

Alabama Law Scholarly Commons

Working Papers

Faculty Scholarship

7-8-2010

'The Most Important Course in Law School': Five Experts Offer a Roadmap for Success in First-Year Legal Writing

Andrew Jay McClurg

University of Memphis - Cecil C. Humphreys School of Law, amclurg@memphis.edu

Christine Nero Coughlin

Wake Forest University - School of Law, coughlcn@wfu.edu

Joan Malmud Rocklin

University of Oregon, jrocklin@uoregon.edu

Sandy C. Patrick

author1508096@ssrn.com

David Walter

Florida International University (FIU) - College of Law, author1508098@ssrn.com

See next page for additional authors

Follow this and additional works at: https://scholarship.law.ua.edu/fac_working_papers

Recommended Citation

Andrew J. McClurg, Christine N. Coughlin, Joan Malmud Rocklin, Sandy C. Patrick, David Walter & Kimberly Boone, *'The Most Important Course in Law School': Five Experts Offer a Roadmap for Success in First-Year Legal Writing*, (2010).

Available at: https://scholarship.law.ua.edu/fac_working_papers/40

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.

Authors

Andrew Jay McClurg, Christine Nero Coughlin, Joan Malmud Rocklin, Sandy C. Patrick, David Walter, and Kimberly Boone

“THE MOST IMPORTANT COURSE IN LAW SCHOOL”: FIVE EXPERTS OFFER A ROADMAP FOR SUCCESS IN FIRST-YEAR LEGAL WRITING

Andrew J. McClurg, Kimberly K. Boone, Christine N. Coughlin, Joan Malmud, Sandy C. Patrick & David D. Walter*

I. INTRODUCTION

This atypical article—consisting of answers to fifteen questions about first-year legal writing courses posed to five experienced professors in the area—came about in an unusual way. Co-author McClurg, writing a book for Thomson West on how to succeed in the first-year of law school,¹ was struggling with how to meaningfully impart advice to new law students about legal writing courses,² which are part of the required curriculum at nearly all U.S. law schools.³ He found, to his surprise, that existing law school prep books devote little or no attention to the subject. While many doctrinal professors have been slow to acknowledge the importance of legal writing courses,⁴ McClurg approached the

* Andrew J. McClurg is the Herbert Herff Chair of Excellence in Law at the University of Memphis Cecil C. Humphreys School of Law. Kimberly K. Boone is the Director of Legal Writing at the University of Alabama School of Law. Christine N. Coughlin is the Director of Legal Research and Writing at Wake Forest University School of Law. Joan Malmud is a professor of legal writing at the University of Oregon School of Law. Sandy C. Patrick is a professor of legal writing at Lewis & Clark Law School. David D. Walter is the Co-Director of the Legal Skills and Values program at Florida International University College of Law. McClurg would like to thank his research assistants, Shea Barker and Chelsea Brown, for their excellent help on this article and on the book chapter that gave rise to it. Herff Assistant Karol Landers performed astute editing and proofreading.

¹ See ANDREW J. MCCLURG, *1L OF A RIDE: A WELL-TRAVELED PROFESSOR’S ROADMAP TO SUCCESS IN THE FIRST YEAR OF LAW SCHOOL* (2009) [hereinafter *1L OF A RIDE*]. A substantially truncated version of the question and answer interviews in this article appeared in *1L of a Ride*. *Id.* at 274-314. Portions are reprinted herein with the permission of the author and Thomson West.

² Legal writing course packages travel under a variety of names, including Legal Research and Writing, Lawyering, Legal Methods, Legal Skills and Values, and Legal Writing and Analysis. In this article, the generic term “legal writing” will be used to describe all such courses, recognizing that most of them also include research and oral advocacy components. In recent years several schools have added other skills components to first-year legal writing courses, such as interviewing, negotiation, and client-counseling exercises.

³ According to the 1992-2002 ABA curriculum study, 81 percent of full-time law school programs and 84 percent of part-time programs require legal writing in the first year. Catherine Carpenter, *A Survey of Law School Curricula 1992-2002*, 2004 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. REP. 25. The figures may be higher today.

⁴ Traditionally, legal writing has been looked down on by many within the Academy, a condition Professor David R. Romantz attributed to four factors:

First, legal writing courses were likely perceived as anti-Langdellian because they failed to incorporate the inductive aspects of Langdell’s case method and were thus labeled anti-intellectual. Second, legal writing courses began to appear in the curriculum shortly after Llewellyn and other legal realists first argued for a broader, more practical orientation to legal education and were thus classified as skills courses. Third, legal writing courses first developed, in

book from the perspective that legal writing is the most important course in law school.

Others agree. Commentators have made this assertion.⁵ Practitioners recognize the primacy of the written and oral⁶ communication skills taught in

part, to cure fundamental grammar and composition inadequacies of post-WWII law students and were thus considered remedial. Finally, legal writing courses were, and remain, more expensive and labor intensive than case method courses, and thus lacked the financial efficiency of large doctrinal courses.

David R. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 133 (2003). These factors, Romantz said, “all conspired to relegate legal writing programs and their teachers to the bottom rung of the academic ladder.” *Id.* at 133-34. This tradition started early on. Romantz quotes a 1959 article in the *Journal of Legal Education* stating that legal writing courses, which were in their embryonic stages of development, “had already ‘become the stepchild of the curriculum, unwanted, starved, and neglected.’” *Id.* at 130-31 (quoting Stewart Macaulay & Henry G. Manne, *A Low-Cost Legal Writing Program—The Wisconsin Experience*, 11 J. LEGAL EDUC. 387, 387-88 (1959)).

Perhaps another explanation explaining the attitudes of some doctrinal professors toward legal writing is that we all tend to be “homers” in evaluating the relative importance of our own courses. See *Urban Dictionary*, <http://www.urbandictionary.com/define.php?term=homer> (last visited Dec. 19, 2008) (defining “homer” as “[s]omeone who shows blind loyalty to a team or organization, typically ignoring any shortcomings or faults they have,” as in “That guy is a total Broncos homer, they haven't done anything good all season!”). And, of course, many doctrinal professors resent the disruptions that occur in their courses in those weeks when major assignments are due in legal writing. See also *infra* pp. 10-13.

⁵ A search of the Westlaw legal periodical database (TP-ALL) using the search terms “most important law school course” or “most important course in law school” turned up several examples. See, e.g., Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 354 (1996) (stating that “as a Legal Research and Writing instructor, I can (as I desperately try to do with my students) make a strong argument that Legal Research and Writing is the most important course in law school,” but adding that “the reality is that . . . Legal Research and Writing has the least prestige in law school”); James D. Gordon, *An Integrated First-Year Legal Writing Program*, 39 J. LEGAL EDUC. 609, 609 (1989) (stating that “[l]egal writing is one of the most important courses in law school” because “[i]t helps students develop analytical and writing skills that will be crucial to them, their clients, and the legal system” and “good writing is essential to good lawyering”); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 1, 5 (2001) (“Virtually all lawyers and judges acknowledge that legal writing is the single most important course in law school and agree that this course provides the fundamental underpinnings of law practice.”).

According to the search results, the only other courses to which commentators have attached “the most important course” label are Legal Ethics and Civil Procedure. See Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Course in Law School*, 29 LOY. U. CHI. L.J. 719, 735-36 (1998) (Legal Ethics); Michael A. Wolff, *Teaching Civil Procedure: The Most Important Course in Law School?*, 47 ST. LOUIS U. L.J. 1, 1 (2003) (Civil Procedure).

⁶ A 2007 survey of legal writing directors showed that 81 percent of responding schools (148 of 181) require an appellate oral argument in first-year legal writing. ASS’N OF LEGAL WRITING DIRS., ALWD/LWI 2007 SURVEY RESULTS, 11 tbl. 20 (2007), available at http://www.alwd.org/surveys/survey_results/2007_Survey_Results.pdf [hereinafter 2007 ALWD SURVEY]. Many schools also require other types of oral presentations in first-year legal writing, such as pretrial and trial motion arguments and oral reports to senior partners. See *id.*

legal writing courses.⁷ Many law students do as well.⁸ The 2007 Carnegie Foundation report on legal education emphasized the advantages of legal writing courses for training students in legal analysis.⁹ Other well-known studies of U.S. legal education, including the Crampton report,¹⁰ MacCrate report,¹¹ and, more recently, the Best Practices for Legal Education report,¹² have all called for more skills training, including in the area of legal writing. The American Bar Association law school accreditation standards elevate first-year legal writing by making “a rigorous writing experience” the only specific curricular mandate of the first year.¹³

⁷ See *infra* notes 37-39 and accompanying text (discussing survey of Chicago private practitioners in which oral and written communication skills ranked first and second on a scale of “importance,” while knowledge of substantive law ranked seventh). A 2005 survey of Arizona lawyers by Gerry Hess and Stephen Gerst asked lawyers and judges to evaluate the importance of various lawyering skills key to the success of first-year associates. See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 78 (2007) [hereinafter BEST PRACTICES FOR LEGAL EDUCATION] (discussing this survey). In order, the skills receiving the most votes as “essential” or “very important” were: (1) legal analysis and reasoning (96%); (2) written communication (96%); (3) legal research (94%); (4) drafting legal documents (92%); (5) listening (92%); (6) oral communication (92%). *Id.* All of these skills except number 5 are directly taught in legal writing courses.

⁸ See WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 104 (2007) [hereinafter CARNEGIE FOUNDATION REPORT] (“In their visits [to law schools], our research teams were impressed by how often students raised the topic of legal writing.”); Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193, 1194 (2000) (“Law students often say that they learn more in their Legal Research and Writing class (LRW) than in any other first-year course.”). The 2008 Law School Survey of Student Engagement found more than one-third of students want more writing opportunities in law school, a result the surveyors acknowledged “may surprise some.” LSSSE, LAW. SCH. SURVEY OF STUDENT ENGAGEMENT: 2008 ANNUAL SURVEY RESULTS 5 (2008), available at http://lssse.iub.edu/2008_Annual_Report/pdf/j4u5h7e9/LSSSE_2008_Annual_Report.pdf.

⁹ See CARNEGIE FOUNDATION REPORT, *supra* note 8, at 111 (“The teaching of legal writing can be used to open a window for students onto the full complexity of legal expertise.”); see also *infra* note 27 and accompanying text.

