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Teaching Legal Drafting Effectively and Efficiently— By Dispensing with the Myths

Jamison Wilcox

Introduction

Should legal drafting be widely taught in law schools? The skills of legal drafting (creation and revision of documents) are basic ones that every lawyer needs. “[W]hereas only a minority of lawyers now participate in litigation, other kinds of lawyers are called on to prepare definitive legal instruments almost daily. No legal discipline is more pervasive.”¹ Yet few lawyers possess these skills at a proficient level.

The subject is little taught. Years ago, Reed Dickerson lamented that “[i]n the United States, there is little training in draftsmanship; of that, little is being provided by the law schools.”² The conventional wisdom among law professors (and probably practitioners) is that a Legal Drafting course is necessarily a labor-intensive (and low-status) writing skills course—but perhaps one, ironically, involving certain technical (“legislative drafting”) skills possessed by few law faculty members. Drafting skills are sometimes thought to be best learned on the job, though there is an irony here, too: law professors are, with justification, unimpressed with their personal experiences of such on-the-job training in drafting.

The vast majority of law students graduate without any drafting education at all. But the few law students who do take a legal drafting course, often perplexed to discover that such a useful, rewarding educational experience is available in an ordinary law school classroom, sometimes ask why a basic Legal Drafting course isn’t required. The question is a fair one. Perhaps no other skill vital to all lawyers is so much ignored in legal education.

If a skill is undervalued, so will its teaching be. This essay first touches on the low professional level at which most legal drafting is performed. It is

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1. Reed Dickerson, *The Fundamentals of Legal Drafting* 1 (Boston, 1986). Dickerson was the leading pioneer in legal drafting.
2. *Id.*

not thought-through choices but rather professional prejudices and associated habits that have marginalized professional attention to the skill of drafting. Contrary to the assumptions reflecting those prejudices, however, a law school can effectively ensure that its students gain sound professional skills in this area by instituting a pedagogically effective and cost-effective course focused on legal drafting alone.

By responding to the prejudices about legal language that muddy much legal thinking, such a course can have an educational value that few others match. Taught as a simulation course, Legal Drafting can both encourage and force law students to deal with—that is, not just write but *read*—language, their only tool, far more carefully than they typically do. Changing their habits of reading and writing benefits them throughout their study and work.

Finally, by having students actively engage in work that lawyers do in chunks of a size appropriate to coursework (i.e., revising small parts of documents), such a course can both engage students' interest and place them in a lawyer-like role. Those experiences assist in their intellectual and social transition from the role of often-passive student to lawyer.

In short, there is every educational and professional reason to give every law student a sound introduction to the essential skill of creating legal documents. And there is no practical or economic excuse not to. This essay removes the last excuse by explaining one efficient, practical way that just such a course can be taught.

The Legal Profession's Ignorant Habit of Using "Legalese" Discourages a Sensible Professional Approach to Legal Drafting

There is an irony in what legal education teaches about legal professionals' use of language: it teaches perverse lessons—inadvertently, but reliably. Learning to decipher involuted sentences, paragraphs, and drafted documents (rules, statutes, and regulations) figures prominently in the law school experience. So does learning new, almost talismanic words and phrases. As they drink in this magical language of the initiated, students inevitably come to expect legal concepts to be inextricably bound up with peculiar language.

Most legal texts they read for class—mainly opinions, but also court rules, statutes, and other official texts—do use, at least in large part, peculiar vocabulary and syntax, and students are told to learn this new vocabulary. The unintended lesson is that semantic and syntactical peculiarity are necessarily inherent in the language of the law, to reflect the uniqueness and complexity of legal thought.

This is the teaching of David Mellinkoff. During twenty years of practice before becoming a law professor, he worked at a labor of love, a book devoted in part to examining and demolishing the myth that legal language is either precise or inherently different from normal language.³ In reality, as

3. David Mellinkoff, *The Language of the Law* (Boston, 1963).

Mellinkoff points out, language that expresses appropriate legal concepts is as often flexible as precise. It is seldom obscure. Only rarely is it actually necessary for legal language to sound peculiar to the non-professional.⁴ And the best-drafted legal instruments avoid the prolixity, oddity, and needless complexity that infect most documents.

Mellinkoff showed that lawyers' use of needlessly peculiar language results from accidents of history, changes in language, and other factors having nothing to do with the need to express complex legal concepts. In his academic life, Mellinkoff devoted a book to teaching legal drafting, *Legal Writing: Sense and Nonsense*, first helping students see this fact and then demonstrating how lawyers can improve their drafting. He dissects and reassembles sickly specimens before his readers' eyes, leaving new, healthy versions in their place.

But Mellinkoff's work remains little appreciated. The myths, like other convenient untruths, continue to dominate lawyers' thinking. Lawyers are accustomed to using language instrumentally, but not to challenging professional assumptions about the role of language in their thinking—assumptions developed from the start of law school, as a professional identity just began to form. Over time, lawyers come to pride themselves on their “professional” knowledge of time-honored stock phrases and habits of expression. By word and deed (figuratively and literally), they pass down to others their odd language habits and the myths that justify them.

