

# FRESH APPROACHES TO TEACHING TRANSACTIONAL DRAFTING

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*Teaching Contract Drafting  
Simultaneously with Statute  
Drafting: How Each Enriches  
the Other--with an Aside about  
the First-Year Contracts  
Course*

Joan M. Heminway<sup>3</sup>

*Drafting Corporate Bylaws:  
From Alpha to Omega*

## INTRODUCTION

**Katherine Koops:**

We'll go ahead and get started. I will introduce, just by name and school, our distinguished panelists today. Their biographies are in your packet of materials. We have to my immediate right Joan Heminway from The University Tennessee College of Law. She'll be presenting on *Drafting Corporate Bylaws: From Alpha to Omega*.

We also have Richard Neumann and Lyn Entrikin who will co-present on the topic of *Teaching Contracting Drafting Simultaneously with Statute Drafting*. Richard is from Hofstra University, Maurice Deane School of Law, and Lyn is from University of Arkansas at Little Rock, William H. Bowen School of Law. So please welcome our panelists, and we will get started.

### ***DRAFTING CORPORATE BYLAWS: FROM ALPHA TO OMEGA***

**Joan Heminway**

Thanks so much, Katherine, and thanks for helping to organize the merry band of thieves that are up here this afternoon presenting. I am really delighted to be presenting today with Richard and Lyn because we really describe two pieces of a single puzzle. We may not be the only pieces in that puzzle, but we are two pieces in the same puzzle that fit relatively well together.

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My presentation addresses a fairly specific application of a planning and drafting course—specifically, a module of an experiential learning course that focuses on drafting corporate bylaws. Even more specifically, I have come to talk to you today about *a* way to teach drafting bylaws to advanced law students. It is important for us to remember that my presentation focuses on “*a*” way. There are many ways to engage students in this kind of drafting process; I am merely describing one.

It is essential to remember, as I proceed, that my students already have had in other courses some of what Richard and Lyn are going to show you in their presentation. They have taken contract drafting. They have taken legislative drafting, in some cases, or they have participated in competitions on the same. So, the students taking my course have some of the foundational skills necessary for successful business law planning and drafting, although I would hazard a guess that not all of the students enrolled in my course have the competencies you will going to hear about in the second part of the program. I hope to offer you a little something different here than what Richard and Lyn have to offer. Having said that, I hope that my students are moving from a matrix like what Richard and Lyn describe into the course work I am presenting to you today.

As among all of the exciting business law planning and drafting tasks one could teach, why focus on corporate bylaws? First, context is important. My bylaw classes are the focus of a business-planning module that is part of a larger course. You might think, however: “Well, gosh, maybe we should be drafting corporate charters, not bylaws.” In fact, I have taught the drafting of charters in this module before. Or maybe you think: “We should be drafting shareholder agreements.” Or maybe: “We actually should be drafting all three.” In fact, there are reasons, most of them resource-oriented, why I can only choose to center my class on one of those three core business planning documents in any depth. I will identify and characterize these resource questions shortly.

Apart from context, I also have a particular affinity for bylaws. They are relatively tricky to draft well; bylaw drafting tends to look easier to most than it actually is. Along the same lines, it seems fair to observe that bylaws are somewhat tricky to teach in a number of ways, even to advanced law students who already have some practice in drafting contracts and other documents and instruments.

Bylaws also are essential corporate organizational documents,<sup>4</sup> although they are not admittedly always treated with the respect they deserve. The indented text reproduced below, which I invite you to read, indicates why I get so frustrated and fakedempt and understand that bylaws are so important.

As you may already know, the process of incorporating a business isn't all that difficult. In many cases, you simply file a fill-in-the-blanks incorporation form or a one-page "Articles of Incorporation" document with the appropriate state agency (often the secretary of state).

Even experienced entrepreneurs and investors, however, often have trouble coming up with appropriate corporate by-laws (also called "bylaws") on their own. And while you might be tempted to skip drafting corporate by-laws, you shouldn't skip this important step.

Many attorneys will tell clients that having and following corporate by-laws increases legal liability protection because the by-laws further enforce and underscore the separate legal identity of the small corporation. Also, in many cases, outside parties like your bank will require you to provide a copy of your by-laws before they'll do business with you.<sup>5</sup>

This text indicates to me what I know from various contexts: that the role of bylaws in the corporation is misunderstood by many people, especially non-lawyers—including certified public accountants ("CPAs") and other professionals—who are often the first people that give nascent clients advice in starting a business. For those of you who teach in the business clinical environment, I think you know what I am talking about when I note this misunderstanding . . . .

In fact, I found the above-quoted text on a CPA's website through which he is promoting an e-book on corporate bylaws. The website performs an important public service in extolling the virtues of corporate bylaws. But a

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<sup>4</sup> The core organizational documents that, together with the statutory law, define the internal governance rules for corporations often are referred to as "organic documents" and are acknowledged to include at least the corporation's chartering document and bylaws (or the equivalent, as labeled under the applicable statute). See Robert R. Keatinge, *LLCs and Nonprofit Organizations--For-Profits, Nonprofits, and Hybrids*, 42 SUFFOLK U. L. REV. 553, 555 n.11 (2009) ("In a corporation (including a nonprofit corporation) the organic documents generally consist of articles of incorporation and bylaws, although in some corporations they may also include shareholders agreements.").

<sup>5</sup> Stephen L. Nelson, *Sample Corporation By-Laws*, <http://stephenlnelson.com/ebooks/sample-corporation-by-laws/>.

major point is lost in the narrative: that bylaws are actually a mandatory part of validly organizing a corporation under state law.<sup>6</sup> People often do not emphasize, or even recognize, that point. The text quoted above is accurate in representing how a firm is incorporated. But it implies that the simple filing of a form is sufficient to legally organize a corporation. Indeed, a firm is recognized as a corporation with valid legal existence when a corporate charter is filed or accepted for filing (depending on the state convention).<sup>7</sup> However, the bylaws are a statutorily mandated part of the corporate form. Bylaws are not optional. Drafting appropriate, valid corporate bylaws is essential to what one needs to do to legally organize a corporation. As a result, quotes like the one included above somewhat trouble me. They give the wrong impression, even if state officials are unlikely to bring enforcement proceedings against a firm for not having bylaws (and I am unaware of any enforcement proceeding of that kind having been brought).

Yet another reason why I like to teach bylaw drafting to advanced business law students is that the standard three-credit-hour course on business associations, which I also teach, affords very little time to spend on the bylaws as an independent legal instrument. When an instructor spends class time on them it is often as part of the class on corporate organization. I usually point to one statutory provision from the Delaware General Corporation Law and one from the Model Business Corporation Act.<sup>8</sup> The class coverage consists of a brief run-through of the basics. The speech goes like this: “Bylaws. Here’s what they are. Here’s why you have to have them. Here’s how they are amendable in some cases (different depending on what state you are in). Have a nice day.” And that is what one typically gets to spend time on in a standard Business Associations course. That treatment of corporate bylaws is so shallow that I

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<sup>6</sup> For example, under Delaware law, bylaws must be adopted at the mandatory organization meeting of the incorporators or board of directors. 8 DEL. C. § 108(a) (2016) (“After the filing of the certificate of incorporation an organization meeting of the incorporator or incorporators, or of the board of directors if the initial directors were named in the certificate of incorporation, shall be held . . . for the purposes of adopting bylaws, . . . .”); *see also* 8 Del. C. § 109(a) (“The original or other bylaws of a corporation may be adopted, amended or repealed by the incorporators, by the initial directors of a corporation other than a nonstock corporation . . . , or, before a corporation other than a nonstock corporation has received any payment for any of its stock, by its board of directors.”). Other jurisdictions have similarly stated rules regarding corporate organization. *See, e.g.*, MASS. GEN. LAWS ANN. 156D §§ 2.05, 2.06(a) (2016); MCKINNEY’S BUS. CORP. LAW §§ 404(a), 601(a) (2016); TENN. CODE ANN. §§ 48-12-105(a) and 48-12-106(a) (2016).

<sup>7</sup> *See, e.g.*, 8 DEL. C. § 106.

<sup>8</sup> *See* 8 DEL. C. § 109; MODEL BUS. CORP. ACT § 2.06 (2007). Similar provisions exist under most state laws. *See, e.g.*, MASS. GEN. LAWS ANN. 156D § 2.06; MCKINNEY’S BUS. CORP. LAW § 601; TENN. CODE ANN. § 48-12-106 (1986).

feel like I am committing teaching malpractice when I cover them that way;<sup>9</sup> however, in a one-semester, three-credit-hour course, that is all I typically can do.

Bottom Line? In addition to the substantive reasons for teaching bylaw drafting, I start with quite a bit of excitement—a passion—about bylaws. That passion supplies an additional reason for me to be teaching bylaws as the key business planning component of our general business law capstone planning and drafting course.

And that brings me to how I teach bylaw drafting as a course module. What is the curricular context? I mentioned before that resources are important. This course fits into our curriculum in a very basic way. For those of you who attended the Emory University School of Law's conference on the teaching of transactional law and skills, you may have heard me and some of my colleagues speak about our Concentration in Business Transactions, which has been around for a long time. If you go back and look at *Transactions: The Tennessee Journal of Business Law*, you'll see the transcription of that panel discussion.<sup>10</sup>

Our Concentration in Business Transactions is one of two concentration programs offered to students enrolled at The University of Tennessee College of Law, the other one being an advocacy and dispute resolution concentration.<sup>11</sup> A student does not have to concentrate to receive a

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<sup>9</sup> The feeling of inadequacy is compounded by the prevalence, in recent years, of bylaw mechanisms that adjust, among other things, board governance rights and shareholder litigation rights. See, e.g., Matthew C. Baltay, *Exclusive Forum Bylaws are Going Mainstream: What's Next, Bylaws Eliminating Shareholder Class Actions?*, 59 BOSTON BAR J. 27 (Spring 2015); Christopher M. Bruner, *Managing Corporate Federalism: The Least-Bad Approach to the Shareholder Bylaw Debate*, 36 DEL. J. CORP. L. 1 (2011); Deborah A. DeMott, *Forum-Selection Bylaws Refracted through an Agency Lens*, 57 ARIZ. L. REV. 269 (2015); Ben Walther, *Bylaw Governance*, 20 FORDHAM J. CORP. & FIN. L. 399 (2015); Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485 (2016). I familiarize students with this tends in my Advanced Business Associations course.

