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Rookie Mistakes to Avoid

Edward R. Becker

University of Michigan Law School, tbecker@umich.edu

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TED BECKER**ROOKIE MISTAKES TO AVOID**

I'm Ted Becker from the University of Michigan. My part of today's presentation is to fall on the sword. I say that because my topic is rookie mistakes to avoid. Many of us up here on the panel aren't rookies but I certainly am. I just completed my first semester of teaching transactional drafting so I'm new to the game, and then when it comes to mistakes, oh yes, there's a bunch of them that we can talk about. Because the semester just ended, these missteps are as fresh in my mind as they could possibly be, and I hope that setting out some of them here will help other professors who are looking at teaching drafting for the first time to have a little bit easier time of things.

Going into this course, I certainly was not holding myself up to any sort of unrealistic standard, I don't think. I didn't expect perfection. Any time you teach a course for the first time, there will be inefficiencies, lots of things to improve. But what I really want to talk about today are the mistakes that I made, looking back at things from the vantage point of an experienced professor in other subjects, that really eat at me because I should have known better. I have been teaching legal writing for ten years so when it comes to teaching I'm not a rookie. In teaching transactional drafting for the first time, I was like an experienced baseball player who is called upon to play a different position.

So I had some idea going into this class, an inkling of how much effort it would take to get the course up and running and the problems that would arise when teaching the class for the first time. I felt some of the same fears and concerns that we have heard some of the other members of the panel discuss. We've heard a lot from the panel about ways to make the transition from teaching legal writing to transactional drafting a little bit easier by taking lessons that we already know from legal writing and transferring them over. That is absolutely wonderful advice as long as you don't do what I did, which was to, for whatever reason, put all that good counsel aside and forget about it.

In other words, we have all this great advice from people who have come before us about how to teach transactional drafting. I attended this conference two years ago. I read all kinds of materials while getting the class ready to go. And then what did I do when I started teaching the class? I just put it all aside. That's the first rookie mistake to avoid. Listen to people who know what they're talking about. I think I did this because I was overconfident, not from a subject matter perspective but from a teaching perspective. I knew I didn't know everything there was to know about the *substance* of transactional drafting, but as it turned out, I knew less than I thought about *teaching* transactional drafting. I was too hasty to throw away the lessons that other experienced transactional drafting professors tried to teach me and also lessons that I've taught myself through ten years of teaching legal writing.

Here is a simple example for the first one of these. Barbara's already alluded to the value of grading rubrics. I have no excuse here because I was at the conference two years ago and attended a presentation about this by Robin Boyle, David Epstein, and Sue Payne. I got the materials and yet for whatever reason when it came time for grading assignments this semester, I didn't use them. I didn't create my own grading rubrics in advance and I think that the results of this were probably inevitable. As soon as all those assignments started rolling in and I started grading them, I felt like I was back in the position I had been in

almost a decade ago in my first couple years of teaching legal writing. It was taking forever. I felt like I was making the same comments over and over. You magnify that by the fact that this was the first time that I had taught a graded course as opposed to a pass/fail course, because at Michigan legal writing is pass/fail. So I was particularly paranoid about grading uniformly and that in turn meant going back and re-reading all the papers, and then re-reading them some more, to ensure that I was grading consistently. And you can probably imagine how much time this took.

I'm not saying that grading rubrics would have been a one size fits all solution. We all know that from teaching legal writing or from teaching transactional drafting. Each individual assignment is going to have its own particular concerns that you want to focus on but equally obviously there is a lot of overlap between different assignments on bigger picture issues and things you want to point out repeatedly from assignment to assignment to ensure that it gets into the students' heads. That's true in my experience in legal writing. Others have advised that it's true in transactional drafting. I should have listened.

Now, how do I fix this going forward? The solution is easy, and I've already started. After the first couple of assignments, I realized I was going to need to start creating the rubrics that I should have taken the time to create before the class started. I did in fact manage to get some very basic ones put together as the semester went on, and one of the key things on my to-do list this summer is to make those a lot better, a lot more comprehensive. And at least all the effort and the time that went into grading this past semester is going to pay off because when I go back through and revise, I kept copies of all the student assignments, so I can pull out all the recurring written comments and transfer them into the grading rubrics that I am going to use going forward. That's exactly what I did in legal writing, too, after my first year of teaching. So that's the easy solution going forward from my perspective.

An even better solution for those who may be teaching transactional drafting for the first time, however, is to learn from my mistake and create those grading rubrics and grading sheets in advance. Otherwise it's going to be very difficult, at least in my experience, to try to create them in the midst of the semester.

