

# LEGAL RESEARCH, LEGAL WRITING, AND LEGAL ANALYSIS: PUTTING LAW SCHOOL INTO PRACTICE

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When I began law school, I thought my goal was to master—and memorize—every case, statute, and rule I would need to practice law. I would put all this knowledge into a magic briefcase. Then when a client came to see me with a problem, I would reach into my magic briefcase and pull out the obvious answer!

I was wrong. First, no one could ever memorize enough law to make my magic briefcase work; one visit to the library or online search shows how naive I was. Second, most legal questions do not have obvious answers. If the answers were obvious, clients would not be willing to pay much for a lawyer's services.

Instead of memorizing cases that would solve easy problems, I learned that researching, analyzing, and writing about the law occurs as a complex, interwoven process. Through that process, lawyers learn of the law that exists and then fashion arguments, documents, and transactions to solve clients' problems. Even novel approaches are steeped in the cases, statutes, and rules that the lawyer has located through thorough research.

That process—not magic—is the practice of law. In all law school classes, students learn legal analysis. In classes devoted to legal research and writing, students weave analysis into research and writing and learn how to practice law. This article introduces you—the new law student—to the first-year legal research and writing class and to writing opportunities beyond the first year.

## I. LEGAL RESEARCH AND WRITING IN THE FIRST YEAR

Although most students come to law school expecting to start with a blank slate in courses like “Torts” or “Civil Procedure,” those same students expect to

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make credible predictions of their ability in “Legal Research and Writing” (LRW) courses.<sup>1</sup> English majors may assume LRW will be the easy course in the curriculum while engineers may fear writing lengthy papers. But all students bring some strengths and some weaknesses to LRW. The English major likely is not intimidated by the library or by an empty computer screen but may have difficulty exchanging creative writing techniques for the strict discipline and unique conventions required by the law. On the other hand, engineers may be uncomfortable writing documents but may excel at the logical thinking and organization required by the law.

Law students often say that they learn more in their LRW class than in any other first-year course. Many law students also find LRW the most enjoyable course of the first year. The reason is that LRW lets you get your hands dirty. In LRW, you get to think and act like a real lawyer. You analyze and research clients’ problems. You write professional documents—including office memoranda, court briefs, and client letters—to explain solutions to those problems. You also present arguments before a court, persuading the court that your client’s problem should be solved in a certain way. In learning to do the work of lawyers in LRW, you have your first opportunities to put into practice the legal analysis that you are learning in all your courses.<sup>2</sup> Realizing that you will learn more in LRW than how to look up cases and use proper punctuation will prepare you for a successful experience.<sup>3</sup>

#### A. Legal Analysis and Legal Research

The key to success in researching legal issues is realizing that research is a process.<sup>4</sup> You cannot memorize a million cases, and you are not looking for a

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<sup>1</sup> Legal research and writing courses have a variety of names at different schools: Lawyering; Legal Skills; Legal Research and Writing; Legal Reasoning, Research, and Writing; Legal Writing; and Communication and Legal Reasoning are some of the more common course names.

<sup>2</sup> See Ralph L. Brill et al., ABA Sec. of Leg. Educ. & Admis. to the B., *Sourcebook on Legal Writing Programs* 17 (1997) (noting that “analysis is inherent in writing”); James E. Moliterno, John B. Mitchell et al., *Seattle University Skills Development Series*, 47 J. Leg. Educ. 280, 280 (1997) (book review) (noting the ability of courses like legal writing to demonstrate for students how to apply what they have learned in doctrinal courses); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561, 562 (1997) (arguing that communication is inseparable from analysis).

<sup>3</sup> See Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 Ariz. L. Rev. 105, 119 (1998) (noting “today’s legal writing courses owe more to Llewellyn’s *Elements of Law* than to Strunk and White’s *Elements of Style*”).

<sup>4</sup> For texts that teach research as a process, see Christina L. Kunz et al., *The Process of Legal Research: Authorities and Opinions* 2–21 (8th ed. 2012); Amy E. Sloan, *Basic Legal Research: Tools and Strategies* 9–17 (5th ed. 2012); see also Brill, *supra* note 2, at 21 (noting that teaching research as a process better demonstrates the “connections between the use of research sources and the reasoning skills essential to legal research”); Terry Jean Seligmann, *Beyond “Bingo!” Educating Legal Researchers as Problem Solvers*, 26 Wm. Mitchell L. Rev. 179, 181–83 (2000).

needle in a haystack. But you can master the overall process of research. Once you have mastered that process, you can complete almost any research assignment with confidence.

The first step in any research process is ensuring that you understand the issue you have been asked to research. In law, understanding the question can be as difficult as answering it. Ask the assigning attorney (or your professor)<sup>5</sup> questions if you need help focusing on the relevant issue.

When you are clear on the question, use your common sense to develop a research strategy. In researching a non-legal issue, you are likely to look on “Google” or your favorite search engine to get started. That can be a good first step in legal research, too.<sup>6</sup> Searching the Internet could lead to a law firm’s website that explains the key statute and leading cases on your legal issue. An Internet search could also lead to a government agency’s website. You might skim an article on Wikipedia just to get some background information or links to other sites with more specific material. Wikipedia is a general encyclopedia; legal encyclopedias exist as well. One free legal encyclopedia available online is Wex, provided by Cornell’s Legal Information Institute. A legal encyclopedia is an example of a “secondary source.” Secondary sources explain the law and contain references to cases and statutes. Another example of a secondary source is a law review article.<sup>7</sup> But secondary sources are not “law,” so you cannot end your legal research with a website, an encyclopedia, or an article.