<sup>10</sup> See Brian K. Krumm, Joan MacLeod Heminway & Michael J. Higdon, *A Case Study in Transactional Centers and Certificate/Concentration Programs: From Program Design to Student Experience*, *The Clayton Center for Entrepreneurial Law*, 14 TRANSACTIONS: TENN. J. BUS. L. 569, 571-79 (2013); see also Carl A. Pierce, *The Center for Entrepreneurial Law at The University of Tennessee College of Law*, 1 TRANSACTIONS: TENN. J. BUS. L. 4, 4 (1999) ("At the heart of the Center is our curricular concentration in business transactions in which students take 19 hours of prescribed coursework (Business Associations, Commercial law, Land Finance, Fundamentals of Income Taxation, Taxation of Business Organization, and Contract Drafting) as the prerequisite for a capstone course."); George W. Kunej & Joseph Watson, *Addressing Shortfalls in Traditional Legal Education: UT's Concentrations and Capstones and Waller Lansden's Schola2juris Program*, 15 TRANSACTIONS: TENN. J. BUS. L. 33, 37 (2013) (describing the concentration in business transactions).

<sup>11</sup> See Kunej & Watson, *supra* note 10, at 38.

For students who plan to pursue a career in advocacy and dispute resolution, The University of Tennessee College of Law offers a similar concentration. The advocacy

Juris Doctor degree from The University of Tennessee College of Law. But a student can choose to be in one of our concentration programs, and some students have been able to complete both. People can also just “do their own thing”—take courses from either or both areas of legal practice. Some are just one course shy of completing one of the concentrations. Members of the business law faculty at the College of Law meet every two years and determine what the concentration curriculum is going to be—whether we need to make changes, where the gaps are, and address other related matters.<sup>12</sup> George Kuney, my colleague who directs our Center for Entrepreneurial Law, is our leader in this endeavor, and he probably can tell anything about our concentration in business transactions that you would want to know.

Students currently can choose from among three capstones in the concentration. Some students take more than one. The first is Transactional Tax Planning, which is taught by my colleague Don Leatherman. It is essentially an LL.M.-level course that is taught to our business law students in the Juris Doctor program. Don has an LL.M. in Taxation from the N.Y.U. School of Law, and he worked for the U.S. Internal Revenue Service and a private firm. He is very experienced in business taxation. If you want to know how to tax mergers and acquisitions 5,000 different ways, he is your man. And that is what the Transactional Tax Planning course is all about. We also offer an Estate Planning Seminar capstone course. The Estate Planning Seminar is our newest capstone in the curriculum for the Concentration in Business Transactions. The content of that course is somewhat obvious given its name.

Our third concentration capstone is a course called Representing Enterprises. I teach my bylaw drafting classes as part of this course. It is an interesting course that was created before George Kuney and I came to teach at The University of Tennessee College of Law. The course has been around for about 20 years now, and it was our original capstone for the Concentration in Business Transactions. The course teaches transactional business law by moving the students from instructor to instructor through four different

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and dispute resolution concentration includes skills-based courses in trial practice, pretrial litigation, negotiations, mediation, and interviewing and counseling, as well as many doctrinal courses such as evidence, criminal procedure, and alternative dispute resolution, each of which are taught utilizing an applied or problem-based methodology.

*Id.*

<sup>12</sup> See Krumm, Heminway & Higdon, *supra* note 10, at 576 (“Those who teach in the concentration curriculum and those who teach related objectives meet as a faculty once every year or two, and we critique the concentration. Are these still the courses students need and want? Do the courses have the right components? The Director of the Clayton Center leads that charge.”).

business transaction modules. The course operates much like a law firm or a government office, in which junior lawyers may move from person to person working on different projects. We try to avoid too much overlap in coverage and workload as between the modules, but sometimes we allow some overlap so that the students have the opportunity to experience the feeling a lawyer often has in practice in trying to juggle projects at different stages—finishing one client matter while picking up another. The instructors for each module are different. Sometimes (typically in our last module for example) two instructors will teach together. George Kuney and I have taught the business planning module together before.

In the past few years, I have taught the first module of the Representing Enterprises course, which is designed to be a business planning module in that four-module course. I typically am given five two-hour sessions to teach bylaw drafting. That is not a lot of class time—a mere ten hours.

As I earlier mentioned, the students in my bylaw drafting module have academic planning and drafting experience. (Some also have engaged in planning and drafting in summer jobs or externships or as students in our transactional law clinic.). In terms of the concentration requirements, which must be met either at the same time as this course or in advance of this course, the students enrolled in Representing Enterprises have taken a course or waived out of a course called Introduction to Business Transactions that teaches basic accounting, foundational information about merger and acquisitions, and other matters essential to a transactional business law practice. Introduction to Business Transactions provides a very foundational explanation of what transactional business law looks like and exposes students to related vocabulary and context.

The students enrolled in Representing Enterprises have also taken Fundamental Concepts of Income Taxation (also known as “baby tax,” the basic federal tax course); Business Associations (our three-credit-hour introduction to business associations including agency, unincorporated associations, and incorporated business associations); Contract Drafting (which is taken by a lot more people than just concentrators at The University of Tennessee College of Law and has been part of the curriculum at The University of Tennessee College of Law for over 20 years); Income Taxation of Business Organizations (the basic business tax course); Secured Transactions and Land Finance Law (two asset-based classes, involving real property and non-real property transactions on an advanced level).

The enrollment for the Representing Enterprises course (and, therefore, my module) is typically 15 to 25 students. We have had as many as,

maybe, 32 students in the course over the years. But for a number of years the enrollment has been between 15 and 25 students. Representing Enterprises is taught in the spring semester of the student's third year. That helps explain why the students in my bylaw-drafting module have met so many of the concentration requirements already. For me, as I earlier noted, the course involves teaching during five two-hour class meetings over the first two and a half weeks of the semester. George Kuney teaches an introductory session before my module starts, and then I jump right in. My module is the first transaction planning and drafting to which the students are exposed in the course. And I have ten classroom hours over two and a half weeks to work with the students to achieve my teaching and learning objectives.

During that time I assign the students two graded written assignments that are worth 80% of their module grade. George Kuney captures all of our module grades and compiles them into a course grade at the end of the semester. A student's participation in class meetings, class exercises conducted during our class meetings, and web-based discussions on The West Education Network ("TWEN") constitutes another 20% of the final grade for my module. I briefly describe the two written assignments later in this presentation. They are included in the conference materials. I have not included my grading rubrics, but I have provided all of my assignments.

What do I expect students to learn in this module? I want them to understand business associations law in its applied form. I do some of that in my Business Associations class, but this module is a much more intensive experience. In particular, I want students to understand and appreciate how this instrument, the corporation's bylaws, interacts with the statute that authorizes and requires it. But that's not all. I also want students to understand and appreciate how corporate bylaws interact with the corporate charter (in Tennessee, we call the instrument that constitutes a corporation—by filing with the office of the Secretary of State—a charter, not a certificate of incorporation or articles of incorporation<sup>13</sup>) and any shareholder or voting agreement. In the case of shareholder agreements, I am interested in student consideration of both the kind of shareholder agreement that jiggers around with the board's power and any other, more general, agreement between or among shareholders, regardless of whether it needs to comply with the applicable corporate law statute.

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<sup>13</sup> See TENN. CODE ANN. § 48-12-101 (1986) ("One (1) or more persons may act as the incorporator or incorporators of a corporation by delivering a charter to the secretary of state for filing.").



I also want the students to have ample opportunity to practice close reading skills. I was part of a discussion group at the Southeastern Association of Law Schools annual conference last year (in 2015) in which we talked about how to encourage students to read words in statutes with intention and give them meaning.<sup>14</sup> In the module, I not only force the students into the statutory law, but also ask them to step back and reflect on what the words in the statute mean—what the words convey in context—and how they can use them to their advantage in a non-advocacy setting. Since Business Associations teaching often engages case law, when students read the corporate statutes in that course, their applied reading of the statutes is most often undertaken in a dispute resolution context.

I also want students to reach out and try to use all the available resources that a good business transactional lawyer uses. That means, yes, not just the Internet, and not just the electronic databases that we provide to them. Having said that, I do counsel the use of both. I want students to know, in using the Internet, what to rely on and what not to rely on. Moreover, I do make sure that my students in the course (and in my other upper-level transactional business law offerings) get introduced in a bigger way to Bloomberg Law, which is our newest electronic database that we use in transactional teaching at Tennessee (we've had it less than five years). I also want them to understand the value of Westlaw—in particular, Practical Law, available through Westlaw, and the Lexis practice tools (especial in Lexis Practice Advisor) that that have been added in the last few years. I want the students to become familiar with each of those services.

But I also want them to understand that, in addition to the Internet, there is still a library downstairs with a bunch of hard-copy books and other materials in it. In extolling the virtues of law library resources, I note that sometimes it is more efficient to pick up a hard-copy book and use it. We also talk a little bit about how that efficiency is generated and when it might be useful.