¹⁰ See AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 15 (1979) (stating “that too few students receive rigorous training and experience in legal writing during their three years of law study”).

¹¹ See AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT-AN EDUCATIONAL CONTINUUM 138-40 (1992) [hereinafter MACCRATE REPORT]. While the MacCrate report called for more skills training in law schools, it did not make specific recommendations regarding first-year research and writing. See Romantz, *supra* note ___, at 134 n.182.

¹² See BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7, at 77 (setting forth as a best practices principle that students be taught “the application of techniques to communicate effectively with clients, colleagues, and members of the other professions” and specifically noting legal writing).

¹³ ABA law school Standard for Approval 302(a) states:

(a) A law school shall require that each student receive substantial instruction in:

(1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;

Specific explanations are discussed below,¹⁴ but co-author David Walter captured the principal reason for the primacy of legal writing courses when he said: “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.”¹⁵

Aware of his limitations as a doctrinal professor to give meaningful advice and information about legal writing courses, McClurg contacted a geographically diverse group of experts—five legal writing professors at different law schools—for assistance. All five of the legal writing professors readily agreed to help. A question and answer format was selected as the method best-suited for obtaining a wide-lens perspective, one featuring both depth and breadth, on succeeding in first-year legal writing courses. The five legal-writing professors are:

Kimberly K. 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 2000.¹⁶

Christine N. 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.¹⁷

Joan Malmud 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.¹⁸

Sandy C. 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

(2) legal analysis and reasoning, legal research, problem solving, and oral communication;

(3) *writing in a legal context, including at least one rigorous writing experience in the first year* and at least one additional rigorous writing experience after the first year;

(4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and

(5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.

AMERICAN BAR ASSOCIATION, 2008-2009 STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302(a), *available at* <http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Chapter%203.pdf> (emphasis added).

¹⁴ See *infra* pp. 19-22.

¹⁵ See *infra* p. 21.

¹⁶ See The University of Alabama School of Law, Kimberly Boone, <http://www.law.ua.edu/staff/view.php?user=124> (last visited Jan. 25 2009).

¹⁷ See Christine Nero Coughlin—Faculty Profile, <http://law.wfu.edu/faculty/profile/coughlcn/> (last visited Jan. 25, 2009).

¹⁸ See Oregon Law: Faculty & Staff: Joan Malmud, <http://www.law.uoregon.edu/faculty/jmalmud/> (last visited Jan. 25, 2009).

assistant state attorney general doing criminal appeals, and as a practicing attorney doing civil litigation.¹⁹

David D. Walter is the co-director of the legal skills and values program at Florida International University College of Law. With nearly twenty years' experience teaching legal writing, he previously taught at Seattle University and Mercer University. He also teaches upper-level skills courses and directs the Center for Appellate Advocacy, Practice, and Procedure.²⁰

While the questions and answers below are directed at new law students, it is hoped that professors—both doctrinal and legal writing professors—will also benefit from reading them. All law professors, of course, are engaged in teaching the process of legal analysis to students, but legal writing professors do it in a way that requires close interaction with individual students in exercises that produce observable results.²¹ Doctrinal professors have little to go on in assessing the development of a student's ability to “think like a lawyer” until the end of the process—i.e., while grading final exams. Socratic-dialoguing offers some glimpses into the analytical abilities of students, but in a legal education system where first-year sections average seventy-seven students,²² these clues manifest themselves haphazardly and are not evenly distributed. Additionally, unlike most doctrinal professors, legal writing professors don't limit their teaching arena to training students simply to *think* like lawyers. They also teach them to *do* like

¹⁹ See Sandy Patrick, Legal Writing Professor, <http://www.lclark.edu/dept/lawadmss/patrick.html> (last visited Jan. 25, 2009). Coughlin, Malmud, and Patrick are also co-authors of *A Lawyer Writes*, which expands on some of their comments in this article. See CHRISTINE COUGHLIN, JOAN MALMUD & SANDY PATRICK, *A LAWYER WRITES* (2008) [hereinafter *A LAWYER WRITES*].

²⁰ See College of Law: Faculty, http://law.fiu.edu/faculty/faculty_walter.htm (last visited Jan. 25, 2009).

²¹ The 2007 Carnegie Foundation report on legal education commented on this aspect of legal writing courses:

The pedagogies of legal writing instruction bring together content knowledge and practical skill in very close interaction. Writing makes language observable. Writing instruction—more accurately, the use of writing as a means of instruction—allows the communication process to be stopped for a while to enable students to observe and analyze the discourse being developed. . . . [T]his is similar to the deep structure of case-dialogue teaching. But in writing instruction, the focus is typically on the generation of a product for a specific rhetorical situation—a simulated or actual piece of legal work. Because of this, students are challenged to engage with the uncertainties of specific practical contexts and to search for solutions together, using the instructor (and one another) as coach and resource. The coaching is precisely intended to support this process of discovery and refinement within a complex context. In its fully developed form, the pedagogy makes this developmental process itself visible to the learners, so that they can become aware of the components of their growing abilities to write—and think—as legal professionals.

See CARNEGIE FOUNDATION REPORT, *supra* note 8, at 110.

²² One of my research assistants arrived at this figure by analyzing enrollment data from the 2006 *ABA-LSAC Official Guide to ABA-Approved Law Schools*. See *ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS* (Wendy Margolis, Bonnie Gordon, Joe Puskarz & David Rosenlieb eds., 2006).

lawyers.²³ From their unique position as hands-on coaches, legal writing professors have a lot to say about teaching legal analysis that doctrinal professors can learn from. If nothing else, this article may help narrow the communication gap between doctrinal professors and their legal writing colleagues by helping to demystify what legal writing colleagues do and how they do it.

Legal writing professors also can benefit from the Q and A. In addition to providing a helpful resource for their students, the questions and answers can broaden their perspective by exposing them to different teaching philosophies and opinions of five colleagues in varied legal writing programs. It might also cause them to think hard about questions they may have taken for granted, such as what exactly is “analysis” and how can it be defined in a way that law students can understand.

Moreover, because the questions and answers are geared toward new law students, they may serve to remind all readers what it was like to be a new student struggling with the vagaries of learning to think—and write—as lawyers. As co-author Chris Coughlin commented, so often in teaching legal writing professors forget what it was like to be that 1L who either thought she was a good writer before law school, is freaked out to learn that being a good lawyer requires becoming a professional writer, or starts law school deluded by the notion that effective advocacy is all about ‘being good at arguing.’

The format of the questions and answers is intentionally conversational. Here are:

II. FIFTEEN QUESTIONS AND ANSWERS ABOUT FIRST-YEAR LEGAL WRITING

1. Let’s get this question 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 I address it with my students on the first day of orientation. If students view the work they put into legal writing solely as an investment in the two graded credit hours they receive each semester, they will be very frustrated. Students should look at the time invested in both legal research and legal writing as time spent learning a new language. They will need to be fluent in this new language to do well in all their courses and to do the jobs they hope to have in the future.

²³ See Nancy B. Rapoport, *Is “Thinking Like a Lawyer?” Really What We Want to Teach?*, 1 J. ASS’N LEGAL WRITING DIRECTORS 91, 92 (2002) (questioning why U.S. legal education is “so fixated on the ‘thinking’ process, rather than the ‘doing’ process”).

The imbalance may be explained by the fact that teaching legal writing as a separate course is a relatively new idea. Legal writing as a discipline may be as old as some of the prospective students reading this book, but it is still very young when compared to more traditional first-year doctrinal courses like Contracts or Torts. Some law professors still feel strongly that our students should be able to learn legal writing on their own as law students once did. Other doctrinal professors do not want to give more credits to legal writing because they believe students already spend too much time on legal research and writing assignments, and they do not want the students to spend even more time away from their more traditional first-year classes.

Legal writing professionals across the country continue to push toward more credit hours for our students. It is a slow process, but with a few of the more prestigious law schools creating new lawyering skills programs worth at least five hours of credit during the first year, more changes may be on the way.

COUGHLIN: This criticism is one I address on the first day with my students. We review Professor McClurg's equation so the students understand the complex analysis institutions use to calculate the number of credit hours for legal writing courses.²⁴ While legal writing is undervalued, the criticism is short-sighted because it focuses on a single educational dimension—credit hours—and not the value added to legal education overall.

What explains the imbalance in credit hours? The first reason is a philosophical divide in the academy concerning legal education. Many academicians think the scale should be tipped heavily in favor of teaching legal doctrine or theory to help students learn to “think like lawyers.” Others, however, think that law schools should balance theory with skills in order to bridge the gap between law school and law practice. Ironically, however, schools that previously focused heavily on practical skills were not considered competitive for purposes of law school rankings—the unfortunate elephant in every law school classroom.

This conundrum is changing, as seen in well-regarded studies on legal education, such as the MacCrate Report,²⁵ the recent Carnegie Foundation Report on the advancement of teaching in legal education,²⁶ and the publication of Best

²⁴ Professor Coughlin is referring to the following satirical analysis in *IL of a Ride* regarding how law schools go about allocating the number of credit hours for legal writing:

The single most iterated 1L gripe (and that's saying a lot) is that the workload required for legal writing is disproportionately 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. *IL OF A RIDE*, *supra* note 1, at 277-78.

²⁵ MACCRATE REPORT, *supra* note 11.

²⁶ CARNEGIE REPORT, *supra* note 8.

Practices for Legal Education report.²⁷ These studies show the importance of classes that combine theory and skill in the legal academy's quest to bridge the gap between law school and the practice of law.

The second reason is economic. Historically, individuals who taught legal research and writing were female, administrative rather than faculty hires, and had different, and many times, capped employment contracts. Many schools fulfilled the American Bar Association's requirement to have a legal writing program in theory without providing the necessary support to allow the legal writing program to advance. While this practice was economical for law schools, it hindered the development of legal writing programs because legal writing professors could not even attend faculty meetings to advance programmatic interests, such as an increase in credit hours.

Times are changing. The legal writing community has professionalized. Legal writing professors more often are considered faculty with voting rights. Many legal writing professors now have tenure. In addition, the legal writing community has mobilized. A sophisticated, annual legal writing survey looks at all aspects of legal writing programs from credit hours, to types of assignments, to the qualifications and contract status of legal writing professors.²⁸ This survey is distributed to each legal writing department across the country to provide support for programmatic and career advancement.

