CHAPTER 17
LEGAL RESEARCH AND WRITING:
AN INTERVIEW WITH FIVE EXPERTS

From: Andrew J. McClurg, IL of a Ride: A Well-Traveled Professor’s Roadmap to Success in the First Year of Law School (Thomson West 2009)

While first-year doctrinal courses differ in content, most of them are extremely similar in format. They each will involve similar daily reading assignments of judicial opinions from a casebook, some mix of Socratic Q and A and lecture about those cases in class, and the same single-exam evaluation method at the end of the semester. Whether it’s Civil Procedure, Contracts, Criminal Law, Property or Torts, the quest for first-year success will follow a similar path and require similar tools and strategies. Thus, nearly all of the advice in this book applies equally to each of the traditional doctrinal courses in the first-year curriculum.

But Legal Research and Writing will be wildly different from your other first-year courses. Year after year, a disproportionate amount of the fretting and angst-letting I hear from 1Ls has to do with their legal research and writing courses. For every student gripe about Contracts or Property or Torts, I hear five about Legal Research and Writing.

That the subject commands such out-of-balance attention from students alone makes it a candidate for its own chapter, but there’s a more pressing reason for giving extended, separate treatment to legal research and writing courses: they are the most important courses you will take in law school.

Five legal writing professors from different law schools will help explain why in more detail below, but the reasons are nicely summed up in this observation by Professor David Walter: “Because this is what lawyers do every hour, every day, every year of their careers—they speak and they write—and when they’re not speaking and writing, they’re listening and reading."

Legal research and writing courses are part of the mandatory first-year curriculum at nearly every law school. They almost always extend through both semesters (as in Legal Research and Writing I and Legal Research and Writing II). Roughly a quarter of law schools require a third legal writing course in the fall semester of the second year. Legal research and writing course packages travel under a variety of names, including Legal Research and Writing, Lawyering, Legal Method, Legal Skills and Values, and Legal Writing and Analysis. From here on I’ll just refer to the courses generically as “legal writing,” while recognizing that all legal writing courses also teach legal research skills and most have an oral advocacy component.

Some schools have added other skills components to legal writing courses in recent years, such as negotiation and client counseling exercises. But in all legal writing courses, the fundamental goal is to teach students how to research and analyze legal issues and effectively communicate their analyses in writing and orally. If the purpose of the other first-year courses is to teach students to “think like a lawyer,” it could be said that the goal of legal writing is to train students to “write like a lawyer thinks.” Legal writing isn’t about how to construct sentences. It’s about how to conduct and convey legal analysis in a written form.

As a teacher of doctrinal subjects, I’m smarter than to give advice about an area that is so different from my milieu. Hey, I didn’t get to be a law professor for nothing. So I asked for, and gratefully received, extensive help with this chapter from five experienced legal writing professors in the form of their answers to a series of pointed questions raising issues common to legal writing courses at all law schools. The Q and A with these five experts is the highlight of this chapter. But before we get to it, here’s an overview of some of the common components—and frustrations—of legal writing courses.

An Introduction to Legal Writing Courses

Legal research.

Typically, legal writing begins with a research component, which usually includes exercises designed to train students to
find and use different types of legal resources in the law library (e.g., case reports, digests, legal encyclopedias). Depending on the school, the person teaching you legal research may be a member of the legal writing faculty, a law librarian, a student teaching assistant, a Westlaw or Lexis–Nexis representative or some combination of these folks.

Law schools are still searching for the proper balance between old and new when it comes to teaching legal research skills. Should students continue to be forced to learn the old ways of doing book research in a technological world where legal research is increasingly performed online through computer databases such as Westlaw and Lexis–Nexis? Schools differ in their answers. Some schools limit computer research until students have been taught book research, while others give students keys to the online world of legal research from the beginning.

It’s important to first learn how to do legal research with real books, just like it’s important that elementary school students learn how to do basic math before giving them calculators. Knowing how to do book research makes students better computer researchers because they better understand the sources with which they’re working, which are the same whether the medium is papyrus or megabytes. Moreover, while law students enjoy the luxury of free access to legal research databases (in part to get them hooked), lawyers have to pay substantial fees for the same services. As a result, many law firms still require lawyers to do old-fashioned book research.

The law office memorandum.

Shortly into the first semester of legal writing, students begin working on their first legal writing project: an internal law office memorandum from an associate (you) to a fictitious partner analyzing the law as applied to a given set of facts. These memos, common in real-life law practice, basically ask you to take a client’s situation and explain and analyze it so the partner can make informed decisions about the client’s case, which may include the decisions whether to accept the case or pass on it.

It’s common to assign two such memoranda in the first semester, often denoted as the “minor memo” (the first one) and the “major memo” (the second one). Often, the minor memo will be a “closed universe memo,” meaning the professor will provide students with all the necessary research, while the major memo will be an “open universe memo,” meaning you will do the research yourself. Other first-semester writing assignments can include client letters (i.e., a letter from a lawyer to his or her client) or drafting a contract or pleading.

Researching and composing an office memorandum requires a ton of hard work. As a student consultant wrote: “The mountains of research you find either in the library or online will seem never-ending and you may feel, as I did, that you are often going in circles with very little, if any, direction.”

Filleted by feedback.

“You write well, but made a substantive error of malpractice dimensions.” Youch! This comment, scribbled by my legal writing instructor on the last page of my major memo assignment introduced me to the harsh realities of law school grading. Like many law students, I was used to As and praise in my previous educational experiences. Now I had a professor telling me that I screwed up so badly I could get sued for it.

One of the biggest practical differences between legal writing and other first-year courses is that students got performance feedback in legal writing, often including letter grades, as they go through the semester. That feedback is often negative and painful.

One can almost hear the self-esteem bubbles bursting when the first wave of legal writing feedback is distributed. Standing in class on those days looking out at rows of morose faces, I feel I should be delivering a eulogy instead of a Torts lecture. As one student put it: “As law students, the majority of us are used to receiving As and when you get that first draft of your first memorandum back with a C– on it (and believe me, this happens even to the students who finish at the top of the class), it can be discouraging.” She should know. She’s ranked second in her class.

The credit-hour crunch.

The single most iterated 1L gripe (and that’s saying a lot) is that the workload required for legal writing is dispropor-
tionately heavy compared to the credit hours allocated. Usually, the workload for a law school course corresponds to the number of credit hours for the course. But we reversed everything for legal writing. We require a lot more work for fewer credit hours (usually two). Students complain that this allocation is completely arbitrary, but they're wrong. It's all done according to a highly scientific, mathematical formula:

$$x/y = 2 \text{ credit hours}$$

with $x$ being the number of hours required to master legal writing (rounded to the nearest million) and $y$ being the number necessary to make the answer equal two credit hours.

Hey, just kidding. On the other hand, the real reasons for why legal writing courses get the short end of the credit-hour stick, which our experts discuss below, aren't likely to be much more satisfying to you. Most law schools have or are taking steps to alleviate the disparity. Nevertheless, credit hours allocated to legal writing still lag behind those for doctrinal courses. In 2007, credit hours for legal writing averaged 2.36 hours in the fall and 2.21 hours in the spring, compared to three or four credit hours for the doctrinal courses.

**Citation style.**

Another component of legal writing courses that students find frustrating is learning legal citation style. "Citation style" refers to the form and format in which legal authorities (such as cases, law review articles, books) are referenced or documented.

The standard legal citation manual is *The Bluebook: A Uniform System of Citation* (18th ed. 2005). The Bluebook tells legal writers what citation information to include (e.g., volume, page number, date), what font to put it in (e.g., big and small caps, italics), when to use abbreviations and what they should look like, where to insert commas and periods, and many other details. It's somewhat similar to the MLA (Modern Language Association) style book you might have used in undergraduate school, except far more detailed and complex. Look at the footnotes to this book for samples of what Bluebook citation style looks like.

