, the property owner must pay the cost of removing toxic materials, which can be incredibly expensive. In some situations, the expense can bankrupt the owner.

The contract of sale has been drafted, but the parties have not yet signed it. The contract contains this sentence:

The Seller represents and warrants that it has not used any materials in the Factory that the law requires a property owner to abate at the owner’s expense.

Find the loophole. It does not matter which party’s lawyer drafted the sentence. The seller’s lawyer might have inserted the loophole deliberately. Or if you drafted the sentence, you might have included the loophole by accident. The only thing that matters is that the problem sentence is in the contract, which the parties have not yet signed.

You still have an opportunity to advise your client not to sign until you have renegotiated the contract and redrafted the sentence to remove the loophole. But first, you must find it. How would you redraft the sentence to protect your client from bearing the expense of removing toxic materials once the sale closes?

Identifying loopholes is an essential drafting skill. It applies to public rules as well as private contracts. The loophole in the hypothetical above is the phrase that limits the seller’s representation and warranty to materials the seller has used “that the law requires a property owner to abate at the owner’s expense.” Just what does the seller mean by this clause? Imagine the federal statute referenced above that imposes a duty on the property owner to abate toxic materials. If you represent the buyer, you will try to interpret
the statute broadly to impose that statutory duty on the seller, to make sure your client is not responsible for the mitigation expenses after the sale closes, including mitigation costs for toxic materials that the original owner used. But if you represent the seller, you will look for a way to interpret the statute narrowly to impose the statutory duty on the buyer and to protect your client from paying those costs.

When drafting any legal rule, anticipate how someone might try to interpret your wording to find a loophole. Then redraft the rule to close the loophole.

7. Draft Consistently.

Inconsistency creates confusion and risks ambiguity. Confusion annoys and frustrates readers. Ambiguity can turn into a disaster if people end up going to court to resolve the ambiguity. This drafting principle has two corollaries:

- **Use exactly the same words to refer to the same thing.** Use identical words when referring to the same object, action, or idea in the same collection of rules. Never vary the wording. If you do, a court can assume that your different words mean different things—even if that’s not what you intended.

- **Never use the same word or phrase to mean two or more different things.** The flip side of the rule applies equally: Don’t use the same word or phrase in a collection of rules to mean one thing in one part and something else in another part. A court could interpret the same wording to mean that both parts of the document refer to the same thing—even if you intended to refer to different things.

8. Use “Shall” for One Purpose Only — to Create a Duty.

Never use *shall* to do anything else except create a duty. *Shall* means “has a duty to.” In drafted documents, it has no other acceptable meaning.

The most common error in drafting rules is using *shall* inappropriately. You have already observed that mistake many times when reading badly drafted statutes and contracts, but you probably did not understand why “shall” was used incorrectly.
Do not be fooled by what you see in existing documents, especially older ones. Most legislative drafting manuals now forbid the use of *shall* except to create a duty.\textsuperscript{126}

VI. CONCLUSION

“[T]he principles that apply to the drafting of legislation are, for the most part, the principles that apply to the drafting of any definitive legal instrument.”

—Reed Dickerson\textsuperscript{127}

Among the earliest of Professor Dickerson’s many textbooks offering excellent resources for teaching legal drafting was *The Fundamentals of Legal Drafting*.\textsuperscript{128} In a 1966 book review, the author accurately observed that “there is hardly a legal problem that does not involve the drafting or interpretation of some legal document, be it a contract, will, statute, regulation, conveyance, lease, trust, indenture, or related form of written expression.”\textsuperscript{129}

We agree, and that statement is all the more true half a century later. Today’s law students will be engaged in law practice involving a much more sophisticated web of legal rules, addressing everything from global business transactions and trade negotiations to cross-national statutes and international treaties. The modern practice of law demands much more of lawyers than preparing traditional office memos and court briefs.

We hope these first few chapters of our forthcoming textbook will encourage the legal academy to offer a greater variety of legal drafting courses that teach students the essential lawyering skill of drafting legal rules of all kinds—both public and private. With great admiration and respect for the pioneering work of Professor Dickerson spanning more than five decades, we think he might be pleased with our modest contribution.

\textsuperscript{126} E.g., *TEX. LEGISLATIVE COUNCIL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL* § 7.30 (2017), http://www.tlc.state.tx.us/docs/legref/draftingmanual.pdf.

\textsuperscript{127} REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* xiii (1965).

\textsuperscript{128} Id.

\textsuperscript{129} James B. Minor, Book Review, *The Fundamentals of Legal Drafting by Reed Dickerson*, 44 TEX. L. REV. 588, 590 (1966). James B. Minor was a practicing lawyer who specialized in legislative drafting. He worked for many years for Congress and various agencies of the federal government and later worked in private practice. *James Minor Dies; Lawyer for Agencies*, WASH. POST, June 12, 1992 at D5. He chaired the ABA Special Committee on Legal Drafting from 1974 to 1978. *Id.; see INTERNATIONAL SEMINAR, supra* note 24, at 1 (listing James B. Minor as Committee Chair in 1975).