As a lawyer, you need to base your analysis on the law: judicial opinions,<sup>8</sup> statutes and constitutions,<sup>9</sup> and administrative law.<sup>10</sup> These are called “primary sources.” Some primary sources are “mandatory authority,” meaning courts in your jurisdiction must follow them. An example is a decision of your state’s highest court. Other primary sources are “persuasive authority,” meaning courts in your jurisdiction may choose to follow them. An example of persuasive authority

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<sup>5</sup> Throughout this Article, the LRW professor may be referred to as your “supervising attorney.” Your LRW professor might assume this role in making assignments to prepare you for the relationships you will encounter in practice.

<sup>6</sup> An initial step in research is developing a list of search terms that are likely to appear in any discussion of your issue. You will use these terms to search the index of various sources you use or to conduct online searches.

<sup>7</sup> See Kunz et al., *supra* note 4, at 33–73 (discussing secondary sources); Sloan, *supra* note 4, at 43–68 (discussing secondary sources).

<sup>8</sup> Cases are published chronologically in series called “reporters.” Even when research is conducted online, cases are referred to by the volume and page number of the reporters where they are published. To find cases in reporters, you might (1) run a search in a database containing cases for the relevant jurisdiction, (2) search an online database that groups law by topic, or (3) use a print “digest,” a multi-volume index in which case references are grouped by topic.

<sup>9</sup> Researching statutes and constitutions is most helpful in publications or online databases that include annotations to other research material.

<sup>10</sup> Administrative law includes the regulations (also called rules) and opinions published by administrative agencies.

is a decision of a court in another state.

Using your common sense again, you will realize that you want to use current law, not outdated or repealed law. Thus, your research plan must include updating the authority you locate. Updating means determining whether the cases, statutes, or administrative regulations you expect to rely on in your analysis have been accepted, modified, or rejected by more recent law.

By using your common sense, you have developed an excellent research plan. It includes secondary sources, primary sources, and updating. Which sources you use to begin your research and how you proceed with your research plan are flexible.<sup>11</sup> Different students prefer different starting points. Some prefer to start with an encyclopedia or an article that gives a broad scope of the issues. Others like to begin by reading statutes or cases. As you gain experience researching legal issues, you may find that certain approaches work better for you in most situations.

One of the skills you must develop is planning a research strategy that is appropriate to the assignment. You should be flexible as you begin to use your strategy and be willing to make changes as you learn more about the issue, the applicable law, and the research sources available. The first few sources you check or searches you run may not reveal any helpful authorities. An initial dead end does not make you a failure. It simply means you need to modify your research strategy, refine your search, and continue your work.

So far, much of the research process has probably seemed familiar or at least expected. But legal research will be unlike any research you have previously done because legal research requires you to use legal analysis. This analysis will tell you which issues to research and how to use the sources you find to solve the client's problem. Without understanding legal analysis, you may be able to perform the mechanical functions of research, but you will not be able to understand the results of the research.<sup>12</sup> As your legal analysis improves, so too will your ability to focus on the key issues present in a fact pattern, find legal sources that address those issues, and decide which sources will determine the outcome.

Another unique aspect of legal research is that often there will be no clear answer to the question you are researching. Instead, you will find pieces to a puzzle, and you will have to use legal analysis to fit the pieces together. Sometimes the completed puzzle will recommend to your supervisor a way to

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<sup>11</sup> For outlines of various research plans, see Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research, and Writing* 49–50 (issue governed by state statute), 75–76 (common law issue), 83–84 (constitutional issue), 90–91 (local law issue) (5th ed. 2010).

<sup>12</sup> See Yasmin Sokkar Harker, *Information is Cheap, but Meaning is Expensive: Building Analytical Skill into Legal Research Instruction*, 105 Law Libr. J. 79, 80 (2013) (explaining the importance of analytical skills to successful legal research). Moreover, reference librarians are invaluable resources, but they are not substitutes for the analytical work that the researcher must do.

solve a client's problem. Other times the completed puzzle will present a novel argument to the court deciding your client's claim.<sup>13</sup> Be patient as you complete the puzzle. You must be able to explain all its relevant parts and support your conclusion. Your supervising attorney or the judge deciding your client's claim probably will not duplicate your research but will rely on your thoroughness. If you cannot explain each step of your analysis and your conclusion, you have not done adequate research or adequate analysis.

Too often students try to skew their research or analysis to reach the answer they think the supervising attorney or the client wants. Sometimes students commit the fatal error of excluding discussion of a relevant case because it does not support the conclusion they want to reach. What a senior attorney really needs, however, is a complete and accurate assessment of the relevant law and an honest prediction of how the client's facts are likely to come out under that law. Consider the consequences of giving your supervisor incomplete information: You predict certain success, either omitting or downplaying in your analysis a key argument the other side is likely to raise. Your supervisor relies on your analysis and files a complaint on behalf of the client. The judge—who has both arguments before her—dismisses the client's complaint and sanctions your supervisor for filing a frivolous lawsuit. The client is unhappy, and you have likely lost your job.

The lesson for law school is that the end is not nearly as important as the means. In other words, your conclusion will gain you far fewer points than your analysis supporting that conclusion.<sup>14</sup> In practice, your supervising attorney will trust you to explain your analysis and your conclusions. Whether that attorney agrees with your conclusion is often less important than whether he understands the analysis that led you to that conclusion. In arguing before a judge, omitting a relevant case could violate rules governing lawyers' conduct. Begin learning in law school how to earn and enjoy the trust of other attorneys, judges, and your future clients by including all relevant authority and explaining your analysis fully.

To be thorough in your research and analysis, you must not stop researching just because you find a few cases or statutes that seem to address your issue. To ensure that you find all the available pieces to the legal puzzle you are solving, you must complete each step of your research plan. Your research is nearing an end only when you have checked each type of primary authority, you have reviewed several secondary sources, you have updated all the authority you rely on for your analysis, and you have begun to see the same authorities appear in all of these places.

On the other hand, do not assume that you should continue to research a problem with endless optimism that some authority exists. Soon after I began teaching, a student came to me during the summer following his first year in law

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<sup>13</sup> See Richard Michael Fischl & Jeremy Paul, *Getting to Maybe* 8 (1999) (drawing an analogy between legal analysis and an engineering student's building project).

