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## Fifth Colonial Frontier Legal Writing Conference Drafting Statutes and Rules: Pedagogy, Practice, and Politics

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## Foreword

### Fifth Colonial Frontier Legal Writing Conference: Drafting Statutes and Rules: Pedagogy, Practice, and Politics

*Jan M. Levine\**

On December 3, 2016, the Duquesne University School of Law hosted the first national conference on drafting statutes and rules, as our fifth biennial conference on legal writing pedagogy, resulting in this issue of the *Duquesne Law Review*.<sup>1</sup> The conference theme and agenda was developed by the faculty of the Legal Research and Writing Program<sup>2</sup> and was supported by our law school administration and our generous alumni,<sup>3</sup> with additional assistance from LexisNexis and Wolters Kluwer Legal Education.

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\* Professor of Law and Director, Legal Research & Writing Program at Duquesne University School of Law. I would like to thank Robert Clark, my research assistant, for his help with this Foreword.

1. Special thanks to the editorial board and members of the *Duquesne Law Review*, especially the Editor-in-Chief, Abigail Reigle, and the Executive Editor, Elizabeth Mylin, for agreeing to publish the proceedings of this conference and for their assistance with the conference registration.

2. I and the other full-time Legal Research and Writing Program faculty members, Professor Julia Glencer, Professor Ann Schiavone, and Professor Tara Willke, thank our program's administrative assistant, Carrie Samarin, for her invaluable assistance with the conference.

3. We thank our Dean, Judge Maureen Lally-Green, for her support of the Legal Research and Writing Program, and for her welcome to the conference attendees. Our alumni have generously supported the Legal Research and Writing Program, resulting in two quasi-endowed accounts enabling our writing program to host the Colonial Frontier Conferences and run other programs. In particular, we owe much to the anonymous donor whose generous gift resulted in the creation of the Bridget and Alfred Peláez Legal Writing Center, named in honor of the late Professor Al Peláez and his late wife. Professor Peláez retired in 2015 and died shortly before the December 2016 conference, and we dedicated the Fifth Colonial Frontier Conference in his memory; the *Duquesne Law Review* has dedicated this issue in his memory.

The theme of this conference was “Statutes and Rules: Pedagogy, Practice, and Politics.”<sup>4</sup> Thirteen presenters offered nine presentations,<sup>5</sup> and this issue of the *Duquesne Law Review* contains five articles resulting from the conference.

The morning plenary session was offered by Professor Richard Neumann (Hofstra University School of Law) and Professor J. Lyn Entrikin (University of Arkansas Little–Rock School of Law), on “Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More.”<sup>6</sup> That session was followed by sessions by Professor Lisa Rich (Texas A&M University School of Law), “One-Pagers, Testimony, and Rulemaking Comments, Oh My! Teaching Public Policy Drafting Techniques in a Law School Setting;”<sup>7</sup> Professor Olivia Farrar (Howard University School of Law) “From Self-Determination to Self-Regulation: Teaching Legal Drafting Through Negotiating and Writing Class Rules;” and Professor Dakota S. Rudesill (The Ohio State University, Michael E. Moritz College of Law), “Legislative Drafting Exercises: Design Decisions and Experimental Experiments.”<sup>8</sup>

The afternoon plenary session was offered by former Pennsylvania Governor Tom Corbett (Distinguished Lecturer, Duquesne University School of Law) and Pennsylvania Senate Minority Leader Jay Costa, moderated by Professor John Rago (Duquesne University School of Law), on “From Chaos to Creation: A Look Behind the Curtain on the Flow of Policy-Making Powers Between Pennsylvania’s Executive and Legislative Leaders.”<sup>9</sup> That session was followed by presentations by Professor Jamie Abrams (University of Louisville, Brandeis School of Law), “Teaching Legislation in the

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4. *School of Law hosts 5th Legal Writing Conference*, DUQUESNE UNIV. SCH. OF LAW (Dec. 1, 2016), <http://law.duq.edu/news/school-law-hosts-5th-legal-writing-conference> (describing the theme and details of the conference).

5. PowerPoint presentations and conference handouts from all sessions are available on the conference website at <http://law.duq.edu/academics/legal-research-writing-program/2016-legal-writing-conference>.