A larger lesson I might take from this and other mistakes that I made, mortifying though they might be to me, is that they remind me to be more sympathetic to my students. It's easy to forget that they are learning something new, whether in legal writing or in transactional drafting, and that, like me, they might be told over and over again how to do it right, and they perhaps know how to do something objectively or at least that they should do it. Yet, for whatever reason, they don't put it into practice the first time that they do it. So maybe it makes me a little bit more humble in dealing with legal writing students and transactional drafting students where it is tempting for me to sit back and say, how many times have I told you to do that or not to do that. It turns out I did the same thing when I was teaching transactional drafting for the first time. I knew what to do and I didn't put it into play, either, so maybe I should go a little bit easier on them.

Overconfidence was the first of the rookie mistakes. The second rookie mistake from my perspective is one of T.M.I., too much information. Not for me but for the students. I might have been overconfident about my teaching experience but I certainly was not about my substantive experience with transactional drafting. Looking back at this past semester, I realize that I was in the position of the student who does a lot of research on an office memo and who finds all kinds of materials and wants to find any way possible to work

it all into the final product, just to get credit for it. I have done the research and I want to use all of it regardless of whether the audience wants or needs that information.

This isn't really a matter of over preparation, although I suppose there could be some aspects of that. You may say, "Do I really want to prepare my class notes? Do I really want to grade this assignment? Or can I put off whatever task I should get cracking on and instead go read some more background materials?" That was a temptation I had to fight all the time, and not always successfully. One reason was simple intellectual curiosity. I found much of the material I reviewed getting ready for the course as a whole or individual classes to be really fascinating stuff. But I also have to admit that I felt a little bit of anxiety about being caught short by a student's question during class so I kept wanting to go read another article or go read what various texts have to say about a particular issue to expand on what my assigned textbook covers. But ultimately I'm not sure that over preparation, excess preparation, whatever you want to call it, is a problem, per se. It is really just a matter of time management. And as long as you can fit preparation for class in with everything else you have to do, all your other obligations to school, family, or what have you, then I'm not sure that there really is such a thing as over preparation from my perspective when it comes to teaching and preparing a new class.

The more important problem, and here is where the "too much information" mistake comes in, is that I put all this stuff into my head and then it led me to want to do too much in class. In other words, sometimes all this extra information floating around distracted me a little bit or, more accurately, I allowed myself to be distracted. The blame is mine, not the background material's. I occasionally allowed myself to be distracted from the main focus of the drafting course as I see it, the actual skills that we're trying to teach our students about drafting. Not, of course, that transactional drafting is only about skills and not about substance. We all know that's not the case and that the technical aspects of drafting can't be divorced from substantive concerns. I'm not suggesting that at all.

But what I found myself sometimes doing in class was wanting to skip past some of the basics, spending less time on those fundamentals so that I could move on to what, to me, were more interesting materials. Again, this is something that I should have anticipated from my ten years of teaching legal writing. Over that decade I have been paring down what I cover in that class. I'd rather cover fewer subjects at greater length than provide a more cursory survey of lots of topics. That's true both on the level of individual classes and the course as a whole. You can't cover everything. I knew that objectively from my experience but I had a bit of a difficult time putting that into practice in teaching this new course for the first time.

Going forward, how I do try to resolve this issue? I have been reviewing my class notes trying to go through and cut things out. I'm trying to decide what is essential and what's not, thinking about what did and didn't work. I didn't have to wait until the end of the semester to start doing this, either. Over the semester, it started becoming apparent to me about half way through the course that my class notes were much too detailed for the amount of time that I had. So one thing I tried to do was start trimming all the background information that I used to try to wedge into the class somehow. I decided to make a conscious effort to try to pull that information back out. I stopped assigning that sort of background information before a class. I might allude to it during class very briefly. I would point students to it, I'd post it to my website after class so any interested students could delve a little bit deeper if they were so inclined. But I stopped providing a lot of this background information before class as part of the reading because I didn't want students to

get distracted from the essentials. I didn't want to shift their emphasis from what the text said and from the assignments that they were supposed to be working on. I wanted them to focus on those things a little bit more.

So that's the second rookie mistake. The third rookie mistake arises out of the recurring sort of "style versus substance" dichotomy that we often see in legal writing as well. I had a hard time figuring out how to balance things along these lines, how much time to devote to these sorts of issues. I think I may have devoted and emphasized it maybe a little too much too early in the class.