<sup>14</sup> This focus on analysis is true for exams as well as for LRW papers. See *id.* (extending the analogy of finding novel answers to novel arguments).

school. He had been asked to research what was then a novel question: whether delivering court papers by Federal Express, rather than U.S. Mail, satisfied certain litigation rules. He had searched all day and found nothing. I asked him to review his research process for me. It sounded thorough, and I concluded that there was likely no authority on this point. He continued to search for several days before reluctantly admitting defeat to his supervisor. She told him that she had not expected him to find anything; she had wanted him to spend only a few hours confirming her expectation.<sup>15</sup>

As you become more confident of your research skills, you will overcome the fear of missing an important authority and the frustration of finding nothing relevant. You will learn to sort efficiently through hundreds of search results to identify those that are most similar to your client's situation. You will learn to analogize when no prior case is exactly on point (which is almost always). Moreover, researching new legal issues should help you see that one of the exciting aspects of practicing law is being able to solve novel problems, even when you are initially unfamiliar with that area of law.<sup>16</sup>

## **B. Resources for Legal Research**

Most legal research can be completed using a wide variety of resources: books in print, free online sites, and commercial online databases.<sup>17</sup> Schools vary in how they teach research techniques. Some schools teach multiple resources simultaneously so that students can compare the advantages and disadvantages of each. Other schools begin instruction with one commercial service (such as Lexis Advance or WestlawNext) before introducing others. Some law schools begin teaching legal research with free online sources and then cover print research and commercial services.

By the end of the first year of law school, you should be comfortable doing research using a variety of resources—and know which resources are best for particular research projects. When working online, you should be able to choose among different services, comparing cost, coverage, and ease of use.<sup>18</sup>

But if legal research is analogous to methodically piecing together a puzzle, choosing one resource over another simply means looking at the puzzle from a

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<sup>15</sup> This student went on to become a successful partner in a highly regarded law firm.

<sup>16</sup> See Peggy Roebuck Jarrett & Mary Whisner, *“Here There Be Dragons”*: How to Do Research in an Area You Know Nothing About, 6 Persps.: Teaching Leg. Res. & Writing 74 (1998) (providing advice for how to begin researching an unfamiliar legal topic).

<sup>17</sup> Do not assume universal overlap between print and online sources. Some material is still available only in books while other material is available only online. See Hollee Schwartz Temple, *Fading Past: Are Digitization and Budget Cuts Compromising History?* 99 A.B.A. J. 36 (May 2013) (noting not only that “of the 2 million unique volumes contained in America’s law libraries, only about 15 percent are available in digital form” but also that for “some states, important legal information is no longer published in books at all”).

<sup>18</sup> See Kunz et al., *supra* note 4, at 6–7 (reviewing factors one should consider in choosing among available sources for legal research).

different angle. Do not be fooled by the ease of running online searches, especially with sophisticated products like Lexis Advance and WestlawNext. Online legal research does not mean clicking a few links and watching the puzzle pieces fall into place before you. You are still the researcher, and your analytical ability drives the research process. You still must decide which sources to read carefully and which authorities are relevant.<sup>19</sup>

The most sophisticated research services currently are Lexis Advance and WestlawNext. They are easy to use and provide access to seemingly countless documents with a Google-like search.<sup>20</sup> These services have a “folder” feature that lets you save documents and organize them on your accounts for future reference at no charge. But beware: as information is easier and easier to access, it is ever more important for you to sift through and distinguish pertinent authorities from irrelevant ones in order to create a meaningful legal analysis.<sup>21</sup>

Other commercial providers of legal material online include Bloomberg Law, Casemaker, and Fastcase. Bloomberg is highly valued for its business law content. Casemaker and Fastcase are low-cost alternatives for online research, and many state bar associations make one or the other available free to bar members.

The Internet is a valuable tool for legal research, in large part because government entities,<sup>22</sup> universities, law schools, law firms, and others have made so much information available for free on reliable websites. For example, the U.S. Government Publishing Office provides free access to official versions of federal statutes and administrative regulations through its Federal Digital System (FDsys). As another example, Google Scholar provides free online access to cases. Be diligent in noting which institution or person is responsible for any database or site used in legal analysis. A database maintained by Lexis or Westlaw, or a website maintained by a law school or governmental entity, is likely more current and more accurate than a website maintained by an individual.

Regardless of their potential for quick, low-cost research, online resources have a few drawbacks. Reading text on a computer screen is inefficient both because you read slower and because screens do not always provide the context of surrounding material as well as printed pages do.<sup>23</sup> An additional drawback for the

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<sup>19</sup> See Katrina Fischer Kuh, *Electronically Manufactured Law*, 22 Harv. J.L. & Tech. 223, 236–42, 249 (2008); Molly Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 Am. U. L. Rev. 85, 88 (1998) (exploring the potential negative impact of online legal research and concerns over the ways online research may impact analysis and evaluation of legal rules).

<sup>20</sup> Harker, *supra* note 12, at 80 (characterizing the new generation of commercial research tools as “‘Google-like’ keyword searching” and discussing the need for information literacy in online research).

<sup>21</sup> See *id.* at 86; Kuh, *supra* note 19, at 249.

<sup>22</sup> See Temple, *supra* note 17 (referring to a study by the American Association of Law Libraries that “revealed that 24 states had designated at least one online primary resource as official”).

<sup>23</sup> See Harker, *supra* note 12, at 83–84.

novice researcher is that most documents appear the same on a computer screen.<sup>24</sup> The text of an editorial from your local newspaper may look on a computer screen very much like the text of a Supreme Court decision. As a legal researcher, you will have to decide which documents are merely persuasive authority and which are mandatory authority.