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.

²⁷ BEST PRACTICES FOR LEGAL EDUCATION, *supra* note 7.

²⁸ See, e.g., 2007 ALWD SURVEY, *supra* note 6.

Interestingly, though, students don't want less work. Each year, at the University of Oregon, we survey the Legal Research and Writing (LRW) students and ask what assignment they would like cut from the fall semester. "None" is the consistent response. In fact, many students report they want *more* assignments because they recognize they need the practice. So, we are working on increasing the credit hours they receive for the work they are doing. But sometimes change occurs more slowly than we might like.

PATRICK: On the first day of class I explain to the students that Legal Analysis and Writing, our school's version of legal writing, will be much like their initial 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 students will, however, get invaluable remuneration of a different kind: They will learn foundational skills for their legal career and will get abundant feedback to help them become excellent attorneys.

By acknowledging the hard work up front, I rarely hear students complain about the time and effort our course demands. Instead, they are quite willing to engage in the process that will make them better law students and attorneys.

Although legal research and writing courses have not historically received the credit hours the subject merits, today more law schools acknowledge the importance of the course in varied ways, including awarding the course more credit. One reason for the historic lack of credit was that this course of study was relatively new, often adopted by schools just in the last two decades. Many law school administrators and case book faculty did not have such a course when they attended law school.

In recent years, more law school professors have taken a Legal Analysis and Writing course while in law school. Further, attorneys who move from private practice to academia keenly understand the importance of the foundational skills the course offers. Our new law school dean, Robert Klonoff, an accomplished trial and appellate lawyer who has argued before the U.S. Supreme Court, spoke with me in an informal, individual meeting. He stressed that Legal Analysis and Writing is the most important class in law school. Lawyers, he said, can learn a jurisdiction's rules on contracts while in practice, but a lawyer will not last a day in practice without a solid understanding of how to research, analyze, and write about the law.

WALTER: Too much time, too few credits—that's certainly a complaint all legal writing profs hear. The disparity between workload and credits awarded arose during the early days of legal writing, when law schools began adding legal writing tasks to doctrinal classes. Although the schools added substantial writing tasks to the doctrinal courses, they gave students little or no additional credits for the work. When legal writing came into its own as a separate course, many schools still failed to give students proper credit for the work. For example, when I began teaching in 1990, the law school required students to write four memos

and two letters during the first two semesters, but the school gave students a grand total of only three credits. Talk about unhappy law students—but they certainly had a right to complain.

Today, though, law schools have largely remedied the most egregious imbalances. Most law schools now require multiple legal writing courses, usually awarding two or three credits for each course. Even so, there is still some imbalance when two credits are given for three credits of work. But, even when three credits are given for three credits of work, some students still complain that they're doing more work in their three-credit writing course than in their three-credit doctrinal course.

I try to avoid such complaints by carefully calculating the hours needed for the research, reading, and writing in my courses. For instance, I give much thought to the time needed to locate, read, and analyze the cases, and the time needed to draft and revise each memo. I also calculate the total hours required for the entire semester. A typical three-hour doctrinal course such as torts or contracts demands about 150-190 hours per semester (forty-two hours for class, 84-126 hours for reading and class prep, and twenty-five hours for final exam prep and the final exam). My three-hour legal writing course demands about 160-190 hours (thirty hours for class, forty-five hours for reading and class prep, forty-sixty hours for the first memo, thirty-forty hours for the second memo, five hours for the client interview and counseling sessions, and ten hours for the legal research exam and final exam).

I believe most legal writing profs strive to get it right, making the workload proportionate to the credits awarded and on par with the workload and credits in other courses.

2. Setting aside legal writing for a minute, what percentage of students would you estimate enter law school who lack basic “regular writing” skills? What’s the nature of these problems? Can you speculate on the causes?

BOONE: Judging from their early assignments, fifteen to twenty percent of students may lack these basic skills. I am not sure I can answer this question fairly, however, because I may never see some of my students’ true “regular writing skills.” Even students with solid writing skills may turn in very poor work, at least initially. Students are so concerned about finding the relevant rules and facts that they forget all about punctuating correctly and using the active voice. This problem is compounded by the fact that many students grossly underestimate the amount of time required for early assignments and often leave little or no time for basic proofreading. For these reasons, I think some of my students are probably better writers than their early assignments suggest.

FWIW (haha),²⁹ I don’t think texting, email, and the internet are the primary causes of the general decline in writing skills. The reasons are likely

²⁹ For those lagging behind today’s tech culture, “FWIW” is a text-messaging abbreviation for “For what it’s worth.”

much more basic. First, many of our students did not learn grammar the way we learned grammar. For example, many of them have never been forced to diagram a sentence and may not even know what that means. (If you don't know what that means, do not panic but consider taking some of the steps recommended in response to question 3.) Second and probably more importantly, many students were not required to write as many papers or papers of any substantial length during their high school and undergraduate careers. There are many studies out there on this topic, but here's some anecdotal evidence. At a conference last year, I heard a statistic during a talk suggesting that the average length of the longest paper students now write during high school is four to five pages. I was discussing this with some of my very bright students (and was about to say I hoped I had misunderstood the speaker and planned to do some research on this topic), when one of them asked, "Is that bad?" Wow. We were required to write longer research papers in junior high school. I'm not suggesting that longer papers are better, but the best way to learn good "regular writing skills" is to practice them—write, get feedback, and rewrite. Oh yes, and while I am ranting, lots of students never read for pleasure. But that's another story . . . or is it?

COUGHLIN: In the past few years, we have seen an increase in the number of students who lack basic "regular writing" skills entering law school. How many? Approximately one-third of my students. Why? Students have not had sufficient opportunities to write and learn basic "regular writing" skills.

In today's world of leaving no (or is it every?) child behind, teachers are less able to teach grammar, punctuation and assign students a multitude of opportunities to write so that they receive feedback. Face it, for our overworked, underpaid primary and secondary educators it is significantly more difficult to work with students on mastering writing skills than to grade an objective worksheet. Teachers have no choice but to focus on teaching basic reading and math skills to prepare students for the standardized tests – after all, teacher compensation is now based on student performance on these tests. Unfortunately, instilling a love of writing, understanding how the English language works, and learning basic grammar and punctuation skills are no longer vogue for testing purposes.

Becoming a professional legal writer requires different skills than required from the text messages that students are used to writing. For example, a professional writer uses capitalization and spells out words in their entirety. Professional writers believe that emoticons are unacceptable. Professional writers repeatedly wrestle with their sentences until they achieve the precise meaning in the precise style desired. Professional writers own a style manual, use it when confronted with a tricky punctuation or grammar situation, and turn in a "draft" only when it is in a finalized, polished form. They know not only the joy but the tedium of writing.

MALMUD: Your question is difficult to answer because different people define "regular writing skills" differently. Does it include the ability to support an

argument with detailed facts? Does it include the ability to use topic sentences to carry an argument through to the end of a discussion? Does it include the ability to use words consistently and precisely? Does it include the ability to write concisely? Or does it just include the ability to use proper grammar, punctuation, and spelling?

I would expect a person who graduates college to have all of the skills listed above. If that's the standard, I would say that less than a third of law students come in with the writing skills I would expect to see.

The problem is that learning to write well requires a lot of practice and a lot of feedback. University, high school, and I imagine even elementary school classes are simply too large for teachers to give the careful, frequent feedback students need in writing.

PATRICK: Although the number may seem high when grading that first stack of papers, the percentage of students who enter law school without basic “regular writing” skills is relatively low. Having an average of forty-five to forty-eight students each year, my own informal statistics find only eight to ten percent of students need instruction in basic writing skills.

Usually, deficiencies occur because the student did not learn English as a first language, the student did not have a grammatical component in the grade or middle school curriculum, the student did not have much experience writing, or the student ran out of time on an assignment before those details were checked and corrected. In Spring 2004, a committee at our law school conducted an informal student survey asking students to evaluate their writing experiences prior to law school and to rate their own writing skills.³⁰ The scale for the ratings included five categories: excellent, good, fair, mediocre, need help. Of the 166 students who completed the survey, seventy-seven percent of the students rated themselves as excellent or good writers, and only four percent of the students rated themselves as mediocre or needing help. These numbers are consistent with what I have seen anecdotally in my teaching.

Significantly, several students entering law school have not had a lot of experience writing complex, analytical papers in their undergraduate curriculum; even when they did, students did not receive significant feedback, particularly in writing mechanics. Fifty percent of the students polled wrote fewer than six research papers in college. Interestingly, although most students surveyed said they received some feedback on grammar as well as substantive content in college writing assignments, fifty-five percent of students said their writing was not subject to a harsh editor who marked almost every sentence with corrections.

Many times “regular” writing problems stem from a lack of skill in grammar or punctuation mechanics. Almost half, forty-five percent, of the students in the survey said they had no instruction in writing fundamentals and

³⁰ *Survey on Writing Experience*, Daryl Wilson, Chairperson, Memorandum from the Writing Committee of Lewis & Clark School of Law (Spring 2004) (on file with co-author Patrick).

grammar in college. Forty percent said that proofreading and grammar were not significant factors in the grading of their written work. Sixty-four percent said they occasionally, but not often, got feedback on grammar issues. Even with these statistics, most students still turn in fine work.

WALTER: Fortunately, the great majority of law students possess very good writing skills, and I think those students write quite well the great majority of the time. To give an exact number, 80 percent of all 1L's "get it right" about 80 percent of the time (my 80/80 rule). Or to state it inversely, about 20 percent of 1L's lack "basic 'regular writing' skills," and even the 80 percent who "get it right" may at times still commit several writing errors.

The writing problems vary considerably in type and significance. They include problems with punctuation, usage, grammar and spelling, as well as problems affecting readability and meaning, such as clarity, precision and conciseness. Punctuation problems may be minor and have little effect on sentence clarity (as with the two missing commas in the previous sentence) or they may seriously affect the meaning of a sentence (as in the case of a comma error that ended up costing a Canadian utility company \$1.5 million). More difficult to spot and, therefore, to correct are errors affecting readability and clarity, such as the omission of key phrases, ideas, and sentences that impact the ability of the reader to grasp the writer's meaning.

