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Teaching, Training, and Technology in Legislative Drafting

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🇬🇧 ABSTRACT ENGLISCH

Legislative drafters play an important role in upholding the rule of law by crafting legislative instruments that promote procedural regularity—a cornerstone of governmental legitimacy. We must, therefore, be concerned about best practices in **preparing** legislative drafters.

This article draws upon more than 30 years of experience at The Public Law Center (Tulane University, New Orleans) in teaching law students and training legislative drafters. It identifies the components of a common curriculum and discusses differences in providers, methods, and materials for students and drafters. The article examines controversies in drafting between the academy and the practice; compares drafting texts that are widely used among students and drafters; and considers how drafting manuals serve both practical and pedagogical purposes in legislative drafting.

A survey of technology acknowledges the role of Zoom during the pandemic, recommends several useful websites, and speculates about the future of artificial intelligence in legislative drafting. A penultimate section explains why statutory construction is "off my list" of helpful subjects in legislative drafting, and the conclusion reaffirms drafting as a vital support in rule-of-law systems.

Contents

1   Introduction

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This article began life as a poster presentation delivered at the 5th European Symposium on the Comprehensibility of Legal Provisions, conducted remotely during March 11, 2021. The article preserves a rewarding feature of the original Prezi poster format—the ability to click through embedded links and review multiple resources that afford deeper insights into teaching, training, and technology in legislative drafting.

The Public Law Center (TPLC, Tulane University, New Orleans, USA: https://law.tulane.edu/the-public-law-center) launched its Legislative and Administrative Advocacy (Leg/Ad) course in 1988, teaching Tulane and Loyola law students how to research and draft legislation and agency regulations in the service of "traditionally underrepresented" clients. Insights gleaned from teaching Leg/Ad inform this article's observations on instructing law students (MARCELLO 2013: 46-49). This article uses "teaching" exclusively to describe the instruction of law students.

Beginning in 1992, TPLC launched a series of tailored training events for legislative drafters from Nigeria, Papua New Guinea, and Pakistan. These trainings led us in 1995 to launch the International Legislative Drafting Institute (ILDI), a two-week program for legislative drafters from across the globe (https://law.tulane.edu/international-legislative-drafting-institute). More than 800 participants from 100+ jurisdictions have graduated from the Institute, and hundreds more legislative personnel have attended training events conducted in their home countries. In this article, "training" refers exclusively to the instruction of "real world" legislative drafters.

A third "T"—technology—has played an important role in both teaching and training that will continue to grow and to shape both practice and pedagogy in legislative drafting.

2   Teaching and Training: Providers, Methods, and Materials

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Considerable overlap exists in what we teach law students in Leg/Ad and how we train legislative drafters at the Institute; nonetheless, TPLC and ILDI curricula exhibit many distinct differences. TPLC and ILDI have made a convincing case that the learning experience is richer and more rewarding when informed by this dual focus on teaching and training students and drafters. Teaching and training methodologies should inform each other—and in our experience, they do.

We begin this comparison of teaching and training by asking who controls the educational experience for students and drafters.

2.1   Who are the Providers?

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American law schools, accredited by the American Bar Association (ABA), provide three years of postgraduate education to the recipients of an undergraduate degree from a four-year college or university (ABA 2021). In the US, legal academia is a sole-source provider in producing lawyers who become legislative drafters.

"Real world" legislative drafters receive training from multiple sources, including in-house sessions conducted by the legislative bodies themselves, instruction from nongovernmental organizations (such as TPLC's Institute), and seminars offered through trade associations like the National Conference of State Legislatures (NCSL). Legislative drafters thus draw upon a much more diverse array of training providers in learning their craft.

2.2   What are the Methods by which we instruct students and drafters?

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In the 1870s, LANGDELL pioneered the use of case analysis and a Socratic question-and-answer dialogue in teaching Harvard law students (GERSEN 2017: 2321-2324). Langdellian "case analysis" has endured ever since as the defining characteristic of a law school education.

About 100 years later during the 1970s, law schools introduced clinical education, allowing third-year students to practice law under the supervision of a faculty instructor (OGILVY 2009: 9-18).

During the 1990s, law firms began demanding graduates with practice-ready skills. An ABA-sponsored task force called for "Narrowing the Gap" between legal education and the profession (ABA 1992). Law schools responded by expanding experiential learning opportunities, which are now widely available in law schools through increased enrollment for clinics, off-campus externships, and even a "Third Year Anywhere" option by which students complete their final year of law school by taking online courses and working under supervision in a law office (WASHBURN 2021). The third year away might include placement in a legislative drafting office.