Finally, the last in my triad of resources that I want students to learn to use—and actually use—in my bylaw planning and drafting module of the Representing Enterprises course is the human resource. Throughout the module, I am acting in part as the students' senior supervising attorney in a simulation. I want the students to come to me to check out their reasoning and conclusions. I also want them to go to each other to experience peer-to-peer

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<sup>14</sup> See Southeastern Association of Law Schools, Programs from Past SEALS Conferences (Annual Meeting 2015), [http://sealslawschools.org/wp-content/uploads/2015/05/SEALS\\_Annual\\_Conference\\_Program\\_2015\\_Final.pdf](http://sealslawschools.org/wp-content/uploads/2015/05/SEALS_Annual_Conference_Program_2015_Final.pdf).

teaching, so that is a mandatory, built-in part of the course pedagogy. It is sometimes tough for students to engage each other as teachers and learners, especially if students have not yet had that experience. Students who already have had me as a class instructor have been required to engage in peer-to-peer teaching starting in Business Associations, a course in which I give a group oral mid-term that is collaborative. (That examination is a whole separate topic for another lecture.)

So, I basically ask my students to use all three of these things—

- electronic resources, including the Internet and proprietary electronic databases (Bloomberg Law, Westlaw, and Lexis),
- hard-copy and other library-bound resources, and
- human resources

—in performing assignments and related tasks for the course. I hope that exposure to each of these different resources enables the students to understand each resource better. I also hope that the students come out of the course with a sense of when it may be more efficient to use one source over another one.

Of course, I also want the students to learn how to perform the basic legal skill central to the course module, which is drafting corporate bylaws—a document that is rooted in the statutes defining and providing rules for corporations as legal entities. The importance of the genesis of bylaws in statutory corporate law cannot be understated for the new planner and drafter. A drafter cannot include things in this document that the statute says cannot be done in this document. That is one of the biggest things students must learn in my module. Every year no matter how I teach the module, I stress the statutory basis for bylaws. Yet, every year, some students fail to learn that lesson. Accordingly, my memo to students at the end of the semester (on common errors in their work in the module) typically reflects, for example, that some students included provisions in their draft bylaws that, under the statute, must be in the corporate charter to be valid and enforceable. The contents of that memo are part of what I want the students to take away from the module at the end of the semester as most of them prepare to take the bar.

So what is my role in the accomplishment of these objectives? What do I do to make all of this happen? After reflection, I identified five key teaching objectives (although this is an incomplete list):

- guide an effective, efficient simulation in business formation planning/drafting;

- provide remedial and equalizing substantive doctrinal instruction;
- encourage active, engaged, collaborative (including P2P), reflective learning and processing;
- enable students to see the benefits and detriments of distinctive approaches to entity governance planning/drafting; and
- introduce (or further explore) the role of client constraints in planning/drafting.

First, I want to guide efficiently and effectively a simulation for my students. I want them to understand what it feels like to represent a client, and I give them a business, Telling Yarns, to work with. The business facts are modified from facts relating to the proposed business of an actual set of entrepreneurs. If you have experience in working with entrepreneurs and new business promoters, you can use facts from that experience to construct a viable simulation. I changed the facts to protect the innocent, the guilty, and others—and to make the simulation more usable as a teaching tool. But the basics facts relate to an actual proposed new business.

My work as a simulation guide is the nub of what I desire to do from a teaching perspective. Beyond that, my module plan allows me to do some doctrinal teaching in an applied context. While this is a skills-based module—or at least a skills-centric module—there always is significant doctrinal knowledge that the students somehow did not acquire from my course or other courses (despite it having been taught). As a result, I spend time with them individually and collectively to make up for those gaps in knowledge.

I also want to engage my students in collaborative learning, which is very important, and I want to help them learn how to reflect.<sup>15</sup> The primary teaching technique that I use in class (focusing on approaches and outtakes, as I

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<sup>15</sup> Over 30 years ago, Professor Tony Amsterdam articulated well the value of teaching reflection and learning from experience in general.

[L]aw schools cannot hope to begin to teach their students "law" in a scant three years. The students who spend three years in law school will spend the next thirty or fifty years in practice. These thirty or fifty years in practice will provide by far the major part of the student's legal education, whether the law schools like it or not. They can be a purblind, blundering, inefficient, hit-or-miss learning experience in the school of hard knocks. Or they can be a reflective, organized, systematic learning experience - if the law schools undertake as a part of their curricula to teach students effective techniques of learning from experience.

Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, J. LEGAL EDUC. 612, 616 (1984). His words are at least as true now as they were then.

describe below) is a particular manifestation of that learning objective. I want the students to look at different approaches—to not just assume that everyone approaches problem-solving the same way or should approach problem-solving the same way. This idea applies whether the problem-solving is drafting, another aspect of business lawyering, or lawyering more generally.

And then, last but not least, we must address client constraints, including what the client can afford. I ask: “Are you going to turn over every stone to produce these bylaws that you think would make for the most comprehensive set of bylaws?” Obviously, the answer is “No.” I tell the students that we have got to think about time, and we have got to think about whether the client is going to pay for the time we spend. I note that even when work is done on a *pro bono* basis, a lawyer should think about time. Time is always a problem—a potential constraint on the provision of legal services, so we talk through those types of issues in these five classes as well.

Set forth below is my module objective from this past semester when I last taught the course.

This module of the Representing Enterprises course is designed to allow you to engage in business planning in connection with the incorporation of a business. In the process, you will review basic principles of corporate governance; research Tennessee corporate law; and learn more about and experience bylaw drafting for a closely held corporation. The module exercises involve both independent work and collaboration. We will use our class meetings to illustrate points of law, methodology, or practice that are important to the successful completion of projects of this kind. At the conclusion of the module, you should better understand the role of corporate bylaws in corporate governance and operations and be able to confidently draft legally valid corporate bylaws.

I tell the students that this objective summarizes what the module involves and what my learning objectives are for them. I tend to change the module objective a bit every year. My module objective is a leveraging point—a vehicle through which I can be more pointed about informing students about my goals for them, and what my role is in terms of both teaching and learning objectives.

In five classes, this is what I do:

- Class #1: in-depth survey of applicable statutory and decisional law; focus on default rules and private ordering;
- Class #2: identification of drafting issues (forms and norms);
- Class #3: introduction to client facts; review and revise initial individual draft bylaws;
- Class #4: evaluate individual bylaw drafts; assign groups for group drafting exercise; and
- Class #5: discuss group drafts.

This is what you see in the assignments.<sup>16</sup> I make the students go and look at Tennessee law (specifically, the Tennessee Business Corporation Act<sup>17</sup>) *ad nauseam* and be prepared to tell me where it is that bylaws come into Tennessee law. They find it is not just that one provision, but many provisions that reference bylaws. Many provisions are default rules that instruct: “to agree around this, you can put an alternative in the bylaws.” Alternatively, the statute may note that “unless a rule is in the bylaws” it is invalid, or articulate a rule that holds “except as otherwise provided in the bylaws.” All of a sudden, the students have pages and pages of bylaw references. They come to class with reams of printed out materials or with their computers flickering away with statute files layered one on top of another, in each case, so that they can inform me about all the places in which the concept of bylaws appears in the Tennessee Business Corporation Act, a statute that is based on the Model Business Corporation Act.

And so, we end up focusing much of our discussion in the first class on private ordering; how private ordering is done and, more specifically, how you identify the corporate organizational document in which to put individual governance rules. Then, for the next class meeting, I have the students locate and look at a number of precedent bylaws and guidance on drafting bylaws from the Internet; both the template documents and secondary sources that they can find are foundational to our class discussion. I tell the students I do not want them paying for any of the websites that offer downloaded bylaws for \$10—or for any fee. So, I nudge them toward finding other sources. Now some of them might locate those other sources anyway. In any event, I am trying to incentivize the students to find things using tools that we have already talked about in class and that are provided for them by the College of Law.

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<sup>16</sup> The assignments and other course materials are available from the author.

<sup>17</sup> TENN. CODE ANN. § 48-11-101 - § 48-28-109 (2012).

With that foundation, I introduce the “real” client in the third class. Each student produces draft bylaws for the client, and each then takes the draft he or she produced and reviews and revises it based on the class discussion in the fourth class meeting. To assist in the effort, each student trades drafts with a partner in class. The partner offers comments that reflect both his or her own experience and the points covered earlier in the class meeting. So, each student works with those partner comments as well as his or her own. The class discussion moves things further forward.

The students submit the individual bylaws to me for assessment after the fourth class. I grade them individually. In preparation for the fifth (and last) class meeting, I conscript the students into further activity on the client’s bylaws. I construct groups of three from among the enrolled students and task the members of each group with collaborating to create a consolidated set of bylaws out of what they have individually researched and drafted. Then, the students report back out on their work in the last class meeting.

There are three key components that I can identify about the aggregation of this in-class and out-of-class activity. In total, the teaching and learning represent a staged discussion. There is little in the way of lecture. There is much in the way of give-and-take between the students and me and as among the students. We are engaged in discussion for the entire two hours of each class, or we are engaging in in-class activities that involve discussion. The essential nature of the discussion is to identify where the students are in their work and how we get them to where they need to be for the client at the end of the five-class module.

There is also an active course website discussion in-between classes. Because the students are graded in part on their participation on the course website, there is an incentive to participate. The website discussion board, used this way, can be a peer-to-peer teaching tool (as I demonstrate below). The website discussion board complements the in-class discussion and the in-class and out-of-class editing and drafting that is being done over the five class meetings. Those are the key component activities in my module.

So what do I do in class—as the instructor? How do I generate discussion and activity? Here’s the technique I have been using. I take the class whiteboard and divide it into two sides, left and right. One side (the left) is labeled “Approaches” and the other side (the right) is labeled “Outtakes.” After class begins, I briefly summarize for the students where we are, from my vantage point as a senior supervisor, in our work and what our objective is for the class meeting. I then turn to the students and ask them, “What did you do to fulfill today’s assignment?” Then I stop and wait. And yes, it typically is

silent. Then, people start raising their hands, and they say, “Well, I did this” (describing their activity to fulfill the request made in the assignment). And I then reply by asking clarifying questions. For example, I might ask, “Is that the first thing you did, or did you . . . ?” I use some additional, responsive and inquisitive reflective clinical teaching questions, including the following:

Did anyone else find and use that resource?

How did you identify that resource first?

