

2013

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Recommended Citation

Becker, Edward R. "Transactional Drafting: Using Law Firm Marketing Materials as a Research Resource for Teaching Drafting." *Transactions* 15, no. 1 (2013): 149-60.

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TRANSACTIONAL DRAFTING: USING LAW FIRM MARKETING MATERIALS AS A RESEARCH RESOURCE FOR TEACHING DRAFTING

Ted Becker*

Since I started teaching drafting, I would like to think that I have continued to learn some lessons about teaching both the substance and the skills of transactional drafting. One of those lessons that I am going to be talking about today is one that I stumbled across by happy accident rather than one that I consciously sought. Specifically, I want to talk about and highlight the ways that law students can use law firm marketing materials to increase their understanding of both drafting and lawyering skills in law school and, hopefully, in practice.

I begin by defining “marketing materials,” and I am casting a wide net here. I am talking about law firm-produced newsletters, client alerts, blogs, and other similar, publicly-available electronic resources that lawyers and law firms are using to solicit business. That is the primary focus of these materials: to have more business come through the door by retaining existing clients and obtaining new clients. What I am suggesting today, though, is that despite the marketing aspect of those materials, drafting professors can use those materials for pedagogical purposes to instill some valuable skills for both first-year and upper-level students.

It is a cliché to talk about today as being an age of information overkill, but certainly every day, when I check my email, I receive all sorts of messages in my inbox. I get faculty-related, student-related, and personal messages. Turning to the subject of today’s talk, I also get materials produced by law firms that provide updates on various developments in the law. I get updates on Michigan law. I receive legal newsletters of various types. I even get direct emails from various law firms that I have had the opportunity to work with in the past. Of course, I do not pretend that I am alone in this. I assume that you all receive these materials as well. I would wager that general counsel and clients, the actual targets of these sorts of law firm materials, receive even more than I do. So, in other words, we are seeing law firms taking full advantage of technology to solicit business.

Looking at some numbers from the supply end, the 2012 ABA Legal

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Technology Survey, not surprisingly, showed a continued increase in the way that lawyers and law firms are using various social media outlets like blogs, Facebook, LinkedIn, and Twitter, all of the sites that my students use in class when they should be listening and taking careful notes. I am not going to talk about all of the details of how lawyers use these different types of tools. I mostly want to talk specifically about one of these tools: law blogs. When asked whether their firm has a blog, 22% of respondents said “yes.” That is an increase from 15% in 2011 and 14% in 2010, and the attorneys most likely to answer “yes” to that question are the big firms—the firms of 100 or more attorneys. Forty-six percent of respondents from those firms answered “yes.” By comparison, only 9% of solo lawyers said that they had a blog. They are likely too busy to produce these materials. So, big-firm lawyers are doing their part to clutter up cyberspace.

If we look at the demand side, the more interesting question that we might ask is whether these sorts of things work. By work, I mean drive business to the firm as opposed to satisfying an individual author’s desire to speak their piece about something. On this side of the equation, the answer is a little more mixed. I can give you some evidence from the survey, though. The ABA technology survey asked, “Have you ever had a client retain your legal services as a result of legal topic blogging?” Thirty-nine percent of respondents say “yes,” 46% of respondents say “no,” and the remaining 15% of respondents do not know. Here is where we see a switch in emphasis between “do you blog at all” and “what are the results,” because solo lawyers actually answered this question more favorably. Fifty-three percent of solo lawyers—remember, many of them do not blog—answered “yes” to the question of whether they obtained referrals as a result. In firms of 2-9 members, 50% of respondents indicated that they are getting some referrals this way. I do not have the specific number for the larger firms, but, just by simple math, it has to be quite a bit lower than that if we are going to come in at the overall result of a 39% success rate across all sizes of firms. In other words, the firms that are using these marketing tools the most are likely seeing the lowest return from their efforts.

We see similar mixed results from other sources. A series of articles released about a year ago questioned whether these marketing materials were in fact serving their intended purposes. There was some discussion in one of the morning sessions that if you have young clients, innovative clients, venture capitalists and the like, they are not likely to respond well to a standard email blast. Instead, if you want to reach those sorts of potential clients, you have to embed a link in a tweet or something similar, perhaps increasing the chances that the recipient will click the link and follow it. Some law firms have gone so far as to use video client alerts, which would terrify me to think about essentially being

on TV opining about something. Some law firms have concluded that this may be an even more direct way of reaching clients than written formats. However you look at it, though, there are definite ramifications to a firm's choice of marketing materials, and we see some criticism of the effectiveness of the types of sources being used.