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Most legislative offices prefer to train their "real world" drafters in-house, relying on two principal methods—(i) courses designed and conducted by drafters for drafters and (ii) on-the-job training (OJT) through supervision and mentoring (MARCELLO 2016: 91-92). Trade associations (e.g., NCSL) also provide "real world" training through workshops for legislative staff, including drafters. Some educational institutions offer intermediate-length training for drafters, such as our two-week International Legislative Drafting Institute. Other universities offer an advanced degree after much longer years of academic study.

2.3   What are the Content and Materials used in teaching and training?

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Let's start with the Common Curriculum—subject matter that students and drafters alike need to study, though perhaps with differing depths of mastery. Both students and drafters must have a good understanding of these four areas: (i) Enactment of Legislation; (ii) Promulgation of Rules (or "Subordinate Legislation"); (iii) Ethical Considerations; and (iv) Public Law. (See chart: https://bmjv5europeansymposium.de/en/pages/posters.) Drafters do need a more in-depth understanding than law students of some specific duties (e.g., **responsibilities in staffing committees** and the **ability to interpret rules of order** under Legislative Enactment; or under the Promulgation of Rules, **managing textual revisions in response to public comments** and **navigating legislative oversight procedures**).

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Another common concern at the heart of legislative drafting is—drafting! Good drafting texts abound; it's simply not feasible to recommend a gold standard in selecting among them. I'll focus my comments instead on just two texts. We use WYDICK (2005) to teach Legislative and Administrative Advocacy students. THORNTON (1996), used by legislative drafting offices worldwide, is described as the "leading professional title" in its area.

For more than 30 years WYDICK (2005) has been our "go to" text. We tell students to apply "plain language drafting" techniques in their use of gender-neutral language, words of authority, short sentences, and familiar words. Because we get to grade their written work, we find them remarkably compliant with this guidance!

But our students are "tabula rasa" as compared with actual legislative drafters, and in many drafting offices, firmly embedded practices may be difficult to change. Many legislative drafting offices would not want to hear our recommendation to use "must" instead of "shall." Others would express vigorously opposing views about whether to use (or not use) a serial comma (MARCELLO 2021). Some offices might challenge the very concept of plain language drafting as "dumbing down" the drafter's craft or diminishing precision.

Their views are out of sync with the views of WYDICK (in 2008) and THORNTON (in 2009): https://law.tulane.edu/international-legislative-drafting-institute/honorees. These two drafting experts made several joint presentations in the Institute classroom: https://law.tulane.edu/sites/law.tulane.edu/files/u1625/EU%20Wydick%20and%20Thornton%20Photo_0.jpg.   They dispensed similar wisdom on the use of gender-neutral language, words of authority, short sentences, familiar words, active voice, base verbs, and the serial comma. Those controversial topics in legislative drafting were mostly matters of consensus for WYDICK and THORNTON, but they remain deeply divisive issues among many legislative drafters.

This article will not resolve long-standing conflicts about "best practices" in teaching and training legislative drafting. Educators and drafters have far too many materials to draw upon; instructional content (whether pedagogical or practical) will continue to be contested ground. But one virtue can be safely advanced, and that's consistency. Whichever policies

are adopted (in the classroom or in the drafting office) should be transparently announced and consistently observed.

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One of the best mechanisms for accomplishing this desirable outcome is a drafting manual. Drafting manuals have long played a useful role in both teaching students and training drafters. When first teaching Leg/Ad in 1988, we kept the Louisiana House and Senate Drafting Manuals on reserve for students. In the earliest years of the Institute, we wheeled a library cart into the classroom with drafting manuals from US jurisdictions and abroad. Today's drafting manuals are much more readily accessible on the web (NCSL 2021).

The Institute curriculum almost always includes a presentation about the importance of drafting manuals. They serve at least four valuable purposes: (i) standardize drafting practices among multiple ministries, agencies, executives, and legal officers who might on occasion play a meaningful role in the drafting process; (ii) supply new staff with a valuable training resource; (iii) empower drafters and enhance their professionalism in the eyes of members, who can be told when questioning an unfamiliar approach to drafting, "We do it this way because that's how the drafting manual says to do it"; and (iv) facilitate drafting by including a "formulary" of templates that can easily be adapted into different types of legislative instruments. WILSON included a Drafting Manual Index with her article (2021: 149-156).