Finally, you should always consider the costs of conducting legal research with competing resources. Many law offices negotiate reasonable rates for online services, while the price of print publications continues to climb. Among online sources, costs and efficiencies need to be weighed. Lexis Advance or WestlawNext might be quicker for some projects, but sometimes a free or less expensive source will work just as well.

### C. Legal Analysis and Legal Writing

In addition to researching and analyzing your client's problem, you have to communicate your solution to the client, supervisor, or judge. Much of this communication occurs in writing. Attorneys in law firms, government offices, and public interest organizations write office memoranda, client letters, court briefs, contracts, leases, wills, and many other documents. Lawyers working in the legislature draft bills and analyze proposed legislation. Judges and their law clerks write court opinions. Becoming a successful lawyer means becoming a professional writer.<sup>25</sup> Much of your instruction in legal writing will come from LRW courses.<sup>26</sup>

Most legal writing courses teach objective and persuasive writing in different semesters.<sup>27</sup> The first semester will be devoted to objective writing, in which you analyze whether the client has a claim or predict how the client's claim might be decided by a judge. After several initial projects designed to introduce legal analysis and legal organization, the first major assignment of the initial LRW course is usually a "closed universe" memorandum. You may learn the client's facts by interviewing a client or by reviewing transcripts, depositions, exhibits, or fact summaries. Your professor will either give you a list of authorities to use in

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<sup>24</sup> See Lien, *supra* note 19, at 101 (stating "all bits of information look alike when presented online").

<sup>25</sup> Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 1–2 (6th ed. 2014) (discussing the importance of writing in the legal profession).

<sup>26</sup> Teachers of doctrinal courses have been increasingly encouraged to add writing components to those courses. See Parker, *supra* note 2, at 562 (promoting writing throughout the law school curriculum, including doctrinal courses, seminars, and clinics); William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (2007). Typically, the LRW class still provides the most feedback, the most personal interaction with the professor, and thus, the most valuable experience.

<sup>27</sup> See Association of Legal Writing Directors & Legal Writing Institute, 2014 National Survey Results 9 (2014) (available at <http://www.alwd.org/wp-content/uploads/2014/07/2014-Survey-Report-Final.pdf>) [hereinafter ALWD/LWI Survey]. Much of the information in this Article about the LRW curriculum comes from Part IV of the ALWD/LWI Survey.



analyzing the problem or provide links to the authorities; these authorities may be familiar to you from previous research exercises. You will study the law provided in your closed universe, analyze the client's situation, and write a memorandum to a more senior attorney. That document may suggest a course of action or predict how a judge might rule if the case were litigated. The next major assignment is often an "open" memorandum, in which you have to do your own research independently and determine which cases, statutes, and other authorities are relevant to the client's situation.

The second semester of LRW is typically devoted to advocacy. You will research and analyze legal issues and then write trial memoranda and appellate briefs to convince a court why your client should win. In this semester, students often present oral arguments in simulated courtroom situations.<sup>28</sup>

Increasingly, schools are requiring a third semester of LRW. If the entire first-year curriculum is based on objective writing, students may turn to persuasive writing in the third semester. In the third semester, students may also learn to write client letters, draft documents, and write legislation.

Throughout the sequence of LRW courses, assignments become more complex. The first memorandum of the fall semester may address only one issue. The second memorandum might require analysis of a multi-part rule. An appellate brief will likely have at least two major issues, each with complicated subparts.

One major difference between legal writing and the writing most students do before law school pertains to the content and goal of the document. Legal writing has to go beyond repeating or summarizing what the law is; legal writing must analyze likely solutions for a client's distinct problem. To do this, you must prove to the reader what the current law is, based on all the relevant authority you found while researching. Then you must explain how that law applies in your client's situation and predict an outcome.

This analytical process seems simple in the abstract, but it can be very difficult in practice. Assume you found only four cases on your issue. They were probably written by different judges, at different times, to address different factual situations. They may contain four different explanations of the same law. You have to reconcile these cases to state a single rule of law.<sup>29</sup> To provide a coherent rule of law in your document, you must explain the facts and reasoning of these cases and show either how they work together or why they are inconsistent. Then you must explain how that rule applies to your client's situation. As you work

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<sup>28</sup> Most students are nervous before their oral arguments, but almost all students consider the experience a highlight of the first year of law school. Louis J. Sirico, Jr., *Teaching Oral Argument*, 7 Persps.: Teaching Leg. Res. & Writing 17 (1998). Oral argument is included in the curriculum not for training in the theatrics of court appearance but because students learn so much about analysis from preparing to present their arguments to a court. Brill, *supra* note 2, at 30.

<sup>29</sup> For an excellent exercise on case synthesis, see Edwards, *supra* note 25, at 66–68.

through this part of your paper, you will compare the facts of previous cases to your client's facts, looking for similarities and differences.

In legal writing, you must always explain every step of this analysis, even when you are sure that the reader knows more about the law and facts than you do. In LRW, you will know that your professor is aware of the important cases; she discussed them with you during classes and in office conferences. She also created the client's facts. Given the professor's knowledge, you might think you can omit some of the analysis, especially when it seems obvious. But the point of LRW papers is not to remind your professor what she knows, but to demonstrate what you know.

Moreover, because your LRW professor is preparing you to practice law in the real world, you cannot take any shortcuts. Your real-world supervisor will be a smart, experienced attorney who may not remember this client's situation and who will be too busy to read the authorities you find in your research. Your supervisor will rely on your thorough explanations of cases, statutes, and other authorities in your memorandum. If you are writing for a court, you cannot be sure that the judge will read the authorities you cite. The judge may rely on a law clerk who has only recently graduated from law school. Your document must educate these readers about what law exists and how it applies to your situation.

Pretend that your reader is blindfolded and trying to walk up a staircase in your house. Given your sight and familiarity with the house, you could bound up the staircase three steps at a time. But the reader needs to move deliberately, step by step. Because you know the way, you must lead your reader, step by step. While your reader will be happy to arrive at the top, the journey—your analysis—will be more important than standing on the top step—arriving at your conclusion.