Is this bleak picture one dimensional? It is no warped cartoon. The professional habit of settling for awkward wording is so ingrained that even the most important professional products of some of the nation's most highly respected attorneys commonly range from mediocre to poor in the quality of their drafting. Martineau makes the point (with the same prominent example I have often cited to students in my procedural courses):

One of the most dramatic examples of the lack of awareness by judges, lawyers, and law professors of good legislative and rule drafting is the U.S. Judicial Conference's advisory committees on rules of practice and procedure. These committees are composed of some of the country's finest judges and most prominent lawyers and law professors. They do an excellent job of reviewing and revising the rules that govern practice and procedure in the federal courts. The rules they propose, however, consistently ignore not only the generally accepted rules of legislative and rule drafting as developed over the past half century by Dickerson and others, but also principles of good legal writing championed by Strunk and White, Wydick, and Flesch.⁵

4. David Mellinkoff, *Legal Writing: Sense and Nonsense* (St. Paul, Minn., 1982); Mellinkoff, *The Language of the Law*, *supra* note 3. Although the *Legal Writing* coursebook is out of print, I have been able to obtain permission to make copies, for a fee.
5. Robert J. Martineau, *Drafting Legislation and Rules in Plain English* 5-6 (St. Paul, Minn., 1991). After providing a sample, Martineau continues:
There is no excuse for such poor drafting, but there is an explanation: the persons who serve as reporters for the Advisory Committees and do their drafting are

In short, otherwise highly knowledgeable and competent attorneys either lack skill in drafting or are unembarrassed not to employ the skill they have—even in the most prominent examples of their work. If the mangling of sentences and concepts were limited to statutes, one might blame interest-based politics or the messy accidents incident to the making of sausage and laws. But no such explanation can explain poor drafting by lawyers and judges on blue-ribbon committees.

Similarly (and just as remarkably), jury instructions, including judicially approved pattern ones, commonly leave their intended audience baffled with their displays of dysfunctional legal language. In recent years, there has been some progress. But it is slow.

The luckier law students have legal skills instructors (in first-year courses) who scratch away the legalese from some of the little written student work that faculty members see and comment on—practice office memoranda and court briefs, most commonly. But students are used to seeing verbiage and vagueness excised from their writing; they do not recognize them as special problems for the legal profession. And even if students learn to write reasonably straightforward memoranda, they continue for their years of law school to focus most of their studies on opinions, court rules, and other official texts composed by lawyers. The official language presents itself to students as—quite obviously—the considered professional work of leaders of the profession. Doctrinal subtlety, not bad writing, is usually thought to explain the wording of these texts. Professors help students learn to decode and analyze them, as they must. Seldom is there comment on the barbarity of the language. The instructors, after all, are used to it. The students come to think of it as normal.

To law students, then, to whom it is second nature to read legal documents puffed up with legalese, the thought that such language is simply poor is an odd notion—one that must be *learned*, for it is contrary to their second nature. Sometimes students are told, “Make a noise like a lawyer,” and commonly they take that admonition as encouragement to spout legal-sounding words, not to *think* like a lawyer or to express themselves in legally *appropriate* ways. Like most lawyers, they believe that legal language has to be odd. As Mellinkoff points out, “This is no tale of conspiracy of the profession against the people. Most lawyers...*believe* that in their language everything is precise, especially if it’s peculiar....”⁶

Such warped lessons are reinforced in part-time and summer employment, where students are typically first exposed to documents other than the standard law school fare. These documents are even more stuffed with awkward and

experts in the substantive areas covered by the rules, not in drafting legislation or rules. Furthermore, the members of the committees are concerned with the substance of the rules and not with drafting style. The result is poorly drafted rules that will create problems for litigants, their attorneys, and the judges who will interpret and apply the rules.

The situation is even worse in connection with legislative and administrative rules. *Id.* at 6.

6. Mellinkoff, *Legal Writing*, *supra* note 4, at 2 (emphasis added).

outmoded—but legal-sounding—language than the specimens the students have already grown used to.

So students learn all the wrong lessons about the language of documents, never balanced by any education in how to create them properly.

It is a Myth—Though a Widespread One—That Teaching Legal Drafting Must be Inefficient and Unrewarding

Introduction

Bad professional habits are an excuse for the problem that most law students are not taught about legal drafting. But looking at this professional problem from the standpoint of legal education, there is no legitimate reason for that neglect—no more reason than there would be for law schools' producing graduates who had never learned the basics of case analysis or advocacy.

It is false to assume, as law professors commonly do, that a course in which students practice a skill is necessarily labor-intensive. Teaching legal drafting can be accomplished with no more effort than is required for the responsible teaching of any law course. When students practice their skills by working with very short passages, class discussion can be focused and efficient. And if each homework exercise takes the form of a document revision to be done by every member of the class, interactive discussion of students' drafts can take the place of the instructor's laborious marking of every student paper.

Legal drafting principles have been reduced to writing in several very good books, complete with useful examples and exercises. Upperclass students can effectively shake off their bad language habits and learn new ones. They can be exposed to examples of documents that use sound drafting principles. They can learn from didactic readings about the special considerations in crafting legal documents, including organization, style, and conventions. And they can effectively practice the skill of drafting by working, time and again, on exercises that require them to improve typical short passages.