3   Technology and Legislative Drafting

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The worldwide pandemic accelerated academia's embrace of the technology and web resources that enable remote learning. NGUYỄN (2021) proclaimed, "I Actually Like Teaching on Zoom!" Video recordings and transcripts afford students after-the-fact access to classes that can be called up for asynchronous learning as needed.

Specially produced videos on legislative drafting are another useful asynchronous learning resource for lay people, law students, and others, as shown here:

https://www.youtube.com/watch?v=wnZOefjHtUA

https://www.youtube.com/watch?v=gAeSSJNQNNI

https://www.youtube.com/watch?v=Vk-I6-0_c_U

https://www.youtube.com/watch?v=c0pKBWADJG0

Students and drafters who embrace plain language drafting techniques will find a wealth of useful resources at the Plain Language Action and Information Network (PLAIN) website: www.plainlanguage.gov. Federal plain language guidelines offer insights into under-standing your audience, organizing the text, choosing words carefully and using them concisely, making documents easy to read and testing texts for readability.

Another valuable technological resource for both students and drafters can be found at the Social Science Research Network (SSRN; https://www.ssrn.com/index.cfm/en/), where professors post their articles online after first publishing them in a hard-copy journal.

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At the furthest frontier of technological questions, "Where will Artificial Intelligence (AI) take us in legislative drafting—and when?" My answers: "Sooner or later, all the way there—but not yet and not for a while."

The leading edge of drafting technology will likely be defined by progress in contract drafting. Law firms provide contract drafting services to affluent clients around the world, so AI applications in contract drafting will be in high demand and highly rewarded. Legislative drafting, by comparison, is more of a "niche" market populated by fewer potential users with less access to wealth. "The Dawn of Fully Automated Contract Drafting" will come haltingly as AI applies the pattern recognition skills of contract lawyers to the stages of "drafting, reviewing, managing, and analyzing contracts" (BETTS 2016: 216-233). Legislative drafting may follow in contract drafting's AI footsteps, but both are headed toward a new era.

HARARI (2017: 313-323) speculated about the relationship between humans and machines: "robots and computers are catching up and may soon outperform humans in most tasks," doing professional work associated with lawyers, doctors, and pharmacists: "In its first year of operation the robotic pharmacist provided 2 million prescriptions without making a single mistake. On average, flesh-and-blood pharmacists err in 1.7 per cent of prescriptions." Change is happening rapidly: "Until a short time ago facial recognition technology was a favorite example of something that even babies accomplish easily but which escaped even the most powerful computers."

Why are humans so susceptible to displacement by machines? WILCZEK explained a few basic truths in *Fundamentals: Ten Keys to Reality*: "human signal processing is limited by the downtime (latency) between pulses of electrical activity that neurons use to communicate with one another," while technology "is not limited by the speed of human thought" (2021: 53-54). Our neurons' processing rate of about 40 firings per second runs way behind the ten billion operations per second of a high-end laptop: "the limiting speed of thought for artificial intelligence is roughly a billion times faster than the speed of thought for natural intelligence."

Here's a thought experiment: Could Google scan and gobble up statutes that create boards or commissions in all 50 states in the US, then generate a checklist of questions—e.g., how many members, length of terms, staggered or concurrent, how appointed, procedures for nomination and confirmation, removal from office, filling of vacancies, and many more components of a law to create a board or commission? Could a drafter or policy maker answer those questions and then generate a presentable draft of legislation? If the answer is "yes," how long will it be before AI can take policy makers' responses, insert them into a template, and produce a legislative instrument? How soon thereafter might we authorize an algorithm to

make preliminary policy choices based on a 50-state assessment of "best practices" in creating boards and commissions?

I think these days are coming, but optimistic as I am about AI and legislative drafting, I'm not sure AI would wake up at 4:00 in the morning (as I did) and think, "Hey, let's add the WILCZEK observations about computer processing being a billion times faster than humans!"