The Bluebook is famously hyper-technical and obsessed with minutia. I had to laugh when I read a comment from one of my student consultants advising new students to pay attention to the Bluebook because an entire letter grade can be lost on a writing assignment "if you leave off just one comma!" The comment brought back memories of a humor column I published several years ago in the *American Bar Association Journal* satirizing a Bluebook rule that required a comma in a particular place under particular circumstances. An excerpt will give you a taste of what you're up against when dealing with the Bluebook. The setting for the column was a mock meeting of the board of Bluebook editors:

Irving: We need that ***** comma! Rule 15.2 means nothing without The Comma. I'll gladly die for it.

Frieda: Accord. [A Bluebook reference.]

Dan: Accord.

Wendy: Put down the gun, Irving. The Bluebook was meant to bring peace.

Irving: Not until I have proof of everyone's commitment to The Comma. I've decided to quit law school and become addicted to amphetamines so I can contemplate The Comma twenty-four hours a day.

Dan: I'm going to have Rule 15.2 tattooed on my thigh, right below the rules for Separately Bound Legislative Histories.

Frieda: I'll cut out my husband's entrails and form them into the shape of one huge comma.

Irving: What about you Wendy?

Wendy: My parents died in a plane crash yesterday. I have to go to the funeral.

Irving: Doesn't The Comma mean anything to you?

Wendy: Alright, I'll send flowers.

While the Bluebook is the historically dominant legal citation manual, many law schools use the more recently developed *ALWD Citation Manual: A Professional System of Citation* (3d ed. 2006). When the ALWD Citation Manual was first published, its simplified approach to legal citation style earned the book instant acclaim and popularity. Which citation guide should you use? As a matter of fact, you don't have to decide. Both guides are widely used, and most legal writing courses require you to follow both.
make an oral argument to a panel of mock judges. The brief, which can run upward of fifty pages, is excruciatingly time-consuming and the subject of much complaining by second-semester students.

As for the oral argument, it’s the most exciting, but also the most terrifying, event of the first year. It’s exciting because the oral argument is often the first law school exercise in which students get to act and feel like “real lawyers” (meaning, in the minds of 1Ls, the lawyers they see on television, who, unlike real lawyers, are always in court). The terror aspect derives from a generalized fear of public speaking accentuated by the fact that oral arguments amount to a public interrogation (they’re not monologues—the judges drill students with lots of questions) in which every utterance is critically scrutinized.

It’s normal to be nervous about public speaking. Surveys show that public speaking ranks higher than death on lists of people’s greatest fears. Seinfeld had a great monologue line about these surveys to the effect that they mean that at a funeral, the average person would rather be the guy in the casket than the one delivering the eulogy. I was so nervous about my oral argument back in law school that I showed up on the wrong day! I arrived at school all spiffed-out in my suit, ready to go, and started freaking out when I couldn’t find the correct room. Sweating buckets, I frantically searched the law school for my professor and judging panel only to finally figure out my argument wasn’t until the next day. At least I was a day early instead of a day late. I got a good laugh out of it once I was released from the coronary unit.

Looking back, the oral argument still stands out as one of the most memorable, albeit most nerve-wracking, events of law school. A student consultant, quiet by nature, wrote that the “mere thought of having to stand in front of others and argue makes you nauseous.” To help her get through the experience, she wrote the reminder to “BREATHE” at the top of her notes. She did fine though, as most students do, in part because they put so much time into the preparation. Sometimes the quietest students shine the brightest in the oral arguments. So don’t underestimate yourself. A great oral advocate may be lurking beneath your shy exterior.
Balancing legal writing workloads with other courses.

One sound piece of advice I can offer—before getting to the advice from our legal writing experts—is to take legal writing seriously and give it your best, but not at the expense of neglecting your other courses. Keep in mind that from a cost-benefit analysis, your doctrinal courses are worth more credit hours, meaning they will weigh more in your cumulative GPA.

On days when major assignments are due in legal writing, class attendance can drop off by a third or more. Professors find such major drop-offs to be irritating and may take them personally. I know professors who intentionally test on material covered in class on days when there are large numbers of absences. At one school, in a faculty email exchange over this issue, a professor commented that the dismal attendance in his class on the due date of a legal writing assignment was “unfortunate” for the students because “[t]oday’s materials will find their way onto my exam.”

Finding the proper balance can be difficult. In general, I’d say most students err by giving too much attention (much of it in the form of inefficient research and profitless hand-wringing and complaining) to legal writing at the expense of their doctrinal classes, but legal writing profs might disagree.

An Interview with Five Legal Writing Professors

Five outstanding, experienced legal writing professors generously agreed to share their thoughts about a variety of key issues common to all legal research and writing courses. Here’s our all-star lineup, in alphabetical order:

Kimberly Boone is the director of the legal writing program at the University of Alabama School of Law, where she graduated Order of Coif and was a member of the law review. She worked several years in employment litigation before joining academia in 2000.

Chris Coughlin is the director of the legal writing program at Wake Forest University School of Law. She holds a joint appointment at the Wake Forest medical school’s Translational Science Institute and is a co-director of a university program in bioethics and health policy.

Joan Malmd is a legal writing professor at the University of Oregon. Prior to joining academia, she clerked for a federal judge in California and worked in the litigation department at a corporate law firm in New York City.

Sandy Patrick is a legal writing professor at Lewis & Clark Law School in Portland, Oregon. Previously, she taught at Wake Forest University. Prior to entering academia, she served as a law clerk to a state appellate judge, an assistant state attorney general doing criminal appeals, and as a practicing attorney doing civil litigation.

David D. Walter is a professor at Florida International University School of Law (FIU) with nearly twenty years’ experience teaching legal writing. Previously, he taught at Seattle University and Mercer University. He also teaches upper-level skills courses and directs an educational center for appellate advocacy and practice skills.

In addition to their other credentials, Professors Coughlin, Malmd, and Patrick are co-authors of A Lawyer Writes (Carolina Academic Press 2008), a legal writing book for first-year students. Check out their book for expanded discussion of some of the points they make below.

Our five experts answered a list of fifteen important questions about legal writing courses, including many questions that bear a direct connection to success or failure in those courses.

1. Let’s get this one out of the way first. For twenty years as a law prof, I’ve listened to students gripe that legal research and writing courses require too much time and effort in return for too few credit hours. I recall having the same complaint as a law student and have heard many legal writing professors echo it as well. What’s your response to that criticism, what explains the imbalance, and are things changing in that regard?

BOONE: I agree with this criticism and address it with my students. If students view the work they put into legal writing solely as an investment in the two graded credit hours they receive each semester (which is a typical credit-
hour allotment), they will be very frustrated. Students should look at the time invested in both legal research and legal writing as learning a new language they will need to be fluent in to do well in all their courses and in future jobs as well.

The imbalance may be explained by the fact that teaching legal writing as a separate course is a relatively new idea. Some law professors still feel strongly that our students should be able to learn legal writing on their own as law students once did. Some doctrinal law profs (i.e., teachers of Torts, Contracts, etc.) may not want to give more credits to legal writing because they feel students already spend too much time on our assignments and don’t want students spending even more time away from their traditional first-year classes.

Legal writing professionals across the country continue to push toward more credit hours for our students. It’s a slow process, but changes are occurring.

MALMUD: I also agree with the criticism. In their first semester, students have so much to learn about basic legal research and analytical skills. It’s all new to them. To develop these skills, they must practice, and practice takes time. The traditional two credit hours are simply not enough.

Academia is a funny world, so explaining why anything happens is a tricky task, but here’s my two-part guess: The imbalance reflects, first, the historical distinction the legal academy drew between doctrinal classes and skills classes. Doctrinal classes—classes that teach doctrine, such as Contracts and Torts—were typically viewed as more intellectually complex and, therefore, more worthy of classroom time. Skills classes, by contrast, were seen as less intellectually complex and therefore less needful of classroom time. There may also have been an assumption that students would learn skills on the job—an assumption that no longer holds. As a result, skills classes were allocated fewer credits.

Second, credit hours are like turf. Reallocating credit hours means one faculty member has to cede turf to another faculty member. To the extent that credit hours are seen as reflecting the importance of a class, shifting hours away from one subject to another suggests that one class is less important than another.