This "*re*-drafting" method has distinct advantages over having each student work on drafting a new document. To ask a student to create a substantial original draft is to ask far too much. Moreover, it is no more appropriate for a professor to make comments on long, error-filled original student drafts than it would be for a professor to make daily corrections of every student's detailed case briefs and notes in other courses. The instructor's task need not be more laborious than in other law courses. But the educational rewards of a good drafting course are large.

Drafting skills, then, can be learned in traditional classroom courses, with no unusual demands on teachers. But most legal educators seem unaware that there exist such effective and efficient legal drafting courses. And not enough drafting courses are taught in law schools to change this widely shared mis-impression.

Some Personal Experiences

My experiences are in many ways typical. As a law student, I took a two-credit legal writing seminar. There were few or no readings; the work was practice and correction in writing or drafting short passages. The course was useful, and the work was a welcome relief from the repetitious study of cases in other courses. But the course worked on the presumption that the student would pick up skills by practice and correction, not by any systematic look at the methods of people experienced in those tasks. Not surprisingly, the course was taught by a graduate student working on an advanced law degree (whose likes would not be available at many schools, and who lacked the status of a professor). Few of my fellow students, naturally, took such a course, for a reason that reflects the point made by Mellinkoff, Martineau, and other reformers: hardly anyone suggested that drafting skills might be valued in the job market.

Years later, as a law teacher, I asked the curriculum committee at my law school to authorize a basic course on legal drafting. Approving such a course was not very controversial; leading law schools did have drafting courses (though many law schools had none). The committee approved the course based on the understanding that it would be a seminar—an idea I had not suggested. The assumption was that any writing course must be a limited-enrollment one; does not the teaching of writing need endless hands-on attention?

Law faculties and administrators commonly assume that teaching legal drafting requires uneconomical small classes, that the effort is highly labor-intensive to both teacher and student, and that the course is therefore unrewarding to the instructor, perhaps to the student, and almost certainly to the school. Law professors also tend to think of drafting as either legislative drafting, a specialty thought to be known to few, or as inextricably tied to a subject matter (e.g., “contract drafting”), and therefore appropriately taught only as an advanced course by a specialist (with or without good drafting experience) in the subject area.

A few others dismiss the subject as a set of technical skills somehow absorbed on the job (or, even more misleadingly, as a nuts-and-bolts one involving filling in the blanks on forms). But, being a bright lot, most law teachers are more impressed by the fact that their own on-the-job training (if any) in drafting was, in most cases, not good, regardless of the capabilities of the practitioners with whom they worked. They do not think of the subject as very teachable, and they do not want to attempt a thankless task. Nor would they encourage students to take a hopeless course, when learning a little more about the current state of the substantive law could help students on the job.

For all these reasons, there is little discussion about whether such a course should—or can—be taught to many students. The widespread assumption is that it cannot. The odd teacher who offers to teach a drafting course may be

humored, just as another may be permitted to teach Law and the Dog. But, given the inevitability of resource shortages (one economic premise never in doubt), the question whether drafting should be taught *widely*—let alone to every student—is rarely considered.

Myths about Teaching Legal Drafting Abound

Although I have made all these observations myself from personal experience, including a dozen semesters of teaching legal drafting, they are not original. Before I first taught the subject myself, I found that closely similar conclusions about the common misunderstandings had been expressed by Dickerson in the Foreword to his coursebook.⁷ (I also soon found that, despite its good quality, the book was so little used that it was already out of print—as is Mellinkoff's coursebook. The total number of legal drafting courses remains small.) Dickerson's coursebook (like the present essay) was expressly designed to allow *beginning* teachers of legal drafting to teach in this "shamefully neglected area."⁸ Reviewing his foreword today, I am struck by how little has changed since Dickerson wrote it.

Dickerson's terse list of common but faulty assumptions about the teaching of this subject bears repeating. It can stand as a summary of a learned, involved critic's observations of the low level of understanding of education in this area. Dickerson identifies eight "important tenets of conventional legal wisdom"⁹ that must be rejected, as he says, if the "ambitious...project" of making possible the teaching of legal drafting to large classes is to succeed.

Every statement on his list expresses a little-examined and still-common assumption. Here are those faulty but widespread tenets, as Dickerson spells them out:

- (1) Legal drafting is a substantive specialty, like patent law or admiralty.
- (2) Legal drafting is a practical "skill" that is concerned mainly with language.
- (3) Legal drafting, like all writing, is an art and cannot be taught.
- (4) Whatever is teachable about legal drafting can be satisfactorily handled in a course that includes other kinds of legal writing.

7. Reed Dickerson, *Materials on Legal Drafting* (St. Paul, Minn., 1981).

8. *Id.* at xx. "Every lawyer needs basic training in how to draft at least the mine run of acceptable legal instruments, and every lawyer who is responsible for constructing pervasive or otherwise critical instruments such as statutes and regulations needs training that is correspondingly more sophisticated.... Unfortunately, the law schools have been ill-equipped to meet either need." *Id.* at xix.

9. *Id.*

- (5) The student can learn only by personally supervised doing.
- (6) A legal drafting course requires that the instructor personally read, criticize and grade each student's work.
- (7) Because legal drafting is meaningless apart from substance, the student draftsman should do the necessary conventional legal and factual research before beginning to write.
- (8) It is appropriate to combine legal drafting (and other kinds of legal writing) with instruction in legal bibliography and research.¹⁰

Two related assumptions may be added to the list:

- (9) Legal drafting cannot be learned in a meaningful way without study of the legislative process and approaches to interpretation.
- (10) Because legal drafting is meaningless apart from substance, the student drafter should study how to draft documents of one of more particular kinds (such as contracts or wills) before moving on (if ever) to a more comprehensive study of legal drafting.