We also see criticism of the substance of these sorts of marketing materials, in some instances coming from lawyers whose own firms produce them. For example, a partner at one firm noted that these marketing materials over-emphasize the fear factor. As he stated, lawyers need to scare potential clients into hiring them, which, in his view, is wrong. In response to these cries of impending disaster that get sent daily through the internet, he indicated that if he were a general counsel, he would have them all on auto-delete. Talk about a waste of time and effort.

Perhaps most significantly, if we just think about the target audience of these materials, regardless of the substance or the method of conveyance, some of the recipients are simply overloaded by the sheer number of these materials that they receive. In a National Law Journal article by Adrian Dayton interviewing general counsels about these marketing tools, several indicated that, "I don't have time to read them," or "if I don't know the person that sent them to me, I don't read it." Another commentator asks: if nobody is reading these alerts, why are we spending the time and the resources to create them?

The take-away is that if we look at it from the perspective of a law firm or the producer's side of this, there may be a question as to whether these marketing efforts are worthwhile. Fortunately, though, that is all background for my purposes. I do not have to resolve whether they effectively reach their target audience, because what I am suggesting is that for a secondary audience like our students, these materials can be useful. I am thinking of students who are trying to prepare for drafting and who need general information that may be necessary to further their understanding of basic business or drafting concepts or more specific information tied to a particular drafting projector research issue.

As I mentioned earlier, I stumbled into this as part of the background research that I was doing for an assignment that I was thinking about incorporating in my first-year research and writing course. I was struck, as I was doing the research into this project, that the most helpful information that I kept running across was all law firm-produced. It was not available in the standard secondary sources like treatises or law review articles—the sorts of things that you can easily access on Westlaw and Lexis. There was not much information available in those traditional sources. Instead, I was getting it through Google

searches that linked directly to the law firms' sites. It occurred to me that these non-standard secondary sources were extremely helpful. In the past, when I taught these sorts of exercises, to both first-year and upper-level students, I had never put much emphasis on this way of obtaining background information. I had not told students about these valuable resources. It occurred to me that maybe I should add these law firm materials to the list of research sources that my students should actively consider checking. If these materials were useful to me, then they could be useful to students as well.

I took the information that I had obtained from various law firm materials and incorporated it in a first-year research problem as well as a related upper-level drafting problem. The handout has some materials from a few portions of those two assignments. The complete materials are accessible via electronic distribution. Both of these assignments require students to draw upon law firm materials. They are both based in New York. The problems require the students to assess, in some form or another, the viability of garden leave clauses in employment contracts. In my first-year class, like many people teaching first-year research and writing, I have to fit drafting in somewhere. I cannot devote nearly as much space to it as I would like. I put the students in the role of a young associate helping a senior attorney develop a CLE presentation, and they are told to find as much practical information as they can. They are looking for information that the senior attorney can pass along to his audience of fellow attorneys like drafting tips, practical suggestions, and other things of that nature. I tell the students that I do not want theory. I want practical advice and, because it is non-billable work, to use as many free research resources as possible. Many of my first-year students use Google, which is fine. I found a lot of the information this way, so I do not have any real objections to that.

Then, building off of their research results, the students negotiate and then draft the terms of a garden leave clause between a corporation and a newly-hired chief information officer. The handouts that you have contain the initial research exercise, the follow-up negotiation and drafting exercise, and some sample background information for one side of that negotiation. There are additional materials available online.

The upper-level assignment is a short drafting exercise inspired by an assignment in Tina Stark's text.¹ Students research the impact of a New York statute on covenants not to compete in the broadcast industry. They assess whether these garden leave clauses might be permitted under the statute, which otherwise seems to prohibit certain types of covenants not to compete. The

¹ TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007).

students advise the client, a New York TV station, about their conclusions. Then they draft new provisions for their client's standard employment forms based on the type of employee involved and whatever information that they were able to obtain in the research process. There is only one case interpreting this statute, and its discussion is minimal. It is a 2008 statute with almost no cases and very little discussion found in traditional secondary sources. Students often have to rely on law firm-produced materials to help understand what this statute was intended to do. The students use these materials to assess how the statute might affect clients like the television station, and to advise the client about the situations where these garden leave clauses might achieve the station's business goals. The last part of the handout is the drafting assignment for the upper level students in the drafting course. A model answer is available electronically if you are interested in that.