On the one hand I am an eager convert to the Tina Stark and the Ken Adams approach to drafting transactional documents. This seems to me to be as straight forward a way as possible to take even the most complicated transactional documents and make them readable. I 'm referring to eliminating legalese and doing anything you can to improve a reader's ability to understand the document, clearing out the deadwood of established drafting practices that's grown up over time and chokes out comprehension. So, during class when we had exercises up on the board, we might be done talking about substantive issues, whether a particular representation or covenant accomplished the substantive goals of the parties. I then might move on to discuss whether the provision in question was or was not written all that well as a matter of style. I'd ask, "What can we do to fix it? How can we change things?"

On the other hand, I started getting a little bit of push-back and questions from students about this. Some of this came from a pragmatic perspective. "Okay, that seems more clear as a matter of style but what's a senior attorney going to say what I make these sort of changes, what's the client going to say? And how am I going to find time to do that?" Some questions were a little bit more theoretical, along the lines of, "In drafting the focus is really on whether the document conveys the parties' intent, does it get the job done? And if it does, then polishing the language simply as a stylistic matter, isn't that a purely aesthetic exercise with no real effect?" I think some of these questions the students were asking came about because they were a little bit confused about the sorts of changes I was talking about. What sorts of changes have substantive effect and which are more stylistic in nature? What changes might look stylistic but really do make a difference on the substance? Their confusion was understandable because I didn't do a good job disentangling those different sorts of changes and explaining which are really the most significant and which aren't.

This is something that I'm definitely going to try to clarify going forward. I know all the standard responses about why students should try to draft as clearly as possible. I know why they should make the conscious decision to clear up what can often be lousy language from form documents. I've tried to appeal to their self-interest. I have tried to appeal to the interests of their clients and so on. But I am ultimately not sure how effective my responses were because I sometimes felt like I was climbing on a soap box. I don't mind doing that but I'm occasionally concerned that the students' reaction might be, "OK, we get it now. Stop telling us about it."

They did seem to get a better handle on these issues as the semester went on, both in terms of their work product and the questions they raised about these issues in class. The students' assignments kept improving along these lines and it's not like I expected the students to have some kind of communal "hallelujah!" moment. But in the end it may be that this is one of those issues that, just like in legal writing, I want to ensure the students know my position and why I think it's correct, but the students won't really be able to buy

into it until they learn it from experience. They can learn it objectively but they have to actually experience it in real legal work to truly understand the importance of it.

Finally, I'd like to conclude with a near miss. A mistake I almost made but luckily didn't. That mistake would have been not holding student conferences. Tina Stark recommended these in her teaching materials but I wasn't sure whether they would fit into my schedule. I was teaching two other classes besides transactional drafting. I was looking at my schedule trying to figure out just how it was going to work. Frankly I wasn't necessarily sure what I was going to say in a conference in any event. So I did not include them in my initial syllabus. I didn't decide to hold conferences until later, about five or six weeks into the class. I added them in part as a reaction to the amount of time I was spending grading assignments. I thought maybe I can short circuit this a little bit of this by talking with students individually.

So I scheduled conferences to discuss my comments on the first major grading assignment. To my surprise, although these were optional and although it is an upper level course and although many of the students were in their final semester of law school, almost everybody signed up and I thought the conferences went very well. They were valuable not merely in terms of answering their questions and explaining my comments, but also allowing me to help them on future assignments, hearing their suggestions about improving the course and their thoughts about the class, and getting to know the students individually.

Of course, none of this should have been new to me. I'm well aware as a legal writing professor of the value of holding conferences with students. But for some reason, I thought that conferences wouldn't work as well in an upper level course. I thought the upper level students might be a little more jaded. I thought the conversation might be a little more forced. It wasn't. In fact these conferences worked so well that I scheduled another optional set of conferences during our last week of class. These came right before finals to discuss the redraft of their last major assignment and again almost everyone signed up. I know 1L students want the chance to get direct feedback on their performance, and now I know that upper level students do, too. They want this interaction with faculty that they maybe don't get from many of their other professors. So the conferences are more important than I suspected for upper level students. They certainly seemed fruitful from my perspective. I know it's a small sample size but a couple of students commented on the evaluations that they found that face to face time to be very valuable. That's something that you hear over and over again from students in legal writing. I almost made the mistake of not transferring that over from legal writing to transactional drafting.

So, in conclusion, my focus today has been on mistakes, but please don't read me as accentuating the negative in teaching transactional drafting because that is certainly not my intent. I love teaching this course. It has been very enjoyable so far. I have one semester down and I am looking forward to teaching it again this fall and going forward. That, of course, will allow me to keep adding to this list of mistakes because I'm sure I'll make some new ones come September.

That brings us to the end of the formal panel. I'd like to remind you that there will be a lunch roundtable tomorrow that continues this conversation about making the move from legal writing to transactional drafting. We have only ten minutes left so I'd like to open the floor if there are any questions for any of us on the panel.