I have already noted the falsity of some of these myths. Rather than further analyze each statement on the list, let us follow a more pragmatic path and look at once at how, like others who have followed this little-trod path, I have found an introductory course in legal drafting to be highly teachable, greatly appreciated by students, and a significant contribution to students' education as lawyers.

How to Teach Legal Drafting Efficiently and Effectively

Reject the Conventional Wisdom: Do Not Teach the Course Like a Seminar or a Typical Writing Course

First of all, the beginning teacher of legal drafting should benefit from the wisdom of Dickerson, Mellinkoff, and other pioneers. Experienced teachers of drafting will work out their own methods, but I suggest that even they consider using the method I recommend here. Beginning teachers of the course would be foolish to try instead to reinvent this wheel: the dangers of lapsing into the conventional mistakes are too great.

I can be most concrete by describing my own course. Each week I assign both some didactic reading (about thirty pages, typically one chapter in a book), always including examples and problems, as well as a short drafting exercise to be handed in. *Every student does the same reading and works on the same exercise.*

10. *Id.*

There is no research component, no grammar review (except as is incidental to discussing completed homework assignments), and no special attention to learning new legal doctrines (although questions of how the substantive rules may affect drafting choices are of course discussed as they arise). The course recognizes that students have learned some things about law and mis-learned other things but have had no exposure to most of the skills to be learned in the course. There is great marginal utility, therefore, in their concentrating on what is new to them.

Avoiding research and study of substantive law is deliberate and important. The craft of legal drafting needs focused attention, especially in view of the above-noted myths that pervade the minds not only of professors but of students. Drafting skills are not learned well if the course includes the distraction of a research project or if it shares a substantive focus (such as attention to tax considerations). Such other hands-on learning projects are of course worthwhile. But students cannot learn much about the basic skills of drafting if drafting is (as usual) an afterthought.

Having all students focus on the same material outside of class is important, too. The shared effort lets the class focus on the same issues during the class hour. It allows students to study together, if they wish, though I ask each to do the weekly written (drafting) homework exercise independently. And having each student work on the same exercise at one time avoids the problem, common in research-based seminars, of having different students engaged in divergent projects. Such seminars have great merits—but they are not effective vehicles to teach legal drafting.

Don't Reinvent the Wheel: Use Good Teaching Materials Already Available

Although books on the skills of legal drafting fill few shelves in even a large law library, there are several such books available for beginners, including a very few designed for the classroom. *There is every reason to use one or two of these tested coursebooks.* These books, most of them readily available for the law school market, effectively communicate legal drafting wisdom, give examples of the principles, offer illustrative documents, and contain plenty of exercises. Some exercises serve for in-class discussion; others are the basis for the short papers to be handed in.

I focus here on the two books that I have used the most: Mellinkoff's ground-breaking coursebook and a sound, comprehensive book by Barbara Child.¹¹ I use both because I find them complementary, but either could suffice for a course.

Mellinkoff's book is especially valuable at the start of the course, for he mixes equal measures of scholarship and scorn to swipe at the smudges

11. Mellinkoff, *Legal Writing*, *supra* note 4, Barbara Child, *Drafting Legal Documents: Principles and Practices* (2d ed., St. Paul, Minn., 1992). Although Mellinkoff does not distinguish between writing and drafting for his purposes, see *id.* at xi, most of his discussion is of drafting as distinguished from expository or persuasive writing.

with which the legal profession's language myths and habits continue to mar lawyers' work. His book responds directly to the writing problems that socialization into the profession have exacerbated. With a number of examples, both short and extended, Mellinkoff also introduces his reader, step by step, to the process of analyzing documents before revising them. These exercises, together with their own experiences, teach students the need to *read* more carefully—commonly to their great surprise.

Since Mellinkoff's book discusses legal writing generally (though drafting is its focus), it helps students transition from expository and persuasive legal writing, with which they are familiar, to drafting. Once students see the reasons for scorning legalese (or "lawsick," in Mellinkoff's idiosyncratic parlance), they are in a frame of mind that permits them to express ideas *that they actually understand themselves* and not just blindly fill in the blanks on legal forms. Acquiring this new, less diffident attitude towards received legal language is vital in encouraging students to venture beyond the timid alteration of an occasional word in a drafted text—as almost all do at the start of the course. Students (and lawyers) tend to see legal forms as safe to use and dangerous to alter, even when a form is plainly inappropriate for a task. Mellinkoff prods them to use their own minds rather than copy blocks of text that they only half understand. And reading aloud a few of the funnier passages about misuse of legal forms from his *Language of the Law* can help the instructor emphasize the dangers inherent in using forms blindly.

I use Child's book second. Child cites, quotes, and agrees with Mellinkoff, but she does not deliver the message of scorn for legalese as strongly as he does. Her book, however, preferably supplemented by instruction based on Mellinkoff's ideas (whether or not any readings from Mellinkoff are used), is fine material for a course. Child's book is considerably longer than Mellinkoff's. Though it lacks Mellinkoff's step-by-step examples of how to revise drafted language, Child provides more examples of typical documents, and it gives a thorough overview of their basic requirements.¹² Both these features are enlightening and comforting to students.