#### **D. The Writing Process**

Just as legal research is a process, legal writing is a process.<sup>30</sup> Your writing will improve when you pay attention to the process of how you write, rather than focusing just on the final written product.<sup>31</sup> Methods of writing vary, especially in the early stages.<sup>32</sup> Some students begin with a detailed outline. Some use a flow

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<sup>30</sup> See, e.g., *id.* at xxv–xxvii (describing legal writing as a process consisting of four stages, each with an important function).

<sup>31</sup> See, e.g., Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to “Think Like Lawyers”: Integrating Socratic Method with the Writing Process*, 64 Temp. L. Rev. 885, 888 (1991) (explaining the process approach to teaching writing).

<sup>32</sup> See, e.g., Christine Coughlin et al., *A Lawyer Writes* 67–79 (2d ed. 2013); Elizabeth Fajans & Mary F. Falk, *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes and Law Review Competition Papers* 62–77 (4th ed. 2011) (explaining various methods of generating ideas and organizing a paper). Many students begin writing by procrastinating. I have heard many tales of bathrooms cleaned and laundry ironed before a student could turn to writing a memorandum for class. For assistance in overcoming writer's block, see Elizabeth Ruiz Frost, *Breaking the Habits of the Inefficient: Procrastination and Writer's Block* Or. St. B. Bull. 13 (June 2013) (available at

chart. Other students find those tools too stifling and begin with a bubble chart that allows them to note relationships between key ideas in a more free-form fashion. Students who cannot overcome the blank space of a sheet of paper or computer screen may benefit from a “free write,” in which they write as much as they can on the issue in a short amount of time, ignoring for the moment organization or clarity; then they devote a majority of their time to cleaning up and revising multiple drafts. A few students spend most of their time thinking and organizing in their heads, and then slowly and carefully write a draft that needs little revision. You should experiment with all of these methods. Once you have found an approach that works well for you, do not spend undue time worrying about whether it fits into one of the recommended options.

One of the most important stages in the process of legal writing is revising your document. As you write, some of your ideas will crystallize. Others will crumble. Concepts you thought you understood will be difficult to explain. If ideas are jumbled in your head, they are likely to come out jumbled on paper. As you write and then revise, you will learn what you know and realize where you need to spend more time on your analysis. You may even discover new issues that you have to research. This process of thinking, writing, and revising takes time. Writing a paper the night before it was due worked for all of us in college; it does not work in law school.

### **E. Specific Legal Writing Problems<sup>33</sup>**

The quality of your legal analysis will determine, in large part, how well your document is written; many of the problems students encounter in legal writing result not from poor writing skills but from weak analysis.<sup>34</sup> Even so, to become an accomplished legal writer you must embrace new vocabulary, new conventions, and new organization.

In mastering legal analysis and legal writing, you are learning a new language.<sup>35</sup> Words have new, specific meanings. “Negligence” seems like a simple word, but in Torts class you will learn that it is an entire body of law. When you encounter a new word—or a word that seems to be used in a new way—take a moment to look it up in a legal dictionary. In learning the law’s language,

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<http://www.osbar.org/publications/bulletin/13jun/legalwriter.html>); Suzanne E. Rowe, *Unlocking Writer’s Block*, Or. St. B. Bull. 37 (Oct. 2006) (available at <http://www.osbar.org/publications/bulletin/06oct/writer.html>).

<sup>33</sup> A number of excellent texts specifically discuss writing problems in the legal context. See, e.g., Terri LeClercq, *Guide to Legal Writing Style* (5th ed. 2011); Megan McAlpin, *Beyond the First Draft* (2014); Richard C. Wydick, *Plain English for Lawyers* (5th ed. 2005). Classic writing texts, such as Strunk & White’s *The Elements of Style*, are helpful as well.

<sup>34</sup> See Parker, *supra* note 2, at 568 (encouraging law schools to provide students with writing tools to help them in exploring, organizing, and clarifying their analysis).

<sup>35</sup> See J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 63 (1994) (explaining that the law creates its own “discourse community” with its own unique language).

however, you should not adopt the “legalese” that peppers many of the older cases you will read. Avoid words like “aforementioned,” “wherein,” and “thereby.” Instead, use common words you hear every day.

While you are learning the language of law, you will also learn new conventions, techniques, and styles of writing for a legal audience. Students often have trouble accepting conventions of legal writing,<sup>36</sup> some of which may not seem to have a better explanation than, “That’s how it’s done.” Legal citations are an excellent example. The third series of a set of books that publish federal appellate cases, *Federal Reporter*, is abbreviated as “F.3d” not “Fed. Rep. 3rd.”<sup>37</sup> There is no real reason to use one instead of the other, except that lawyers use the first, not the second. Until you learn these conventions, you will feel like a novice, and experienced lawyers will recognize your work as that of someone new to the field.

Some conventions have explanations, but those explanations may not be immediately apparent to you as a new law student. For example, lawyers reading legal memoranda generally want to understand the relevant law before they read about your analysis of the client’s facts under that law.<sup>38</sup> If you analyze the facts before explaining the relevant authority, the lawyer may not understand why certain facts are relevant or why you have dismissed a line of reasoning that may seem intuitive but has not been followed by courts. Lawyers also want to read the most important part of the analysis first. Novels save the best for last; legal documents reveal the best arguments at the outset.

Consider the organization of this letter as an example of reader expectations:

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<sup>36</sup> See *id.* (explaining that the language of the law is “somewhat unfamiliar territory for law students”); but see Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 Dick. L. Rev. 7, 9 (1998) (arguing that biases in legal language may hinder the learning of historically marginalized students).

