

Get Real About Research and Writing

Do you share the myths students often have about the role of research and writing in legal practice? If so, you'll want to take your skills more seriously

by Mark Cooney

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When I was a lawyer in private practice, I supervised student clerks at my litigation firm and taught research and writing as an adjunct professor. My conversations with students often turned to the role of legal research and writing in the “real world” of lawyering. Their comments often betrayed a number of common misunderstandings about everyday practice

Students expressed these mistaken beliefs time and again, so it's a good bet you share at least some of them. If you leave these myths unchecked, brace yourself for a rude awakening once you start working at a firm.

To help you ease the transition from the classroom to the law office, I've developed a list of the top 10 myths law students believe about research and writing in the practice of law. Each is followed by a more realistic perspective. If you reject these myths, you'll be well on your way to becoming a more valuable clerk or associate at your firm.

Myth 1: You can choose a practice area where you won't need strong research and writing skills.

Despite what you've seen on TV and in movies, lawyering is primarily researching the law and writing about it. Every area of the law requires sound research and writing skills. Whether you're a tax lawyer, commercial litigator, corporate lawyer, criminal defense lawyer, or trust specialist, you'll spend hours on research. Statutes, codes, and regulations change and are interpreted in new opinions. Your clients will have questions that require you to understand the current state of the law and to communicate it in writing.

Whether it's opinion letters, memos, or briefs, you will be writing. Even trial lawyers draft briefs of all kinds, including mediation summaries, trial briefs, and briefs for dispositive motions and motions in limine. Trial lawyers also draft contractual documents, such as releases and settlement agreements. You can't hide from the fact that lawyers must know how to do legal research and write about the law. You'll be a better lawyer by working on these skills throughout law school and after.

Myth 2: In legal writing classes, students learn only how to write.

Legal writing classes teach more than just how to write. They teach how to read, analyze, and form substantive legal arguments. First-year research and writing classes teach students how to analyze unabridged case opinions and statutes. Students also are introduced to the rules of statutory construction and contract interpretation. Advanced writing classes give new focus to the concepts of vagueness and ambiguity.

Learning to spot ambiguity in a contract or to break down a statute will translate into spotting legal arguments that may control the outcome of future cases. For instance, criminal defense lawyers always scrutinize the statutes and ordinances under which their clients are charged to see if they truly apply and if any ambiguity or excessive vagueness will enable their clients to avoid prosecution. In a contract dispute or insurance coverage case, the litigation often focuses on interpreting contractual language and making careless drafters pay for their lack of clarity. Students in research and writing classes learn how to spot and exploit poor writing to help their future clients.

Myth 3: New lawyers impress their bosses the most with oral advocacy skills.

It's important for students to learn oral advocacy skills in law school and to continue developing them in practice. But, for new lawyers, good research and writing is the fastest and surest way to impress supervisors. Most new associates spend the bulk of their early years preparing memos and briefs. If that's the case, your value as an employee will hinge largely on the quality of your research and written work.

What about those lucky new associates who are quickly sent to motion calls, mediations, depositions, and the like? Their supervisors are still likely to evaluate them primarily from their written work, because that's probably all their supervisors will ever see. Bear in mind that supervising lawyers typically ask new associates to cover court hearings and depositions for a reason--the supervisors have scheduling conflicts and need to be elsewhere. Except in rare cases, no supervising lawyer will watch a new associate present an argument in court or cross-examine a deponent. But these same supervisors will carefully read the memos and briefs they've asked an associate to write for them. Thorough research reflected in a polished memo or brief is the single best way for a new lawyer to prove his or her mettle.

Myth 4: Research and writing doesn't win cases--oral advocacy does.

Students often believe that briefs are just "primers" for judges, giving them background information on the case and the issues before the decisive oral argument of a motion or appeal takes place. Obviously, oral advocacy carries the day at trial, and law students and lawyers should strive to develop good oral advocacy skills. But when courts are presented with complex or dispositive legal arguments at the trial or appellate level, oral argument usually is far less important to the outcome than are the briefs and the research that went into them.

It's common for state and federal trial judges to issue opinions on dispositive motions without even hearing arguments. And more and more appeals are being decided without any oral

argument at all. State appellate courts often use “summary” panels to decide appeals without argument. Federal appellate courts often issue memorandum opinions without hearing arguments. These no-argument cases obviously are decided on the briefs alone.

What about the cases where the court hears arguments? Law students are surprised to learn that judges' research clerks often prepare memos recommending an outcome, or even draft opinions, before the lawyers offer a single word of argument. Trial judges often admonish lawyers to limit their arguments to points that aren't already briefed (or listen impatiently while lawyers orally rehash their briefs) and then read prewritten opinions onto the record. In appeals where arguments are allowed, there often is a 15-minute time limit. Appellate judges often comment privately that oral arguments rarely change the outcome of an appeal.

Myth 5: Your primary reader will always be a judge with a good working knowledge of the area of law you're writing about.