After a brief, useful introduction and an initial focus on complaints, answers, and motions (three litigation documents that she carefully distinguishes in purpose from planning documents), Child's book discusses the special considerations concerning some different planning documents: contracts, statutes, and wills.¹³

Child includes a five chapter "Process Manual" of drafting practices and principles, suitable for study a chapter at a time and available to ambitious

12. Its thoroughness reflects the fact that the author drew upon the experience of a number of teachers of legal drafting. The author describes her book as "reflect[ing] the evolution...of the Legal Drafting Program at the University of Florida College of Law." Child, *Drafting Legal Documents*, *supra* note 11, at v.
13. Its separate chapters on documents of different types are divided between two sections, on "Drafting in Litigation Practice..." ("Part One") and "Drafting in the Practice of Preventive Law..." ("Part Two"). *Id.*

students for reference while studying other chapters. Like Mellinkoff, Child stresses the *process* of creating documents; students see that they have not sprung full-grown from the heads of ancient, god-like form-book editors. (Rather, they have often come from litigation case files of failed documents, often chosen by underpaid freelance editors with a motive to be verbose: payment by the number of words used.)

The titles of the Process Manual chapters are a good list of the basic considerations covered in any drafting course. They are: "Using Clients and Documents as Resources"¹⁴; "Choosing Flexible Language: Vagueness and Generality vs. Precision and Particularity"; "Achieving Clarity and Avoiding Ambiguity"; "Defining Terms and Naming Concepts"; and "Making Stylistic Choices."¹⁵

A highly useful feature is Child's inclusion of full documents, complete with copious annotations. Law professors can easily forget how unfamiliar "lawyer" documents are to students, who in the course of law school see only rare examples. (Is it not at least a little remarkable that students can take contract courses without ever reading a contract?) Child's examples introduce students to typical (if better-than-average) documents, carefully explained and drained of mystery.¹⁶

Both these books, then, are good coursebooks, each with its particular strengths. Each is clear and accessible to an instructor who has never taught legal drafting. Mellinkoff's alone can suffice for a two- or three-credit course; Child's, for a three- or four-credit course.¹⁷

14. An in-class exercise on interviewing a client fits in nicely with this chapter.

15. *Id.* at Chapters 7-11.

16. Child includes judicial opinions, those doctrinal discussions which we law professors flatter ourselves by calling cases. As illustrations of the perils of entrusting document construction to the mercy of strangers, the cases are not badly chosen. But I have found them less useful than other parts of the book (or outside readings). Well-drafted documents rarely become the subject of judicial construction. More important, courts' discussions of badly drafted documents are poor vehicles for showing how to draft well.

My strong suspicion is that judicial opinions are included to mollify traditionalists who find it hard to conceive of a lawbook that lacks them. Experienced teachers of legal drafting should know how little courts' discussions of language offer to teach students how to perform the task right. At best, the cases let students gawk again (as in other courses) at the commonly simplistic invocation of maxims and half-understood grammatical rules to decide disputes. Statutory interpretation, itself a too-neglected subject, should be taught for its own sake. Neither that subject nor the much-taught subject of how to analyze cases is necessary or even useful as a part of a drafting course.

17. Mellinkoff considers his materials suitable for a two- or three-credit fifteen-week course. Mellinkoff, *Legal Writing*, *supra* note 4, at 9. I consider it most suitable, if used alone, for a two-credit course. More time offers students more opportunity not just to practice drafting, but to study its principles, and other books offer more discussion of the principles than is found in Mellinkoff's fine but slim book.

There are a handful of other books comparable to Child's, mostly from West Group.¹⁸ Like Child's, these books have exercises available, either in the book or separately. Creating exercises that work well can take time. The new teacher, fortunately, can rely on ones tested in class by others over the years. A successful exercise can be re-used for a future class if grades are not based on the exercises but rather on students' examination performance on exercises similar to those done during the semester. I use this method and recommend it. It emphasizes learning, not pleasing the instructor.

*Give Students Practice By Having Them Redraft Short Passages. Never
Have Students Draft from Scratch or Attempt to Redraft Long Passages
or Do Work Based on Research*

Key to teaching a beginning drafting course that is *either* effective *or* efficient—let alone both—is to give frequent homework assignments requiring short drafts. I give one a week. *Every assignment is identical for every member of the class.* Almost every such assignment is to revise (“re-draft”) a short passage (never to draft anything from scratch). The recommended coursebooks contain such exercises, as well as exercises of other kinds. It is the assignments to do revisions that generally work best. Part of the assignment is to write brief annotations explaining the student's drafting choices; doing so encourages reflection.

Surprisingly enough, to anyone unfamiliar with teaching an initial drafting course, the passage to be revised is typically only two to four sentences. The passage usually takes more than a little time to read and understand, however, and may need to be surrounded by a paragraph or so of language from the document to give context. *To revise a badly worded passage of that length is a sufficient drafting assignment.* (A longer assignment has another disadvantage: it lets students tell themselves that they would have done better if they had taken more time. It is hard to give themselves that excuse if the text to be revised, though a bit challenging, is only a couple of sentences long.)