And who did something differently?

What did you do next?

We spend the first part of the class meeting engaging questions of that nature—questions about process. I take notes on the left side of the whiteboard.

Then, I move the discussion to a second stage. I ask the students: “What did you learn from all this?” (gesturing to the now overfull left side of the whiteboard). I transcribe the students’ answers onto the right (“Outtakes”) side of the whiteboard.

In total, then, each class meeting involves discussion around a series of questions about what the students did and what it taught them. In essence, I ask, over the course of the class meeting: “How did you approach this assignment? What did you find? What did you learn?” In the course of the discussion, we highlight and summarize responses to these queries. The information gathered on the whiteboard from the discussion is rich, and some students come up at the end of class with their smart phones at the end of class and take pictures of the board.

I sometimes ask the students to post the photos they take on the course website for the benefit of the class or send them to me so that I can see what they are capturing and remind myself of that. The repetitive reflective classroom activity helps the students to understand the system of learning and be ready for the next class. It connects the stages of their work and enables them to learn from each stage and apply it to the next. They can say to themselves: “Well, in the last class, I did this. So, maybe I will try something else this time as a way to solve this because so-and-so said that ‘something else’ was helpful and interesting.” Then, in the next class meeting the student can relate that and indicate what he or she found using that new source or method. So the students have the opportunity to experiment with the business lawyering process as part of the class.

I choose TWEN (The West Education Network)<sup>18</sup> as my course management website for a variety of reasons. The discussion board on which students post is among the tools it provides. I like the one-stop shopping of a course management tool, and TWEN automatically links statutory and decisional law citations to their sources. That's my simple explanation for choosing that teaching tool for my module. I post all the course materials there. There is ample incentive over these two-and-a-half weeks of class meetings for robust Q&A on the website discussion board because the students have work product due and desire to use the time wisely.

Students also post materials and ideas on TWEN, and I respond. Sometimes I'll wait (for a few hours—sometimes more) to see if another student responds, and then I will respond. It depends on the nature of the issue and when a response would be most useful. Given the short-term nature of things in the module (five classes over two-and-a-half weeks), I typically do not wait for too long before posting a response.

Set forth below are two slices of a student interaction from this past semester—one that I found to be particularly useful. Actually, I think they are pretty cool!<sup>19</sup> After sharing them, I will tell you why I think the interaction is “cool.” I have pasted in the actual student text; I have not edited it to correct typographical or other errors.

Student number one:

After putting together a rough draft of the bylaws I noticed there are several questions that need to be answered. The most glaring one revolves around the voting scheme of the Corporation in light of each person's varying degree of control they wish to have combined with wanting to protect the corporation in the future should they choose to add shareholders. A secondary one is I am not 100% sure how to set up the stock section for this Corporation. Based on the needs of the parties I am not sure a general boilerplate Article on stock is appropriate.

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<sup>18</sup> See, e.g., Joan MacLeod Heminway, Caught in (or on) the Web: A Review of Course Management Systems for Legal Education, 16 ALB. L.J. SCI. & TECH. 265 (2006) (comparing and contrasting TWEN and LexisWebcourses); Marie Stefanini Newman, *Not the Evil TWEN: How Online Course Management Software Supports Non-Linear Learning in Law Schools*, 5 J. HIGH TECH. L. 183 (2005) (describing uses of TWEN in law teaching).

<sup>19</sup> I used this word in my actual presentation and, in editing, determined to retain its use in a (perhaps weak) attempt to convey my enthusiasm and passion for this kind of student teaching and learning. As a child of the 1960s and 1970s, I also could have chosen “groovy,” I suppose. But “cool” was what came out of my mouth at the time . . .



Set forth below is the response of another student in the class, posted before I interacted with the students to post any response of my own.

Student number two:

I am with you here as it was one of the first things that caught my eye from the fact memo. The percentages of ownership are situated in such a way as to make the voting rights very important if we are to meet the wants and needs of the client. I'll be interested in hearing some of the ideas in class today about how to solve the problem as best we can.

So what do I love about this website discussion board interaction? At least four instructional values come to mind. First: *engagement*. Students are engaging with each other to resolve a legal planning and drafting question, even if the interaction is electronic. Also, salient: *reflection*. The initial student is effectively saying: "I have thought about this, and here's what I am thinking . . ." The responding student then is saying back (after affirming the original post in relevant part): "I thought about this, too." In addition: *collaboration*. For the instructor as a reader, there's a great feeling of openness, partnership, and affirmation. I love the feeling I get when I read this kind of colloquy between or among students—students becoming self-learners and peer teachers and taking direction from each other. Finally: *presence*. The interaction indicates that the students understand and appreciate the value of class time. As I read the posts, I understood that the responding student was confirming the need to be in class to advance the project. This is affirming. It made me feel loved—not personally, but professionally. It was a really wonderful part of that little interchange. There are similar discussions that I am privy to periodically on discussion boards and in class, but I just love this particular interaction.

In terms of the guiding, drafting and editing piece of the course module, the students do the out-of-class drafting of the initial bylaws on their own after we have gone through the class on the templates and forms of bylaws that I describe above. They engage in self-assessment and peer assessment of their planning and drafting in class through the guided discussion and peer-to-peer review. Then, they implement the resulting changes to their drafts outside class. They submit their revised drafts back to me with what is commonly called a "tie sheet." For those of you who are not familiar with this tool, it is a chart that links each bylaw provision back to the prescribing or enabling underlying law or rule (in this case a statutory or decisional rule). To create the tie sheet, the student must review each provision in the bylaws and determine that the bylaw is required or permitted to be included. In other words, the students

must be able to identify and convey to me the statutory sections and court opinions that authorize the provisions and words that they have chosen.

One interesting positive artifact of this exercise is that the students typically are quite good at finding the statutory sections after having gone through the statute location assignment at the beginning of the module. In other words, the students typically are good at identifying the applicable statute or case for each included bylaw provision. However, a negative that I spot each year in some students' work is a failure to read the statutes closely enough—resulting in the inclusion of an unlawful or invalid bylaw provision in the draft. When I am grading, I identify these lapses and share them with students in the grading memo that I produce after the conclusion of the module. Lapses of this kind happen every year with one provision or another in several students' work. Oftentimes, these errors are caught when the students consolidate their individual drafts at the end of the module—no doubt a result of the deeper peer-to-peer learning experience involved in creating the final consolidated draft bylaws submitted to me for assessment. I grade those composite bylaws and assign a group grade on that project.

So I will end with this quip that I found on the Internet, attributed to Fred Rodell (1907-1980). “There are two things wrong with almost all legal writing. One is its style. The other is its content.”<sup>20</sup> That pretty much says it all for those of us who teach legal drafting. I focus much more in my Representing Enterprises module on the content, although I do give the students some guidance on style (including principally word choice and formatting) in class and in written assessment. My review memorandum to the students does, for example, go through drafting errors that are standard. Having said that, I also trust to some extent that style also has been taught to them in another planning and drafting context, at least in other courses in the concentration in business law.

Before we hear more about style and substance from Richard and Lyn, I will take a few questions from those folks who may have them.

Q: Do you allow anonymous postings on the module discussion board?

Heminway Response:

For this module, I do not allow anonymous postings because the website discussion component of the course is included in the module grade. But in my Business Associations course, where I also use TWEN and want to

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<sup>20</sup> Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

encourage discussion of basic legal doctrine, policy, theory, and skills, I allow anonymous posting unless I am assessing student participation as an out-of-class exercise (for example, when I have a speaking engagement out-of-town and must miss class). In Business Associations, I have students who are taking the class for so many different reasons, and it is hard for me to plug into a central thing. But in this class, our activities are more focused, and all of the grading non-anonymous.

Q: What are some examples of substantive legal issues highlighted in the module?

Heminway Response:

The facts of the client problem that I give to the students raise several substantive things that I call out for attention. Particularly, conflicting interest transactions are part of what we cover. Issues include how the lawyer would address those based on these facts and where—in which corporate organizational document—charter, bylaws, or shareholder agreement (or even somewhere else). The students also must address the potential marriage dissolution of one of the founders. In general, I press the students to think about which of the issues we identify can be and need to be addressed in the bylaw document and which either will not be addressed at all or should be addressed elsewhere.

We also focus on whether to put transfer restrictions on this stock, and if so, in what context, for what purpose. For those of you who are not familiar with stock transfer restrictions, I will briefly note that under most state corporate laws, provisions restricting the transfer of stock can be in the corporate charter, they can be in the bylaws, and they can also be in the shareholder agreement under most statutes (including the Tennessee statute that the students must locate and use in the module).<sup>21</sup> This kind of question forces the class to think about where these restrictive provisions are put and why.

The discussion in this area extends beyond substantive law. One of the answers to the question about locating stock transfer restrictions is a normative one. Where do people usually put these provisions? Why might a lawyer make that choice? The students have trouble finding examples of stock transfer restrictions in bylaws even though they know that the statute says those provisions can be included in bylaws.

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<sup>21</sup> See, e.g., TENN. CODE ANN. § 48-16-208 (1986).

Almost every year in my Representing Enterprises module something unexpected happens that must be addressed real-time. For this module, for example, recent changes in Tennessee law present challenges. Accordingly, some of the template bylaws the students find do not reflect those recent changes in the law. For example, this year one of the things the students failed to note is a relatively new provision under Tennessee law that liberalizes the classification of required officers. In our new law in Tennessee, a corporation no longer needs to have a president and a secretary.<sup>22</sup> However, the corporation does need to have an officer that serves in certain functional roles that look like those of a traditional corporate secretary. That office, can be labeled whatever the firm's principals want. One of the unplanned discussions we had in class relating to the students' the first drafts related to why so many drafts provided for presidents and secretaries. One student opined that both offices were required in the statute. I challenged the student to locate the operative provision. The ensuing interactions revealed that those offices actually are *not* required in the statute.