Thus, change is a delicate matter. Things are changing for the better, but sometimes change occurs more slowly than we might like.

PATRICK: I always tell my students that their legal writing course will be much like their first job as an attorney—they will work long hours, invest a lot of time and energy into their projects, and probably not get the kind of acclaim (pecuniary or otherwise) they want for the work. I stress that they will, however, get invaluable remuneration of a different kind: Students will learn foundational skills for their legal career, and get plenty of valuable feedback along the way.

Although legal research and writing courses have not historically received the credit hours the subject merits, more and more schools are acknowledging the importance of the course by giving it more credit hours. One reason for the lack of credit hours is that this course of study is relatively new, often being adopted by schools just in the last two decades. Older law school administrators and doctrinal faculty did not have such a course when they attended school. Now we’ve reached the point where most current law professors took legal writing while they were in school and recognize its importance.

2. For students who recognize they have writing deficiencies, is there anything they can do to help themselves succeed in their first-year legal writing courses before they begin law school?

COUGHLIN: If a student knows he or she has a writing deficiency, I recommend the following—not only to succeed in their first-year legal writing courses, but to succeed in law school and the profession: Start by buying and studying a basic grammar and style book or program. There are many on the market. Accept that learning basic rules of grammar, punctuation, and parts of speech may not be exciting or fun. No “instant gratification” is involved. One student who took it on himself to upgrade his writing skills after his first year of law school analogized his summer remedial writing activities to repeatedly sticking a fork in his knee.

The nature of the deficiency, along with the nature of the individual learning style, must be assessed. Each student is unique and learns differently, and there is no magic pill or process to cure all deficiencies. If the deficiency involves
simply a lack of knowledge, step one above might be sufficient. If the deficiency is more serious, the student should consider being tested for a learning difference or disability. If the deficiency rises to the level of a disability, such as dysgraphia (which is a neurological disorder characterized by writing disability), the school may be able to provide reasonable accommodations to help the student succeed. Obviously, any such disability would need to be documented by a medical provider and that information communicated to the law school as soon as possible.

To remedy any deficiency, a student must understand how he or she learns best. To do this, the student should look back on her educational career, and determine whether there is a common denominator in the teachers, environments, situations, and subjects in which she responded most positively and successfully. Everybody learns differently and everybody writes differently.

MALMUD: Learning to write well is a lifelong process that should start well before law school begins and continue long after law school ends. There are no quick fixes.

That said, I recommend that all students read William Strunk and E.B. White’s classic *The Elements of Style*. We should probably all read it once a year. Another great book on writing is Richard Wydick’s *Plain English for Lawyers*. Both books cover the basics of clear, concise writing.

Once the student gets to law school, if she is still concerned, she should go to her legal writing professor to discuss her concerns. Her professor may have some helpful suggestions, especially if the student has submitted a writing assignment and the professor has had a chance to review the student’s writing.

Finally, the student should become a critical reader. During law school, students see a lot of writing—mostly appellate opinions. Some appellate opinions are well written. Others are not. The distinction between work that is well written and work that is not is whether you can understand it. If you can’t understand what the writer is trying to convey, the writer has failed. So when you cannot understand what you are reading, ask why. What could the writer have done differently? If you find yourself blissfully gliding through your reading, ask why. What has the writer done to make the ideas easy to absorb? By asking why some writing is effective and other writing is not, you will begin to develop better judgment about your own writing.

WALTER: Even students with serious writing deficiencies can improve their writing. The first step, of course, is often the most difficult—recognizing that you, the writer, have writing deficiencies. Sure, Cs and Ds in English classes and other courses with major writing requirements are a good clue, but I’ve seen several writers with serious problems who received Bs and even As in undergraduate courses with extensive writing requirements.

Once the need for assistance is recognized, several avenues are available for students who want to improve their writing. First, there are plenty of professors and tutors in English departments, other departments, and college “writing centers” who are willing to help students correct those writing deficiencies—find them ASAP and ask for their help! Ask them to read samples of your writing. Ask them to look for organizational issues—do your sentences and thoughts seem to flow together in a logical manner? Ask them to check for mechanics issues—are your commas in the right place, is your word usage proper, and is your grammar correct? Ask them to examine the “readability” of your writing—is your writing clear, do you use words precisely, and are you concise in your writing?

Second, as suggested above, find a good “style” book and give it a careful review. That should give you a better idea about some of the topics you’ll see in legal writing.

Third, review and critique a few of your writings and the writings of others to evaluate your deficiencies—if you can spot the problems in your past writings or the writings of others, you have taken one more step toward improving your writing in law school and beyond. The idea here is to learn how to read very carefully and with a critical eye.

Even excellent writers will benefit greatly from following the steps outlined above.

3. Is it common for students to enter law school entertaining mistaken assumptions about the nature of “legal writing”? What are those misconceptions?

BOONE: One of the most common misconceptions is that being a strong writer in other fields or being an English major necessarily translates to being good at legal writing.
This is not always the case. Different undergraduate majors both help and hinder you in legal writing. For example, English majors may love to write and know what it means to write in the active voice, but might have a terrible time learning to be more concise and direct. Math and engineering majors may sometimes forget to write in complete sentences, but they may pick up on legal analysis more quickly.

Students may also assume that they can use the same processes they used for college papers on their legal writing assignments. This will not work. The research is different, the citation style is different, and the analysis is new. Let’s be brutally honest. Somewhere along the way, many of you wrote a paper shortly before (or even the night before) it was due. If you received a good grade, you may have made a habit of it.

Be forewarned that this will not work in legal writing for several reasons. First, good legal writing may look simple, but it usually requires long hours and multiple drafts to make complex ideas look simple. Second, you may not realize you are lost until you actually start writing. If you start assignments early, you’ll have time to ask for help if you need it. And finally, as if you won’t hear this enough, all of your law school classmates were at the top of their classes too. Your work will be judged in relation to other good students.

COUGHLIN: One misconception is that legal writing drains your creativity. The reason for this misconception is many legal writing professors require that students use a mnemonic (a specific order) to structure their legal arguments. For example, commonly used mnemonics in legal writing include “IRAC” (Issue, Rule, Application, Conclusion)—pronounced similarly but not to be confused with IRAQ—and “CREAC” (Conclusion, Rule, Explanation, Application, Conclusion).

In reality, using a mnemonic structure should not limit the creative process. Mnemonics are supposed to be flexible tools, not rigid formulas. They provide an effective starting point for drafting a legal analysis. The substance of your analysis—the way you frame your legal arguments and your unique application of the law—is necessarily creative.

To illustrate this point, think of the poetry form of haiku, a Japanese form of unrhymed poetry that is always three lines long, with five syllables in the first line, seven syllables in the second line, and five syllables in the third. While the haiku is written in a strict form, the writer has freedom within the substance of the poem to be creative. Likewise, while the legal writer may use a pre-set organizational structure, outstanding legal arguments build bridges between prior cases and new sets of facts, a skill that mandates creativity. As my colleague Professor Miki Felsenburg says to her students: “Bore me with your organization and thrill me with your analysis.”

PATRICK: I agree with what Professor Boone said that one great misconception about legal writing is that researching and analyzing a legal problem will mirror the work students did for term papers in undergraduate school. This misconception arises in part because new law students don’t understand that legal writing is not just about “writing.” It’s about something much more complex—legal thinking. Committing sound analysis to paper requires far more skill than knowing the parts of a paragraph, how to use commas, or whether the period goes inside the quotation mark (it does). Legal writing requires students to find the law that governs a client’s issue, discern the relevant parts of the law, weave those parts into a cohesive explanation, and apply it to a client’s fact situation. Doing all of those things requires the student to mentally engage the material with critical reading, thinking, and questioning.

4. I commonly tell students that their legal research and writing courses may be the most important courses in law school and I’m sure you would agree. How would you explain to students why that is so?