Each homework assignment should require students to focus on a relatively poor text: one that is ambiguous, too wordy, internally inconsistent, or poorly organized—or sometimes (but not too often) too complex to understand, despite its brevity, without great patience and maybe a decoding ring. Short explanations are sometimes needed along with the exercises. These should be in writing, but I often find some oral mention, too, of a few points to be helpful. A short explanation of the *intended* meaning of the poor sample passage and its context is often needed to make the assignment clear: lacking the professor's

18. Thomas R. Haggard's book, now with George W. Kuney, *Legal Drafting: Process, Techniques, and Exercises* (2d ed., St. Paul, Minn., 2007), has a text identical to their fine *Nutshell* book, with problems added. Thomas R. Haggard and George W. Kuney, *Legal Drafting in a Nutshell* (3rd ed., St. Paul, Minn., 2007). Also very good, but limited to contracts, is Haggard, *Contract Law From a Drafting Perspective: An Introduction To Contract Drafting For Law Students* (St. Paul, Minn., 2003). A good book available from Foundation Press is Susan L. Brody et al., *Legal Drafting* (Boston, 1994).

experience, students cannot always be expected to read this meaning behind words that fail to express it well. (Interestingly, they also often fail to grasp the meaning of short homework texts that are awkward but unambiguous. Making this mistake repeatedly is part of what convinces them that they must be more careful as readers.)

Sometimes a very brief explanation (three to five sentences) of the surrounding law is also needed. Learning legal doctrine is incidental to the course. It should not be a focus, but rather a by-product. As any professor should know, student misunderstandings of legal concepts can easily arise and are often understandable, however ill-anticipated they may be to the instructor.¹⁹ In giving assignments, I do not assume that students fully understand and remember the concepts and rules that they have supposedly mastered in required courses. If there is any possible value in demonstrating to students their doctrinal weaknesses, that value is more than offset by students' failure, when ignorant of legal rules, to deal with the intended task. There is no reason to deal with substantive doctrinal issues in a first course in legal drafting.

The student's drafting homework each week, then, is to take the ideas intended but poorly expressed by the original text and to produce a draft that improves on the expression of those ideas. The assignment is to revise the text or to put it in a form for a lay reader. One assignment may be to put a pattern jury instruction into clearer language.²⁰ The practice of putting legal concepts in words for the layman makes a good exercise.²¹

Having every student redraft the same short text with the same instructions means that every student is ready to dig into the problem at once in class. Every student wants to know how or whether others solved that exact drafting puzzle. Revising a short text is like solving a puzzle, and the challenge tends to engage students' interest. Since it takes careful effort to revise a text, and since every failed effort to produce an adequate revision becomes a conspicuously wrong answer to the puzzle to the student, this activity of performing small, frequent drafting tasks encourages good intellectual and work habits in a way that typical courses do not.

There is no shortage of drafting decisions to make, even with a very brief text. Recognizing that fact is key to understanding how the course works—and indeed to understanding the nature of the art of drafting. Explicitly recognizing that fact in the very structure of the course, by acknowledging that even a few sentences can

19. I have been amused to encounter the failure of many students from Connecticut, where counties are pure vestiges with no functions, to understand the concept of an unincorporated area of a county—sometimes even after I have given a written explanation. No such place exists in the State.
20. There is little literature about how to draft jury instructions, so I immodestly use as an example my own article, Jamison Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity*, 59 *Temple L. Q.* 1159 (1986), which argues that the task is not unreasonably hard.
21. A whole course could be taught using pattern jury instructions as the texts to improve, but it would lack the advantage of introducing students to typical documents of various kinds.

require real effort, helps students to appreciate how demanding and complex even relatively simple drafting tasks can be. Students see that again in class discussions, for the multiplicity of different comments from the class makes it impossible to exhaust discussion on a problem. Courses that use the re-drafting problem method never want for things to discuss in class.

Every text that needs revision typically violates more than one principle discussed in the class members' reading assignments, so although class discussion of an exercise focuses on its biggest problems, there is continual, explicit, recursive reference to the readings and to earlier classes and exercises.

I present student drafts for discussion without the authors' names. I have learned to ask the student authors of drafts being discussed not to identify themselves as such and not to volunteer any comments during that part of the discussion. This practice protects egos and keeps the focus on the drafting issues. I explain that it is the draft that we are criticizing, not the author, and that I find it most useful for the author simply to listen. A student author's attempts to explain (justify) a paper being critiqued tend to be defensive ("special pleading") and rarely add anything of value to the discussion. Focus should be on the text and the task, not on personalities.

Revising Others' Texts Is the Best Kind of Drafting Exercise for the Beginning Course

The "redrafting" approach to the course will seem like educational heresy to many—especially to those who have not taught a drafting course and to many who have taught other kinds of legal writing successfully and therefore know how important individual feedback is for students. This approach is essential, however, to teaching this basic course in the satisfactory way that springs from the recommendations of master teachers of the subject.

In-class discussion provides more feedback than would be reasonably possible for the instructor to give orally, in red ink on paper, or in typed form. Comments are prompt and thorough. The instructor leads the discussion, but many of the relevant points may be made by fellow students. Having all students work on redrafting the same short passage also gives students time to review and concentrate on the drafting principles and examples they have been studying—and gives them intellectual rewards for doing so.