These two exercises show how I try to implement these marketing materials into my teaching. Now, I want to talk about the lessons that we might draw from the use of law firm marketing materials in these sorts of assignments, drawing on both what I have seen with my students and my separate thinking about the subject. A caveat is that I am not trying to suggest that you should design a drafting exercise solely with the purpose of requiring students to research in these sorts of sources. What I will recommend is that in at least one exercise over the course of a semester, assuming you're teaching an upper-level drafting course, it would be a good idea to craft a problem where, as part of the assignment, students have to look into using these sorts of materials or at least have occasion to look at them as part of getting the information that they need to draft whatever it is you have asked them to draft. That way, along with the substantive drafting skills and techniques that we are teaching as part of that exercise, students also will take away the lesson that, in appropriate instances, these materials can be useful to put on a student's checklist of things to look at to get background information.

Frankly, even if we do not try to direct students' attentions to these materials, students will find them. I use some of the exercises from Tina Stark's text, and, as some of you may know, the capstone exercise of her text is an aircraft purchase agreement. One semester I was using that problem and a student emailed me. He was happy because he had found a law firm site with a lot of background information on aircraft purchase agreements. He asked if he could use these materials. The site was not directed at Tina's exercise, obviously, but it provided some really great background for these sorts of agreements. All I could do was tell him, "Good job." I want students to look for this sort of

information. Many of them will not necessarily take the initiative to do it, but some will. And when they do, they will find this sort of background material. So, rather than hide them from students, we should let students use them.

The one-page handout that is available sets out a non-exclusive list of some quick takeaway points about using these marketing materials. We will talk a little more about why these materials can be valuable sources for our students. No source is perfect. So, as we go through these topics, I also will talk about some of the pitfalls and caveats of using sources in these ways.

The first reason that these materials can be valuable, and I think the most significant reason, is that these sorts of sources often can be a good source of practical drafting and negotiation tips. This has to be the key because if the sources are not providing useful information, then why bother? Why would I waste my students' time directing their attention towards them? I am looking for practical information that students can use. Sometimes, the information that these marketing materials provide is admittedly quite basic, like general advice about boilerplate clauses. They probably would not help answer a specific question that a student might have. But they still might be of use to a student who has very little experience in that particular area or that particular topic; that, of course, describes many of our first-year and upper-level students perfectly. Also, from a teaching perspective, we might be able to use these sorts of general materials as handouts to supplement whatever text that we are using. Doing so can fill in the gaps in the students' knowledge of a particular substantive subject area or drafting technique. Naturally, we might not always agree with the position that the source takes or the drafting advice that it offers, but that lends itself to other pedagogical purposes. For example, we could provide that source to the students and then discuss the potential problems by pulling out the language that the source recommends and digging into why that language might not actually be all that helpful.

The most significant sources are those that provide students with specific sorts of information that they can readily put into play in their assignments. Here is an example. I have pulled a couple of pages from a newsletter produced by a big firm that deals with indemnity clauses in construction contracts. This has not only an in-depth discussion of these sorts of clauses in this setting but also an analysis of what the language is meant to accomplish as well as some variations on different terms. That is great stuff for students if we have set a drafting problem in this area, or it is going to be a topic of classroom discussion. When you have this sort of material that you can direct students to, students will rely on it. I saw this all the time in the first-year exercise that I described where the students found information about garden leave clauses. Then, in classroom discussions

and in the negotiation reports that I ask them to prepare about their strategy and the results of the negotiation, the students constantly refer back to these materials. How do we approach this problem? How do we accomplish this client goal? How do we achieve that one? When you give students those sorts of useful sources, they will rely upon them.

Sometimes we will find materials that can be useful even if we are not necessarily directing students to them. They might be useful for professors as background information on a particular topic. For example, in one of my classes I spend a lot of time talking about retail commercial leasing, and I have used such sources for my own background purposes when I discuss this.

Finally, given the increasing globalization of legal practice and the global reach of many of the larger firms, these materials can be useful for providing basic background information for an attorney who does not have much exposure to the law of other nations. These obviously are not going to answer every question that a young researcher might have about international legal requirements and drafting practices; but, as an introduction, it is an easy way to learn about these issues. These materials are not going to be all encompassing. They are not going to be necessarily the only place that students might look at to get worthwhile information about international materials, but certainly they can be useful sources.

Another positive feature of directing students to these law firm materials is that they are free, and “free is good.” That is a mantra that I repeat all of the time to my students, assuming that they are accessing these sources through the open web. Lots of these sources may also be available on Westlaw, Lexis, or other paid subscription services, but if students can get them directly from the web or from law firm sites for free, so much the better. This is a point that is not exclusive to drafting, of course. It is something that all young lawyers should know for any type of research; it is especially something that I like to reinforce both in the first-year legal writing course and the upper-level drafting course.

