Contents

xxxi

Preface to the Third Edition

Ackno	Acknowledgments					
		Prologue 1				
Why s	stories	s work	2			
Client	t-cent	ered lawyering	3			
The recursive process of writing						
How t	to use	this book	6			
1	Me	eting the client	9			
	1.1	Client needs and goals	10			
	1.2	Embracing curiosity as a client-centered skill	12			
	1.3	1 1	14			
	1.4	Ethical considerations	14			
		1.4.1 Providing competent service	15			
		1.4.2 Being a diligent advocate	16			
		1.4.3 Respecting client autonomy	17 18			
	1.5	1.4.4 Keeping client secrets: client confidentiality The client as a key audience	20			
	1.6	Getting started: learning about your client	21			
	1.0	Germing started. Tearming about your effects	21			

2	Fou	ındati	ons		25
	2.1	Wher	e does lav	v come from?	26
		2.1.1	Sources	of law	26
		2.1.2	Types of	f law	28
			2.1.2.1	Enacted law	28
			2.1.2.2	Court-made law	30
	2.2	Const	raints on	judicial rule-making	31
		2.2.1	Respect	for precedent	31
		2.2.2		ay be binding (mandatory) assive (permissive)	32
			2.2.2.1	Statutes are binding in a jurisdiction	32
			2.2.2.2	When are cases binding?	33
			2.2.2.3	Other forms of persuasive authority	34
		2.2.3	Precede	nt can be overturned—sometimes	35
		2.2.4	Limitati	ons on stare decisis	36
			2.2.4.1	Broad or narrow holding?	36
			2.2.4.2	Distinguishing previous cases	37
3				or communicating If of clients	39
	3.1	Classi	cal rheto	ric	41
		3.1.1	Logos: t	he logic of the communication	43
		3.1.2	Pathos: emotior	appealing to our audience's as	44
		3.1.3	Ethos: t	he credibility of the advocate	46
		3.1.4	Kairos: t	he opportune moment in time	47
		3.1.5		it all together: persuasion requires athos, ethos, and of course, <i>kairos</i>	49
			3.1.5.1	Start with the logos	49
			3.1.5.2	Build empathy for your client's position	50
			3.1.5.3	Establish your own credibility along with your client's	50
	3.2	Audie	nce respo	onses to persuasion	50

			Con	tents
	3.2.1	Respons	e shaping	50
	3.2.2	1	e reinforcing	51
	3.2.3	1	e changing	51
	3.2.4	1	osner's formula for persuasion	52
		3.2.4.1	Distance	52
		3.2.4.2	Resistance	52
3.3	Cogni	tive psych	nology	53
	3.3.1		ativity bias	53
	3.3.2	_	k in images and narratively	
		transpor	t into scenes	54
	3.3.3	Stock str	ructures in persuasion	55
		3.3.3.1	Types of stock structures	57
		3.3.3.2	Be careful: stock structures are different to different people	58
		3.3.3.3	Many legal disputes are centered in a debate about competing	
			stock structures	58
	3.3.4	Priming		59
		Framing		60
3.4		_	ommunication takes time to master	61
3.5	Concl	usion		61
Sto	rv as a	a tool fo	or communication and	
	suasio			63
4.1		is a word vriting co	like "story" doing in a serious	63
4.2	0	O		63
4.2		on-maker	aasive, even to lawyers and legal s	65
4.3	The bi	iology of	storytelling	68
	4.3.1		e transportation into the story's ctivates persuasion	69
	4.3.2		ns connect stories to "frames"	70

4.4 The storyteller's toolbox

4.4.1.3

4.4.1 Structural tools for the legal writer

Theme

4.4.1.1 Character4.4.1.2 Conflict

 $\boldsymbol{x}\boldsymbol{v}$

71

72 72

72

73

			4.4.1.4	Setting	73
			4.4.1.5	Perspective	73
			4.4.1.6	Point of view	74
			4.4.1.7	Plot	74
			4.4.1.8	Organization	74
		4.4.2	Stylistic	tools for the legal writer	75
			4.4.2.1	Description and the selection of details	75
			4.4.2.2	Stock structures	76
			4.4.2.3	Metaphor	76
			4.4.2.4	Reference or allusion	77
			4.4.2.5	Tone	77
5	Thi	nking	about 1	the audience	7 9
	5.1	The c	ounseling	document audience	80
			~	lience: the supervising lawyer	80
		5.1.2	Meeting	g our intra-office audience's	
			expecta	tions	80
		5.1.3	Our auc	lience: the client	82
	5.2	The a	dvocacy o	locument audience	83
		5.2.1	Trial jud	lge: mentor to the client	84
		5.2.2	- 0	need to know the client's story	
		5.0 0		e beginning of the case	86
		5.2.3		the trial court as fact finder	87
		5.2.4	-	for higher authority	88
	5.3			ourt audience	88
		5.3.1		te judge: mentor to the trial judge	89
	5.4	Writin	ng tor an	appellate audience	9(
F	Part	II: De	velopir	ng the story of the law 91	
6	Тур	es of	legal re	asoning	93
	6.1	Types	of rules		93
		6.1.1	Explicit	rules	94