MALMUD: Legal writing teaches the must-have skills to be a successful attorney. I promptly forgot most everything I learned in Contracts, Civil Procedure, and Constitutional Law within hours of taking the exams. On the job, though, that wasn’t a problem. I worked for big fancy law firms and for government agencies, but none of my employers expected me to remember much substantive law. My employers did expect me to know how to research the substantive law, synthesize it into a coherent explanation of the law that would apply to a client’s problem, and then write my analysis in a clear and compelling way. I learned those skills primarily in my legal writing class.
PATRICK: From their first day of orientation, my students hear the proclamation that legal writing is the most important class they will have in law school. They initially hear those words from me (whom they might not believe), but soon hear them echoed by upper-division students, practicing attorneys, and prospective employers. Each year I invite guest speakers to class—upper-level students, law clerks, or attorneys. Invariably, without my solicitation, they confirm the notion that legal writing is the most important class in law school. Why? Because it teaches students the core skills for legal learning: how to assess law, think about law, and communicate law to someone else. Effective lawyering requires those skills. An attorney can know everything there is to know about tort law, but if he cannot assimilate law relevant to a client’s issue and communicate his analysis, that attorney will not effectively represent his client.

WALTER: I do agree! I tell my 1Ls on the first day that legal writing courses are the most important courses in law school. Written and oral communication skills are so critical to everything lawyers do. In two American Bar Foundation studies, the lawyers polled overwhelmingly identified oral communication skills and written communication skills as the two skills/knowledge bases that are most important to lawyers. They ranked “knowledge of substantive law” as seventh in importance.68

The researchers also surveyed hiring partners to determine the most important skills students should learn in law school. The top three skills? Library legal research, oral communication, and written communication. Knowledge of substantive law came in at an eleventh place.69

Why are oral and written communication skills more important than knowledge of the substantive law? Because this is what lawyers do every hour, every day, every year of their careers—they speak and they write—and when they’re not speaking and writing, they’re listening and reading.

5. The standard major assignment in most first-semester legal writing courses is the law office memorandum written from junior associate to senior part-

ner. Why is the office memorandum still seen as the most effective or important vehicle for teaching legal writing to 1Ls as opposed to, say, drafting pleadings or legislation or some other type of assignment? Related to that question, I’m sure 1Ls often wonder what drives the content of legal writing courses. Any insights on that point?

BOONE: The process required to write the memorandum is what makes it a good first-semester tool. The office memo, at least as we teach it, requires the students to research two legal issues and analyze them objectively. We ask the students to write an interoffice memo (from associate to partner within the same firm) to train students to fully and objectively evaluate legal issues, rather than argue for or against a certain result. For example, in a civil suit, we may ask the student to evaluate two issues to help determine whether the firm (the student’s fictitious employer) should take the case. Even with an assignment structured this way, most first-year students struggle with the notion that we aren’t seeking a single “right answer.” In other words, I could usually care less whether the student concludes the firm should take the case. I’m much more concerned with whether the student has thoroughly researched and analyzed the issues and fully explained the reasons both for and against taking the case.

The content of our legal writing course is driven in part by a desire to prepare students well for their first summer jobs. An in-house memo is the type of assignment our students are most likely to be assigned in those jobs.

Learning to explain legal rules and apply them to a fact scenario also helps students develop the skills they will need to write effective exam answers.

COUGHLIN: While some students complain that the office memo is dated, it remains the optimal vehicle for beginning law students to develop analytical skills. It is also important, of course, to learn to effectively draft pleadings and legislation, but those skills are more sophisticated, technical, and require knowledge of litigation and/or legislative processes. Such exercises are better taught after the students have completed Civil Procedure and/or a legislation or administrative law course or seminar.

Typically, most legal writing programs begin by assigning an office memorandum with a closed universe of research

69. Id. at 460 tbl.11.
6. If you had to list just three hallmarks of an outstanding law office memorandum, what would they be? Conversely, if you had to list three hallmarks of a poor law office memorandum, what would they be?

COUGHLIN: "The Outstanding Office Memorandum" is:

1. A direct and precise response to the question being asked. The writer tells the reader up front what the specific issue is being analyzed, as well as the predicted outcome. The body of the memorandum—the analysis—does not go off on tangents but builds bridges between each point to reach a conclusion.

2. A clear, concise response using plain English. As my colleague Professor Barbara Lentz puts it, if you wouldn’t use the word when ordering at McDonald’s, don’t use it in your office memorandum. So just as you wouldn’t say “Herewith my hamburger, french fries would be a most effective side dish and, accordingly, supersize me,” when ordering at the drive-thru, do not use that type of language or sentence structure in your memorandum. For maximum clarity and effectiveness, use the KISS theory (Keep it Simple, Stupid).

3. A response that shows all steps of the analytical process. An outstanding office memorandum can be thought of as a math problem in elementary school. Simply getting to the correct solution or prediction is not enough. You must show your work.

Conversely, "The Not So Outstanding Office Memorandum" is:

1. A response that is overly formal in style. Students sometimes think that if they write formally their reader will not realize the writer did not take enough time or did not understand the analysis. When students are confused, they think that if they use eighteenth-century prose, the professor will not realize that they did not spend enough time to understand the links between the cases and/or build the necessary analytical bridges between them.

2. A response that is written in the passive voice. While there are strategic uses of the passive voice (i.e., “mistakes were made” rather than “the defendant made a mistake”), consistent use of the passive voice is a red flag that tells your legal writing professor one of the following: (1) I haven’t
spent enough time on this memo. One can think back to Samuel Clemens' (Mark Twain) famous quote “I apologize for the length of this letter, but I didn’t have time to make it shorter.”; or (2) I don’t understand this analysis, but if I use really complex language maybe my legal writing professor will think I am really smart.

3. A response that is fraught with Bluebook errors, typographical errors and formatting errors. Typically, there is a correlation between a lack of precision in analysis and a lack of precision in style. Errors with these “finer points” distract a reader from the analysis and limit the amount of confidence a reader has in the writer’s prediction of the outcome.

**PATRICK:** I agree wholeheartedly with Professor Coughlin’s comments regarding the hallmarks of a good memo, so let me concentrate on the hallmarks of a bad one. Local attorneys at large law firms in our city recently asked our Legal Writing and Analysis department to conduct a seminar instructing young associate attorneys on how to improve their writing. The partners articulated a fairly consistent list of problems with which associates struggle. Those problems mirror the hallmarks of a poorly written law office memorandum:

1. **Poor organization.** Often neither the overall presentation of issues nor the component substantive parts within each issue are presented in a logical, clear order that the reader can follow, absorb, and understand.

2. **The legal substance of the memo is not clearly communicated to the reader.** The paragraphs fail to signal their points, leaving the reader lost as to what each paragraph will prove. The law may not be fully explained. Additionally, the memo may be organized around cases instead of legal points, with the writer failing to show how the cases fit together. The application of the law to the client’s facts often has leaps in logic, leaving the reader unclear about how legal precedent requires a particular outcome for the client’s case.

3. **The product is not professional.** Often, because of time constraints so prevalent in law practice, memos are rife with errors—typographical errors, poor grammatical choices, inappropriate punctuation, and poor citation. The overall effect of the errors paints the attorney as either lax or incompetent.

Ironically, writing an outstanding memorandum does not take that much more time than writing a poor one. A little extra time spent organizing the research, mapping out the most logical flow of arguments, and polishing the final draft can transform a mediocre memorandum into a great one.

**WALTER:** First, the most important hallmark of an outstanding office memo is its selection and development of the law (i.e., relevant cases, statutes, regulations, and so forth). Accuracy is critically important because the writer is flying solo—no one else is researching and analyzing the issues—so the writer must get it right the first time. If the writer fails to find or discuss a key case, or if the writer explains the case or the legal rule poorly, the attorney relying on the memo may give the client inaccurate legal advice. Thus, the writer’s most important task is to find the appropriate law and explain it accurately.

The second hallmark of an outstanding memo is its organization. The large-scale organization of an outstanding memo will be perfect from beginning to end: from the memo heading, to the framing of the legal questions presented, to the brief answers to those questions, to the statement of the facts, to the discussion, and finally to the conclusion. The mid-scale organization of an outstanding memo also will be near perfect. For example, the discussion section will be organized into appropriate sub-sections, each one starting with a conclusion, followed by explanation of the law, application of the law to the facts, and ending with mini-conclusions. Finally, the small-scale organization of an outstanding memo will be excellent, with nearly every sentence and idea leading to the next idea in a logical manner, like climbing a staircase step by step to reach the logical conclusion at the top of the landing.

