

Preface to the Third Edition

This book is client-centered and storytelling-inclusive in its approach. Lawyers represent clients. Lawyers counsel and advocate for clients. In doing so, lawyers tell their client's story: the facts and the law's relationship to those facts. Storytelling plays a critical role in client representation, whether the lawyer is communicating to counsel the client, or communicating to advocate for the client's desired outcome.

Reflecting our client-centered approach, we have organized this book around the central reality of a lawyer's life: handling a client's case, especially those key moments of representation typically covered in a first-year legal communication course:

- getting to know the client (their character, their goals, and the obstacles they face in achieving their goals);
- investigating the law related to the client's legal issue;
- formulating a strategy to tell the client's story within the confines of the law; and
- implementing the strategy through written communication (both counseling and advocacy documents) and through oral communication with a judicial audience.

Notice that this organizational structure starts long before we actually place our fingertips on the keyboard to write a legal document. While one might think that a book on first-year legal communication would focus primarily on the final products (e.g., memos and briefs), this book focuses students on the process of communicating legal concepts, either to inform the client or another lawyer in the same office (what we call "counseling documents") or to persuade a reader to grant relief to the client (what we call "advocacy documents"). This process begins when we first meet our client and we learn the story that led them to seek our counsel. The process continues as we gather more information about the client's story, and research and synthesize the relevant

law and how it applies to our client's situation. It is only after we have a firm understanding of the substance of our client's issue that we are ready to begin the writing and rewriting necessary to counsel our client and advocate for them.

Organization of this third edition: the material is topical and we expanded the scope!

We have made considerable changes to this book since the second edition. The scope of earlier editions was limited to persuasive, advocacy-focused writing, and was intended for use in second-semester legal writing classes and advanced writing classes on advocacy. But because storytelling is also important when writing those counseling documents typically taught in the first semester (client letters, office memos, etc.), the third edition expands this scope to include the analysis and writing related to those documents.

To get there, and to keep the book from looking partitioned by semester rather than by lawyering tasks, we have organized the book around the essential elements of how lawyers think about legal problems.

- **Part I** introduces students to the client and law. It explores foundational principles of lawyering.
- **Part II** next examines how we develop the story of the law. In this part we talk about how to analyze and synthesize the law.
- **Part III** walks students through the way we develop the client's story and explains how we gather and assess the facts of our client's problem.
- **Part IV** moves the students to the writing stage with an emphasis how we communicate our thinking through organizing, revising, and the developing the theme and theory of the case.
- **Part V** deals with the special problem of oral advocacy in a litigation setting.

This organization permits flexibility in the way professors assign the material. The organization acknowledges the considerable overlap in the skills used to produce counseling documents (like memos and client letters) and the skills used in producing advocacy documents.

Consequently, rather than making a guess about the sequence of any professor's semester, we organized the material *topically* to make things more flexible for the professor. We also imagine that professors will reassign parts of chapters at different moments in the full-year curriculum, especially as the class moves from counseling documents (often done in the first semester) to advocacy documents (often done in the second semester). This reflection on familiar concepts enriches students' understanding of those concepts and how to transfer the skills previously learned to new context.

We spent three years field testing this topical approach to the textbook with our students. Some of our colleagues tested it alongside us and offered feedback on what changes to make. Because we wrote a few new chapters and changed the organization, several of the chapters in the first and second editions have been renumbered. In greater detail, the book takes this approach:

Part I creates the setting for the rest of the book. It introduces fundamental principles of lawyering: understanding our client, understanding the process of persuasion, and understanding how legal stories are structured through legal argument. As in previous editions, **Chapter 1** begins with examining the lawyer-client relationship. **Chapter 2 is new**; it explains fundamental legal concepts, including the sources of law, *stare decisis*, and binding v. persuasive authority. **Chapter 3** continues the exploration of foundational concepts, including *logos*, *pathos*, and *ethos* and other concepts related to persuasion. **Chapters 4 and 5** are largely unchanged from Chapters 3 and 4 of the second edition, introducing narrative theory and the importance of audience. **Chapter 5** also examines the difference between counseling documents and advocacy documents.

Part II examines how lawyers think about the law. **Chapter 6** examines the nature of legal rules and introduces the five type of legal reasoning: text-based reasoning, analogical reasoning, inferential reasoning, policy-based reasoning, and narrative reasoning. **Chapter 7** explores text-based reasoning, primarily through the prism of statutory interpretation. **Chapter 8 is new**; it introduces analogical reasoning and the foundational organizing principle of CREAC. **Chapters 9, 10, and 11** (updated versions of Chapters 11, 13, and 12 from the second edition), explore policy-based reasoning, inferential reasoning, and managing adverse material. Finally, **Chapter 12** (updated version of Chapter 9.75 from the second edition) cautions about the dangers of logical fallacies.

Part III moves from the story of the law to the story of the parties, exploring how we investigate and assess facts and use those facts to tell our client's story. These chapters, **13 through 17** are largely unchanged from **Chapters 5 through 9** from the second edition. **Chapters 13 and 14** examine how to gather facts and then use those facts to research and assess the legal issues they present. **Chapter 15** updates how we develop the central characters of the party's story and examines the importance of setting in creating a persuasive story. **Chapter 16** introduces the shadow story as a working document to capture the emotional impact of a story. **Chapter 17** begins the transition from thinking about how to craft the story to writing the working draft of a Facts section.