As you would expect, these problems have multiple causes. Some students did not learn key punctuation rules in grade school, or simply forget them as they turn their attention to the substance of their writing. Some students know the rules, but lack critical reading and proofreading skills that allow them to see and correct their errors. For others, lack of time is the major cause. The writing or proofreading is rushed or perhaps proofreading is skipped altogether causing the writer to miss obvious errors (like the missing period in the prior sentence). Some students have learning disabilities that affect their writing. Finally, some students lack a critical trait of all good writers: caring deeply about the quality of their writing. Hmm, let me proofread this one more time.

3. For students who know 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?

BOONE: First, I applaud a student who recognizes that he has writing deficiencies; acknowledging the problem is a big first step. Some students are very upset and more than a little defensive when I suggest they may need to do some work in this area. Fortunately, once a student is willing to acknowledge the problem, there are many good resources available. The books I recommend most often are *Plain English for Lawyers* by Richard Wydick³¹ and Bryan Garner's

³¹ RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (5th ed. 2005).

Legal Writing in Plain English.³² Both books include grammar, style, and punctuation rules in a legal context. More importantly, both have lots of exercises and answers. Many students have found working through one of these books the summer before law school very useful. If students want to inject a little humor into their punctuation review (and yes, that is possible), *Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation* by Lynne Truss is also a fun book.³³

Additionally, most universities and many law schools have great writing centers. Some of these centers simply provide resources, but many offer students substantial one-on-one instruction. Many students are unaware of these centers or fail to take advantage of them during their undergraduate careers. If you know your writing skills are lacking, take one of your papers to the writing center on campus. When you get some feedback, don't just listen to it. Try to rewrite your paper, incorporate the feedback, and go back to the center to discuss the paper again. If you want to be a good writer and a good lawyer, it is a process you should start learning as soon as possible.

COUGHLIN: If a student knows that he has a writing deficiency, I would recommend the following—not only to succeed in a first-year legal writing course but to succeed in law school and the profession: Start by buying and studying a basic grammar and style book, workbook, program, etc. There are many on the market. The ones recommended by Professor Boone are excellent.

Accept that learning basic rules of grammar, punctuation, and parts of speech may not be exciting or fun. No “instant gratification” is involved. In fact, one student who took it on himself to improve his writing skills after his first year of law school analogized his summer remedial writing activities to repeatedly sticking a fork in his knee.

Understand that 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 are no magic pills to cure a deficiency. If the deficiency involves 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. The student should look back on her educational career, and determine

³² BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES* (2001).

³³ LYNNE TRUSS, *EATS, SHOOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION* (2003).

whether there is a common denominator in the teachers, environments, situations, and subjects to which she responded most positively. Books, websites, educational psychologists, and campus learning assessment specialists and centers can assist students with tools to understand how they best learn. Everybody learns differently, and everybody writes differently.

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

That said, I might recommend all the books Professor Boone mentioned, as well as William Strunk and E.B. White's classic *The Elements of Style*.³⁴ In fact, we should probably all read it once a year.

This now goes beyond the call of the question:

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 very 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 cannot understand what the writer wants to convey, the writer has failed. Thus, if you cannot understand what you are reading, ask yourself *why*. What could the writer have done differently? If you find you are blissfully gliding through your reading, ask yourself *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 and better judgment about your own writing.

PATRICK: Incoming students can do a few things to help them succeed: read well-written material (legal or not), get a good style manual, as already suggested, that addresses fundamental writing skills such as grammar, punctuation, and form, and consider taking an immersion or preparatory class on how to be a good law student. One of the best things students can do is simply practice writing.

Reading good nonfiction writing will help students get a sense of organization and flow of ideas. In reading, students can note whether the piece is cohesive as a whole, whether the ideas are presented in an understandable way, and even whether the thesis sentence of each paragraph identifies what the paragraph is about.

A good style manual can be an invaluable tool for a new student. It can guide students on those basic mechanical problems of grammar or punctuation or word usage. Even after years of practice and teaching, I keep a style manual close by for quick reference.

³⁴ WILLIAM STRUNK JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* (4th ed. 2000).

Finally, although not a necessity, many students benefit from attending a law school preparatory course. Such courses range in terms of length and content, but they can often give students initial exposure to reading and understanding the law and doing basic legal analysis. Increasingly, such courses are offered through individual law schools as a one or two-week introductory session. Even if the legal substance of the course is not extensive, students benefit from these courses by gaining enough confidence to face the new, unknown challenges of law school.

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 places, 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 of 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 towards 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.

4. 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. Most 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 they may also have a terrible time learning to be more concise and direct. Math and engineering majors may sometimes forget that one should write in complete sentences, but they are very analytical and often 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 is different, and the analysis is new. And now, 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 made a good grade, you may have made a habit of it. Be forewarned that this is not a good idea 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 an assignment soon enough, you will 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 now be judged in relation to theirs.

COUGHLIN: Students entering law school commonly have multiple misconceptions about legal writing. The primary misconception is that legal writing drains creativity. The reason for this misconception is many legal writing professors require their students use a mnemonic (a specific order) to structure their legal arguments. Some of the more commonly used mnemonics include the following:

- “IRAC” (Issue, Rule, Application, Conclusion—pronounced similarly but not to be confused with IRAQ);
- “CREAC” (Conclusion, Rule, Explanation, Application, Conclusion);
- “TREAC” (Thesis, Rule, Explanation, Application, Conclusion); and
- “CRRPAP” (many students refer to this mnemonic as “CRAP” but it actually stands for Conclusion, Rule, Rule Proof, Application, Prediction).³⁵

Using a mnemonic should not limit the creative process. The substance of the analysis—the way the individual writer frames the legal argument, and the writer's unique application of the law—is necessarily creative. 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.³⁶ Likewise, while the legal writer may use a preset 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.”

³⁵ See A LAWYER WRITES, *supra* note 19, AT 82-83.

³⁶ *Id.* at 85.

MALMUD: One great misconception is that legal writing involves fancy words. Keep it simple. Use short words in short sentences. Your client, the court, and other attorneys you work with will be grateful.

Another great misconception is that the same approach to writing that was effective in another setting will be equally effective in a legal setting. A student should compare what is being said in his legal writing class to what he has learned in the past to determine which approaches will cross-over and which will need to be modified.

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 large 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.

WALTER: True, a few students enter law school with serious misunderstandings about legal writing. Some new law students seem to think that legal writing is simply "English for Future Lawyers." They are quite surprised to find that the core subject of every legal writing course, like every doctrinal course, is legal analysis. When we ask our students to review and understand the factual scenario, we are asking them to analyze the facts and spot the legal issues. When we ask them to conduct the legal research to find the relevant cases and statutes, we are asking them to analyze the cases and statutes and determine which are legally relevant to their set of facts.

When we ask them to plan and outline their memos, we are asking them to analyze the factors or elements of the legal rules, as they apply to their client's facts, and then determine the depth of the written analysis and how that analysis should be organized. When we ask them to draft their memos, we are asking them to put their legal analysis into written form. And when we ask them to edit and revise their memos, or to condense or develop their explanation of the legal rules or their application of the law to facts, we are asking them to sharpen their legal analysis.

One of my students stated it quite forcefully and pointedly during a legal writing class a few years ago. We were in the second month of legal writing, discussing the needed revisions to our first office memo. This particular student, who had done quite well in both undergraduate and graduate work, with a B.A. in

Philosophy and M.A. in Theology (and as I recall, partial work on a Ph.D. in Religion), was normally quite reserved and quiet. However, during the middle of this particular class session, he suddenly blurted out in a loud voice, to no one in particular, “Oh my God, this isn’t about legal writing. The whole thing is about LEGAL ANALYSIS!” Yes, Darren, you’re absolutely correct—legal analysis drives every portion of every legal writing course, from fact analysis to legal research to the final edits of the memo.

5. 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?

BOONE: The most obvious explanation is that we are teaching students what they will actually be doing during their summer jobs and in practice. Unlike other first-year courses which focus on specific content like criminal law or contracts, legal writing focuses on the methods lawyers use to research and write about any type of legal issue. For example, my students may write one assignment involving criminal law and another based on contract law. They use the same basic strategies for researching and writing about both types of issues.

Many students are even more interested in how legal writing can help them with their most pressing concern—their first law school exams. Professors in other first-year classes may ask their students to do some writing or drafting, but many do not. A student’s legal writing class may provide the only opportunity for any significant feedback on the ability to write about legal issues prior to exams. Success in legal writing does not always translate to success on exams, but a student who does poorly in legal writing rarely ends up at the top of the class.

COUGHLIN: All first-year courses are important because they teach the student to think like a lawyer. Legal writing, however, is probably the most important course because it not only teaches the student how to think like a lawyer but how to effectively communicate this new thought process of legal analysis. These skills lay the foundation for performing sophisticated legal analysis in the practice of law.

Performing a sophisticated legal analysis is vital whether a student wants to litigate, practice transactional work, or enter into the business or public interest sectors. In each setting, a lawyer needs to know how to analyze legal issues and efficiently and effectively communicate that assessment. Those students who hone their analytical and communication skills tend to be the most successful, both in law school and in the practice of law.

While these skills do not appear to be difficult to master, communicating the solution to a legal problem clearly and concisely requires a different skill set than students have used so far to excel in school. This variation is no different than in any other professional discipline. For instance, the tools and language a doctor uses are different than the tools and language a business executive uses. For this reason, medical school is different from business school, and both schools

are different from law school because each discipline teaches unique skills, tools, and language. In legal education, students must learn a new way of critically looking at information, organizing, explaining, and applying that information, and predicting the likely outcome—the way a lawyer does. Legal writing is the single class that breaks down and examines every aspect of the analytical process and works individually with the student to effectively communicate that process. Without learning the fundamental skills taught in legal writing, a student will not be as successful in her ability to process and communicate what she knows in other first-year classes, be a successful summer associate, or be a successful lawyer.

MALMUD: Legal writing teaches the must-have skills to be a successful attorney. I don't know about you, but I promptly forgot most everything I knew about Contracts, Civil Procedure, and Constitutional Law within hours of taking the exam for that class. On the job, though, that wasn't a problem. I worked for big fancy law firms and for government offices, and no one 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 in my legal writing class.