6. *Drafting Statutes and Rules: Pedagogy, Practice, and Politics: The Fifth Colonial Frontier Writing Conference*, DUQUESNE UNIV. SCH. OF LAW (Oct. 10, 2016), [http://law.duq.edu/sites/default/files/documents/LRW/Fifth%20Colonial%20Frontier%20Conference%20-%20Agenda%20\(Draft,%20Oct.%2010\).pdf](http://law.duq.edu/sites/default/files/documents/LRW/Fifth%20Colonial%20Frontier%20Conference%20-%20Agenda%20(Draft,%20Oct.%2010).pdf) (providing the agenda for the Fifth Colonial Frontier Conference). See J. Lyn Entrikin & Richard K. Neumann Jr., *Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More*, 55 DUQ. L. REV. 9 (2017).

7. See Lisa Rich, *Teaching Public Policy Drafting in Law School: One Professor’s Approach*, 55 DUQ. L. REV. 151 (2017).

8. DUQUESNE UNIV. SCH. OF LAW, *supra* note 6.

9. *Id.*

Era of Trump;”<sup>10</sup> Adjunct Professor Jeffery Parrish (Belmont University College of Law), “The Government Relations Clinic;” Adjunct Professor Rex Frazier (University of the Pacific, McGeorge School of Law), “The Capital Lawyering Concentration & Courses;”<sup>11</sup> Professor Heidi Brown (Brooklyn Law School), “Misprision of a Felony? Using State and Federal ‘Failure to Report a Felony’ Statutes to Illustrate Language Choices in Legislation;” and Professor Ann Schiavone (Duquesne University School of Law), “Writing the Law: Promoting Community Engagement and Social Justice Through Statutory and Rule Drafting.”<sup>12</sup>

I did not offer a presentation at the conference, although I have been teaching an advanced course addressing legislative and rule drafting since 1992.<sup>13</sup> This Foreword gives me the opportunity, however, to explain why I think such a course is important, and why this type of legal writing should no longer be so wrongfully neglected by law schools.

When I began my law practice career, I was a public interest attorney working in the areas of health law, disability law, juvenile law, and elder law. I then went into government service in Massachusetts, first at an agency dealing with child care facility licensure in the areas of foster care, day care, residential services, and adoption, as well as special education and inter-agency coordination of services to children. I was then counsel to the state child protective services agency.<sup>14</sup> Apart from notable class action litigation at the

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10. See Jamie R. Abrams, *Experiential Learning and Assessment in the Era of Donald Trump*, 55 DUQ. L. REV. 75 (2017).

11. See Rex D. Frazier, *Capital Lawyering & Legislative Clinic*, 55 DUQ. L. REV. 191 (2017).

12. DUQUESNE UNIV. SCH. OF LAW, *supra* note 6. See Ann L. Schiavone, *Writing the Law: Developing the “Lawyer Citizen” Identity Through Legislative, Statutory, and Rule Drafting Courses*, 55 DUQ. L. REV. 119 (2017).

13. See *Course Descriptions: Current Curriculum—Elective Courses*, DUQUESNE UNIV. SCH. OF LAW, <http://law.duq.edu/sites/default/files/documents/Registrar/Course%20Descriptions/Current%20Curriculum%20-%20ELECTIVES%202016-2017.pdf> (last updated Nov. 30, 2016) (describing my Advanced Legal Writing: Drafting course at Duquesne University School of Law). I have offered conference presentations about my course several times. See Jan M. Levine & Ann Schiavone, Presentation, We’re Not in Memo and Brief Land Any More: “Statutes and Rules and Regs! Oh My!,” Capital Area Legal Writing Conference, Univ. of Md. Sch. of Law (March 11, 2016); Ted Becker, Jan M. Levine & Sara Rankin, Panel Presentation and Discussion, Teaching Drafting Through Collaborations, Bringing Outside in: Social Justice Collaborations in the Legal Writing Curriculum, Univ. of N.H. Sch. of Law (June 29, 2014); Jan M. Levine, Invited Panelist, Our Place on the Continuum: Re-envisioning the Way We Prepare Law Students for Practice, “Practice Meets Pedagogy” Conference, St. John’s Univ. Sch. of L. (Dec. 2008); Ken Kirwin, Jan M. Levine & Deborah Schmedeman, Presentation, Writing Outside the Usual Box: Expository Writing Options in LRW Courses, Association of Legal Writing Directors Conference (2005).