The third hallmark of an outstanding memo is superb application of the law to the facts; that is, clear explanation of the legal arguments.

7. **What characteristics or personality traits can you spot in 1Ls early on that you consider predictors of success in their legal research and writing courses?** Conversely, what characteristics or personality traits can you spot in 1Ls early on portending a lack of success in their legal research and writing courses?
BOONE: Students who are open to constructive criticism are much more likely to be successful in my class. They seek feedback, discuss the feedback they receive without being defensive, and try to fully implement what they understand that both processes continue throughout an assignment also do well.

I am most concerned by the student who sets a conference with me early in the semester and says, “Look, I just want an A. Tell me what I need to do to get an A, and I’ll do it.” These students are much more concerned with the result than the process, and my whole class is about the process. These students are very frustrated that I can’t give them ten specific steps to follow to get an A or a sample memo they can use as a template. At the other end of the spectrum, students who are unwilling or unable to ask for help generally don’t do very well either. When a student comes to a conference and has no questions at all, I am very concerned.

MALMUD: Openness to learning. If a student is open to learning, that student will be successful to one degree or another. If a student believes that he is already a good writer and, therefore, has nothing to learn from a legal writing class, that student is likely to fail. Students must remember that writing in different contexts requires different skills. For example, while I can write a compelling memorandum or brief. no one would want one of my short stories or poems. Although some skills do cross over, success in one writing context does not necessarily mean success in the other. The key is for each student to learn what attorneys expect in legal writing, and then determine which skills will cross over and which new skills will need to be developed.

WALTER: Three closely related attributes go far in predicting a student’s success in legal writing and in law school overall: work ethic, caring, and attention to detail. The students who earn the top grades in legal writing are those who have an excellent work ethic and are truly dedicated to turning out a superb work product.

Successful students care whether they have found the best cases to make their law and application sections work. They care whether they have eliminated every last punctuation and grammatical error. They care about citation style. They pay attention to details, such as whether there should be a period after the id. in a short-form citation to authority, as in “See id. at 737.” (To satisfy the burning curiosity of the uninitiated, there should be a period after the id.) These students also tend to read the cases and statutes more carefully and critically, pulling out facts and arguments that other students typically miss. They also tend to ask more questions about the materials than other students, again, trying to discover as much relevant detail within the material as possible.

I recently conducted a two-year study at our law school to determine how well undergraduate GPAs and LSAT scores correlate with legal writing grades and overall law school grades. Somewhat surprisingly, neither LSAT scores nor GPAs were useful in predicting how students would fare in law school (although undergraduate GPAs were somewhat more helpful). Very interestingly, scores on the fifty-question, multiple-choice legal research exam we use in our first-year legal writing course proved to be a far better predictor of students’ future grades in first-year courses (including legal writing) than either the LSAT or undergrad GPA! How’s that possible? Students who scored higher on the exam typically read the assignments more carefully, took better notes in class, reviewed the books more closely in the library, and put much more effort into making certain they understood the material. In short, they worked harder, they cared, and they paid close attention to everything.

8. Some students mistake functional writing (e.g., coherent sentences, good grammar, etc.) with good legal writing. They don’t realize how important the analysis is or even what analysis is. How would you define “analysis” in a way that law students can understand what it means?

BOONE: Everyone can read the rules (cases, statutes, etc.) and most students can learn the rules well enough to predict accurate answers to many legal questions. But analysis goes further than that. Analysis is not about the answer. It’s about the process of reaching that answer. Some have analogized it to long division: if you don’t show all your work, you get no credit. For example, if you are asked to “analyze” what time it is, you would first explain to the reader the “rules” of time zones, identify the important fact regarding
what time zone you are located in, and apply the time zone rules to the specific time zone to reach an answer.

**Coughlin:** Analysis is the process of evaluating the law on a particular topic. In a legal analysis, the writer will show how an established rule of law will function given a new set of facts (i.e., rule-based reasoning) or explain why a client’s case is like or unlike a previous case and how those comparisons work to yield a particular result (i.e., analogical reasoning). In other words, it is deducing a likely outcome considering prior law and new facts. Analysis is where a student’s creativity and brain power truly come to light.

Analysis is like the fixings in a sandwich. While two pieces of bread may be homemade and quite good, it isn’t enough unless you add the meat, veggies, cheese, and condiments. Before all the fixings are added, there is no sandwich. There are simply two pieces of bread. Likewise, in your memorandum, the analysis is the fixings—it is the most important component of the memorandum.

**Malmond:** In the typical fall-semester memo, there are three analytical components that distinguish functional writing from really good, insightful legal writing. The first analytical component involves separating the whole into its parts. Every legal analysis will begin with a governing rule. Almost all legal rules are made up of component parts known as “elements” or “factors.” For example, the tort of negligence has four elements (duty, breach of duty, causation, and injury). Part of analysis is breaking down broader rules and principles into their constituent elements or factors and examining each of them one by one.

The second important analytical component is the explanation of the law. For each element or factor that is at issue to a client’s problem, law students must coherently explain the relevant law. Doing so is difficult because students must pull together the law from numerous, disparate sources. But that’s the analytical challenge: assembling a group of relevant disparate legal snippets into a seamless whole. This component of legal writing is analytical in that it requires students to understand both the whole and the parts and explain their relationship to the reader.

Finally, students must apply the law to a particular fact pattern in order to predict an outcome in the client’s case. This part of the argument is analytical in the sense that students must think precisely why the law will lead to one outcome and not the other and then articulate their thinking in a compelling way. Law professors commonly refer only to this last part—applying law to facts—as “the analysis.” But please know that the first two parts are also analytical in their own way.

9. **If we divide the process of composing a law office memorandum or other legal writing assignment into three parts—researching, writing the initial draft, and rewriting/editing the final product—which part commonly gets the short end of the stick from students? In other words, which of the three steps do less successful students regularly not devote enough time and attention to?**

**Malmond:** Editing—it’s key to a professional work product. A study by Anne Enquist of Seattle University showed that successful legal writing students spend approximately three-fifths of their writing time revising and proofreading, while less successful students divide their time more equally between writing the first draft and revising and proofreading it.

But to say “edit more” is unhelpful. One has to know how to edit. Effective editing requires first a big-picture understanding: What’s my goal? If you understand your goal, you can step back from your project and ask yourself, does this work achieve my goal? For example, if you are writing an objective memo, the goal is to educate and inform. Understanding that goal allows you to step back and ask yourself, have I educated the attorney receiving this memo about all the relevant law? Have I done so clearly? Have I informed the attorney about the areas where the law favors our client and the areas where our client will struggle to make her case? Have I clearly explained why those strengths and weaknesses exist?

Second, effective editing requires you to understand the problems that typically get in the way of achieving your goal and actively look for those problems. Essentially, you have to create a checklist out of your legal writing class. Let’s say in class you’ve discussed that a well-organized legal argument states a conclusion, explains the law, applies the law, and then concludes again. Well, have you done that? Be sure to go back and check. Let’s say your professor has pointed out that
your sentences tend to be wordy. Well, that needs to be added to your checklist, and with each memo you write, you’ll need to check your sentences for wordiness.

Because editing often seems like such drudgery, I’d like to put in a personal plug for editing. Editing is about creating a synchronized, lucid solution to a complex problem. The reward and “fun” comes from seeing the improvement.

Let’s say I want to build a machine that will squirt just the perfect amount of mustard onto a hotdog. The parts lay before me. I start trying to fit them together. I discover at the end of my first attempt that I’ve done pretty well, but the machine has a leftward tilt, so that all the mustard winds up on the conveyor belt to the left of the hotdog. I tinker until the mustard is hitting dead-on, but there’s too much of it. I tinker a little bit more so that just the right amount of mustard is hitting the hotdog. Finally, for a flourish, I adjust the machine so that instead of the mustard running in a straight line, it has an S-shaped flow down the hotdog’s spine. I did it! I created the perfect mustard-hotdog combination. To me, that’s the pleasure in editing. It’s the time when I sync up all the parts to create exactly the product I want to deliver. There’s beauty in that.