The next consideration is one that I originally thought was fairly straightforward. My general thought is that while these law firm materials are not necessarily an entirely comprehensive discussion of a particular topic, they are credible in the sense that a law firm, if it is sending out a client alert, if it is producing a newsletter, or if this is going to be accessible for anybody to see, obviously has every incentive to “get it right.” That seems straightforward.

A couple of weeks ago, though, I was reading Nate Silver’s new book about predictions, *The Signal and the Noise*. The book contains a discussion in the

context of political punditry that points out that there will be some instances where someone might make a prediction or someone might give an assessment of a particular political issue that they do not necessarily completely believe. Shocking, I know: talking heads who do not completely believe what it is that they are saying on CNN or whatever other talk show that they might be on, because they are trying to make a name for themselves. The idea is that they make an outlier prediction that, if it comes true though it may be unlikely, elevates them a little bit in the punditry game.

Based on this, I started thinking whether there might be any way in which firms might have a similar incentive. If there are twenty different firms that are sending out client alerts about the impact of some new statute or a new case that has just come down or some general subject, and all twenty of those firms are basically giving the same sorts of suggestions, advice, recommendations, etc., do those firms or at least an individual lawyer within those firms have an incentive to produce an outlier assessment that targets a particular category of client? This does not strike me as likely. I would think that most individual lawyers and firms would be too protective of their reputations to play games like this. But although I do not think that it is likely, I cannot discount it entirely. And if people have thoughts about this subject, I would love to hear them.

Audience: That has to be only if you are talking about predicting some truly uncertain thing in the future like a football game or an election. If you are talking about something that should be within the domain of what a lawyer should know, it is more descriptive. So if the lawyer is wrong, that has to be incredibly damning for the lawyer's reputation.

Audience: I have been a partner for twenty-two years, and we write a lot of these things for marketing purposes. We do our very best to get them right, and there is no intent to be an outlier and be seen as unique and potentially wrong.

T. Becker: I am glad to hear that, and I assume that to be the case.

Audience: Sometimes these materials are written, not to predict the future, but to sort of upset the market for how to deal with it. Say, this issue has come up. This is how we recommend dealing with it in contracts, and they are trying to get others to agree to their approach so that they will have an easier time negotiating it with other law firms in the future. So I think it is not about always predicting the future. It is sometimes about making the future.

Trying to shape the future going forward? That ties in with a related point about credibility. Law firms are trying to get it right. They may be wrong, but they are trying to get it right. It is not the same as being perfectly objective, of course, and I think your comment ties into that a little bit. We are always trying to train students to gauge the objectiveness of any research source that they use, and these sources are no different. Some firms have reputations of representing certain types of clients or of always taking the same sides in deals. Sometimes the reputations are accurate. They are well deserved. Sometimes they are actively embraced by the firms so any sort of general advice that they provide on a subject must be evaluated for bias, but that is true of any research source like this.

The other point that goes to credibility, and again if people would chime in on this, I would love to hear your thoughts, is who is actually preparing these sources. When you review them online, many of them have a partner's byline you can click and get the information about him or her. Sometimes there will be an associate or a junior partner who gets a little bit of credit as well. Some of these sources have no specific author who is credited. I sometimes wonder who is actually bearing the laboring oar in producing these. The partner signs off, but it often is the young associate, maybe even a summer intern, who writes it. I remember as a summer associate and as a young associate—this is getting us into the realm of anecdotal evidence, I know—working on these materials. When we were assigned to produce these items, it was something that my peers and I were never really all that thrilled to do. It was non-billable work. It almost always seemed to take low priority. Is it the case that someone creating one of these blog entries or newsletters or updates devotes as much time and effort to it as they would to billable client work? I am not sure that we can say that this is the case. Does that, in some way, limit how much emphasis you would want to put on these sources from a researcher's perspective? It is at least something to consider. Again, if anybody has thoughts, feel free to chime in.

Audience: I do not want to shock anybody but, anecdotally as well, I usually see quite a few mistakes in newsletters that come out. But I have also seen quite a few mistakes in treatises that are quite reputable. I caution the student to not completely rely on any of these because there are often mistakes.

T. Becker: Absolutely. You should not treat any source as holy writ, right?

Audience: Right, exactly.

Audience: I like using these materials, just to give the students, as you said, a general background in scenarios that they do not know so that they can get the background, not so that they can cite or use it in their writing. The other thing is that you often find duplicates: Firm X says the same thing that Firm Y does, and it is clear that there was a marketing firm somewhere that is generating all of it, so you do not always know where it is coming from.