14. See Jan M. Levine, *J.D.: Director of Legal Research and Writing and Professor of Law*, DUQUESNE UNIV. SCH. OF LAW, <http://law.duq.edu/faculty/jan-levine> (last visited Jan. 18, 2017) (providing further information on my legal experience and past employment).

start of the development of the law in those fields, virtually all of those areas of the law were controlled by, and based upon, federal, state, and local statutes and regulations.<sup>15</sup> And it is axiomatic that in the modern legal environment virtually every practice area and context is controlled by statutes, rules, and regulations.<sup>16</sup>

So when I had the opportunity to teach an advanced legal writing course, I made legislation (and correspondence) the focus of the course.<sup>17</sup> One of the many ironies of legal education is that students are exposed, almost exclusively, to case law.<sup>18</sup> If statutes or rules remain in the edited cases they read and from which the professors teach, the only attention given to those primary materials is on poorly-written or ambiguous statutes and regulations, court rules, and Restatements of the Law, as they are criticized and parsed by the appellate courts, but almost never on the techniques of drafting that can teach how difficult it is to write good statutes and rules.<sup>19</sup> You will be reading about courses that are offering students the opportunity to learn those critical skills.<sup>20</sup> Instead of doing a post-

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15. See, e.g., 42 U.S.C. §§ 1–18501 (2017) (providing the “Public Health and Welfare” code which governs much of the health law practice area); 42 U.S.C. §§ 12101–12213 (2017) (providing the primary laws governing disability law, including the Americans with Disabilities Act of 1990); Paul Premack, *Elder Law Practice: An Overview*, 45 S.D. L. REV. 461, 466–68 (2000) (discussing the statutes, regulations, and rules that control the practice of elder law).

16. See RICHARD K. NEUMANN JR. & J. LYN ENTRIKIN, *LEGAL DRAFTING BY DESIGN: A UNIFIED APPROACH* 14 (Wolters Kluwer, forthcoming 2018) (noting that legislation is the most common form of public law, which governs all of the public generally); Entrikin & Neumann, *supra* note 6, at 12–17; Robert F. Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 MERCER L. REV. 803, 804 (1984) (“Statutory law has replaced common law as the most important source of law and legal tool in America.”).

17. See DUQUESNE UNIV. SCH. OF LAW, *supra* note 13 (describing the Advanced Legal Writing: Drafting course assignments, which include drafting legislation and “various types of correspondence”).

18. Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225, 241 (2011) (noting that the case method is the primary teaching strategy in most law courses).

19. See NEUMANN & ENTRIKIN, *supra* note 16, at 2–3 (discussing the lack of legal education focused on drafting and the difficulty of practicing good drafting skills); ASS’N OF LEGAL WRITING DIRS.: LEGAL WRITING INST., *REPORT OF THE ANNUAL LEGAL WRITING SURVEY*, 11, 13 (2015) (reporting that only 9 of the 194 law schools surveyed have required writing courses that provide education on drafting legislation and 54 offer an advanced writing course on drafting legislation).

20. See NEUMANN & ENTRIKIN, *supra* note 16, at 3 (noting the increase in law school courses focused on legal drafting); ASS’N OF LEGAL WRITING DIRS.: LEGAL WRITING INST., *supra* note 19, at 30 (2014) (reporting that thirty-one percent of law schools report a student demand for courses on drafting legislation that exceeds the availability of such courses).

mortem on a dead body, we ask students to create new life, by writing a new law, or curing the existing law, and to change the world by writing the rules under which our society operates.<sup>21</sup>

There are other benefits that come from offering such courses.<sup>22</sup> Although in some courses students are given a very narrow or totally circumscribed area of the law in which to write, other courses leave the topic up to the individual student.<sup>23</sup> In my course, I ask students to find something in the real world that bothers them, that they know about, and which they want to fix. In my course and many others, students can write legislation that actually becomes law, by working with legislators, government agencies, and interest groups, from communities beyond the law school's walls, who share the same interests and goals.<sup>24</sup> This gives students the opportunity to write about something that holds meaning for them, and having that chance results in work product that far exceeds in depth and quality what the students have done in the past, and what they thought they could do.<sup>25</sup>

Sometimes these projects are about what we usually think of as legislative drafting, such as statutes about public financing of athletic stadiums, criminal code reform, or permitting use of medical marijuana.<sup>26</sup> But at other times these same drafting lessons can be applied to such varied contexts as reforming soccer league rules, addressing concussion policies and procedures used by the NFL, or a law school's course registration system.<sup>27</sup> All of the projects I've mentioned have been recently completed by my students or are currently in the drafting phase by some of the students who attended

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21. See NEUMANN & ENTRIKIN, *supra* note 16, at 3–5 (discussing the various types of legal rules that govern many aspects of our lives).