PATRICK: Without a doubt, students spend the least amount of time revising and polishing the final product. Realizing that the revising and polishing steps can often take longer than the research and drafting steps is a secret to success.

The research phase is often the most enjoyable because students can wander mindlessly, breezily, through library stacks or online databases—working, yes, but minimally engaging difficult material. Research can be a delightful black hole, allowing students to save the thinking for later.

Once some thinking has occurred and the student has slogged through statutes and cases and mapped out some kind of tangible structure, students are willing to devote some time to hashing out that draft—what they hope will be the only draft. That draft is like painting the walls of a room; we all paint expecting immediate gratification and hoping that two coats will not be necessary. And maybe even that we can skip doing all that difficult trim work! Likewise, some students hope one slapdash draft will be enough.

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When students finally finish the first two laborious stages (research and writing the first draft), they are spent—from both a time and a mental standpoint. They rationalize that the first draft is good enough, and submit it.

Early in my legal writing career, colleagues introduced me to Anne Lamott’s book on writing, Bird by Bird. Lamott’s ideas on fiction writing transfer quite easily to legal writing. In one chapter she accurately captures the three stages of composing a written document. The first draft is the “down draft,” where the goal is just to get the words down on paper. The second draft is the “up draft”—you fix it up and “try to say what you have to say more accurately.” The final draft is the “dental draft,” where you check “every tooth to see if it’s loose or cramped or decayed, or even, God help us, healthy.”

My students love this analogy, although sometimes they add their opinion that the final draft is called a dental draft because getting it done is worse than having a root canal. Despite the pain involved, revising and polishing are the pivotal steps needed to reach that dental draft. Revising takes time. The task also requires that the writer engage the text in a hypercritical way, making sure every statement is accurate and complete, every sentence is soundly constructed, every paragraph flows logically to the next. Polishing is an equally arduous task requiring writers to move beyond spell-check to look at each word, each piece of punctuation, and each citation.

Students who are willing to complete that third step—revising and polishing until they get a dental draft—usually are very successful.

WALTER: While all three aspects of the research and writing process often get the “short end of the stick,” I think the legal research process gets “shorted” most often, causing great damage to students (and their clients) in the long run. Here’s what frequently happens. After the students are given the facts for the open memo problem (i.e., a memo where students have to do the research themselves), most of them begin their legal research. Some perform in stellar fashion, devoting the necessary hours in the books and online, carefully researching the issues, closely reading the

70. See ANNE LAMOTT, BIRD BY BIRD 25-36 (First Anchor Books 1995).
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cases, and finding nearly all of the relevant law. Many students, however, underestimate how long it will take to locate the relevant law, and some underestimate how frustrating it can be to find the law. In both instances, these students do not complete the research task. Unfortunately, and as surprising as it might sound, there are a few students who never start their research, figuring instead that they'll simply rely on another student, or the professor, to tell them which statutes and cases are important.

Once the research phase ends and the drafting phase begins, the students typically discuss the law both in and out of class, and most students will then learn which cases and statutes should be included in the memo. Even if a student did not do a great job during the research phase, at this point it's still possible for a student to earn a good grade on the draft and final project by “borrowing” the research and ideas of others, without going back and completing the research on their own.

Students know they have to turn in high-quality drafts and final versions of the memo to do decently in the course, so built-in incentives exist for these phases. In the long run, however, students who shirk quality research will earn lower grades in legal writing courses, as well as future courses, such as seminars, that require research. And because they never develop efficient research skills, they'll actually spend more time earning those lower grades than their classmates. But the bigger harm will befall the clients of these students, as less effective and less efficient researchers pass the short end of the stick to their clients.

10. One would assume a correlation exists between the amount of time spent on a major legal writing assignment and the result. But we all know students who fruitlessly pour in tons of time inefficiently. What are some of the ways time devoted to a major legal writing assignment is not time well spent?

BOONE: I don't think this should count as time devoted to the assignment, but apparently an amazing amount of time is spent worrying about the assignment and complaining about how hard (or how simple) it is to one's classmates. I would not want students to completely miss this chance to bond with their fellow 1Ls, but they should try not to waste too much time commiserating. Inefficient research and the quest for a perfect outline also take up untold hours. If students have been lost for hours or days in the research or the writing process, they should stop and ask for help. Finally, searching relentlessly for a very clever turn of phrase is probably not the best use of your time.

COUGHLIN: Many law students are competitive. Because many law schools grade on a curve, this population of students want to make sure they are on the top end of that curve. For many students, instead of focusing on answering the question asked by the assignment, they try to go above and beyond the facts and relevant authorities to try to find alternate areas and authorities to explore so as to make legal arguments that other students are not making. While students may spend inordinate amounts of time researching to come up with unique arguments that no one else may make, it is time that would have been better spent proofing and editing their papers or relaxing with a cup of coffee and newspaper.

While researching all arguments thoroughly is commendable, and spending time thinking about alternative arguments is helpful, students tend to go down tangents and waste a lot of time for minimal or no return. An analogy is going to the doctor and telling her that you have a runny nose, cough, and are achy. You would expect the doctor to say you have a cold and that you need rest and lots of fluids—not to send you in for a full-body MRI in search of any possible ailment.

In legal writing, to maximize time and effort, spend sufficient time researching, writing, editing, and proofreading so that you feel comfortable that you have done the best you can. The rest will take care of itself. Even if all the students use the same authorities, every student’s thought process is unique. So, be strategic with your time. While you want to consider all viable arguments, don’t create arguments that really aren’t there.

PATRICK: Students become the most inefficient at two points in time: when they postpone thinking until after the research process and, similarly, when they start writing before they’ve developed a map of how the pieces of the legal argument should be arranged.

Research can seem like a productive time, but it can actually be a waste of time when students avoid critically
reading and thinking about the sources before wasting time and resources printing them. Thinking during research makes the task a little more difficult, but understanding early on how each source will (or will not) contribute to the answer will certainly save the student a lot of time later in the process. I encourage students to use charts or diagrams along the way to see how the legal authorities relate to each other and how the authorities together answer the legal question.

Once the authorities are compiled, students too frequently want to jump into the writing without first organizing the law around the points they need to explain. Many students have never outlined assignments before writing them, and they utterly resist this step. Outlining or mapping the structure of the arguments saves the writer time and aggravation. Students normally find that once they understand the document’s overall organizational structure and the organizational structure within each issue, the writing is not so difficult. To the contrary, students who try to figure out the organization as they write hit a lot of dead ends and usually must discard a lot of what they wrote along the way.

The most successful students quickly learn that producing a solid piece of legal analysis is a multi-step process. Skipping steps inevitably backfires and makes the student’s effort less efficient.

11. Related to the above question, research obviously is a key ingredient of successful legal writing, but ineffective or inefficient research can go on with no end in sight and little to show for it. Any tips for how students can improve the efficiency of their research? How does a student know when he or she has done enough research?

BOONE: To effectively research a legal issue, students must understand two things. First, if there were an easy answer to the question, they probably would not have been asked to research and write about that issue. Second, students must make sure they understand the question. For example, if I ask my students to predict how a California state court will rule on a particular issue, a student who answers only with law from other states has not answered my question effectively. The most relevant law would, of course, be California law. If you are thinking that this student simply failed to follow my instructions, you are partially right. My students don’t intentionally disregard the instructions, and they often end up with poor research results because they got lost somewhere in the process. This tends to happen when the students are trying too hard to come up with the “perfect” case to answer my question. When there isn’t one, they tend to start changing the question. They are, after all, going to be lawyers, right?