PATRICK: From their first day of orientation, Lewis & Clark students hear the proclamation that Legal Analysis and Writing is the most important class they will have in law school. Although they initially hear those words from me (whom they do not always believe), they soon hear those words echoed by people they absolutely believe—upper-division students, practicing attorneys, and prospective employers. Each year I intermittently invite guest speakers to class—second- or third-year students, law clerks, or attorneys—and invariably those speakers, without my solicitation, confirm this notion that Legal Analysis and Writing is the most important class in law school. The course is important, they say, because it teaches students the core skills for legal learning.

The core skills Legal Analysis and Writing teaches are how to assess the law, think about the law, and communicate that law to someone else. Effective lawyering requires those skills. An attorney can know everything there is to know about torts, but if he cannot assimilate current, relevant law on a client's issue and communicate his analysis, that attorney will not effectively represent his client.

WALTER: On the first day of class, I explain to my students that our legal skills courses should be considered the most important courses in law school. And because our law school has broadened the scope of "legal writing" to include professionalism and other skills (such as client interviewing, client counseling, and negotiations), our legal skills courses should take on even greater importance. Written and oral communication skills are so critical to everything lawyers do. In studies by the American Bar Foundation, the lawyers polled

conclusively identified “oral communication skills” and “written communication skills” as the two “skills/knowledge” that are most important to lawyers—they ranked “knowledge of substantive law” as seventh in importance.³⁷ The American Bar Foundation also surveyed hiring partners to determine the most important skills students should learn in law school.³⁸ And what do you think the hiring partners said were the three most important skills? They said that library legal research, oral communication, and written communication skills were most important, with knowledge of substantive law coming in a distant eleventh.³⁹

Oral skills and writing skills—more important than knowledge of the substantive law. Why is that? 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. If the lawyer is a “transactional lawyer,” specializing in making deals and contracts, that lawyer must frequently speak and write to clients and other attorneys—in person, via telephone, via letters and email, via teleconference—negotiating until the deal culminates with the final written product, the contract. If the lawyer is a “litigator,” specializing in resolving disputes or bringing and defending lawsuits, that lawyer must frequently speak and write to the client, opposing counsel, and the courts—using dispute resolution methods such as negotiation, mediation, and arbitration, and using litigation methods involving pleadings, motions, discovery requests, depositions, memos, briefs, and settlement conferences—until the litigation culminates with the final episode, the trial, or in some cases, the appeal.

And, according to the hiring partners, the three skills—library legal research, oral skills, and writing skills—should all be learned in law school. Why is that? Although lawyers continue their legal education after law school, attending seminars and reading new materials, most of this instruction focuses on the lawyer’s substantive area of practice. For example, if the lawyer drafts contracts or litigates in the area of construction law, then the lawyer will read a great deal about new law affecting the construction industry. But most lawyers receive very little instruction about legal research or oral or writing skills once they enter practice.

Thus, any law school class that requires students learn and practice their legal research, writing skills, or oral skills is invaluable, no matter whether it’s labeled legal writing, legal skills, or family law seminar. Law students should strive to take as many courses as possible that allow them to practice and hone these skills (and remember, any class with a research, writing, or oral skills component will also require you to practice and hone the core skill, legal analysis).

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

³⁷ Bryant G. Garth & Joann Martin, *Law Schools and the Construction of Competence*, 43 J. LEG. EDUC. 469, 473 (1993).

³⁸ *Id.* at 488-92.

³⁹ *Id.* at 490.

partner. In a 2007 survey of legal writing directors, 100 percent of the respondents indicated they still rely on the office memorandum as a principal assignment.⁴⁰ Why is the office memorandum 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 encourage the students to fully and objectively evaluate each issue and avoid arguing “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 should take the case. This also helps the student avoid making one-sided arguments and ignoring obvious facts and legal arguments for the other side. Even with a problem structured this way, most first-year students struggle with the idea that their “answer” is not really important. In other words, I usually could care less whether the student concludes the firm should take the case. I am 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.

Additionally, the students’ ability to explain the rules and then apply those rules to the fact scenario we give them often helps students develop the skills they will need to write effective exam answers. Finally, an in-house memo is the type of assignment our students are most likely to be assigned during their first summer jobs.

The content of our legal writing course is driven by several factors. First, we look at what other successful writing programs are doing. We are constantly looking for ways to improve the content and method of our course. Second, we consider whether we are preparing our students well for their first summer jobs. During the fall semester, we email our former 1L students and ask them about their summer experiences and whether they felt prepared to handle the assignments they were given. If students feel they were less prepared in some particular area, we try to incorporate more information about that topic into our course or consider adding it to an upper-level writing course. Finally, we seek student feedback about the assignments by using detailed student evaluation forms. If students really hate a particular memo topic or assignment, we take that into consideration when planning future assignments and classes.

COUGHLIN: While some students complain that the office memo is dated and infrequently used today in practice with the many modes of electronic

⁴⁰ See 2007 ALWD SURVEY, *supra* note 6, at 11 tbl. 20.

communication available, it remains the optimal vehicle for the beginning law student to develop analytical skills. While it is also important to learn to effectively draft pleadings and legislation, those skills are more sophisticated and require knowledge of the litigation and legislation processes.

In drafting an office memorandum, the student learns to apply the governing rule and analogize and distinguish facts to determine whether a prior authority will control the legal outcome in the new set of facts. In doing so, the students learn the following types of basic reasoning skills: (1) rule-based reasoning, where a student directly applies a rule to predict the outcome to a new set of facts, and (2) analogical reasoning, where the student compares the facts from previous cases with the new set of facts to predict the outcome.

MALMUD: A formal memorandum is the writing assignment of choice because it allows students to practice the skills that are most fundamental to effective lawyering. First, a memorandum is an objective analysis. That means it teaches students to examine both the strengths and weaknesses of a client's position and explain it fully. All attorneys need to be able to see the strengths and weaknesses in a position taken. Second, a memorandum requires students to synthesize their research into a coherent explanation of the law that will apply to a specific client's problem. Throughout their careers, attorneys will be repeatedly asked to create a coherent explanation from disparate sources. Third, a memorandum assignment will usually require some analogical reasoning. That is, to build a compelling argument, students will have to show why their client's case is like or unlike prior cases. Since, in the American legal system law is developed and refined through judicial decisions, attorneys must be able to reason by analogy. Finally, throughout the memorandum, students can practice describing complex ideas in concise, straightforward prose.

All of the skills above are also practiced in writing a client letter or a brief to a court. Therefore, many legal writing classes will move on to practice these same skills in a client letter or brief. Most legal writing classes, though, begin with the memorandum because its legal discussion is likely to be more fleshed out. For example, in a client letter, a legal discussion may be simplified to make it more accessible to the non-lawyer client. In a brief to a court, the weaknesses in an argument will be addressed and countered but not explained as fully as they would be in a memorandum. Because the objective memorandum analysis requires the most complete discussion, it's considered the best place to start.

Notably, the memorandum (along with the client letter and court brief) puts doctrinal classes into perspective. The memorandum shows students how they might actually use all those appellate decisions they are reading in their other classes. Other legal documents such as pleadings and legislation, which do not rely so explicitly on case law, would do less to help students put their doctrinal classes into perspective.

Our goal in designing legal writing assignments is to develop the skills that a student will need when she begins her practice. We can't teach all of those skills at once. The memorandum is simply an excellent place to start.

PATRICK: Legal writing professors still use the legal memorandum as the primary vehicle for a writing assignment because it requires engaged analysis and exemplifies the type of assignments students will most likely be doing early in their legal careers.

Legal memoranda require law students to analyze a legal issue by going through the same process they will use as attorneys. Attorneys typically will research the issue, assess how the law fits together, and then apply that law to the client's case. This type of direct analysis and application of law to facts often requires a deeper level of critical reading and thinking skills that are not always necessary when drafting pleadings, regulations, or statutory text.

Attorneys, particularly those in the private sector, will likely draft more legal memos than they can count during their first years of practice. In two years as an associate at a large law firm, I drafted three times more legal memos than I did pleadings, briefs, interrogatories, and other documents combined.

Legal memoranda are relevant to students for another reason: A memorandum assignment simulates what the students will be asked to do on most of their first-year exams. Most exams during the first year ask students to predict an outcome for a factual scenario and support their decision with the law they know. Although exams have certain differences from the office memo, both assignments ask students to assess a problem, discern and apply the relevant law, and communicate a cogent answer.

WALTER: I've asked myself that same question over the years, and I've thought at various times that we should start the course by drafting a complaint and answer, or perhaps by drafting a contract, all before we turn to memos. But, I am reminded of the answer to that question every time others ask me to put some mechanical or electrical device back together after they have taken it apart. They might say, "Hey, I took the [vacuum cleaner/washing machine/CD player/distributor] apart, and I have the new part, but now I can't get it all back together—help!" And I think, "I wish I had seen it when it was in one piece and then as it came apart, step-by-step—that way, I would know how to put the new part in and get it all back together."

I think this example explains the approach used in both 1L doctrinal and legal writing classes. In doctrinal classes, it is easier to identify the legal rules and see how they function if take we take the cases apart, piece by piece, and see how the rules work. In legal writing classes, it is easier to see how the legal rules function if we take the cases apart, piece by piece, and then put them back together again, inserting the new parts (our client's facts) and applying the rules to the new facts.

In doctrinal courses, we start with several appellate court cases on a given topic; the cases show students how courts apply a given legal rule to various facts. In legal writing courses, to prepare the first office memo we start with the client's facts, but then we move to multiple cases in which the courts have applied legal

rules to facts similar to those in our client's case. In both courses, the students learn to identify the relevant legal rules—for the doctrinal course, so the students can apply those rules to new factual situations raised in a later exam, and for the legal writing course, so the students can apply those rules to our client's facts in the context of writing an office memo.

I also teach pleading and contract drafting to 2L and 3L students in my Legal Skills & Values III course. They already understand how the rules from the cases and statutes function and how they might apply to any given set of facts, so we do not spend much time discussing them. Rather, because they already have a good understanding of legal rules and how they function, we spend our time instead focusing on the technical aspects of pleadings and contracts.