	6.1.2	Implicit	rules	94
	6.1.3	Combin	ation of explicit and implicit rules	95
6.2	Rules	may use	elements, factors, or both	95
	6.2.1	Element	tests	96
	6.2.2	Factor to	ests	96
	6.2.3	The real	ity mostly looks like a	
		combin	ation	96
6.3			pes of legal reasoning	97
6.4	What	's next?		99
	_	with th	e law, part 1: Interpreting	404
sta	tutes			101
7.1	How t	o read a s	statute	103
	7.1.1	The stat	utory context	104
	7.1.2	Reading	the statute critically	105
		7.1.2.1	To whom does the statute apply?	107
		7.1.2.2	Does the statute provide any express definitions of key terms?	107
		7.1.2.3	-	107
		7.1.2.3	permit, or prohibit?	108
		7.1.2.4	What are the exceptions to the general rule?	108
		7.1.2.5	What is the consequence of not complying?	108
		7.1.2.6	When does the statute apply?	108
7.2	Text-b	ased inte	rpretive tools	109
	7.2.1	Plain m	_	109
	7.2.2	Canons	of construction	110
		7.2.2.1	The plain meaning rule	110
		7.2.2.2	Canons regarding specific words	110
		7.2.2.3	Canon regarding grammar	111
		7.2.2.4	Canons regarding lists of things	111
		7.2.2.5	Other textual canons	112
	7.2.3	Context	cual canons	112
		7.2.3.1	The statutory context:	
			definitions and in pari materia	113
		7.2.3.2	Consider the historical context	114

xvii

Contents

xviii Contents

	7.2.4	Substan	tive canons	115
		7.2.4.1	Punitive statutes are to be narrowly construed; remedial statutes are to be broadly construed	115
		7.2.4.2	Constitutional interpretations are favored over unconstitutional interpretations	115
		7.2.4.3	The legislature does not intend absurd results	115
		7.2.4.4	Statutes codifying the common law are to be broadly construed; statutes in derogation of the common law are to be narrowly construed	116
		7.2.4.5	The rule of lenity	116
7.3	Purpo	se-based i	interpretation	116
7.4	Legisl	ative hist	ory	118
	7.4.1	The mo	re the merrier	120
	7.4.2	Who's t	alking makes a difference	120
	7.4.3	Not all l	egislative history is created equal	120
	7.4.4	Hindsig	ht is not insight	121
	7.4.5	No one	voted on this stuff	121
7.5	Case 1	aw		122
7.6	Admir	nistrative	interpretations	123
7.7	How t	o craft a	statutory interpretation argument	123
	7.7.1		the statute through a broader come up with a category	124
	7.7.2	Look for	r other statutes that fit into the	
		same ca	•	124
	7.7.3		n-related statutes	125
	7.7.4	analogo	unicate to readers that there are us interpretations to the statute	
		•	dealing with	125
7 Q	Concl	usion		126

8	Working with the law, part 2: analogical reasoning					
	8.1	The tl	hinking stage	127		
		8.1.1	Step one: understand the facts of our case and the issue we have been asked to address	130		
		8.1.2	Step two: collect the relevant law and annotate as you read	132		
		8.1.3	Step three: determine the applicable legal rule	137		
		8.1.4	Step four: apply the legal rule to the facts of our case	143		
		8.1.5	Step five: predict the likely conclusion	146		
	8.2		nunicating—putting our thinking into en form	147		
		8.2.1	Introduction: understanding CREAC as one organizational paradigm	148		
		8.2.2	Writing the conclusion	150		
		8.2.3	Writing the rule explanation	151		
		8.2.4	Writing the application	154		
		8.2.5	Making fact-to-fact comparisons	155		
	8.3	What	's next?	157		
9		_	with the law, part 3: creating guments	159		
	9.1	Future	e world: the uniqueness of policy arguments	160		
	9.2	When	to make policy arguments	161		
		9.2.1	When one party is arguing for a change in existing law	161		
		9.2.2	When an argument is based on persuasive authority	162		
		9.2.3	When the time is right (<i>kairos</i>)	162		
	9.3	The n	ature and types of policy arguments	163		
		9.3.1	Judicial administration	164		
			9.3.1.1 The new rule should be firm (or flexible)	164		