22. See, e.g., AM. BAR ASS'N, SOURCEBOOK ON LEGAL WRITING PROGRAMS 181–82 (Eric B. Easton ed., 2d ed. 2006) (noting that upper-level writing courses can provide valuable legal drafting training to students that gives them a substantial advantage in the job market).

23. See generally Michael R. Smith, *Alternative Substantive Approaches to Advanced Legal Writing Courses*, 54 J. LEGAL EDUC. 119 (2004) (describing the variety of advanced legal writing and drafting courses, which can include an integrated or survey-style of coverage).

24. See DUQUESNE UNIV. SCH. OF LAW, *supra* note 13 (describing my drafting course, which allows students to pick their own topic of legislation and has led to actual legislation based on some students' drafting assignments); *Legislative Drafting Course Student Projects*, DUQUESNE UNIV. SCH. OF LAW, <http://law.duq.edu/academics/legal-research-writing-program/legislative-drafting/student-projects> (last visited Jan. 24, 2017) (describing several student-chosen drafting topics that relate to potential future legislation).

25. Elizabeth Fajans & Mary R. Falk, *Comments Worth Making: Supervising Scholarly Writing in Law School*, 46 J. LEGAL EDUC. 342, 348 (1996) (explaining the importance of writing courses allowing students to choose their own topic based on their own interests).

26. See NEUMANN & ENTRIKIN, *supra* note 16, at 12–13 (discussing the variety of public laws that may be drafted and enacted by public authorities that issue legal rules).

27. See *id.* at 11–12 (discussing the private rules that control contracts and other agreements that are voluntarily adopted by private parties to govern their interactions).

the conference; some past projects can be found on the Duquesne Law website, recognized as examples of outstanding faculty-supervised student writing.<sup>28</sup>

The other benefits are long-term in nature. The requirement to fully research problems calling out for legislative solutions results in students broadening their commitment to law reform, to progressive legislation, to social justice, and to honesty in their professional work.<sup>29</sup> For example, I had one die-hard conservative Federalist Society student begin a project on welfare reform. He came to me one day, sheepishly, and announced that once he actually had to read deeply in the area, he realized that his assumptions were flawed, that he was naïve in his understanding of the economic and psychological issues in the project, and that past proposals for reform that he had once held in contempt were actually well-conceived, effective, and worth exploring as solutions to his problem. Another student, my own research assistant, wanted to draft a “right to work” statute for Pennsylvania, only to conclude, after doing her typically impeccable research, that it was unfair for dues-paying union members to have non-dues-paying workers be “free riders” and benefit from union contracts. She also learned that wages went down in right-to-work states, and discovered the corporate funding for the legislative activities of the American Legislative Exchange Council. She decided to change her project to one requiring disclosure of union expenditures.<sup>30</sup> One wishes that some of our legislators and their staff could have such epiphanies. And one wonders that if law schools took more responsibility for training law students in statutory and rule drafting it could lead to a higher level of performance in professional drafting and lead to wiser and more honest shaping of law on the local, state, and national levels.<sup>31</sup>

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28. *Outstanding Student Papers*, DUQUESNE UNIV. SCH. OF LAW, <http://law.duq.edu/student-life/outstanding-student-papers> (last visited Jan. 19, 2017) (listing outstanding student papers recognized by Duquesne University School of Law, including several that were completed in advanced writing courses).

29. See Schiavone, *supra* note 12, at 140–144 (arguing that statutory courses help to develop students’ focus on social justice and law reform).

30. See Dan Kaufman, *Scott Walker and the Fate of the Union*, N.Y. TIMES, June 12, 2015, [https://www.nytimes.com/2015/06/14/magazine/scott-walker-and-the-fate-of-the-union.html?\\_r=0](https://www.nytimes.com/2015/06/14/magazine/scott-walker-and-the-fate-of-the-union.html?_r=0).

31. See Schiavone, *supra* note 12, at 140–144 (urging law schools to take advantage of the opportunity to educate students in critiquing the law and working to change the law to reflect important social values); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 42 (1995) (explaining the importance of teaching students how to integrate their values, including justice and morality, with the law, rather than focusing merely on the rule of law itself).

All of the conference attendees took home ideas about how we can do a better job crafting legislation and rules and how to better teach the next generation of drafters. We hope that this issue of the *Duquesne Law Review* shares many of those ideas with a broader audience.