All in all, whether it's a course with 1L, 2L, or 3L students, the course content will be driven by the professor's desire to teach legal analysis, research, and writing, and other related skills, with as much breadth and depth as possible within the constraints of a short law school semester. We strive to teach these skills in a real world context so that the students will not be overwhelmed or intimidated when they see difficult legal tasks as summer law clerks or as new attorneys in a firm or agency.

7. If you had to list just three hallmarks of an outstanding law office memorandum, what would be they be? Conversely, if you had to list three hallmarks of a poor law office memorandum, what would they be?

BOONE: An outstanding memo is accurate, clear, and thorough. A student must be able to research and synthesize well to state the rules in a memorandum accurately and clearly. A careful student also states the facts accurately and avoids the urge to stretch the facts or the law to support a certain argument or position. Clarity necessarily includes good organization. Good memos include strong roadmap paragraphs and topic sentences to guide the reader through the rules and the analysis. Clarity also requires the writer to cite authority properly and to be as concise as possible. A thorough memo avoids the typical first-year pitfalls of missing or misinterpreting important rules and jumping to conclusions without proper analysis.

A poor memo is usually poorly researched, disorganized, and vague.

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.

MALMUD: A good memo exhibits these qualities:

1. Clear organization. (By “clear organization,” I mean an organization that is clear to attorneys. In the first year of law school, many legal writing programs teach that organization by using a mnemonic such as IRAC, CREAC, CRRPAP.)

2. Precise, consistent use of language.

3. No editing errors.

Not surprisingly, a poor memo exhibits these qualities:

1. Poor organization.

2. Inconsistent or imprecise use of language.

3. A memo replete with editing errors.

PATRICK: I agree wholeheartedly with what has been said 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 nearly perfect. For example, the discussion section will be organized into appropriate subsections, 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.

8. What characteristics or personality traits can you spot in 1Ls early on that you consider predictors of success in their legal research and writing course? Conversely, what characteristics or personality traits can you spot in 1Ls early on that portend of a lack of success in their legal research and writing course?

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 that feedback. Students who actually enjoy the research and writing process and 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.

COUGHLIN: One characteristic that predicts success in legal writing is a willingness to be open to different ways and forms of writing. When students enter the legal writing classroom, they are often concerned that the writing format they have used all of their lives is being turned on its head. Specifically, before law school, you are encouraged to have an introduction, a body, and a conclusion in most papers. Similar to a good joke, you do not state the punch line until the end.

Writing in the practice of law is very different. In law, the punch line comes first. Many students express concern that this order is simply wrong. In the practice of law, starting with the conclusion does not ruin the joke but helps the reader understand the context of the analysis. While practicing attorneys expect this arrangement, the students reject it, at least until they receive their first grades.

Many students also reject the use of the mnemonic, saying that it is redundant to state a conclusion at the beginning, at the end, and possibly before starting the application section. While in a simple memorandum strict adherence to the mnemonic may seem redundant, in the practice of law, where a client’s problems are seldom simple, the mnemonic provides an understandable structure and effective organization for the reader.

So, there actually may be a method to the legal writing professor’s madness. A primary purpose of the first-year legal writing class is to break down and then build up the components of a legal analysis. Only by going through this process are the students ultimately able to perform the more sophisticated legal

analysis that they will need for their upper-level courses, the bar examination, and the practice of law.

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 do poorly. 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.

PATRICK: Successful students typically have a common characteristic: Those students understand they have something to learn, and they are willing to work hard to learn it. With this characteristic—one of understanding and desire—a student can succeed, regardless of other traits.

I have seen many types of students who are successful, whether procrastinators or non-procrastinators, morning or midnight studiers, slow or fast readers, aural or visual learners, those coming straight from college, and those who are returning to school after a long career. Finding a precise formula of characteristics or traits that portend of success or failure may be futile; however, students willing to admit they do not know “the answer,” those who are willing to be vulnerable and open themselves up to a new learning experience, do quite well.

Despite their tough reputation, most law schools provide an environment in which students can succeed through academic mentors, student tutors, structured academic success programs, and other similar aids. Those very few students who fail to progress usually have a combination of complicated underlying reasons—whether external circumstances, health issues, being in law school for someone other than themselves, or simply not being ready to mentally commit to the challenge.

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-semester 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.

9. 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.) Especially with the internet resources now available, anyone can look up the law on a particular topic. In law school, you first learn to understand the rules you read. Everyone can read a case, but it takes some practice to understand what is actually going on in the case and what the court is and is not doing. Next, you learn to synthesize the development of rules using multiple cases, statutes, or regulations to create a framework of rules. Still, that's only half the battle. After that, you must determine how the rules apply to a new set of facts to predict an outcome—that's analysis.

Analysis is not about the prediction or the answer; it is about the process of reaching that prediction. 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 should not tell your reader how to build a clock. That's more information, but is it really relevant to answering the question? Instead, you would first explain to the reader the "rules" of time zones. Next, you would identify the important facts regarding the time zone in which you are located. Finally, you would apply the time zone rules to the specific facts to reach an answer.

COUGHLIN: Analysis is the process of evaluating the law on a particular issue. In a legal analysis, the writer will show how an established rule of law will

function given a new set of facts. In other words, it is deducing a likely outcome given the prior laws and the new set of facts. The analysis is where the student's creativity and brain power truly come to light.

Analysis is like the fixings in the sandwich. While two pieces of bread may be homemade and quite good, bread is not 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—the analysis is the most important component of the memorandum.

MALMUD: 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 to explain their relationship to the reader.

Finally, students must apply the law to a particular fact pattern in order to predict an outcome in this client's case. This part of the argument is analytical in the sense that students must think precisely about 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.

PATRICK: Analysis is the critical assessment of the law relevant to a legal issue and the application of that law to a set of facts. Although “analysis” is one of the most common words of a law student's vernacular, deriving a precise definition of the term is difficult. Most first-year texts really do not define the term. Under common usage, “analysis” can mean a section of a paper, a section of a legal mnemonic or paradigm (like IRAC), the evaluation of law, the evaluation of how a law will apply to a set of facts, or a combination of these things.

Traditional standards define “analysis” in many ways, including “the separating of any material or abstract entity into its constituent elements,” and “this process as a method of studying the nature of something or of determining

its essential feature and their relations.”⁴¹ These definitions taken together best define how an attorney views the term. We break apart a governing rule of law, look at the pieces, decide their essential requirements, and then decide how those pieces affect new facts. More specifically, analysis in our profession requires we find the law that governs a client’s issue, discern the relevant parts of the law, weave together those parts into a cohesive explanation, and then apply that law to a client’s situation.

WALTER: “Analysis” is the core of succeeding in every law school course, including legal writing. An excellent writer may prove to be only an average legal writer, but some average writers prove to be above average or even excellent legal writers because they possess superb legal analysis skills.

Superb legal analysis, like any other type of analysis, requires multiple skills. First, superb legal analysis begins with the ability to read with great care and then comprehend 100 percent of the material (not just 50 or 75 percent). Second, superb legal analysis requires the reader to be able to discern which legal rules are relevant to a particular set of facts. Third, superb legal analysis requires the reader to discern which facts are legally relevant and which are irrelevant. Fourth, in many instances superb legal analysis requires the reader to compare the legally relevant facts of multiple case precedents to each other, identifying similarities and differences, drawing analogies and distinguishing among them. Fifth, superb legal analysis may require the reader to identify why the courts reached seemingly contrary outcomes in cases with seemingly identical facts. Finally, superb legal analysis requires the reader to translate the legal rules, the facts of the precedent cases, and the facts of the present case into a coherent legal argument.

Essentially, the reader must now explain the legal analysis that has just been performed, this time eliminating the excess information and omitting all the missteps in the analytical process (and there will be many!). While the reader may have considered ten cases with fifty relevant facts and five relevant rules, the superb legal analyst will distill and synthesize that information to create an explanation and application of the law that consists of perhaps only the three most important cases, the six most important facts, and the three key rules. In a nutshell, that’s legal analysis.

10. 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, to which of the three steps do less successful students regularly not devote enough time and attention?

⁴¹ WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY 74 (Deluxe ed. 2001).

BOONE: Many students fail to devote enough time to the initial draft. This draft should not be a rough draft or a true first draft. A student should never turn in a draft that has not been revised, edited, and proofread. Students who spend too much time researching often fail to write strong first drafts. They assume that once they have found good authority, the writing will be easy. Don't make that mistake. We give our students all the cases they need to write their first memorandum, and some may still fail to write an acceptable initial draft. Especially if you are doing all your own research, set a deadline for yourself to stop researching and start writing. After you start writing, you will likely need to do some follow-up research to clarify some of your rules or analysis, but go ahead and start writing.

Students who write strong drafts also get better feedback. The more you put into your initial draft, the more your legal writing professor can help you. Students should also try to remember that they will only get busier as the semester progresses, and their final drafts will likely be due near the end of the semester. Writing a solid initial draft will make writing the final draft a much more manageable task.

COUGHLIN: Rewriting and editing the memo typically get the short end of the stick. Some lawyers say that there is no such thing as good writing, only good rewriting. In 2000, I took my legal writing class to the North Carolina Court of Appeals to hear oral arguments. Afterwards, the students met with Judge Sidney Eagles, who reviewed the argument process with the students and told them, "Attorneys submit briefs and other written work one draft too early." I have used this piece of advice with every class since hearing it. What Judge Eagles so thoughtfully stated is that one last read-through to check for the finer points is always essential. A writer spends a lot of time on writing. Rewriting and editing ensures that the work product is taken seriously.

MALMUD: 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.⁴²

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

⁴² See Anne M. Enquist, *Unlocking the Secrets of Highly Successful Legal Writing Students* 21-22 (2007), available at http://works.bepress.com/anne_enquist/.

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.

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."⁴³

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 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

⁴³ See ANNE LAMOTT, *BIRD BY BIRD: SOME INSTRUCTIONS ON WRITING AND LIFE* 25-26 (First Anchor Books 1995) (1994).

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.

11. 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 school students are competitive. Because many law schools grade on a curve, 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 beyond the facts and relevant authorities to explore alternate areas and authorities and make legal arguments that other students are not making. While the student may spend an inordinate amount of time researching to discover that unique argument that no one else may make, it is time that would have been better spent proofing and editing his paper 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 on 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 diagnosis a cold and that you need rest and lots of fluids. You would not expect the doctor to send you in for a full-body MRI.