Part IV completes the transition from thinking about a legal problem to the writing stage. **Chapter 18 is new**; it is about how we structure a variety of counseling documents, including intra-office memos, bench memos, and client letters. **Chapters 19 through 23** update Chapters 14 through 19 from the second edition. **Chapter 19** (Chapter 14 in the second edition) examines organizing strategies for both counseling and advocacy documents. It covers both the Legal Discussion section of a counseling document (such as an office memo) and the Legal Argument section of an advocacy document, either a trial or appellate brief. There are many similarities between those types of documents, but we highlight the differences as well. **Chapters 20 and 21** emphasize revision strategies that focus on persuasion. They are what you knew as the important Chapters 15 and 16 in the second edition. **Chapter 22** examines the persuasive power of Introductions and Conclusions, and is an updated version of Chapter 17 in the second edition. **Chapter 23** explains the parts of an appellate brief, as required by the Federal Rules of Appellate Procedure. **Chapter 24** explores how document design plays an important role in the persuasive power of contemporary advocacy documents including student-centered advocacy such as resumes and cover sheets to writing samples. These are updated versions of the chapters in the second edition.

Part V transitions from written advocacy to oral advocacy. **Chapter 25** updates Chapter 20 from the second edition and simplifies oral advocacy to two fundamental principles: know your stuff, and help the court.

To help those who used the second edition, here is a table to show how the third edition's chapters relate to the previous edition:

		Second edition counterpart chapter
Part I	Introduction to client and law	
1	Meeting the client	1
2	Foundations	New
3	Effective tools for communicating with or on behalf of clients	2
4	Story as a tool for communication and persuasion	3
5	Thinking about the audience	4
Part II	Developing the story of the law	
6	Types of legal reasoning	first half of 9.75
7	Interpreting statutes	10
8	Analogical reasoning	New
9	Creating policy arguments	11
10	Inferential reasoning	13
11	Managing adverse material	12
12	Testing the legal argument	Last half of 9.75
Part III	Developing the client's story	
13	Gathering and assessing the facts	5
14	Researching the client's legal issue(s)	6
15	Representing your client, the protagonist	7
16	Starting to write: shadow stories and theme development	8
17	Creating the working draft of the Facts section	9
Part IV	Creating documents	
18	Structure of counseling documents	New
19	Organizing the working draft of the legal analysis	14
20	Revising the legal argument for efficacy: persuasive rules and persuasive application	15
21	Revising the story to strengthen the theme	16
22	Making the first and last impressions: the Introduction and Conclusion sections	17
23	Finishing up: the other parts of a brief	18
24	Dressing your document: tone and credibility with good visual design	19
Part V	Oral argument	
25	Persuading in person: oral argument	20

A Note on Generative AI

AI is not ready for prime time

When New York City lawyers Steven A. Schwartz and Peter LoDuca had to file a brief in a Manhattan court opposing a motion to dismiss their client's case, they decided to use the newest available technology, ChatGPT, to research and write the brief. The program produced a well-written ten-page brief, citing numerous cases, so Mr. Schwartz filed the brief in court.

When opposing counsel and the judge read the brief, they did what every legal reader does: they tried to read the cited cases to see if they were good authority or really stood for the stated proposition. But nobody could find the cases! It turned out that ChatGPT had just made them up out of thin air.

Schwartz and LoDuca ultimately admitted that they had failed to check the accuracy of the Chat GPT-generated document. For this misuse of generative AI, the judge in the case fined the lawyers \$5,000 and required them to write letters to the judges whose names were wrongfully invoked in the brief, noting that the lawyers conduct promoted "cynicism about the legal profession and the American judicial system."

This story is a good reminder to us all that lawyers should be cautious about all technology tools, and that generative AI is particularly problematic.

Source: Benjamin Weiser, *ChatGPT Lawyers Are Ordred to Consider Seeking Forgiveness*, NEW YORK TIMES, June 22, 2023.

Right now, as we finish writing the third edition, lawyers, judges, and law professors are considering whether or when legal writers should use generative artificial intelligence engines such as ChatGPT as a tool to improve their legal writing. Several federal judges have announced new rules requiring attorneys to certify whether they used these tools in court filings. Noted platforms such as Google, Microsoft, Grammarly, and Lexis/Nexis are introducing generative AI features to their software. Their capabilities are changing weekly.

We have chosen not to address generative AI in this text for several reasons. First, and most importantly, the entire field of generative AI is developing so rapidly that anything we write about it now will be out of date by the time our manuscript is put into a finished book.

Second, while all of the major legal research engines have been incorporating extractive aspects of artificial intelligence for a long time, the concept of "generative AI," in which the program tries to write legal documents, is not yet fully developed and is not ready to replace human authors.¹ These

¹One speaker at a conference one of the authors recently attended told the audience that, while artificial intelligence is quite good at proposing a wide range of possible solutions to a complex problem, it still needs a human to both identify the problem and then evaluate whether any of the proposed solutions are appropriate. Thus, AI is not designed or intended to replace human thought; it is only intended to leverage human creativity.

programs don't really "think" at all; they merely try to predict what a particular genre of writing might look like. Generative AI does not "think" and therefore doesn't reason. Nor does it check facts. And, as the true story in the shadow box shows, it is subject to a phenomenon known as "hallucinations," where it just invents information that it thinks will look good.

Until this new technology is much more fully developed, we advise students to approach it with extreme caution.