T. Becker: That is definitely the case. I have occasionally run into some of these materials that are suspiciously similar and, if not word-for-word, pretty close. You ultimately do wonder who is producing these materials.

Audience: Just one last thing on that too. There is also the risk, because you see this with contracts that major law firms can turn out as well, that these newsletters sometimes perpetuate some methodology around contract drafting tips that might not actually be true or accepted in the contract drafting circles or would be controversial in that way.

Yes, if you say something enough times, then it must be true. If ten law firms say it, then it must be ten times true. But is that necessarily the case? No, not at all. And those are all useful caveats to bring to students' attention when they are looking to these sources just like they would for any other research source that they use.

One place where these sources may be particularly useful is on some research projects or issues where they might be the only or among the very few sources that are available that discuss a particular issue. A great example is the cutting edge development like a new case or a new statute that is simply too new for any discussion to have made it to any other traditional secondary source. If I can give a quick example of this from September 2012, I received a client alert with a detailed description of a new California case and how it might impact drafting covenants not to compete in the state. Assuming that this case is significant, at some point it is going to filter down into the standard secondary sources. If you are dealing with it right now, however, you do not have a whole lot else to rely upon other than sources like this if you are looking for additional guidance to get your head around the effect of a new case. This is one common type of issue where these materials might be the only sources that are available.

A couple of other instances might be when you have issues that are limited to a particular jurisdiction. I have run across this in Michigan. For

example, I was looking at a 2011 Michigan Supreme Court case that made some changes in the law as to how a contracting party's common law or statutory tort duties might apply to non-contracting third parties, and I was thinking about how that might affect indemnification clauses going forward. The case has been cited forty-two times by other courts in the year since it was released, but it has only been referenced in a couple of traditional secondary sources, and those are specialized secondary sources dealing with construction, which was the subject matter of the original case. The case, in my opinion, stands for a much broader principle than that. It is a principle that is going to extend beyond the construction context. But if you look to standard secondary sources, you do not get any sense of that. If, on the other hand, you look to law firm materials, many Michigan firms chimed in on the impact of this case, including eleven firms that I was able to obtain just by using a standard Google search. This case is a year old, it is limited to Michigan, and it has not filtered down into the secondary sources yet, so law firm sources are the only ways that you are going to get background information necessary to try to make sense of what the case might mean.

One problem with this, from the perspective of creating an assignment, is that if you are using a cutting-edge issue, and you are asking students how they would revise a contract in light of this new case or new statute or what have you, it may only work for one or two assignment cycles. If one goal of an assignment is to familiarize students with using marketing materials as a research source, the assignment might accomplish that goal only until information about the new case, the new statute, or the new development makes it to more standard secondary sources that students, through force of habit, tend to want to look at first.

Thinking about the remaining other features of these sources noted on the handout, one of the skills that we are trying to instill in our students is that of professionalism and acting like a lawyer. These materials, even if they do not prove to be substantively useful for the research that students are doing or for their understanding of an issue, they can still serve as useful models or examples of professionalism. For example, students can look at the ways that these sources are crafted. Many of these, if well done, tend to be cautious. They tend to not overstate the impact of a new case or statute. They often highlight what issues still remain unresolved. Those are all things that a careful, cautious lawyer wants to do when assessing the law and advising the client accordingly. It is something that students are still trying to learn, and so it provides examples of that. It often serves as a great model for students about how to take a complicated case, break it down, and sum it up. For students who are still developing their skills in that area, who might be called upon in upper-level courses or in a summer associate

position or as a young attorney to sum up a new development in an in-house memo or to a client, it is a great model for how to go about doing that. I have often thought about giving these materials to first-year students in their first week of class, or even before classes start. The goal of this would be to show students, when they are reading and briefing cases for the first time in their lives, that this is how to do it. We should give the students something to strive to achieve.

These sources might also be models for students of the sorts of things that they will be doing on the job, perhaps as soon as the upcoming summer. I do not mean briefing cases as a student. Instead, I have in mind that, as a summer associate or a young attorney, the students might have to prepare these materials themselves, and it is useful to have had some exposure to them and to know where to look for good examples before they get an assignment along those lines.

As far as where to look for these sources, obviously there are some standard search techniques like Google, Westlaw, Lexis, and Bloomberg. Other really good sources include the Association of Corporate Counsel's Lexology site, MyCorporateResource.com, daily newsletters, and other aggregators of these materials. These are mostly going to be focused on corporate law issues but in a transactional drafting setting; those are usually going to be the issues that we want our students to consider.