The reward is not in the form of a grade. Grading by end-of-semester examination lets students feel freer to experiment during the course. Letting them have this sense of freedom is, I think, important to their development as independent (and sometimes even bold) thinkers, rather than timid copiers of others' language. (There is no shortage of unused problems to use for exams. Half a dozen very short exercises plus one or two longer ones are enough to occupy three exam hours and give a good sample of a student's work.)

Asking students to draft from scratch when they have not yet acquired the needed tools is not merely ineffective, it is unthinkingly cruel. Like many

an experienced lawyer, students flounder when asked to do a task for which they are not prepared. The course should aim to have them *learn* the basics, rather than skip that step in the interest of learning more substantive law, as the believers in Dickerson's list of myths are wont to do.

With the redrafting method, class discussion is easily focused sharply on issues that every student faced in the redrafting assignment (or should have faced, but failed to see), while repeatedly bringing discussion of the studied principles to bear on those issues. Almost no time is wasted explaining background law behind each problem, as must be done in a drafting seminar that requires larger projects and the inevitable research. Since every student has dealt with the same problem before class, an experience in grappling with the issues is the starting point for all. The emphasis in both class preparation and discussion is on how to solve drafting problems, not on learning more bits of the endless body of American law.

The Nuts and Bolts Are Not Hard to Handle

After some experimentation, I have found satisfactory ways to deal with the housekeeping details of the course. Each student submits a typed copy of her completed assignment, complete with brief explanatory annotations about the student's drafting choices. The students use 18-point bold type (for easy visibility when projected on a screen). Few assignments run over one sheet, even with the large type.

I have found it easiest for myself to use a low-tech method to focus class discussion on drafted texts: I project transparency copies of student drafts onto a screen. PowerPoint projections could be used as well. I tried having students submit their work in digital form, but file-shuffling and technical problems have been fewer with paper and transparencies.

In a small class, I have transparencies made of all student papers, together with my own "solution" and other exhibits. The sheets are available with removable paper strips on one edge to facilitate copying.²² I have these transparencies collated, sheet by sheet, with the paper sheets from which they were made, so that I can see the paper's text through the transparency sheet, which would otherwise need a white backing sheet in my three-ring notebook. On the paper sheet, I make class notes specific to that one student paper, which I keep in front of me when its transparency is on the projector.

I can later return the marked-up paper to the student. I keep copies of some interesting student efforts, good and bad, to use, mainly for my own class preparation should I recycle the same exercise. A puzzle that has fascinated one student group usually works with another. (With grading

22. These can be made just as fast and easily as copies on paper. Each week, after collecting the students' homework, I drop them off to be copied onto transparencies. (Although transparency sheets are available with three-ring notebook holes already punched in them, I find that the texts on the transparencies line up with those on the paper originals from which they were copied if I use unpunched transparency sheets, and have holes for my three-ring binder punched after the texts are copied onto them.)

by end-of-semester exams, there is no student temptation to copy from “A” papers from earlier semesters.)

Matters of layout and formatting are drafting concerns and are therefore class concerns. I direct students to use a non-proportional font such as Courier New, to make their layout choices clear. If they don’t follow this rule, the layout can become unclear, and everyone gets the point about how layout matters. Another way that class work demonstrates the importance of format comes when students violate another rule: to make any necessary page breaks in convenient places. Again, when they fail to do so, the problem their drafts have in communicating to their readers is made obvious. (In such cases, I sometimes type a more usable version or ask the student to reformat and resubmit the paper.)

If I want to add comments to be projected on the screen, the assignments are short enough that I can simply retype a student paper and make a transparency of both versions—or, of course, just make marks on the transparency sheet. I prepare my own transparencies well in advance of class. Any brilliant last-minute thoughts I may have as I review before class can be typed up, enlarged to 18-point bold, and photocopied onto a transparency in moments. (If I did not have a photocopy machine handy, I would probably use PowerPoint.)

During class sessions, probably half the time is spent discussing student papers. (For class discussions, a large class can be an advantage over a small one, just as in many doctrinal courses.) Other time is spent discussing the reading and doing brief in-class exercises, most suggested by the book.

For the teacher, class preparation involves several steps. The teacher must first come to grips with the drafting problem and be prepared to offer solutions to it. The coursebooks’ editors give plenty of help, but the teacher should come up with his or her own versions to offer as examples of solutions. Beyond working at a solution to the exercise problem himself, the teacher must take some planning time, after reviewing each set of student papers, to decide carefully on an order in which to discuss different issues, in the process compiling a list of student papers showing different approaches (and different levels of success) to each issue.²³ Usually this planning results in my showing papers in the planned order, generally from poorer to better papers. I sometimes choose to direct students’ focus to a particular issue (or issues) at one time and move from paper to paper to see the different approaches, with the class and me commenting on the merits of the drafting choices. At other times, I find it better to look at several issues in the context of one paper and then take a second look at those issues with another paper projected on the screen.

23. I organize student papers so I can easily retrieve each. I use “Post-it” notes sticking out the top of my notebook to indicate the order in which I plan to use them, but occasionally—as when student argues for his own approach, not yet shown on a screen—it can make sense to turn to a paper I had not planned to use.