The teaching and learning in this module—and in the course as a whole—are challenging on a bunch of different levels. Having said that, in the end it is usually the substantive issues that I embed in the fact pattern that create the most discussion and difficulty for the students. For example, the stock transfer issues relating to the potential future divorce also raise questions about enforceability. This brings family law into the purview of the module. We must determine for the client whether stock transfer restrictions are enforceable under Tennessee law in judicially supervised asset allocations in divorce proceedings. The students must engage in family law research to answer that question.

Q: Do you address professional responsibility and other engagement issues related to business formation in the module?

Heminway Response:

Thank you so much for asking about that. Indeed, we do. We handle that in the first class. Then, we come back to it when I introduce the client. Some students in the class have had experience in our business clinic and have approached this issue with respect to the entrepreneurial clients that come to

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<sup>22</sup> See TENN. CODE ANN. § 48-18-401(a) & (c) (2012) (“A corporation has the officers described in its bylaws or designated by its board of directors in accordance with the bylaws. Unless the charter or bylaws provide otherwise, officers shall be elected or appointed by the board of directors . . . . The bylaws or the board of directors shall delegate to one (1) of the officers responsibility for preparing minutes of the directors' and shareholders' meetings and for authenticating records of the corporation.”).

that clinic for help. These students reveal the approach they have taken in the clinic, and I ask them why. I act like a two-year-old, repeatedly asking “why?” We discuss what the engagement letter looks like and what it may mean to be representing an entity that is yet to be formed. It is hard enough to get ones hands wrapped around an artificial entity to begin with; but a pre-artificial entity . . . ? We talk through those and other issues. The students who have not had a business clinic experience get a lot out of that interchange. And the students who have had the clinical experience have to rethink why they did what they did and why they were doing what they did. So, yes, we approach the engagement issues twice: once at the very beginning of the module and then once again in the third class when I introduce the client.

Q: All those are really excellent drafting exercises for students. Do you talk to them at the end of the day about how much would you have charged your client if you were billing this much an hour? Do you look at Rocket Lawyer or LegalZoom?

Heminway Response:

LegalZoom! We do talk about it, and yes, we talk generally about client constraints, including time and cost constraints on particular projects. When we talk about LegalZoom, we discuss whether it is a good option for people. I no<sup>23</sup>te that I make them read Tennessee bylaw cases (judicial opinions) and incorporate relevant cases from other jurisdictions that may or may not be reflected—or even be able to be meaningfully reflected—in LegalZoom forms. When I point out to students at the end of the semester how their drafts were deficient, it helps them to appreciate that even an intelligent person with legal training may spend a lot of time drafting bylaws that are invalid, unenforceable, or otherwise suboptimal.

However, in terms of having my students bill hours or having a granular discussion about billing efficiency . . . I do not do that in this class. I have thought about doing it. However, with a five-class module, there is only so much I can do; so I address time and cost efficiency through conversation. I do have students that argue with each other about how to keep costs low while still delivering diligent, competent legal advice. One student may offer, for example, “Well, I would take this shortcut . . . ,” and then another student may reply, “Oh, I’d never take that shortcut because . . . .” We engage in that kind of a conversation in class so students get a chance to both suggest ways of

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<sup>23</sup> See, e.g., Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS 63, 94 (2016) (noting that “companies such as LegalZoom and Rocket Lawyer that provide basic legal documents and forms to consumers over the Internet are now firmly established and growing rapidly.”).

efficiently delivering legal services to small business clients and hear those ideas. I try to referee the conversation without taking sides—except to help point out negatives and positives to the suggested approaches.

That is it. Seeing no other hands, I will just thank you for being an attentive and engaged audience.

*TEACHING CONTRACT DRAFTING SIMULTANEOUSLY WITH STATUTE  
DRAFTING: HOW EACH ENRICHES THE OTHER—WITH AN ASIDE  
ABOUT THE FIRST-YEAR CONTRACTS COURSE*

**Richard K. Neumann, Jr. &**

**J. Lyn Entrikin**

**Richard K. Neumann, Jr.**

Lyn and I are completing a textbook on drafting in both contracts and statutes. We found that some core concepts of drafting are common to both. Contracts are really private statutes created by the parties to govern their transaction. Statutes, of course, are public law created by elected representatives to govern everybody.

Both contracts and statutes are collections of rules, and there are only three kinds of rules—duties, discretionary authority, and declarations. Any rule can be subject to one or more contingencies. The contingencies are called conditions or tests or exceptions, but those words all mean the same thing.

These four—duties, discretionary authority, declarations, contingencies—are the basic tools in drafting. Drafting is identifying a problem, deciding which tools to use in solving it, and using the tools well.

In contracts, you have some additional tools—representations and warranties—and in statutes you have to worry about things like controlling administrative agencies. But good drafting starts with understanding rules and how they work. And a lot of bad drafting results from the opposite.

We didn't start from scratch. Tina Stark is a pioneer. We learned from her and from George Kuney.

**J. Lyn Entrikin:**

I'm trying to follow you, Richard. No, no, not at all. This is part of the reason that we had to tweak the PowerPoint. As many of you who know Richard—his brilliance, and his work—know that he thinks globally and holistically, and it's all over the map. I, on the other hand, am simple-minded, very linear. These slides are in a particular order, so we've got this problem

[unintelligible] when we present it. I think we're going to start by just saying how we define legal drafting. As many of you know, we use legal drafting in a transactional sense in a pretty narrow way. However, most of our students and many of our fellow colleagues do not think of it in that narrow way. George [Kuney] understands this completely, but we start off with what we're working on, this manuscript, and define what we mean by legal drafting in the way that you understand it as transactional professors and lawyers. We mean legal drafting as a rule-based drafting exercise, not drafting an appellate brief, not drafting an office memo, but drafting and creating a rule. The rule structure itself is what we [unintelligible] keep working.

Tina Stark was a pioneer in teaching many of us, including me, how to draft rules. Richard has already alluded to the credit that we all owe Tina for being a pioneer in this field. These are her seven contract concepts. Those of us who are familiar with her work know she starts off in the first few chapters outlining these concepts. Richard has already alluded to the fact that what we were working on is how we can do what George has already recognized. What are the common components of Tina's list that she knows so well in a deal context? And how can we literally distill those down to the least common denominators that all rule structures have in common? I'm so excited about Joan's class, I'm going to take her module. She's as excited about corporate bylaws as I am about legislation and administrative rules.

So from there, though, Richard will pick up and talk about his three distilled concepts and how they relate to Tina's work.

### **Richard K. Neumann, Jr.**

I've discovered a game that students don't like to play, but can really get into it. For the game, you put in front of them a really complicated statute on a big screen in a classroom and ask them to identify every rule and categorize it. Is it a duty, discretionary authority, or a declaration? Is it subject to a condition? Did the drafter make a wise choice and express it well? You can do the same thing with a contract provision. Ask them what's there. At first, they're baffled and would rather leave the room than answer. But this is how it begins to make sense for them.

### **J. Lyn Entrikin:**

Talk about these other kinds of roles.

### **Richard K. Neumann, Jr.**

They can make sense out of all of this stuff if they will just learn how to dissect it.

## J. Lyn Entrikin:

And what we've done is just list the things as we brainstormed, "What are those other rule-based structures?" George's book goes into a lot of them. Tina's book deals with them in a very deep, comprehensive way with respect to big deal transactions. Some of you know I was one of the first presenters at Tina's first conference here. I got dragged kicking and screaming into teaching transactional drafting because I don't have a business background; I have a public law background. So the way I was able to capture Tina's wonderful teaching materials was, "Hey, I can do this if I just think how would I do it if it were a public law. How would I do it if it were an administrative rule or something I had lots of practical experience doing? How could I do that if it were a corporate bylaw?"

Judy and I have worked over the years and many times on the [unintelligible] bylaws. We're working on them again, Judy, so I should call you about that. But all of these rules, corporate bylaws are a wonderful example of another form of a rule structure that's not a big deal. It's not even transactional, but it is forming an organization. It becomes the governing document for that organization on a day-to-day basis. How do membership fees work? How does the organization work? What are the officers' powers and duties and responsibilities?

This was an interesting discussion we had. I mentioned jury instructions, and Richard says, "That's a litigation document." And I said, "But it is a litigation document, and yet if you think about translating a complicated common law cause of action or a statutory cause of action into a jury instruction, what are we doing? We're taking really bad language, and we're trying to translate it into the nuts and bolts of what the jury has to do with that. I think it's exactly the same thing." So that's where we started trying to brainstorm this list of rules.

And then it seemed like we have private aspects of this, much like the corporate bylaws, but then we can group them. Of course, this is a very simplistic grouping. But we thought you can really look at this in terms of a private law versus public law dichotomy. It's not a clean break because I think with corporate bylaws, for example, there are definitely private laws that deal with private agreements that deal with private corporation; however, they are a lot more public in terms of a governing document than a traditional contract between two parties that are trying to make a deal work out.

So that's what our concept is, looking at what are the common elements that all of these things have? And what are the benefits of teaching our students to think and deconstruct language and rebuild it using those building blocks? Basically we want to take what Tina has done as a pioneer with deal contracts deeply, generalize it, cut through the silos, and bring it out to virtually what application it has, even for common law in some ways.



So that's where we are. Now, Richard, I think it's your turn. Those are your three building blocks.

**Richard K. Neumann, Jr.**

These are all governing documents. They control human behavior. That's what their purpose is.

Legal writing—office memos and appellate briefs—goes to the past. It judges conduct that has already happened. Drafting goes to the future.

Think about drafting as stage directions. If you are directing a play, you want people to do or not do certain things. You will give them directions. You can impose the duty, which is a command: thou shalt, thou shalt not. It's an order. The stage character must do something or refrain from doing it. You can give discretionary authority. You can give them power or permission, but not the requirement to act or refrain from acting.

And you can declare something to be true. Students love this idea. It's Harry Potter. You can wave your magic wand, say an incantation, and suddenly something happens. My university exists because the legislature in New York passed a resolution waving a magic wand and the university now exists.