			9.3.1.2	The existing or proposed rule is too complex	165
			9.3.1.3	1	165
			9.3.1.4		166
		9.3.2	Econom	ic arguments	166
		9.3.3	Instituti	onal competence arguments	167
		9.3.4	Social va	alues arguments	167
	9.4	How to	make a	policy argument	167
		9.4.1	Prediction	on	167
		9.4.2	Judgme	nt about the prediction	168
		9.4.3	Support	for the prediction and judgment	168
			9.4.3.1	Legal support	168
			9.4.3.2	Nonlegal support	168
			Couch to bad out	the argument in terms of avoiding comes	171
		oning		e facts: inferential	173
	10.1	Deterr	nining f	acts	175
		10.1.1	Fact sy	nthesis	176
		10.1.2	Weigh	t of facts	180
	10.2			l stream (aka "reasoning	
		with f	,		181
				tive inferences	185
	10.4	What'	s next?		186
11	Mar	naging	, adver	se material	187
	11.1	What	kind of	adverse material is there?	188
		11.1.1	Advers	se aspects about the lawsuit lures	188
		11.1.2		nt facts that conflict with the s story	188
		11.1.3		se interpretations of the applicable ad standard of review	189

_	
Contents	XXI
COHICHIS	~~

	11.2	Structuring the counterargument: sidedness and refutation			
	11.3	Considerations when it is unclear whether the opposing party will use the adverse			
		materia		on against adverse material	193 194
				on against adverse material	194
		11.3.2	material	when to manage adverse	196
			11.3.2.1	Address adverse material that you are ethically obligated to raise	196
			11.3.2.2	Address adverse facts that we know the opposing party will use	197
			11.3.2.3	Address and manage the opponent's strongest argument as soon as you bring it up	197
			11.3.2.4	Avoid phantom counterarguments and look for the harder ones to manage	199
	11.4	Where	to manag	e the adverse material	200
	11.5	Writing	g countera	rguments	201
		11.5.1	Know wł	nen we have already made the rgument	201
		11.5.2	Avoid de	fensive phrasing of rguments	201
		11.5.3		veakest link in the middle	202
		11.5.4	Protect o	ur own ethos	204
	11.6	Read th	ne writing	of expert legal writers	205
	11.7	Wrap-u	p: this isn	ı't easy, we know	205
	11.8	What's	next?		205
12	Test	ing the	e legal a	rgument	209
	12.1	Avoid l	ogical fall	acies	209
		12.1.1	Shallow	thinking fallacies	210
		12.1.2	Insufficie	ent evidence fallacies	213
		12.1.3	Non sequ	ıitur fallacies	215
		12.1.4	Avoidand	ce fallacies	217

xxii Contents

	12.1.5	Incomplete syllogisms	2	19
	12.1.6	A final caution	2	20
12.2	Tying i	t all together	2	20

Part III: Developing the client's story 223

13	Gatl	hering	and ass	essing the facts	225	
	13.1	Facts re	equire con	text to understand them	228	
	13.2	A five-s	step proces	ss to thinking about fact		
		gatheri	ing and fac	ct assessing	229	
		13.2.1	Step one	: what facts are legally relevant?	230	
		13.2.2	Step two	: what is the chronology?	232	
		13.2.3	Step thre	e: does it all make sense?	234	
		13.2.4	Step four	: have you made any		
			assumpti	ons?	234	
		13.2.5		what story will the other		
-			side tell?		235 236	
	13.3	Tools f	Tools for investigating and collecting facts			
		13.3.1	Two type legislativ	es of facts: adjudicative and e	236	
		13.3.2	Facts, inf	erences, and characterizations	238	
			13.3.2.1	Facts	238	
			13.3.2.2	Inferences	238	
			13.3.2.3	Characterizations	239	
		13.3.3		ools for discovering facts beyond client knows	239	
		13.3.4	Informal	tools for discovering facts	240	
			13.3.4.1	Client interview	240	
			13.3.4.2	Witness interviews	240	
			13.3.4.3	Document review	241	
			13.3.4.4	Informal discussion with		
				opposing counsel	241	
			13.3.4.5	Electronic sources	242	
	13.4	Conclu	ısion		243	