<sup>37</sup> The two national citation manuals are the *ALWD Guide to Legal Citation* (5th ed. 2014) and *The Bluebook: A Uniform System of Citation* (20th ed. 2015). In addition to these national manuals, be sure to follow any citation rules that are particular to the state where you are practicing. See, e.g., *California Style Manual* (4th ed., West Group 2000).

<sup>38</sup> Legal writing texts use a variety of acronyms to explain this organization. See Coughlin et al., *supra* note 32, at 81–85. Among the more popular acronyms are IRAC (for Issue, Rule, Application, and Conclusion), CREAC (for Conclusion, Rules, Explanation of the rules, Application of the law, and Conclusion), and CRRPAP (for Conclusion, Rule, Rule proof, Application, and Prediction). *Id.* at 82–83. These different labels all point to the same organizational paradigm: (a) explain the legal point at issue, (b) explain the relevant law, and (c) explain how your facts fit under the law. See also Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 Marq. L. Rev. 887, 912 (2002) (comparing the terminology used in various paradigms). Despite their great usefulness for beginning law students, these acronyms and paradigms are only rough tools, and they may not be appropriate in more sophisticated writing.

Chris

Sincerely,

I appreciate your sharing your concerns with me. I am investigating the matter and will be in touch with you soon.

Dear Pat:

August 1, 2014

Eugene, OR  
Pat Sullivan  
100 Man Street

All of the necessary information is included in the letter: the date, an inside address, a salutation, the body of the letter, and a closing. But the letter looks very odd because it is not in the expected order. In the same way, a legal memorandum that does not follow accepted organization will seem odd and will likely indicate that the writer is a novice.

A related problem is that, as you struggle with new legal concepts and new organizational conventions, you may tend to forget the basic writing tools you learned in high school, college, or other graduate schools. While you should concentrate your energy on the legal analysis of a paper, you need to devote some energy to editing the sentences you use to explain that analysis. Legal writing demands higher precision than you probably are accustomed to providing.<sup>39</sup> Changes in word placement and punctuation can completely alter the rule of law. Notice the difference in meaning in the following sentences:

- Students may only eat in the student lounge.
- Students may eat only in the student lounge.
- Only students may eat in the student lounge.

The first sentence suggests that students cannot study in the lounge; they may only eat there. The second sentence limits the place where students may eat; they may not eat in classrooms. The third sentence prohibits faculty or staff from eating in the students' domain. Your legal training should encourage you to notice such subtle but important differences in word choice and placement.

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<sup>39</sup> Occasionally, a student will bring me a college paper that received high marks. Invariably, I find grammatical, spelling, and punctuation errors, as well as problems with tone and style. In a college context, perhaps those mistakes did not compromise the quality of the document. In a legal document, such errors are unacceptable.

Legal writing must be edited to perfection,<sup>40</sup> and even tiny punctuation marks can be costly.<sup>41</sup> Consider the misplaced comma that cost a Canadian company \$2 million. The company had signed a contract that was to be in force “for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.”<sup>42</sup> The comma after “terms” changed the sentence so that either party could cancel the contract at any time with prior notice of just one year, which the other party did. Renegotiating the deal cost the company \$2 million.<sup>43</sup>

## F. Stress and Professionalism

Despite the fact that many students enjoy LRW and learn so much from it, most agree that it can be a source of stress. One reason is that LRW is time consuming, and sometimes your work will far outweigh the credits you earn. It helps in these situations to compare LRW to a science lab. In college, students may receive four credits for a biology lecture and only one credit for the required biology lab. Students and the administration know that the lab consumes a disproportionate amount of time. Everyone also recognizes that the lab is critical for learning biology because in the lab students do the real work of biologists. Similarly, in LRW you will learn not only to think like lawyers but also to do the work of lawyers.<sup>44</sup> This work takes time. View LRW as a complement to all your other first-year courses and recognize that work required for LRW will strengthen your ability to do well in them.<sup>45</sup> Moreover, because LRW uses real-life situations,<sup>46</sup> teaches hands-on research skills, and requires writing realistic documents, some students find LRW more conducive to learning legal analysis

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<sup>40</sup> For suggestions on editing documents, see Suzanne E. Rowe, *Perfect Proofing*, Or. St. B. Bull. 33 (Dec. 2006) (available at <http://www.osbar.org/publications/bulletin/06dec/writer.html>).

<sup>41</sup> See Thomas R. Haggard, *An Open Letter to First-Year Law Students Concerning the Practice and Profession of Law*, Student Law. 24, 26 (Sept. 1998) (advising students to agonize over mistakes in documents).

<sup>42</sup> Grant Robertson, *The \$2-Million Comma*, Globe & Mail (Toronto, Can.) B1 (Aug. 7, 2006) (available at 2006 WLNR 13600639).

<sup>43</sup> *Id.*

<sup>44</sup> See Kearney & Beazley, *supra* note 31, at 886 (noting that law students “practice the same thinking process in the law classroom and the legal writing course, although legal writing students must take the additional step of learning how to communicate their thinking to an audience in writing”). But see Roy T. Stuckey, *Education for the Practice of Law: The Times They Are A-Changin’*, 75 Neb. L. Rev. 648, 668 (1996) (arguing that the case method of legal instruction is more likely to teach students to think like appellate judges than to think like practicing lawyers).

<sup>45</sup> At the same time, do not devote undue time to LRW at the expense of other courses. Balancing competing demands is a requirement that will continue after law school. See Haggard, *supra* note 41, at 27.

<sup>46</sup> While most LRW problems are based on hypothetical situations designed to be life-like, some are based on real clients’ needs. Rebecca A. Cochran, *Legal Research and Writing Programs as Vehicles for Law Student Pro Bono Service*, 8 B.U. Pub. Int. L.J. 429, 431 (1999).

than courses offered primarily through lecture or the Socratic method.<sup>47</sup>

One of the greatest challenges facing legal writing students is accepting constructive criticism. You will work very hard on writing assignments and will expect them to meet the standards of the professor. Most likely, your documents will be returned to you covered with comments and corrections. Try not to take criticism of your writing assignments as personal criticism; instead, focus on the documents as an expression of legal analysis. One of the best ways for you to improve your legal analysis is to have a professor pore over your writing—line by line and word by word—and tell you individually what is good and what to change.