Declarations are underrated. Duties are overrated. I can give you an example that you're probably all familiar with as deal people, the standard anti-assignment clause. You want to do it well? You've got to create a duty not to assign and delegate. And you have to *declare* that any purported assignment or delegation is void.

Now if you heard a voice from the heavens that said "In this contract which you are now drafting you can use only one --- a duty *or* a declaration --- and I will strike you down with lightning if you use two," which would you choose? The declaration. It *prevents* the thing you don't want to have happen. The declaration makes it a nullity. But lawyers don't understand the power of declarations. They think the only way to get results is to impose duties. As Holmes said in *The Path of the Law*, a promise is a promise to perform or pay damages, and the promisor gets to choose which one. So declarations are underrated, and duties are overrated. Everybody mistakenly thinks the law should be ordering people around.

Those are all rules pertaining to those three categories. All of them. You can go through statutes that are incoherently drafted. Just identify all of the rules, and except for conditions and tests, there are no other controlling words. Everything else that doesn't fit into those four categories is surplus.

**J. Lyn Entrikin:**

Now, we've got those three building blocks. Next, there are test conditions and exceptions. That's the next slide. Go ahead, Richard.

**Richard K. Neumann, Jr.:**

Now any rule can be subject to a condition, an exception, or a test, which are all really the same thing --- a contingency, an uncertainty, or a thing that is not guaranteed to happen as an on-off switch. If it's a condition or a test, you push the "on" button when all the elements are satisfied, the lights go on, and the rule is activated. If it's an exception, it's an "off" button. If the exception is satisfied, the rule gets turned off. That's all it is. It's a relatively simple concept. But in application, it becomes incredibly complicated.

Those are your four tools. You want people to behave on a stage? That is what legislatures do, and contract drafters do. You have those four tools, plus representations and warranties in contracts, and it is part of the challenge using only those four things.

This is sort of like writing sonnets. You get a limited number of things you can do. You've got to fit it into the eight lines plus six lines in a classical sonnet. You've got to choose your meter. You've got to self-discipline yourself that way. But using the four tools, you can control what everybody does on the stage.

If you want this person to do so-and-so, want that person to do such-and-such, those are your stage directions.

### **J. Lyn Entrikin:**

On the next slide, we try to test this by looking at what things are the add-ons that we need for contracts: those representations and warranties.

I've actually tried to make an argument with Richard that there are representations, and statutes are called legislative [unintelligible]. We have all kinds of debates on this. You can imagine the discussions we have. But representations and warranties are really different animals. They're different operative terms in a contract that really don't exist; at least not in the classic sense—in a statute. My argument, though, is that we still have our special things over here too; that statutes don't self-execute. You can't create a right or a duty in the traditional sense in a statute and have it just happen. It doesn't instantly happen. George [Kuney] is nodding. I love the noddors in the audience.

When you create a duty in a statute, you have to figure out how you're going to endorse that duty, or it's not going to happen. You better figure out in a legislative world how you're going to fund it. You're going to have to figure out which agency has the responsibility to get it done, or give someone a cause of action to do something about it, maybe with an incentive called a private attorney's general statute to make sure it's actually being carried out.

Again, this is just trying to test what are those common elements. The duties and prohibitions are there. The rights happen on both sides. The flip of the duty and the discretionary authority is always there. The declarations are essential. In a statutory world, we define a lot of terms. The statute is defining

terms as a matter of law, and then the conditions and exceptions, although they take different forms, are still there.

Now we had a really interesting argument. I wanted to talk just a minute about a conversation we had when we were working out this book. We tested this and thought, “Well, what about a criminal law? What about a criminal statute that defines a common law crime like burglary?” And we all can probably recite from our first year criminal law class the elements of burglary. What’s an element? Why do we call it an element? What does that mean? How do we fit this kind of a structure onto something as basic as a criminal statute with elements?

And we had a quite interesting conversation until we suddenly had this light bulb come on. Isn’t an element that’s a requirement for a criminal offense to be created and prosecuted nothing more than a condition? If someone breaks and enters in the nighttime the dwelling and house of another with the specific intent to commit a felony therein, that means burglary.

**Richard K. Neumann, Jr.:**

It’s the declaration. It is not the duty.

**J. Lyn Entrikin:**

The declaration. And it’s not a prohibition, thou shalt not commit burglary.

**Richard K. Neumann, Jr.:**

That’s right. The Ten Commandments, but not in legislation.

**J. Lyn Entrikin:**

We’re defining to the declaration the crime of burglary and an element, although we always called them elements, as a cause of action or parts of a cause of action. It isn’t that conceptually the same as a condition that turns on and off the existence of that burglary offense. So you can debate that with Richard as he’s here another day or two and I’m not, but that’s what we came up with. And so we think it even fits in something as simple as a criminal statute.

Now then we attach a punishment or penalty to it.

**Richard K. Neumann, Jr.:**

This is an example of stage management. The legislature says, “Oh, those people are breaking into a house. We want them in prison.” Well, we’ve got to declare, create the crime by declaring it with clarity that you are guilty of burglary when you do those things. And you don’t automatically get punished. The police have discretionary authority to arrest you. The local prosecutor has

discretionary authority to prosecute you. If the jury convicts you, the judge has a duty to impose a sentence, but discretionary authority within a range to choose your sentence. Once the sentence has been handed down, various administrative and police officers have certain duties to transport you to a prison. And the prison officials have duties to keep you there, etc. All of these things are tied together so that everybody does what the legislature wants as a consequence of committing a crime. You can use all these tools to have people move around on the stage in exactly the way you want it done.

**J. Lyn Entrikin:**

Richard is a closet scriptwriter in addition to closet lots of other things.

**Richard K. Neumann, Jr.:**

I once [unintelligible] criminal law.

**J. Lyn Entrikin:**

Okay. So we're going to go now to the operative terms aspect. Richard, this is also your riff.

**Richard K. Neumann, Jr.:**

Once you've identified what you're trying to do, you face the historical problem that there's no accepted formula, at least among drafters. There are about 30 publicly available state legislative drafting manuals. And some of them are very thoughtful. Those people are doing the best they can, but there's no inner core of reasoning that they have been able to follow.

Essentially every duty can be expressed in a relatively simple way. Whoever has that duty is the subject of the sentence, follow it with the word "shall" or "shall not," then the rest of the sentence is the duty. If all duties were expressed that way, the world would be a simpler place, and law would be easier to understand. Next is discretionary authority.

**J. Lyn Entrikin:**

We're going to talk just briefly about "must not," which can be used in some places.

**Richard K. Neumann, Jr.:**

Then there is the dispute about "shall" and "must." Our position is that "must" is okay for consumer contracts. Consumers generally don't understand the meaning of "shall." But you need to reserve "must" for really complicated conditions. In the deal world, closing conditions are an obvious example. In the statutory world, they're all over the place. For a long list of conditions, the only way to express them is in complete sentences introduced by the word "must."

If you want to create discretionary authority, place whoever is going to have it as the subject of the sentence. The next word is “may.” The rest of the sentence is what they have the power or permission to do. If all discretionary authority were expressed that way, we wouldn’t have to worry about whether somebody has a power or an obligation because it would be clearly expressed by the modal verb the drafter used.

Declarations are a little bit more complicated. They use a verb that expresses a state of being. A declaration is a present tense expression of a truth that we create by declaring it.

**J. Lyn Entrikin:**

And of course the definition is just a specific version of the declaration and is used so importantly. Sometimes the definition actually becomes the building block of a statute or a contract. For those key terms that we find rather than a state of being modal verb type thing, we’re going to use what word means. And we teach our students to do that whether it’s a statutory definition, a contract definition, or a bylaw definition. Who are the officers of the organization? Officer usually means the president or secretary, but not any more in Tennessee. So again, teaching the students these basic building blocks and getting them to realize. One of the things I’ve struggled with is teaching the students that this is the operative term that should signal to you that it’s a duty or a prohibition, a negative duty meaning shall not. And so then I actually ask them to start redrafting language. And I’ve mentioned this to Richard, they say, “Oh, well, it says shall not so that must mean a duty.” It’s a negative prohibition. It’s a negative duty. Like, no, no, no, you don’t understand. All those people that wrote for years and decades and centuries, they used “shall” way too often. This has been the challenge as we’re thinking about organizing materials so we’re teaching students to draft using these operative terms before we get them into redrafting badly drafted language, which we’re going to get to here in just a little minute.

Now, Richard, you’re going to talk about conditions and exceptions and how to express those, the subordinate conjunctions.

**Richard K. Neumann, Jr.:**

A really nice way to start a condition is with the word “if.” In drafting statutes and contracts, anything that begins with the word “if” has a very high chance of being a condition. It’s an unambiguous way to express a condition. Even in the second month of law school, students can recognize that if you put a complicated contract provision on the screen and ask them to identify a condition, they look for “if.” It’s instinctive.

Exceptions include “unless,” “except,” long lists of conditions are introduced by the word “must,” etcetera. If we had an agreed-upon method of expressing these rules, those conditions everything drafted would just be easier to understand.

**J. Lyn Entrikin:**

So we already got to the burglary anecdote, but basically what we have here is translating this statute and recognizing even in the criminal statute context that what we really have is a declaration with conditions. We just happen, in a criminal law or cause of action world, to call it an element because it makes it easier for our first-year students to understand that structure. But our point is, can we agree that an element is nothing more than a condition to a declaration in a sense? We call it an elements test. Sometimes we have factors tests and all those other things, but they're just different variations on a conditions theme.

**Richard K. Neumann, Jr.:**

Could I interrupt you? When you're expressing a test, it is useful, to write "if" or "unless," "except," etcetera, but a large proportion of statutes don't use any of those. For example, "A person who commits breaking and entering in the nighttime with the intent to commit a felony therein is guilty of burglary." There is a test in there, but the word "if" is not. Those six elements are the test. So it's not necessarily true that conditions are always introduced by the word "if." In statutes they often aren't, and that's okay as long as you know how to recognize a test, which first year students can pick up.