4 Res	earchin	g the client's legal issue(s)	245
14.1	Identif	ying the legal issues	246
	14.1.1	Identify the domain	247
	14.1.2	Identify possible issues within the	
		domain	247
	14.1.3	Research the substantive issues	247
		14.1.3.1 Identify the domain	248
		14.1.3.2 Spot the issues	248
		14.1.3.3 Research	248
	14.1.4	Research procedural or "side" issues including burdens of proof and	
		standards of review	249
14.2	Organi	zing your research	249
	14.2.1	Commercial research programs	250
	14.2.2	Create your own database	250
		14.2.2.1 Creating the issues list	250
		14.2.2.2 Creating the database of authorities	253
14.3	Selecti	ng the issues to write about	255
	14.3.1	Arranging your research results	255
	14.3.2	Analyzing your results	257
	14.3.3	Selecting the issues for deeper analysis	257
14.4	Next st	reps	259
Rep	resenti	ng your client, the protagonist	2 61
15.1	The cli	ent as a character in the legal story	262
	15.1.1	The client as hero	263
	15.1.2	Using your client's back story: competing considerations	265
	15.1.3	Your client's character will have weaknesses	267
	15.1.4	The client's narrow and broad goals	267
15.2		character roles in the legal action	268
10,1	15.2.1		268

xxiii

Contents

xxiv Contents

		15.2.2	witnesses, and lawyers	270
	15.3	Finding	g your client's archetype	271
		•	Selecting a heroic archetype	271
		15.3.2	Missing information and reasonable inferences	272
		15.3.3	Repeating the steps	272
	15.4		ent's obstacle: the conflict type of lawsuit	273
		15.4.1	The types of conflicts	274
		15.4.2	Identifying the central conflict your client faces	275
16		_	write: shadow stories and relopment	277
	16.1		ng for writing: sketching a "shadow" f the facts section	277
		16.1.1	What is the shadow story, and why do we need it?	278
		16.1.2	Identifying your theme via the shadow story	281
	16.2	Conclu	ision	283
17		ating tl s section	he working draft of the on	285
	17.1	relates	cts section introduces the theme, which to (but is different from) the theory	20.5
	17.0	of the		285
	17.2		e plot's arc	287 288
			Introduction/exposition Complicating incident/rising action	290
			Story climax	291
			Resolution/falling action	291
			Denouement	292
	17.3		g hands on the keyboard (or the	
		-	logical equivalent)	292
		17.3.1	Be ready to throw away the pity	293

			Contents	XXV
	17.3.2	Taking stock of the story's "beats"	294	
	17.3.3	Organize the beats into a cause-and-effect flow	295	
	17.3.4	Describe actions, settings, objects, and (sometimes) characters	296	
	17.3.5	Choose the level of detail by changing the perspective of the reader's viewing of the story	298	
	17.3.6	Omit characterizations that consist of unsupported opinions rather than fact	s 299	
17.4	Putting Facts se	down the working draft of the ection	301	

Part IV: Creating documents 303

intra	a-office	memos	eling documents: s, opinion letters,	
and	the lik	е		305
18.1	Types o	of client co	ounseling documents	306
18.2	Writing	g a client c	counseling document	307
	18.2.1	Identify t	the client's goal or goals	308
	18.2.2		ne outcome and identify	
		obstacles		309
18.3	The for	m of spec	ific client counseling documents	309
	18.3.1	Opinion	letters	310
	18.3.2	Bench m	emos	311
	18.3.3	Long form	n intra-office memos	312
		18.3.3.1	The caption	312
		18.3.3.2	Question(s) presented (the issues)	313
		18.3.3.3	Brief answer(s)	315
		18.3.3.4	Statement of facts	315
		18.3.3.5	Discussion/analysis	316
		18.3.3.6	Recommendations and	
			next steps	317
	18.3.4	Short for	m office memos	317
18.4	Conclu	sion		318

xxvi Contents

19	_	anizing I analy	-	rking draft of the	319
	19.1	Choosi	ng your la	rge-scale organization	322
		19.1.1	"Logical	flow" structure	322
		19.1.2	Organizi	ng by type of reasoning	323
		19.1.3	Argumen	t chains	323
		19.1.4	"Lead wi	th strength" is the default choice	325
	19.2	Roadm line, uj		eadings: signaling the bottom	325
		19.2.1	Roadmar memory	os lay the groundwork for	326
			19.2.1.1	Describing the overall legal structure and the arrangement of the analysis	327
			19.2.1.2	Setting up foundational law	329
	19.3	Headin	igs chunk	the information	329
	19.4		sual design ic outline	of headings (and why the style?)	331
	19.5	Small-scale organization			
		19.5.1		mon organizational arrangement reasoning	333
		19.5.2	Variation	s (avoid formulaic thinking)	336
		19.5.3		ned argument using a common : rule of law at issue	338
		19.5.4	Handling	g factor tests	339
			19.5.4.1	Individualized (unrelated) factors	340
			19.5.4.2	Interrelated factors	342
			19.5.4.3	Factor tests pop up everywhere—even in the	
				middle of an elements test	342
		19.5.5	Local roa	dmaps	343
	19.6	Conclu	ısion		344