Another source of stress is that, in addition to learning analysis, research, and writing skills, students must follow tedious rules in submitting papers. Your LRW professor may follow court rules for documents; these rules prescribe the maximum length of a document, the number of lines that can appear on each page of a document, the margins of each page, and the size font to be used.<sup>48</sup> Court rules, and LRW classes, also have strict rules about the timeliness of documents.<sup>49</sup> Few students are accustomed to the sensitivity to detail required by court rules or by LRW classes. Losing points for such minutiae can cause you stress since your future job options may be determined by your first-year grades. But learning to work within these constraints in law school is essential to becoming a successful lawyer.

Perhaps the biggest source of stress is the fact that most students receive their first law school grades in LRW. In most of your doctrinal classes, you will have one exam at the end of the semester on which your entire grade will be based.<sup>50</sup> By contrast, many LRW classes include graded assignments throughout the semester. Even if your early work is not graded, receiving extensive feedback for revisions can create stress. Recognize that the early stress in LRW can prevent stress later on in the semester. Early mark-ups and grades tell you how you are doing and identify ways for you to improve before it is too late to help your semester grade.

You can benefit from the situation by remembering that stress is a part of the lawyer's life. Clients, partners, supervisors, and judges will all place stressful demands on you. You must learn to balance their competing demands. Managing stress will be a critical component of your success in practice.

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<sup>47</sup> See Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. Leg. Educ. 402, 411–16 (1998) (recommending nontraditional strategies for teaching law, including experiential learning exercises, writing exercises, and collaborative learning exercises).

<sup>48</sup> See, e.g., Fed. R. App. P. 32(a)(4) (“The text [of appellate briefs] must be double-spaced . . . Margins must be at least one inch on all four sides.”).

<sup>49</sup> See, e.g., Fed. R. App. P. 31(a) (setting forth times for filing appellate documents).

<sup>50</sup> See Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 Harv. L. Rev. 2027, 2033–37 (1998) (explaining the impact on students of receiving their first grades in law school).

## II. UPPER-LEVEL RESEARCH AND WRITING EXPERIENCES

Even after working throughout the first year to master the research process and learning to write office memoranda, trial documents, and appellate briefs, you still need more practice and instruction in legal research and writing. The reasons are obvious but frequently overlooked. First, there are too many research tools available for you to learn everything about them in one year. Second, legal writing develops legal analysis; this is true throughout law school and during the practice of law. Third, you may pick up bad habits in your first legal jobs and need additional instruction to correct these mistakes.

Law schools provide a variety of opportunities for legal research and writing beyond the first year. You should choose the options that genuinely interest you. In most of these options, you will be required to write a major paper—at least twenty pages and often closer to forty pages—on a specific area of the law. The research, analysis, and writing of this document should take at least one semester. If you do not find the topic compelling at the beginning of the semester, you will likely find it drudgery after working on it for several months.

As you select and then learn about your topic, you will likely encounter new research tools and databases. Current legal events can provide excellent topics for upper-level papers. To learn about recent events, you might visit legal blogs (called “Blawgs”) or use Bloomberg Law (especially its BNA topical databases). On each new research tool or database you encounter, be sure to take advantage on online tutorials and webinars to learn how to conduct research effectively. This self-teaching is an important part of your growth as a legal researcher, and it will take place throughout your legal career. Librarians and representatives of commercial databases like Lexis Advance and WestlawNext can also help you learn new research skills.

To maximize your experience, choose both a topic that you find interesting and a setting that suits your learning style.

### A. Law Journals

Being asked to join one of your school’s law journals is an honor. Membership may be based on first-year grades, a writing competition, or a combination of the two, so membership marks you as one of the school’s better students. If you devote your time and energy with enthusiasm, membership on a journal will make you a better lawyer and increase your worth on the job market.<sup>51</sup>

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<sup>51</sup> Not every student will be asked to join a law journal. You are not a failure if you do not join a law journal. *Id.* at 2037–38. Moreover, not every student should want to be a member of a journal. If the requirements for membership are not appealing, you should give careful thought to whether an impressive line on your resume is worth the effort you must contribute to the journal. You might decide instead to devote that time to moot court or an externship that will prepare you for practice.



Law journal members are involved in all aspects of publishing scholarly work. Senior members elected to the executive board select articles for publication from the many manuscripts submitted by professors, judges, practitioners, and students. The senior members edit the articles and direct junior members in “cite checking.” These junior members have the task of verifying the accuracy of every footnote in the article, both for content and for citation style. The process of editing someone else’s work can make you a more careful writer; cite checking someone else’s footnotes can make you a more thorough researcher.

Journal members are often expected to write a scholarly article, generally called a “comment” or “note.”<sup>52</sup> Scholarly writing is academic writing that is done to determine what the law should be. The writer works without the constraints of pleasing a client. You could write a successful article by focusing on a narrow legal issue that has not been explored.<sup>53</sup> In writing the article, you would identify an ambiguity or problem in the law, summarize the existing law on point, and make recommendations for addressing the ambiguity or solving the problem. Alternatively, you could write a “case note” that analyzes a recent case of great significance or a summary of “recent developments” in a certain area of law. Student-written articles contribute to the scholarly literature not only through their recommendations but also in the research they compile. Many practitioners use articles as research tools since students have exhaustively researched the issue and gathered in footnotes the sources relevant to that issue.

If you are possibly interested in a teaching career, publishing scholarly work is critical. Law school publications help. To increase your chances of having your article published, look for a topic that is timely and interesting—a “hot topic” that proposes a new solution to a current problem. Even if you are not selected for membership on a law journal at your school, you may still write an article and submit it for publication either to your school’s journals or to journals at other law schools.