**J. Lyn Entrikin:**

So this is the premise of what we've been working on for four or five years, and hopefully we'll get a manuscript to Aspen before too awfully long. We think that when we talk to the students about these common basic elements of structure and rules from the ground up, they learn that the same basic components are there whether it's a jury instruction, corporate bylaws, even charter agreements, or ordinances. If they learn to do that together, they're going to see that they're not in little discrete silos for each doctrinal course. There's a common structure to law, and it starts with [unintelligible] to figure out what are we trying to accomplish. We are using legal language to accomplish some sort of a goal for a client or to prohibit certain things that we don't want people to engage in as a matter of public safety and morality.

So when we teach them together, the students can start to see that it isn't as discrete as we make it sound using semantics that are unique to each individual field. There really are common elements that cross through all of that. Our idea is that if we teach students that there's going to be a synergistic effect that not only makes them better and more precise thinkers and writers, it teaches them the precision that Joan talked about; understanding that corporate bylaws can't do something that the corporate statute doesn't allow them to do. That there really is a nesting aspect to that, and that's a deep thinking skill.

I don't know that we've really done that in a comprehensive and sophisticated way with the legal education curriculum that's been what it's been since the 1870's. So that's our basic premise. We also emphasize throughout

our manuscript that the best way to get to the essential drafted document is to simplify, simplify, simplify it. Some of our other presenters have talked about the keep it simple rubric KISS, keep it simple stupid. Anytime you inject something that's not necessary into that rule, you create a potential litigation issue.

And, Richard, that's your riff. You can take it from there.

**Richard K. Neumann, Jr.:**

I've taught contract drafting now for about 12 years, and I've discovered how to teach students how to diagnose and treat, in a medical sense, bad drafting. Most drafting is really redrafting. When I put badly drafted provisions on a big screen in class, they didn't know how to start fixing them. So the first step of the diagnosis would be to ask what is it? What are you looking at? You've got only four possibilities, and with a contract two more. What is that sentence on the screen? And eventually I figured out I've got to color code it on the screen.

**J. Lyn Entrikin:**

Just a second, Richard, if you don't mind. We're going to get to the colors in just a second. Okay. Well, we're going to get to the colors because Richard really likes colors. He's very visual. So am I, so we're going to get to color coding which you'll see in the back of the handout.

But to teach our students this process that Richard's talked about, putting something up on the screen and saying, "what is that?" You all have tried this. If you've used some of Tina's materials about the badly drafted deal contract, she says, "All right, redo it." The students first say, "I don't want to read that. It's a wall of text. It's bad stuff. It's wordy. It's poorly organized. I don't want to read it." You know what I'm talking about. Your students will resist. That's why Joan's students are having a hard time going back and finding the statute because statutory junk is hard to read.

The first thing we have to ask students when we're trying to get them to look at the statute is not only "What is that?" but "When you read the whole thing and you get the gist of it, what is that rule or document or statute trying to get done?" Is it trying to keep people from burglarizing a house? Is it trying to keep the president from taking over the entire organization without the permission of the shareholders? What are we trying to get done here? If they can't figure that out, it's really hard to go into the building blocks and get them to reconstruct it.

So the first goal is to read the whole thing. Where are we trying to do that? What are they trying to do? From there, the what is did the drafter use the right tool, the operative term, and the building block component? Did the drafter use the right tool to get that done? And, generally, in the statutory rules, the answer is no, and then they have to start over.

**Richard K. Neumann, Jr.:**

If you look at the handout on page 12, what you see in the left column isn't where I start out with students. I would put that up on the screen without any color coding. And the first step would be to say it's badly drafted, let's figure out how.

First, let's identify what you are looking at. And it might take a fair amount of time to get them to identify. Now that they know the definitions of the three kinds of rules, plus conditions and rep warranties, etc. What are they? And I'll work it through with them. They have to do the real work, but as soon as they've agreed and correctly diagnosed what these things are, they're color coded because I color them as students identify them.

Then we can talk about how to fix them. What's the best way to express them? The first one you see in the handout is discretionary authority or a declaration. Red is for duty; green is for discretionary. Blue is declaring something to be true. Brown is for a condition. But students decide that the first sentence is a condition plus declaration. So what's the best way to state the declaration? Now that we know it's a declaration, there's a limited number of ways to express it. If we use one of those limited number of ways, the reader will instinctively understand it to be a declaration. And what's the best way to express the condition?

Students don't know what to do unless they know what they're *trying* to do. The only way to know what they're trying to do is to figure out what tool is being used or what tool the original drafter misused.

So after doing that, the next step is to see all this in color. There would be a third column over here if we'd had the foresight to do that. The column on the left would be where there are no colors at all. The next step would be to color code the four tools, where students identify what type of rule and whether there's a condition and if so, what kind.

The third step is to choose the right wording to express it most clearly. That's the column on the right. The translation that we draft.

**J. Lyn Entrikin:**

So we'll take a really quick example from Richard's page 12. "The term of this agreement shall begin upon the option commencement date and ends on the 9th of June, 2019." [Cross talk] Why are we using "shall" to express what amounts to a declaration? So using the same language, how would you translate it? This option period begins. It's a state of being. We're just turning it into what it really is. It's a declaration, and by selecting the operative term that makes that clear rather than overusing the operative term "shall" that should be reserved for duties, we make that clear. So this same principle, this deconstruction effort, can be used in a statute. So we selected some things from the New York General Obligations Code because that's what Richard loves to deal with, really badly drafted New York statutes. They do have a transactional



component because it's the general obligation law, so it's that set of statutes that restricts and limits what you can do in a contract in New York.

This is actually an interesting one. I'll give you just ten seconds to read what's on the left. But like a student, I don't want to read that. And I actually color coded it for you, so it only takes a little bit of scanning. What is really going on here? This is very deep thinking stuff. I feel like I'm solving a really complicated crossword puzzle when I'm doing this. But this process is just reading that junk and trying to figure out what it is and how we are going to color code it.

**Richard K. Neumann, Jr.:**

The first two and a half lines are clearly an exception, which is a kind of condition.

Now what's the word "cannot" mean? Is it an expression of a requirement not to do it, or is it an expression of impossibility? "Can I have the potato chips?" "I don't know. *Can* you?" That's how children learn the difference between permission and possibility—"may" versus "can." A lot of the verbs here actually go back to kindergarten. Is what you see here on the screen permission, a duty, or a declaration of impossibility?

**J. Lyn Entrikin:**

And some students would look at that, myself included, and on initial instinct say it says cannot. That sounds like that a negative duty. It sounds like a prohibition.

**Richard K. Neumann, Jr.:**

Do they get punished if they do? Do they have to pay damages if they do it? No. The legislature's goal was to make it impossible. "Cannot" is not a bad verb, but it's just not the best one to express it because it's not legally precise.

**J. Lyn Entrikin:**

So we ended up deciding that it's not a prohibition; it's really a declaration that a certain kind of contract is going to be void.

**Richard K. Neumann, Jr.:**

That's what the legislature was trying to do. Now, the next block of text is in brown as though it's a condition. Literally, what the legislature has done is to make that part of the declaration an impossibility. This is what it's impossible for two spouses to do. Now, the problem is that they used an imprecise legal concept or maybe not even a legal concept at all. "Cannot." It's impossible.

Well, in the law of contracts, what makes something impossible? You have to make it void.

As a matter of public policy, the legislature wanted this void. Once you put the precise legal concept into the sentence, then the rest of the sentence is conditions. It's void "if." What makes it void is the satisfaction of the condition.

**J. Lyn Entrikin:**

Ambiguous.

**Richard K. Neumann, Jr.:**

Well, yeah. It didn't work in law. So if that's all true, what are the consequences? You have to translate it into precise legal language.

**J. Lyn Entrikin:**

Which requires a lot of deep, analytical thinking. What is the legislature really trying to say here? Are they telling someone he or she cannot enter into that kind of contract? Well, no, we can't prohibit married couples from entering into any kind of contract. What the law is saying is if you try that, we're not going to enforce it. It's essentially null and void. It's unenforceable, and that's what the general obligations law in New York is trying to say when you think about the context of it.

**Richard K. Neumann, Jr.:**

If you do this in a drafting course for second year students, all of a sudden they know what the idea of voidance is good for, which they were supposed to have learned in their first-year Contracts course. They know what it's actually supposed to accomplish. If you try to get them to work out whether the legislature should declare voidness or voidability, what the difference is, and why the legislature should have chosen voidness. Voidability is when one of the parties wants to get out. Voidness is when it doesn't matter which one of them wants to get out.

**J. Lyn Entrikin:**

And we've both seen in trying this on our respective students, Richard in a more transactional setting but working in statutes and myself in a statutory setting but working in some exams on contracts, we have both seen this happen. Suddenly the light bulb is flashing on, and all the things that they've been able to incorporate now make sense. "Oh, that's what they meant when we were assigning a duty or assigning a right. That's what it meant." Suddenly you start seeing the integrated thinking skill. Really what we're doing here is another form of analysis, but we're cutting sideways through the doctrinal silos. I think we're really getting at something that helps our students transfer what they learn in our different classes to one another, so that it really isn't about

contracts. It's not about statutes. It's not about administrative rules or even corporate bylaws. It's about the same skills that we need to apply across all of those fields.

**Richard K. Neumann, Jr.:**

And if you could think about first-year Contracts as a drafting course. Contracts is a two-semester course at Hofstra. My faculty has been persuaded every time we face this issue that we live in a world of contracts. The course in Contracts explains life. We don't live in a world of torts. You don't commit a tort every day, but you enter into a contract every time you click on "I agree" on a website.

**J. Lyn Entrikin:**

They live in a world of statutes.

**Richard K. Neumann, Jr.:**

Our Contracts course is six credits because it basically explains the world around you. And so for me, the drafting course is the third semester of contracts. Analytically it puts things together in a way that students were not in a position to understand during the first year.