Seriously though, students can research much more efficiently if they keep in mind that there is usually no “golden egg” in the treasure hunt. Students often spend days looking for the “perfect” case to resolve their issue. They quickly discard cases that are fairly similar and provide good rules in the relevant jurisdiction, because they just know that there is a better case out there if they just keep looking. Surely, some court somewhere has addressed this exact issue before! These are great students, and they just know they can find THE answer—even if I have told them there is not one. Once they are completely exhausted and the deadline for the assignment is fast approaching, they realize that those cases they discarded might have been exactly what they needed. That leads us to another suggestion. Students should carefully track their research paths. This allows the exhausted student to avoid further frustration because he can at least go back and find those sources he discarded earlier.

A student has probably done enough initial research when he begins to see the same sources over and over again. When a student starts noticing that all of her sources seem to be citing each other, rather than citing sources the student has not yet seen, she is probably done with this round of research.

COUGHLIN: Take advantage of all training opportunities from Westlaw and Lexis. Not only will you enhance your research skills, you’ll have the opportunity to win prizes and eat lots of free pizza.

But do not rely on computerized legal research as your only option. It is important to know how to research in the books because many smaller law firms or public service entities may not have access to computerized legal research or the funds to pay for it. Also, understanding print resources will provide you with a better idea of the scope of information you are researching. In addition, computerized legal research
has the drawback of being only as good as your search terms. If your search term does not precisely appear in the document, you may miss a big case. You are more likely to get a wider breadth of relevant materials when you combine computerized and print research.

It is difficult to be efficient in legal research at first. Initially, the best way to begin is to use a flow chart and make sure that you document each step or source that you find for easy retrieval in the future. There are many such flow charts or decision trees for basic case law and statutory research skills that will be available in the legal research materials you receive in class or on the web.

As far as knowing when you are completed, a good rule of thumb, as Professor Boone said, is to continue with your initial research until you start seeing the same sources appear over and over again and the cases or sources begin to cite each other.

Patrick: Efficient and thorough research requires a student to do four things: know the question being asked, follow a methodical process of reviewing sources, keep a trail of where you have been, and above all, think as you go.

Students, and even young lawyers, can be horribly inefficient at research because they do not adhere to those four mandates. Research can be deliciously mindless as one prints off stacks of cases to read later or as one follows tangential queries down a cyberspace rabbit hole. But once that illusion of productivity wears off and that young student or attorney realizes he is no closer to answering the legal question than he was hours or days ago, frustration and panic erupt.

Using a methodical process for research can foster efficient and thorough research. First, always know the exact legal question you are being asked to answer. Usually clients pose narrow legal questions; understanding the question before you delve into myriad sources can save time and energy.

Next, establish a logical method for going through the various sources of authority. Most research texts students will see in law school set out some sort of step-like process to use in research. Understand that process and use it consistently.

Keeping a trail of where you have been and the sources you have checked can be crucial for a successful research project, particularly in real-life practice. Whether in school or practice, finishing a research project at one sitting will not likely happen. In reality, a research project may take several days or weeks and may be interrupted by competing tasks. Keeping a detailed list of search terms, sources, queries, will prevent duplicative research efforts later in the project.

Finally, think as you go. Never print a stack of “possibly relevant” cases to read later when you have time. No one, not even an experienced attorney, can read and assimilate two dozen cases at once. I warn my students to print a source only after they know what part of the legal puzzle that source solves. Thinking as you go through the research process is more difficult (and sometimes not as much fun), but saving time and finding the answer efficiently is well worth the effort.

I also echo that research is finished when either your search efforts start to yield the same legal authorities time and again or you run out of time on the project.

12. I’m always all over my seminar students about typos, Bluebook errors, formatting mistakes, and other fine points. They think I’m just being a nitpicker. You’ve touched on this, but could you elaborate about how important these finer points are when it comes to evaluating either a student’s or lawyer’s writing product?

Coughlin: The finer points mentioned in the question are essential. While my students may consider my strict attitude toward citation, formatting, etc. frustrating, they generally come to appreciate that precision and attention to detail make the difference in being invited onto the moot court board or law review, or getting a job offer.

Specifically, many times I take a point off the student’s final grade for any Bluebook error. My philosophy is that these finer points represent the area of your writing product over which the student has the most control. You do not have control over your client’s facts, and you do not have control over the state of the law. You can not control what your professor, judge or senior partner will think of your legal argument because of personal bias or prior life experiences or simply because the law may be against you. You can control, however, citation, formatting, and proofreading.
If you are sloppy with these finer points, your reader will think that your analysis is likewise imprecise. If you are not precise with your typing, your proofreading, your citation, your punctuation, how then will your reader have confidence in your work? For example, when I was in practice, a colleague sent out a letter that was supposed to read “return receipt requested” but instead read “rectum receipt request-ed.” One can imagine recipients having a difficult time placing confidence in the substance of a letter when the heading makes an illicit proposition.

MALMUD: You are being a nitpicker, and your students should thank you for it. Let’s fast-forward to the question of how important these finer points are in the real world. Imagine you are a lawyer interviewing two job candidates. One candidate walks in wearing a suit and presents you with a crisp, clean resume. The other walks in wearing jeans, flip-flops, and presents you with the same resume content-wise, but full of typos. Which one would you hire? Whether we like it or not, those reading our work make judgments about our capabilities based on its appearance, just as people make judgments about us based on our appearance. Sloppy citations, punctuation, grammar, or formatting will make your reader skeptical about the quality of your analysis.

Because attention to these details matters in the real world, we pay attention to them in legal writing classes. Although legal writing grades are always more dependent on the legal analysis than on mechanics, they will ultimately be lower if the student doesn’t pay attention to the “finer points” of grammar, typos, punctuation, and citation errors.

WALTER: The “finer points”—punctuation, usage, grammar, spelling, citation, and formatting—are very important to the overall grade on a legal writing memo and may be even more important in the real world. In my legal writing classes, I give a specific point value for the errors listed above, a value that is typically about 10-15 percent of the overall assignment grade. Committing too many of these errors will cost a student about one-third letter grade, dropping a B+ to a B, for example.

For legal writing professors who use a more “holistic” grading system rather than a specific point system, I think that the grading penalty for such errors is likely to be even more severe. Why? Because of something called “heuristics.”

The concept of heuristics is pretty straightforward: when decision-makers are short on time or information, they often make judgments based on more observable factors, even if those factors don’t necessarily lead to a purely rational decision. In other words, heuristics is a decision-making shortcut often based on appearances.

In practice, it might operate like this: A trial judge, looking over a three-foot tall stack of court documents so that she can make decisions on dozens of pending motions, begins reading the plaintiff’s memo. It’s full of typos, the cases are cited incorrectly, and some of the sentences don’t make sense because of grammar and usage problems. Frustrated, the judge picks up the defendant’s memo. It’s perfect. There are no misspellings or typos, the cases are properly cited, and the memo is well written. The defendant could very likely prevail on the motion even if the law actually favors the plaintiff.

It works the same way in legal writing courses. Poor mechanics may cause the grader to undervalue the substance of the writing, giving a lower grade than the substance might otherwise dictate.

13. What complaint do you hear from students year after year that you think is justified? Conversely, what complaint do you regularly hear that is unjustified?

BOONE: I think student complaints that they receive too few credit hours for the work they do in legal research and writing are justified. On the other hand, I think students’ complaints about our strict deadlines in legal writing are unjustified. With very few exceptions, my students lose significant points on major assignments if they are even a few minutes late. If an assignment is over twenty-four hours late, I will not grade it. The policy may seem harsh, but the practice of law runs on deadlines. Students may as well get used to it.

PATRICK: One justified criticism is that students do not get enough research instruction. With the explosion of online legal sources on the internet in recent years, we cannot begin to teach all of the research skills that students may need for their legal careers. Sources expand or change so quickly we do well to cover the basic sources of law and the easiest ways to find them. I encourage students to take an upper-division course we offer in advanced legal research taught by our
skilled librarians. I also would encourage law students to lobby their administrators for more research-oriented classes and to take those classes to improve their research skills.

WALTER: I hear three complaints on a frequent basis, and I think two are probably quite justified. Many students complain that their professors don’t return writing assignments as quickly as they should. Ideally, feedback would be immediate. Students would know exactly what they did right and wrong and be able to correct the wrongs on the next version. Unfortunately, with so many students and so many papers, it often takes longer than ideal to critique and grade memos and other assignments.