In legal writing, to maximize time and effort, a student should spend sufficient time researching, writing, editing, and proofreading so that the student

feels comfortable that she did her best. While a student should consider all viable arguments, she should not create arguments that really are not there.

MALMUD: Because most people refine their thinking as they write, it's usually a waste of time to try to get each sentence perfect the first time it's written. Assume your thinking will shift and that you will need to rewrite. Use the first draft to get an overall sense of where you are going with your argument. Then, go back and tweak paragraphs and sentences so that they fall in line with your now more settled conclusion. Similarly, don't polish citations until the end. Because you will reorder your sentences when you edit, the sequence of your citations, and therefore the substance of your citations, will also change. As you draft, a case name and page number is enough.

Now, I have to admit, that I know of a student who thought through his arguments with such precision and detail when he outlined that, after outlining, he could sit at his computer, produce the perfect sentence to encapsulate the first point on his outline, and then move on to produce the next perfect sentence. That student is the exception. For most of us, we write, rethink, and revise. As a result, you will usually waste time if you insist that your first sentence be the perfect sentence.

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.

WALTER: Certainly many students use their time inefficiently, but much inefficiency could be eliminated with focused attention on three specific problem areas. First, every student should take full stock of the task at hand, considering the overall project that must be completed, then breaking the project into smaller manageable tasks, and then estimating the amount of time it will take to complete the smaller tasks and the overall project (following the prof's suggestions as to the time needed for each task is a great idea). Students should stick to the time estimates, keeping a time sheet so they'll actually know how much time they're spending on each task and the overall project. For example, if the prof says that the research and first draft of the memo should take about fifteen hours, then students should break up the various research and writing tasks and attempt to complete them in that time. If it will take about five hours to do the research, and a student is an hour over, that's not a big problem, but if that hour turns into five hours over, it's time to stop. Better yet, if students estimate it will take five hours, and if they've reached the three- or four-hour point and they're not even half done, it's probably a good time to stop and have a chat with the prof about the situation (just to make sure they're on track).

Second, students should consult with the legal writing prof and follow the prof's advice (that's why we're here). The prof is an expert on legal research, analysis, and writing, and the prof's advice could save several hours (the student could be completely on the wrong track, or maybe the student just needs to streamline the approach, or perhaps the prof underestimated the time it would take—the only way the student will know for sure is by speaking with the prof). For example, if the professor critiques the first draft of the memo and says that the research looks fine, but the discussion section needs to be reorganized and the rules and the law need to be explained more thoroughly, the student should NOT head back to the library to find additional cases. Instead, the student should focus the time and energy on, yes, you guessed it, the organization and the explanation of the law.

Finally, like good lawyers, law students must continually evaluate the “costs and benefits” and “cost effectiveness” of their work. If the student missed the most important case for the entire memo, it's probably worth spending an additional hour or two finding that case and understanding why it was missed in the first place. But if the student has located the key cases, and the student is thinking about spending another hour or two in the library “to see if there are any others,” that is NOT time well spent. If the entire memo has been proofread twice over the last three days, spending an additional two hours to proofread it again is NOT time well spent.

12. 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, but 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 actually 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. A student should tackle a research assignment from several different angles. If these searches all yield similar sources, the student will know that he's on the right track. If the student then reads those sources and finds other good sources, and all of them seem to cite each other rather than citing sources the student has not yet seen, he is probably done with this round of research. Still, it is hard to stop, so I force an end to my students' initial research. I require students to turn in outlines and source lists well before their first drafts of those assignments are due. Of course, the research process continues sporadically throughout the writing process.

COUGHLIN: The ability to research efficiently and effectively can be the difference between a good lawyer and an exceptional lawyer. As a student, it is worthwhile to obtain all of the instruction available from your school in legal research, particularly if your school offers any advanced courses or specialized courses in an area of law the student may be interested in pursuing, such as tax law or labor law. These (and various other subjects) have some specialized research tools that are unique to that area of practice. Additionally, by taking

advantage of all training opportunities not only will you enhance your research skills, you'll have the opportunity to win prizes and eat lots of free pizza.

A student should not rely solely on computerized legal research. She is more likely to get a wider breadth of relevant materials when computerized and print resources are combined. Moreover, 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. Understanding print resources will provide the student with a better idea of the scope of information being researched. In addition, computerized legal research has the drawback of being only as good as the researcher's search terms. If the search term does not precisely appear in the document, the researcher may miss an important authority.

At first, being efficient in legal research is difficult. The best way to begin is to use a flow chart and make sure that each step or source is documented for easy retrieval in the future. Many such flow charts or decision trees for basic case law and statutory research skills will be available in the legal research materials a student receives in class or gets on the web.

As far as knowing when research is completed, a student needs the mindset that research is ongoing; research is not a task to simply be checked off a list because legal research should be intertwined and updated with the writing process. When confronted with a legal question, a student will research to get background information to fully understand the legal question, as well as authority that will help predict the legal question. As Professor Boone stated, above, a good rule of thumb is to continue with the initial research until the same sources appear over and over again and the authorities begin to cite each other.

MALMUD: You know your research is done when research in various sources points to the same set of authorities repeatedly. For example, if you have found a relevant law review article and it cites a statute and a set of cases and all of those cases cite to that same statute and to each other, then your research is probably complete.

Efficiency comes with practice. (Sorry. It takes time to become efficient.) As you conduct more research, you get a better feel for which sources are most likely to yield the best results most quickly. Most importantly, I would encourage students at the beginning of their career to use both print and online resources so that they get a feel for when their work can be done most efficiently in print and when it can be conducted most efficiently online.

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 likely will not 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.

WALTER: Certainly, legal research is a key element to superb legal writing. Without the right law, both the legal writing student and the lawyer in practice will miss the “winning” arguments. Some suggestions:

First, make sure you ascertain from the facts what issues need to be researched. If the facts involve a simple car accident where a car changes lanes abruptly without signaling and strikes a truck, the issue may simply be whether the abrupt lane change and failure to signal constitutes negligence. But if the driver of the car changed lanes because a bee flew into her face while she was driving, the issue may now be whether the car driver is excused from what would otherwise be negligence by responding to a “sudden emergency,” the bee in her face. The researcher is now looking for law relating not only to abrupt lane changes and failure to signal, but also cases where drivers (or others) encountered “sudden emergencies.”

Second, know what kind of law you’re looking for. Is the issue controlled by local, state, or federal law (or even international law)? If it is controlled by local or state law, what are the relevant jurisdictions? Is the issue controlled by case law, statutes, administrative regulations, or some other law?

Third, the researcher must be methodical in and keep a record of his research. Take accurate notes so that there is no need to retrace steps. You don't want to be sitting there scratching your head going, "Hmm, I can't remember if I looked there or not."

Fourth, the researcher must weed out the less-relevant sources and concentrate on the most relevant sources. Typically, any research task will turn up authorities. The researcher simply does not have time to read every bit of law word for word; rather, the researcher must become accustomed to skimming the law quickly but competently to determine whether the authority is relevant. If it is relevant, *then* the researcher must read the entire case or statute thoroughly.

Finally, the researcher must conduct the appropriate follow-up work. The cases and statutes will refer to other cases and statutes, and the researcher must check those, too. We're unanimous in our advice that once the researcher begins seeing the same cases and statutes referenced over and over again, it's finally time to stop.

13. 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. How important are these finer points when it comes to grading a student's legal writing assignment and to the evaluation of writing products in the real legal world?

BOONE: These finer points are very important to my students' legal writing grades. My grading grids for major assignments have one category for "*Bluebook*" and another for "Grammar, Style, and Proofreading." These categories are not worth nearly as many points as the "Organization" or "Analysis" categories, but losing points for these errors can certainly affect a student's grade significantly. This is especially true in first-year classes that are graded on a curve. Students simply can't afford to lose these points. Additionally, students whose papers are rife with typos often lose points in other more important categories like "Analysis" because it is more difficult for the reader to follow their points.

In the real world, many lawyers and judges probably do not know all the rules in the most recent edition of the *Bluebook*. They do, however, recognize sloppy citation form, poor grammar, and the failure to run spell-check. More importantly, they may also make assumptions about the overall quality of your work based on these errors. In other words, if you did not bother to spell and punctuate correctly, why should the reader trust that you thoroughly researched and analyzed the issues you are presenting? Producing a poor work product as a summer law clerk may cost you a job; submitting poor or sloppy work as a lawyer may be detrimental to you and to your client. Start paying attention to details now.

COUGHLIN: The finer points mentioned in the question are essential. While my students may consider my strict attitude toward citation, formatting,

and the like frustrating, they generally come to appreciate that precision for detail makes the difference in being invited onto the moot court board, law review or getting a job offer.

I have taken a point off the student's final memo grade for any *Bluebook* error. My philosophy is that these finer points represent the area of the writing product over which the student has complete control. When there is not much in life or law school of which a student has control, why not take advantage of those small areas that the student can actually control? For example, one does not have control over the client's facts, nor does one have control over the state of the law. A student can not necessarily control what the professor, judge, or senior partner will think of the legal argument because of personal bias or prior life experiences. The student can control citation, formatting, and proofreading.

If the writer is sloppy with these finer points, the reader will think that the analysis is likewise imprecise. If the writer is not precise with typing, proofreading, citation, or punctuation, how then will the reader have confidence in the 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 requested." 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 get to the more important question first: How important are these finer points in the real world? Imagine you are a lawyer who is 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, but crumpled, resume. Who would you hire? It's possible that the flip-flop-wearing applicant would do a better job, but the presentation is going to raise concerns about that person's professionalism and attention to detail. Whether we like it or not, those reading our work make judgments about our capabilities based on its appearance. Sloppy citations, punctuation, grammar, or formatting will make your reader skeptical about the quality of your analysis. Why invite that skepticism?

Because attention to detail matters in the real world, we pay attention to it in our legal writing classes. At the beginning of their law school careers, students are often unaccustomed to lawyerly nitpickiness. For that reason, at the University of Oregon we do not deduct points from their first assignments due to mechanical errors in citations, punctuation, grammar, or formatting. But we do note for our students where they made those mistakes, and we alert them that on subsequent assignments their grade will be affected by those errors. Although a person's grade is always more dependent on the legal analysis than on mechanics, at our school, a grade will be lower if the student doesn't pay attention to those "finer points."