## **B. Upper-Level LRW Courses, Seminars, Practicums, and Moot Court**

Optimally, you should take a course requiring legal research and writing in each semester of law school. At a minimum, you should take at least one course in the second and third years of law school devoted strictly to legal writing. These courses teach legal drafting, advanced advocacy, scholarly writing, and judicial opinion writing, as well as general writing skills.<sup>54</sup> If your school does not offer

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<sup>52</sup> See Fajans & Falk, *supra* note 32, at 5–8 (explaining different terms for student articles); see generally Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review* (4th ed. 2010).

<sup>53</sup> Your piece will be published only if it contains some unique idea. To ensure no one has already raised your argument, a preemption search is critical. On the other hand, if nothing has been written on your topic, it may be difficult to establish a foundation for your arguments. See Fajans & Falk, *supra* note 32, at 14–51 (explaining the process of choosing and developing a scholarly topic).

<sup>54</sup> See ALWD/LWI Survey, *supra* note 27, Part V (concerning upper-level writing courses).

enough upper-level writing courses to meet this need, talk to the dean and ask for more. Until the administration recognizes both the need for and the interest in these courses, they may not be added to the curriculum.

Seminars can provide opportunities for in-depth research, analysis, and writing. Typically a small number of students enroll in a seminar, and the grade in the course is based on a lengthy paper. As with law review articles, a critical aspect in a successful seminar paper is finding an interesting topic. Almost as important is finding a professor who invests time in seminar students. A professor can help you find a topic, suggest research materials, review an outline, mark up a draft, hold a conference with you to discuss the draft, and provide feedback on the final paper. You will learn less if you receive only a few comments on a hastily written draft, followed by a grade on an unmarked final paper.

Another possibility for gaining research and writing instruction is a “practicum,” sometimes called a “practice lab.” A practicum may also give you opportunities to hone lawyering skills such as interviewing clients and negotiating documents. A practicum may be a stand-alone course or a one-credit addition to a doctrinal course.<sup>55</sup> Some schools offer practical skills training in relation to a substantive area of law; for example, in a taxation practicum you would learn the specialized research done by tax lawyers and write documents on tax issues.

Moot court offers an additional forum for researching and writing, specifically in the appellate context.<sup>56</sup> Students research and write an appellate brief and learn to present arguments before a panel of judges. Success in moot court is determined by excellent writing, rigorous analysis, and oral advocacy, all of which contribute to success in the practice of law.

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<sup>55</sup> E.g., Barbara J. Busharis & Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 J. Marshall L. Rev. 303, 305 (2000); Christine A. Corcos et al., *Teaching a Megacourse: Adventures in Environmental Policy, Team Teaching, and Group Grading*, 47 J. Leg. Educ. 224 (1997); Robert C. Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Business Skills*, 59 J. Leg. Educ. 221 (2009). Increasingly, courses have been added to the curriculum that use real-world problems as the basis for research or writing exercises. See Sarah Ricks, *Using Real Legal Research Assignments to Teach Upper Level Students*, 25 The Second Draft 16 (2011).

<sup>56</sup> See Darby Dickerson, *In re Moot Court*, 29 Stetson L. Rev. 1217, 1217 (2000) (explaining that one main benefit to students that comes from participation in moot court is the enhancement of research, writing, oral advocacy, and analytical skills).

### III. BEYOND LAW SCHOOL: BAR EXAMS AND PROFESSIONAL WRITING

Your final hurdle to becoming a lawyer will be passing the bar exam. The bar exam should test how well you put into practice all that you learned in law school. Almost every state administers essay questions in addition to the Multistate Bar Examination, which is composed of multiple choice questions. Increasingly, states are supplementing this traditional format by adding a Multistate Performance Test, which focuses on problem solving and requires writing realistic documents.<sup>57</sup>

Once you become a practicing member of the bar, you will be required to research, analyze, and write, whether your legal job is with a firm, government agency, public service organization, corporation, or judge. Try to find mentors who will discuss with you the analysis in your assignments, show you new research techniques, and critique your writing.<sup>58</sup> Be willing to adapt your writing style to that desired by your employer. Do not assume, however, that an abbreviated form of analysis is best or a legalistic style of writing is perfect just because one employer prefers it.<sup>59</sup> While you must adopt the preferences of employers, remember that one day you will have the authority to make decisions on analysis and writing yourself. If at that point you remember what you learned in LRW, you can advance the standards of our profession.

### IV. CONCLUSION

Most of us go to law school to learn to practice law. In LRW, you will put your legal education into practice for the first time by researching, analyzing, and writing about client problems. You will refine these skills throughout law school and your career. There is no magic to it, just an interwoven process of research, analysis, and writing that enables you to be called a lawyer.

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<sup>57</sup> Information and past tests are available at <https://www.ncbex.org/exams/mpt/preparing/>. Most states also require the Multistate Professional Responsibility Examination (MPRE), which is administered separately from the state's bar exam. Some states are moving to a Uniform Bar Exam. See <https://www.ncbex.org/exams/ube/>.

<sup>58</sup> See Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 38 (1992) (noting difficulty of finding mentors in busy law offices); see also Stuckey, *supra* note 44, at 659 (stating that the "mentoring function, once served by older lawyers for new associates, no longer exists in many firms").

<sup>59</sup> See Lisa Eichhorn, *The Legal Writing Relay: Preparing Supervising Attorneys to Pick Up the Pedagogical Baton*, 5 Leg. Writing 143, 143–44 (1999) (explaining how legal writing professors need to train supervising attorneys in providing effective feedback); Kathleen Elliott Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 Touro L. Rev. 507, 508 (2005) (explaining that, although lawyers depend on the effective use of words in their careers, often attorneys are viewed as producing "incomprehensible and confusing" writing).