We also discuss the quality of the drafters' written explanations of their drafting choices. Quite often the explanation is better than the draft, both because students often communicate better when not trying to use their stuffy lawyer voices and because the explanations reflect their later thoughts. When I see this phenomenon, I often take advantage of the situation to make the appropriate observation: either that the student's own voice is better than the phony lawyer voice of the draft, or that the process of revision usually leads to improvement, so students should *expect* further thought to yield a better product and should always be ready to revise their drafts to reflect these later thoughts.

It is seldom hard to keep discussion flowing; usually it is time to discuss other issues long before students are done with their comments on one issue. And it is not hard to keep attention focused on specifics, as only one paper is on the screen at a time.

I find that discussing three or four carefully selected student papers turns up the vast majority (at least 80 percent) of the considerations relevant to any particular student's concerns with an assignment. I make sure to raise any significant issues not raised by students. I also want to be certain that students hear explanations, from me if not other students, of why some approaches work and others do not. Class discussion is highly efficient in giving quick commentary that is responsive to every student's work. *Virtually every drafting choice of any significance made by any student in the class is discussed in class, whether or not that student's paper is displayed that day.* Additional feedback in the form of my written comments may be helpful, but it is not at all necessary.

I mark up and return some but not all student papers (never announcing in advance which papers will be returned): students' knowledge that class discussion will not always be duplicated in individual written comments is one way to encourage those students who earnestly intend to learn *mañana* to remain mentally present in class.

Before the end of the discussion, the teacher should point out specific examples of good work: either his or her own versions or particularly successful student versions (whether or not already discussed). The coursebook authors offer suggestions of solutions to exercises. Often I prefer my own version, and commonly (sometimes with the stimulus of seeing novel student approaches) I come up with several different "re-drafts." Sometimes more than one will be of comparable quality, sometimes not; I offer my opinions as to which solutions seem to work best. I prefer to use excellent student papers as model solutions (acknowledging whatever flaws they may have), but often, especially with some exercises, none of them is quite right to offer in place of my own.

I do not always identify my own version as mine; I like to treat it as simply one of the more successful papers discussed. And I am careful to stress that so long as ambiguities are avoided, there can be different ways to solve a drafting problem. The same thought may be expressed,

for example, not only in different words, but in different formats: using a paragraph, a list, an outline, or a table. Often I show in class versions that are radically different to make the point that, as long as sensible drafting principles are followed, there is room for creativity and imagination in drafting.

It is important to point out positive features of student papers. Even a paper with major errors, including even a total failure to deal with the major problems of the text to be revised, can show some improvements over the original text. Students deserve to know that they are indeed learning and doing some things right as they proceed through the course, even as they see mistake after mistake criticized by the instructor and fellow students.

A Web-Based Course?

I have been asked whether this course might be taught over the Internet. My answer is “maybe.” Experience with such courses has shown that any course (even a lecture course) must be reimagined and redesigned when taught online. Some of the basic elements of this drafting course would translate easily to a web-based course: the assignment of readings and homework exercises. Some short questions and very small exercises could substitute, presumably, for some of the discussion of readings. The real question is whether students could get the same quality of feedback on their homework as in a live course.

In a course with synchronous on-line classes, typed comments by students might substitute, at least in part, for live in-class comments. Even in an asynchronous course, the instructor’s comments could be even more structured than in a live class and could provide the most necessary bits of feedback.

The course, in short, would not be the same one that I have taught, though many of its benefits would still exist. Part-time students might well benefit from such a web-based course, as they do from others. The experiment is worth trying, but should be done, I think, by someone who has first had the benefit of obtaining student feedback in a live course.

Conclusion

The advantages of a Legal Drafting course go beyond teaching the vital basic skills of drafting. Certainly students get hands-on practice, and their experience, together with their learning about principles and techniques, leaves them able to do legal work of a type in which they knew they were (and, very uncomfortably, *felt*) wholly uneducated before taking the course. The course’s central goals are met.

But I have come to see as equally important a kind of learning that I did not anticipate before teaching the course: the majority of students explicitly come to realize that many of the shortcomings of their drafts are a result of their not having *read* carefully enough—not even the very brief passage that they were assigned to redraft. Typically, with almost every drafting assignment, some (at times most) students’ drafts innocently but significantly change the meaning,

simply because the students did not clearly understand the text, however brief, that they were redrafting. (Since the legal issues are never hard, it is rarely any doctrinal misunderstanding that is the problem.)

Students find it hard to ignore the lesson behind these errors: they were intellectually careless and have not yet made it a professional habit to avoid such carelessness. Since clear writing is so important to clear thinking, and since most students do so little writing in law school, these drafting exercises do a lot to convince students (without my ever saying so) that they must be more intellectually careful. I have been delighted, from time to time, to hear a student (usually a very good student) confess, "Professor, doing these drafts makes me realize that I haven't been *reading* carefully enough [as a law student]."

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Early in this essay, I mentioned the repeated student question, "Why isn't this a *required* course?" Since the course not only teaches students how to perform a vital legal task that is otherwise almost ignored in their education, but also prods them to engage in more careful thinking in their other legal work, I have concluded, like some of my students, that the only sensible answer is, "It should be." As this essay shows, it could easily be taught to all students. It would yield the greatest benefits, I believe, as a third-semester course, when its lessons would affect the rest of a student's formal legal education.