20		_	_	argument for efficacy: nd persuasive application	345
	20.1	Cognit	ively prim	ing your readers	346
	20.2	Persuas	sively wor	ding the rules	346
		20.2.1	Use clien	t-centered imagery	347
		20.2.2		and common law rules: The vocacy principles apply	349
			20.2.2.1	Writing about statutory law	349
			20.2.2.2	Writing about common law	352
	20.3	Persua	ding throu	gh headings and introductions	354
		20.3.1	Writing p	persuasive and client-centered	355
		20.3.2	· ·	ine Up Front (BLUF) writing	357
	20.4			: illustrating with precise details	
			ock structu		358
		20.4.1	The story	telling of the rule explanation	359
		20.4.2	Persuasiv	e thesis sentences up front	361
		20.4.3	Choosing	g the length of the rule	
			explanat	ion: in-text versus parentheticals	363
			20.4.3.1	Will a case story help readers at all?	364
			20.4.3.2	How important is the case to the argument?	365
			20.4.3.3	How complicated are the facts of the case?	365
		20.4.4	Drafting	parentheticals	365
			20.4.4.1	Narrative parentheticals	365
			20.4.4.2	List parentheticals	366
			20.4.4.3	Quote parentheticals	366
	20.5	Applica	ation to th	e client's facts	367
		20.5.1		w your legal position is it with existing precedent	369
		20.5.2	Show ho	w your position is materially from precedent, and therefore	
				ave the opposite result	371

xxviii Contents

		20.5.3	Show how the plain meaning of a statute directly supports the result your client wants	373
		20.5.4	If a statute appears to contradict the result your client wants, show how the statute does not apply	373
21	Revi	sing th	ne story to strengthen the theme	375
	21.1	-	ence for revising across the major parts	375
	21.2		g the facts	373
	21.2		Reworking "telling" to become "showing" description	377
		21.2.2	Organizational revising: possibly use headings to prime the reader	379
	21.3	Revisin	g across the brief	379
	21.0		Visual impact moments in the Statement of Facts	379
		21.3.2	Connecting the facts to the argument	382
		21.3.3		383
			Strategizing word choices	384
	21.4		appens next in the writing process?	387
22			e first and last impressions: the on and Conclusion sections	389
	22.1	The po	wer of the introduction	389
		22.1.1	Planning the introduction	391
		22.1.2	Expressing the theme of the brief	394
		22.1.3	Developing the character in an introduction	396
		22.1.4	Developing the conflict and the goal of the story	398
		22.1.5	Wrap up	400
	22.2	-	g the final impression: writing a	400

23	Finis	shing u	ip: the of	ther parts of a brief	405
	23.1		ew: the co	ntents of a brief depend on	405
	23.2	Require	ements of t	the Federal Rules of Appellate	
		Proced	ure		406
		23.2.1	Appellant	's brief	407
			23.2.1.1	Corporate disclosure statement	407
			23.2.1.2	Table of contents	407
			23.2.1.3	Table of authorities	409
			23.2.1.4	Jurisdictional statement	410
			23.2.1.5	Statement of the issues	410
			23.2.1.6	Statement of the case	415
			23.2.1.7	Summary of the argument	416
			23.2.1.8	The legal argument and standards of review	417
			23.2.1.9	Conclusion	418
			23.2.1.10	Signature	419
				Certificate of compliance with Rule 32g(1)	419
		23.2.2	Appellee's	-	419
	23.3		ting rules		420
			O		
24				ment: tone and od visual design	423
	24.1	Docum	nent design	principles	424
		24.1.1	Contrast	with size and weight	424
		24.1.2	-	r: keep related items related opriate spacing	426
		24.1.3	0	t: justification and tables (and time and cover sheet tips)	428
		24.1.4		n and document consistency	430
	24.2			imitations in legal documents	431
	24.3			een reading	434
		24.3.1	9	outlining for navigability	434
				ting visuals into your document	435

xxx Contents

	24.3.2.1	Documentary evidence	
		presented as visuals	435
	24.3.2.2	Analytical reasoning presented	
		as visuals	436
24.4	Further readings		438

Part V: Oral argument 441

25	Persuading in person: oral argument			
	25.1	Setting the stage: the purpose of oral argument	444	
	25.2	Preparing for argument	447	
	25.3	Conduct of oral argument	452	
	25.4	Tips on presentation	456	

Epilogue 459 Index 461