PATRICK: A student recently told me about his experience with these finer details. After being selected for a prestigious summer clerkship, he wrote his

first memorandum with great pride and flourish, confident in his thorough research, his sound substantive analysis, and his clear writing skills. Within an hour after turning it in, the supervising attorney appeared at the student's door with the paper. Much to the student's shock and dismay, the attorney said that he was sorry, but he could not read the memorandum, much less take it seriously, until the student had corrected an error. The student had inadvertently used the word "council" in several places when he really meant to use "counsel." Thus, despite the student's exceptional talent, grades, and class rank, a small error on an otherwise stellar assignment hurt his credibility. He spent the rest of the summer trying to restore a credible and professional image (and making sure that he always spelled words correctly).

In my class, these fine points are grouped into a category called "professionalism." A typographical error or a misspelled word may seem inconsequential to students in the context of a writing assignment for class. Those same errors, however, have a much greater impact when viewed in the context of a person's professional credibility.

A reader infers a lot about the writer's capability, competence, and standards from any piece of written work. Such judgments may not be accurate or fair—they may not even be consciously made—but as legal professionals, we need to understand the silent messages our work sends to supervising attorneys, colleagues, adversaries, and clients. We may not have control over many aspects of our clients or the claims we represent, but we always have control over the professional quality of our work.

WALTER: The "fine 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 huge 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.

14. 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 students' complaints that they receive too few credit hours for the work they do in legal research and writing is 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 their 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.

COUGHLIN: Students consistently complain that the amount of time expended in legal writing is substantially more than the credit hours awarded. While the complaint is justified overall, it should not justify a student's decision to "blow off" the class. The class is simply too important to do that.

As stated in response to question number 1, legal writing will be the most important class in a student's ability to retain a job because the integration of theory and skills learned in legal writing directly relate to the success as a summer associate, intern, and lawyer.

Moreover, comparing the amount of class work only to credit hours received is not the best way to prepare for the practice of law. Remember, the student will need to represent a client to the fullest of his abilities regardless of financial return. The same should be true during your three years of preparing to practice law.

It may help some students who have had a science background to treat legal writing like any type of biology or anatomy lab which also has the anomaly that the credit hours are not consistent with classroom hours. Isn't the lab the place where scientific and medical miracles are made?

MALMUD: Justified complaint: "LRW is a *lot* of work for two credits." Unjustified complaint: "LRW is too much work." They're going to need everything we teach them on Day One of their jobs.

PATRICK: Maybe students are just too concerned about my sensitivity and ability to take criticism, but my students provide more positive comments than criticisms every year. The one justified criticism I do hear is that they 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. Our school recently added a research component to our course, taught by our skilled librarians, and this addition may alleviate some criticism.

For schools that do not have a research component, I would encourage students to take any upper-division Advanced Legal Research class, or request as many free sessions with online research vendor representatives as possible. Additionally, students should lobby their administrators for more research-oriented classes and 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 on 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 on 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 that 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.

15. 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 on what constitutes plagiarism and how to avoid it?

BOONE: This question arises so frequently that the Legal Writing Institute has created a plagiarism brochure that students should peruse.⁴⁴ 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.

Students should also 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. For example, in my class, my students do not get a grade on any assignment related to their first memorandum. Students are allowed to discuss this memorandum, but all of their writing must be their own. Students may discuss their ideas, but those who divide up assignments and use pieces of each other's work are plagiarizing. Excepting the rare penalty or bonus, my students' grades are based on the final draft of their second memorandum. My students may not discuss this memorandum with anyone other than a legal research or writing professor. A student who violates my rules may be penalized even if she does not ultimately plagiarize. Why the difference? I think collaboration is an important process; real lawyers collaborate regularly. The rule governing the first memorandum allows students the freedom to engage in this process. The rule governing the graded memorandum is very strict but ensures that students' graded work is solely their own.

COUGHLIN: Plagiarism is the act of incorporating another individual's work product into your work product without appropriate attribution. It does not matter whether the incorporation was intended, or the omission was simply careless. The act is still plagiarism.

In law school, using myriad attributed sources for each legal proposition noted supports, rather than detracts from your analysis. Because of our common law system, every legal authority builds upon one another to give us the current

⁴⁴ LEGAL WRITING INSTITUTE, LAW SCHOOL PLAGIARISM V. PROPER ATTRIBUTION (2003), available at <http://www.lwionline.org/publications/plagiarism/policy.pdf>.

state of the law. We use that current state of the law to determine the outcome of a new or novel legal issue. A professor or the judge is not interested in what the state of the law should be according to Bob. Rather, the professor or the judge is more interested in the weight of the legal authority underlying the argument. Without that legal authority attributed, the argument—besides being dishonest—holds little weight.

Plagiarism is not a victimless crime. The original author worked hard to come up with the precise words used. After someone plagiarized the work of columnist Leonard Pitts of the *Miami Herald*, he wrote a column detailing how it felt to have someone plagiarize his work.⁴⁵ Mr. Pitts ends the article with the following: “Let me say something on behalf of all of us who are struggling to learn how to write or just struggling to be honorable human beings. The dictionary is a big book. Get your own damn words. Leave mine alone.”⁴⁶

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. By the second week of school, students know they must cite every proposition appropriated from another source. Before entering law school they should know that they cannot appropriate the ideas of another student or an internet source without providing an attribution. That takes care of a lot of plagiarism issues.

The 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 substantive idea comes from another source but the specific words and their unique sequencing comes from that source. A rule you can follow is this: 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 have borrowed both.

For new legal writers, knowing when to use quotation marks can be difficult because we encourage them to appropriate key legal phrases without providing quotation marks. For instance, a student might write that a police officer had “reasonable suspicion of criminal activity” without using quotation marks. That language in that sequence is so commonly used that it is, essentially, public language. (A quick search of federal cases in the past year showed that twenty-seven federal cases used this exact phrase, and none used quotation marks.) For students, the question is when is a phrase so commonly used amongst lawyers that the phrase is public language, making quotation marks unnecessary. To answer that question, pay attention to the cases you read. If a phrase repeats itself in many cases, you can likely use that phrase without quotation marks—a

⁴⁵ Leonard J. Pitts, Jr., *Chris Cecil, plagiarism gets you fired*, MIAMI HERALD, June 3, 2005, available at <http://www.miamiherald.com>.

⁴⁶ *Id.*

citation will do. If, however, you are borrowing a phrase (or more) and the specific words and sequence are unique to that source, cite it and quote it.

PATRICK: Most simply, plagiarism is the taking of another's work and using it as one's own without attribution. Students can avoid plagiarizing merely by citing any authority they used in their work. The legal field is unique and values previous work; thus, cited authority in legal writing holds more weight than the original thoughts so valued in other academic disciplines. The more authorities supporting analytical ideas in a legal document, the stronger the document is perceived to be.

In recent years, the primary culprit is not student dishonesty, but a coupling of inattention with the cut and paste feature on computers. Students often see a good passage from a case or law review article, then cut and paste it onto their working draft, fully intending to cite the passage later. As the draft wears on, the excerpt gets altered, moved, and tweaked; after a time, the passage is so integrated into the work, the student forgets that the work is not her own.

To avoid plagiarism, students should cite as they write. That is, students should cite every authority they use *immediately* after that source is put in the paper. They should denote direct quotations formally with the appropriate punctuation and citation. Students should be exceedingly careful with paraphrased excerpts, taking great care that the citation follows the excerpt through any later revisions. The best motto is, "Cite everything and often."

WALTER: On the first day of law school, there are many law students who do not understand the concept of "plagiarism." But if the school's academic advisors, or the students' legal writing prof, has discussed the matter in a workshop or class, and distributed a written description of plagiarism, then students are presumed to know and understand (like the courts, we presume you know the rules once they have been set out).

To give some clear guidance, I ask students to follow just two rules. 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, if the quote is 50 or more words, the quote should be blocked, indented, and single spaced. Even though it's pretty easy for a writer to know whether exact words have been borrowed, a significant number of writers still fail to use quotation marks when quoting from cases and statutes. Why is that? While some writers knowingly and intentionally plagiarize the original source (hoping they will not be caught), I think there is a more likely an "innocent" explanation for the copying without attribution—some writers are not careful when they copy or download the original source, and they lose track of the original author's words, and they don't take the time to go back and check the original source (a good rule: when a writer copies or downloads information, the writer should make certain to include a cite with each and every bit of information). Regardless of the reason, I still deduct substantial points for the failure to use quotation marks.

The second rule is also straightforward: (a) if a writer borrows exact words (again, three or more, but even just one unique word), or (b) if a writer borrows an idea (the writer paraphrases from the source), or (c) if a writer borrows the organization or structure from the original source, then the writer **MUST** provide a citation to that source and, that citation **MUST** include the exact page numbers of the borrowed material. For legal writing classes, this is not a difficult rule to follow, considering that virtually all of the law will be borrowed from cases, statutes, law review articles, treatises, and so forth. Thus, virtually all ideas and all sentences will require supporting citations. One thing that is a bit trickier, but it does not arise in most legal writing classes, is the last point above about borrowing the organization and structure—this often comes up with seminar papers or law review articles, and the writer relies heavily on the organization of the original source, but this problem is easily corrected with a citation and proper credit given to the original source.

III. CONCLUSION

All law school subjects, of course, are interdependent in teaching communication and analytical skills in varying degrees and varied ways. But suppose one were forced to cut one of the traditional first-year courses (Civil Procedure, Contracts, Criminal Law, Legal Writing, Property, Torts) from the curriculum. Which deletion would cause students the most harm? Some might make the case for Civil Procedure, but much of the law of civil procedure can be assimilated studying other litigation courses.

Legal Writing is the only course where students are directly taught, step-by-step, how to research and construct sound complex legal analyses, and how to incrementally improve them. Consider your own experiences as a lawyer or law professor. What do you spend the largest portion of your work days doing? Most likely, some combination of: researching, writing, and oral communication. Even when applying substantive expertise, whether it is in tort law, intellectual property law, commercial law, or something else, the vehicles for applying that expertise require the types of communication and analytical skills that are the direct focus of first-year legal writing courses.

It may very well be that “the most important course” in law school question is one of those rare “legal questions” with a clear right answer.

###