Whether in a trial or appellate court, the first person to read your brief is likely to be a research attorney who's less than three years removed from law school. This lawyer's job is to carefully evaluate the briefs, check the research, and recommend the correct outcome--often in the form of a draft opinion. Don't presume the reader has any level of experience or expertise in the area of the law you're writing about. Because a relatively inexperienced lawyer probably will play a large role in the court's decision, you must write briefs that clearly communicate the law, with a step-by-step approach that yields a logical flow of analysis. Therefore, always aim to educate your readers.

Adopt the same philosophy even if you're confident that only the judge or judges will read your brief. Even the most experienced judges are required to be jacks-of-all-trades, often presiding over diverse criminal, civil, and family law cases. For example, a fine judge with decades of experience may never have presided over a Fair Credit Reporting Act case. Or that judge may have gone five years without seeing a Uniform Commercial Code case dealing with the specific issue that controls your case. Effective lawyers concentrate on educating even experienced judges with their briefs.

Myth 6: Using simple words is not lawyerly and means you're dumbing it down.

Have you ever heard anyone complain that a brief, statute, ordinance, or contract was too easy to read and understand? Have you ever heard anyone criticize a lawyer because he or she used plain language in a brief? Of course not. If you avoid the inflated language and poor habits so often associated with lawyers, no one will think that a plumber broke into your law office, stole your letterhead, and decided to write a brief on implied contractual indemnity. In short, no one will think you're a nonlawyer--or an unsophisticated lawyer--simply because they easily understood what you wrote. In fact, they'll think you're a good lawyer. You don't lose credibility by writing "Mr. Jones sued Mr. Smith" instead of "Mr. Jones initiated a cause of action against Mr. Smith."

Simple, uninflated language sounds confident. Legalese and inflated language are the trappings of insecure writers, writers who feel compelled to cry out to the world, "Believe me, I'm a lawyer!"

Myth 7: It's the reader's fault if he or she misunderstands what you wrote.

When you start your first job as a summer clerk or lawyer, your bosses and co-workers will edit your work and suggest changes. You may feel a sting of disappointment, take offense, silently reject the criticism, or get defensive. You may try to explain to the reader that what you wrote really was clear. Don't.

Adopt the attitude that the customer is always right--and your reader is your customer. Accept and embrace feedback at work.

Remember that if what you wrote was truly clear and seamless, the reader wouldn't have felt the urge to suggest a change. A reader rarely will pick up the red pen unless something needs attention. If your reader can't follow what you're saying, you didn't write it well enough--period. So even if you don't agree with a specific edit, you're on notice that you need to do something to clean up your document. And you'll learn from the feedback.

Even the world's best writers have editors. Don't reject edits. Address the problem and learn from the feedback. And when you're editing your own writing on the job, always strive to keep your future customer happy. After all, your reader will be deciding your case or issuing your paycheck.

Myth 8: Grammar, style, organization, and other details don't matter because they'll go unnoticed.

It's true that readers won't consciously notice that you've paid careful attention to style and mechanics while writing a legal document. No judge will read a brief and then announce to her clerk, "Hey, I liked that active-voice phrasing and those strong verbs!" But, if you're diligent, the same readers who don't consciously notice your editorial decisions will notice that your document was easy to read and understand. And they're likely to read your document more carefully because it's easy for them to do so. This will enhance your chances of persuading your reader and winning your argument.

Myth 9: All the research tools and resources readily available in law school will be readily available in practice.

Students are spoiled during law school: free Westlaw and Lexis, and a library with every resource a lawyer could ever want. But it's often very different in practice.

Law students often are shocked when they learn the typical per-minute charges for using Westlaw and Lexis. Not all firms subscribe to these services. And, even if they do, not all clients will pay those per-minute charges. For example, associates at insurance defense firms may be subject to a client's "litigation guidelines," which often prohibit using computer databases outright or require special authorization to use them. And not all firms can afford, or want to pay, the flat-rate plans that can cost four figures a month and add substantially to a firm's overhead. Add to this the uneven supply of hard volumes found in most law office libraries, and you'll quickly realize you need to become much more resourceful than you had to be in law school.

Myth 10: You won't need to research the controlling cases and statutory law.

Law students often get caught up in a canned-outline mentality. Whether it's studying for a first-year contracts exam or reviewing for the bar exam, all the rules are served on a silver platter. If you're like many students, you've purchased commercial outlines or found something from a student bar association outline bank. Just memorize and comprehend these easy-to-digest rules and all will be fine, right?

In practice, it rarely will be this easy. The general rules found in outlines will be a given, and you'll need to dig deeper. New associates often have to hunt for cases on point, and at times it will take some work to find them. You'll encounter new areas of law and new issues in familiar areas of law for which you'll find no brief or outline to guide you. And you'll often need to find cases that apply familiar rules in unique factual situations. In these situations, the thoroughness of your research can mean the difference between winning and losing a case.

When your state's law is sparse on an issue, finding persuasive case law from other states or instructive secondary authority can give a judge who otherwise would be grasping at straws the confidence to accept your position. This extra research can take time, and it won't be as easy as turning to a law school outline. But it may make all the difference to your client.

Don't be lulled into a false sense of security just because the general rules of law always have been readily available to you in outlines. Take your research and writing classes seriously. What you learn in these classes will help you dig far deeper and excel as a law clerk or new associate.