Second, I often hear students say that their professors don’t grade consistently, and third. I hear related comments that legal writing professors grade unfairly and play favorites (i.e., grading someone down or up based on the prof’s dislike or like for the person).

I think it’s true that some profs don’t grade consistently. Perhaps they’re grading without a grade sheet or list of key points, perhaps they’re grading too many papers at one sitting, or perhaps they’re grading at 3 a.m. Whatever the cause, the effect is often the same: inconsistent grades. For example, two students make the same mistake, but only one student gets dinged, or a student corrects an error made in a prior draft in the final version (at the prof’s suggestion), but then the professor grades the change negatively. Or just as frustrating, the prof finds something wrong in the second draft that passed un-criticized on the first draft. If a student thinks the professor has missed something or graded inconsistently, the student should talk with the professor. Fortunately, most grading inconsistency does not affect the student’s overall course grade, even if it affects the individual assignment grade. If, for example, the professor mistakenly gives one student eighty points on a memo when the student should have received seventy-six points, the four-point error should not affect the overall grade in the course.

As for the third criticism, I think it is mostly unfounded. Over my nearly twenty years as a legal skills teacher, I have worked with thirty to forty legal writing professors. I don’t think I have personally met any legal writing professors who graded anyone up or down based on their like or dislike of the individual student.

14. I’ve seen many incidents of plagiarism arise in legal writing courses over my years as a professor. Some of them have been egregious. A common defense is that the student didn’t know what he or she did constituted plagiarism. The first few times I heard this defense raised, I found it lacking in credibility. As the years have passed, I’m less sure. It seems that some students simply don’t grasp what plagiarism is and isn’t. Can you give readers of this book some clear guidance as to what constitutes plagiarism and how to avoid it?

BOONE: This question arises so frequently that the Legal Writing Institute has created a plagiarism brochure. Students can find it at http://www.lwionline.org/publications/brochure.asp. The brochure defines plagiarism, explains how it arises most often in the law school setting, and provides five basic “Rules for Working with Authority.” The brochure also gives sample sources and excerpts from student papers and asks the reader to decide whether the writer has avoided committing plagiarism. The answers explain how the student writers have followed or failed to follow the five basic rules. Students may be surprised by some of the answers. The brochure also discusses how the rules tend to operate differently in the practice of law. Finally, the brochure reminds students to ask their professors if they have any doubts about whether attribution is required. I recommend that students consult this plagiarism brochure.

Students must make sure they understand their legal writing professors’ rules about collaboration. Most of our plagiarism problems arise when students misunderstand or choose to ignore those rules.

MALMUD: Plagiarism is appropriating the ideas of another and presenting them as your own without attribution.

For the most part, plagiarism in legal writing classes should not be a problem. Before entering law school students should know that they cannot use the ideas of another student or other source without providing attribution. By the second week of school, students know they must cite every proposition appropriated from another source.

One difficult question for new legal writers is knowing when a sentence needs both a citation and quotation marks. Quotation marks signal that not only the idea comes from
another source, but also the specific words and their unique sequencing. Here's a rule to follow: If you have appropriated not only the substantive idea from another source but also its unique sequencing of specific words, use a citation and quotation marks to show you borrowed both.

For new legal writers, knowing when to use quotation marks can be difficult because lawyers appropriate key legal phrases without providing quotation marks. For instance, lawyers might write that a police officer had "reasonable suspicion of criminal activity" without using quotation marks. That language is a statement of a legal standard. Essentially, it's "public language." By way of example, a quick search of federal cases in the past year showed that twenty-seven federal judicial opinions used this exact phrase, and none used quotation marks. Pay attention to the cases you read. If a phrase repeats itself in many cases, you can likely use that phrase without quotation marks, but a citation of where it came from would still be required.

WALTER: I ask students to follow two simple rules to avoid plagiarism. First, if a writer is borrowing the exact words (three words or more, or just one very unique word), the writer must use quotation marks (or, as you'll learn, if a quotation is fifty or more words, it should appear as an indented block without quotation marks). A surprising number of students fail to use quotation marks when they quote from cases, statutes or other legal sources. Why is that? It's true that some writers knowingly and intentionally plagiarize the original source, hoping they won't be caught. But often, there's an innocent explanation. Some students are not careful when they copy or download the original source, and they lose track of what they wrote and what they borrowed from other sources. Regardless of the explanation, I still deduct substantial points for the failure to use quotation marks. Plagiarism is a serious offense.

The second rule is also pretty straightforward. If a writer: (a) borrows exact words (again, usually three or more, but it can include just one unique word); (b) borrows an idea (the writer paraphrases from the source); or (c) borrows the organization or structure from the original source, the writer must provide a citation to that source and that citation must include the exact page number(s) of the borrowed material. The last point is a bit tricky and one that escapes even some conscientious students. Borrowing a writer's organization or structure of ideas without full attribution is also plagiarism, even if you use your own words. This issue tends to come up more in upper-level seminars than in first-year legal writing courses.

15. What's the silliest mistake one of your students has ever committed?

COUGHLIN: The silliest mistake a student committed happened during a closed universe office memorandum (where we provide the students all the law they have to work with) assignment involving only two cases that the student had to compare and contrast. The issue was a very narrow one: whether, given our client's facts, the element of the tort of slander known as "publication" (a term of art meaning that the slanderous remark was disclosed to at least one person other than the defendant) was satisfied. One case held that the element was satisfied and the defendant was liable for the tort. The other case held that element was not satisfied and the defendant was not liable.

The problem facts the students were wrestling with were intentionally drafted to fall right in the middle of the two cases. During the first few weeks of my class, I practically hold my students' hands. I had walked them through the analysis and flowcharted it on the board. We had discussed the issue ad nauseam. Unfortunately, one student disregarded the first two weeks of class (including orientation week, which included twelve intensive classroom hours of legal research and writing instruction) and wrote a paper not about the narrow element of publication in a slander case, but about First Amendment rights to free speech! While it was an interesting essay on the history of the First Amendment, I had no choice but to fail the paper.

MALMUD: Well, let's see. Here are a few to choose from:

Students not realizing they might need their professors for a reference one day.

Students who assume everyone but them "gets it"—not realizing all the other students are thinking the same thing.

Students who think that after reading forty identical papers I won't notice the condensed font they tried to slip in to get around the page limitation.
I love this one: I once explained to my students that prepositions often signal excess language and so if they cut out prepositions, their sentences are likely to be more concise and vigorous. A student then handed in a paper containing literally no prepositions! Quite an accomplishment.

**WALTER:** Silly mistakes come in all shapes and sizes. The big ones usually do not seem very humorous to the student who suffers grade-wise. For example, a silly error, using the wrong font size or exceeding the page limit, could result in a grade reduction. It’s a “silly” mistake because the instructions on font sizes are clear, but one with serious consequences.

Many smaller mistakes are quite humorous, for both prof and student, especially when they don’t result in a severe grade penalty. One semester I used an environmental law problem for a memo assignment, and one student wrote in his memo: “My client has discussed whether he will fill the chemical basin with his partners.” We all had a good laugh over that one.

Perhaps the silliest mistake occurred in my fifth year of teaching (I still remember it well). In connection with a search and seizure issue, we were discussing the Fourth Amendment to the United States Constitution and its prohibition against “unreasonable searches and seizures.”

One of my students boldly asked during class where she could find a copy of “that statute.” A bit confused, I asked, “What statute?” And she replied, “The one you’ve been discussing for the last thirty minutes.”

Stifling a gasp, I asked her, “By statute, are you referring to the Fourth Amendment?” I was hoping she would say no and point to some statute mentioned in one of the cases. Unfortunately, she said, “Yes, that’s the one. Is that a federal statute?” At that point several students laughed aloud, but I quieted them with a quick look. In case you’ve missed the joke, the Fourth Amendment is part of the United States Constitution—not a statute. If you avoid making that mistake because of reading this, I’d say your investment in McClurg’s book was worthwhile.