4   Statutory Construction: "Off My List!"

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In South Louisiana, "lagniappe" (pronounced "lan'-yap") is an idiomatic term for "something extra" or "a baker's dozen." In the Prezi poster presentation, my observations about statutory construction were "lagniappe." They focused not on teaching, training, and technology in the education of legislative drafters but rather on "what not to teach." I expressed my lack of enthusiasm for statutory construction in a 2016 article about teaching and training in legislative drafting (MARCELLO 2016: 97-98) for several reasons:

(1) The principles of statutory construction were created by judges and canonized by law professors, most of whom have never worked in the legislative enactment process. One scholar's analysis (RUDESILL 2010:702) concluded that among judges,

> only 14 percent have ever worked for a legislature—any legislature—and seen from the inside how the statutes they interpret are made. Remarkably, this low rate of firsthand legislative experience among jurists is still nearly three times what it is among Top 20 law professors. On the most prestigious law faculties, only 5 percent of professors have worked for a legislative institution—local, state, federal, or international.

(2) Furthermore, drafters do not apply the principles of statutory construction when they draft legislation: "We learned that staffers certainly are aware of canons, and, on occasion, canons did surface in the drafting process. By and large, however, staffers did not view canons as a central factor in drafting legislation" (NOURSE/SCHACTER 2016: 600).

(3) In fact, the principles of statutory construction are decidedly **unhelpful** when drafting legislation. We all know the theory—that if drafters understood how judges will interpret their texts, they would be better able to avoid mistakes that empower judges to undermine their intended meaning. But the drafter's mental process simply does not work this way (MARCELLO 1989: 573-575). Drafters look forward in a synthesizing, creative frame of mind, anticipating problems and crafting general principles of law to provide a fair resolution when specific disputes arise. This forward-looking drafter's mindset is analogous to a "civil code" mentality.

By contrast, evaluating a text in accordance with principles of statutory construction requires a retrospective, deconstructing, analytical mindset more akin to a "common law" mentality. Checklists might prove useful in applying the principles to a text that has already been drafted: *Ejusdem generis*? *Expressio unius*? *In pari materia*? *Noscitur sociis*? Check, check, check, and check! But drafters attempting to apply these canons will find them more of an impediment than an aid in the compositional phase of a legislative drafting project.

(4) Drafters might discount the value of canons because so many are subject to rebuttal by equal and opposite canons that enable judges to pick and choose among these principles to support a post-hoc justification of their predetermined conclusions (LLEWELLYN 1950: 401ff.).

(5) These judge-made principles of statutory construction empower courts at the expense of the legislative branch of government. A better interpretive model by far is the "rules-based approach" advanced by NOURSE (2012). In lieu of legislative "intent," courts should focus on legislative "decisions" that result in enactment of a statute—**decisions** driven by **rules** that the legislative body devises and imposes upon itself.

Before resorting to canons made by judges, courts should look to rules made by legislatures: "Canons generally should be a **last resort, not a first one**. Why? Because, as a general rule, canons are judicial assumptions about meaning—default rules. Default rules are second-best guesses or policies that apply when all first-best evidence fails" (KRISHNAKUMAR 2018: 169). The best evidence of how legislative decisions were made is found in rules governing the legislative enactment process.

NOURSE's approach restores an appropriate balance of power between co-equal branches of government: Courts should first evaluate lawmaking based on legislative rules governing the enactment process and only later, if necessary, subject statutes to judge-made interpretive principles. If judges are in fact "faithful agents" of the legislative will, they should apply the legislature's own rules before leaping to apply judicial canons of statutory construction.

5   Conclusion

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Teaching students, training drafters, using technology—all are important, interconnected, and integral in maintaining the rule of law at a time when democracies around the world confront existential challenges from a rising global enthusiasm for authoritarian governance.

This article explores commonalities and controversies in legislative drafting. Those controversies do not undermine a shared commitment to "rule of law" among members of the legislative drafting community. Drafters may differ dramatically in their views about the serial comma or plain language drafting; statutory construction or rules-based interpretation of statutes; gender-neutral terminology or the proper words of authority. But these debates are over means, not ends. Despite their differences, most drafters embrace the rule of law as a cardinal virtue.

Capable drafting contributes to procedural regularity in governance, and procedural regularity undergirds the legitimacy of governmental systems. Legislative drafters—and the people who teach, train, and support them technologically—play an important role in preserving the rule of law. We may need one further expansion in our pedagogical program —instruction about the systemic significance of legislative drafting as a pillar of governmental legitimacy and rule of law. Teachers and trainers, students and drafters, technology gurus—all could use a reminder of their larger purpose in upholding governmental systems.

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