**J. Lyn Entrikin:**

Let's turn into students for just a second and just flip through some slides. Imagine you're in a class, Richard's class. He puts this up on the screen and says, "All right. What is that? We're going to figure out how to redraft to where it makes sense." What do you do as a student? "I don't want to read that."

**Richard K. Neumann, Jr.:**

You say, "Oh, God, he's writing again. Can I take a break and go out and take a phone call?"

**J. Lyn Entrikin:**

You all want to go out right now and get something to drink. You do not want to do that. It's just absolutely resisting human nature to try to deconstruct that. So you say, "All right, let's take it apart." Let's take it one sentence at a time. We know it's badly drafted, but can we figure out what the goal is of each of these sentences? We don't have to spend a lot of time doing that. We could if we had time, but the next slide is just the same thing with the color coding. And again, pick the colors that you like. These were Richard's choices. I probably would've picked something else, but that's okay. We're going to go with Richard's colors. He likes the brown thing for conditions.

All you're doing here is taking that black block of text on a PowerPoint, or if you prefer a WordPerfect slide, and you're changing the font

colors as the students have that discussion. You are forcing them to read that block of text and figure out what's going on in there. It looks classified. It's not that hard. There's only four choices here. And yes, we know we're oversimplifying, but let's start there because we can get more sophisticated as we learn more about the different kinds of variations. But all we're doing is color coding.

Then you can take each of those color coded portions. What a mess. Look at all the jargon they put in that very first sentence. "No person shall . . ." No person can do anything. There isn't anybody there to not do it. So then you can actually take them from that to this. You can say it might help to simplify it if we take all that jargon and create some definitions so that we don't have to repeat the words all the time. And it took me doing this a long time to get here, but imagine this as being a class exercise. Imagine the cross [unintelligible] and the ideas and the brainstorming. What's a skill-sized class that would actually be able to engage in that kind of discussion? So we just wanted to show you what you could do in class by doing something this simple. I think conceptually it's pretty deep thinking skills that students are going to develop.

**Richard K. Neumann, Jr.:**

What we've been talking about so far is diagnosing and fixing what is already there. Diagnosing is something that first-year students are capable of learning. Second-year students are capable of learning how to fix it. But the next step would be starting from scratch. Building using the three rules, conditions, and in contracts reps and warranties. And if students have to learn that drafting is building. It's not passing judgment on the past in the way the office memo and briefs do. You build for the future. It's the same as architecture and construction or building a house.

**J. Lyn Entrikin:**

I think you have a set of brief exercises if you look at this last piece of paper in your handout. Don't turn it over yet. Just look at this for a second.

**Richard K. Neumann, Jr.:**

Look at page 15.

**J. Lyn Entrikin:**

Let me just give you an introduction, and then we're just going to pick up on Exercise B because we don't have time to do all of them. You're welcome to use these any way you want. My attempt was to start off with something that's more of a traditional rule drafting exercise. A couple of neighbors want to authorize their kids to climb each other's trees, but they want to make sure that they're protected with liability insurance if someone gets hurt. It's a more transactional, contract-like neighborly agreement. It's not a deal, but it's a consumer transaction across the back fence.

The next one, which Richard is going to walk you through, is drafting a set of bylaws for a homeowners' association. This one is a more hybrid situation, very much like what Joan Heminway is doing in a big corporation context. But now we're actually doing it in something more like an organizational setting. So we're going to walk through that.

The third one, which we won't have time to do, looks a lot like what it would be if you were working on drafting an ordinance for a local city council to create a tree board to regulate how we're going to put trees in this little subdivision to make it look prettier. That one shows you that we hope to accomplish the transferability of these skills across different doctrinal areas. Go ahead, Richard. You're going to explain Exercise B.

**Richard K. Neumann, Jr.:**

So you do this with students, and you say, "The client wants this drafted, roles to include in a set of homeowner association bylaws to provide for the removing and replanting of trees located on private lots." There is a homeowners association, which means there is a bunch of rules about what you can do with the property. What happens with trees that are seriously damaged by wind or hail and that authorizes the association to reimburse the homeowner for 50% of the actual cost, etc. So we ask the students, "All right, which rules are you going to use?" The first thing you've got to do is make a list of the tools you're going to use and how you're going to use them. For each thing that you try to accomplish, choose a rule, choose a kind of rule, and attach a condition to it if you want. This is not a contract, so you can't use reps and warranties. Although there is a transactional overlay to it, it's closer to an ordinance or a statute; however, it's within the context of people living together making a set of rules for themselves. It's not like the legislature.

Now students will instinctively try to impose a duty on the homeowner to replace the trees because a lawyer is supposed to order people around. That's their instinctive response. "Make 'em do it!" But what's the purpose? That dictates what you want to have done. What is the goal here? Is the goal just to make sure that everybody's front yard looks presentable? If everybody's house and everybody's yard looks like *The Truman Show*, then everybody's happy? It's a model community? If that's the purpose, impose a duty.

If, on the other hand, this is a form of helping sort of insurance, then when it [Unintelligible] happens to you, hail or wind destroys your tree, your neighbors through the association would get together and defray some of your costs up to certain limits. If that's true, give the homeowner discretionary authority.

Your choice of type of rule often depends on your goal. What does the client want done and why? Client says, "Oh, fix the tree." Why do you want the tree fixed? Is it because you can't stand the sight of damaged trees? Or is it because you assume that every homeowner would want to repair the tree, and it would be good to help him or her do it.

**J. Lyn Entrikin:**

We want a wooded subdivision because that's what was designed from the very beginning. We'd originally hoped to actually get you to draft this, but I think with these kinds of simple examples you can see. Now Richard is saying, rather than making the students do it, you could talk through where there would be more advantages to setting up this homeowners' association bylaw as an incentive. If you do that, we will cost share with you because the homeowners' association as an organization shares an interest in maintaining the wooded quality of this subdivision. So you can talk about the policy choices between each of those different approaches.

**Richard K. Neumann, Jr.:**

If the homeowner removes the tree, the association shall pay up to a certain limit. In fact, you could skip the discretionary authority and go straight to the conditions. If all you want is payment and you're not going to require removal.

**J. Lyn Entrikin:**

Now, the aside about first year Contracts class, Richard.

**Richard K. Neumann, Jr.:**

Yeah, actually Tina was talking in a session before about the first year Contracts course, and because I come from a clinical background, I can't restrain myself from trying to teach skills in a casebook course. She talked about many ideas she came up with, espoused them for a long time, and tried with her students, and the students love them. The students are learning how to *do*—how to accomplish things.

And the second thing is that by doing, the students actually understand the world around them. And they love exercises where you do drafting in class, but you should save it until you get to conditions. Save it until you get to the *Reading Pipe* case and express conditions versus constructive conditions.

But back in the offer and acceptance part of the course, or more accurately meeting of the minds, during the first few weeks in September, there is an exercise which I would use, and you can just read it at the bottom; Exercise D. I promised Lyn that there would be a certain reaction. Was that a duty—did I take on a duty?

**J. Lyn Entrikin:**

He did promise. It was a promise.

**Richard K. Neumann, Jr.:**

This—section 2-207—is the single most troublesome section of Article 2. Courts hated it until about two decades of case law decided what it actually

meant. Students hate it because it's very complicated. Article 2 actually is a lot of compression. In many ways, some of the drafting in it is admirably compressed into few words and simpler ideas; however, here the compression left out some stuff.

Students are capable of figuring out what's missing. It takes a lot of guidance. It takes about 60 minutes to run through this in class, after they've done at least one 2-207 case. Then they get a sense of what's *not* there in the drafted words, and they can understand the statute better than if the missing concepts had been expressed there. And as with a series of statutes, they can vent their frustration by inserting into the statute the sentence or sentences that have troubled them the most.

You're not going to be able to teach complete drafting in the second month of law school, but you can get them used to the idea that aggressive reading of statutes means aggressive redrafting in the reader's own mind. The only real way to understand those statutes is to rewrite it in your own mind.

So, what questions can we answer?

**J. Lyn Entrikin:**

Suggestions, thoughts?

**[Inaudible question from class participant]**

**J. Lyn Entrikin:**

Yeah, and this is back with the same problem Tina speaks to in her work. You're going to have those seasoned lawyers that require us to use the magic dust because otherwise they won't recognize that. The same thing happens in wills and everything else. And I think all we can do is say, "Look, isn't it true that once you read it redrafted, don't you understand it better?" And they respond, "Oh, yeah, I really understand it better as long as you read." So if you can distill it down, you can teach them the analytical benefits. From a statutory standpoint, if we want people to comply with the statutes, wouldn't you like them to understand what they're reading? I don't think that that's unique to your world or our world or any of it. I think we deal with that all the time. And my students say, "Well, what if you're dealing with this?" And I say, "You know, at some point you're going to be at liberty to show them the way. Now obviously, if they're signing your paycheck, you've got to do it the way they want." [unintelligible]

The statutory conduct is a real problem. It's one of the things we're dealing with in the manuscript we're working on. This is my part because contract precedent is out there too, but in the statutory world, if you've got a whole Uniform Trust Act that you're trying to amend that is unique to your state, you've got to deal with the comprehensive canvas that's out there. However, I still think we can teach them the value of thinking it through analytically before just randomly using the same words that the context does.

But they certainly do need to understand that context absolutely. And we could talk for another two hours just on that. It's a really good point.

I'm going to have to leave for family reasons but Richard will be around. We have been working for a long time trying to come up with an appropriate title for this manuscript we're working on.

If you have thoughts and suggestions, we thought about Drafting the Law, but doesn't that connote drafting statutes? And so we've kicked this around for a long time, and George Kuney has got a suggestion. George.

**George Kuney:**

The Unified Theory of Legal Drafting.

**J. Lyn Entrikin:**

That's a wonderful start. Keep them coming. Thank you so much, and I really enjoyed the presentation.