Prologue

Topeka, Kansas, 1950. World War II had ended five years ago. The country was turning to happier times. The Baby Boom was underway. Factories were turning out cars and refrigerators and a new device called a television. Prosperity reigned.

But not everyone was pleased with the status quo of 1950.

> In September 1950, Linda Brown, an eight-year-old African-American child who lived in Topeka, Kansas, was ready to begin the third grade. Her first years of education had been spent at Monroe, an all-black school located about twenty-one blocks from the Brown home. In a modest neighborhood, the Monroe school building had been constructed in 1926. It was of brick in the Italian Renaissance style, well-cared for and …"a credit to the community" where it was located. The Brown's home was in a racially mixed neighborhood. The children of white and other nonblack families of the neighborhood attended Sumner School about seven blocks from the Brown residence. Named for abolitionist leader Charles Sumner, the first school on the Sumner site was initially for blacks only, but in 1885 it was designated for white students. The current building at Sumner was built in 1935. It was constructed of light-colored brick with a good deal of ornamentation. The testimony of the expert witness was that the Sumner classrooms were more spacious and the facilities more ample and in keeping with a good school situation. The academic programs at Monroe and Sumner were comparable.
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> Bus transportation was provided for Linda and other Monroe students along a designated route. Linda boarded the bus at a pick-up station about seven blocks from her home. There was no shelter for waiting passengers, and to reach the pick-up station Linda and other black students had to walk through a railroad switchyard and cross Kansas Avenue, Topeka's main commercial street, where the motor traffic was heavy. No such hazards were encountered by students walking to Sumner.

> As the 1950–51 school term was about to begin Oliver Brown, Linda's father, was concerned about his daughter's safety and comfort, the inconvenience of her daily trip to and from Monroe School, and the quality of the educational opportunity afforded her by the Topeka school district. On the day appointed for her enrollment he led Linda to Sumner, the neighborhood school, and requested that she be admitted. The request was denied solely because the child was black and the rules of the board of education limited attendance at Sumner School to white, or approximately white, children. Linda continued to attend Monroe, but the events of that September morning commenced a series of happenings from which Linda Brown emerged as a celebrity and a folk heroine of the civil rights movement.[1]

We all know how this case turned out. In one of the most important decisions of the twentieth century, the United States Supreme Court ruled that separate schools for black and white children were "inherently unequal" and therefore unconstitutional.[2] But let's stop for a moment and consider the choices facing Linda Brown and her father Oliver in September 1950. The law of the land was, and had been for a long time, that separate facilities for black and white persons were permissible so long as the facilities were "equal."[3] To challenge that law meant that Linda and her family had to take on not only the entire city school system, but also a long-established line

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[1]Paul Wilson, *A Time to Lose: Representing Kansas in* Brown v. Board of Education 8–10 (U. Press of Kan. 1995) (footnotes omitted). (Copyright © 1995 by the University Press of Kansas. Used by permission of the publisher.) The author of this book was an assistant attorney general for the state of Kansas in the 1950s. He wrote the briefs and represented the Topeka Board of Education in oral argument on the case before the United States Supreme Court. By the way, the reference in this passage to "approximately white children" is explained later in the book: Hispanic, Asian, and American Indian children were permitted to attend the Sumner school. Only black children were segregated at the Monroe school. *Id.* at 15. In Chapter 15, we return to this story, and particularly the interesting fact about the school's namesake.

[2]*Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

[3]*Plessy v. Ferguson*, 163 U.S. 537 (1896).

of precedents that originated in the United States Supreme Court. And the facts of her case were, overall, not shocking. At least one of the witnesses from her neighborhood described the blacks-only school as "a credit to the community," and the academic programs at the two schools were described by experts as "comparable."

Nevertheless, Linda and her family believed that enforced segregation was wrong, not only because of the inconvenience of having to travel to a much more distant school, but also because of how it made them feel. And by telling a compelling story about their experiences, they helped change our society in a dramatic way.

Stories matter.

Lawyers are paid to advocate for their clients. Advocacy is a form of communication, designed to persuade someone. Legal advocacy, consequently, is a communication designed to persuade someone to take a position about the client's legal claim. And because human beings are hardwired to think and communicate in stories, one of the central premises for this book is that stories are an effective way to advocate on behalf of our clients. We tell each other stories all the time. Stories help us imagine what that other person senses or feels, something that we cannot know for certain, other than through empathy and conjecture. A story that "feels" true to the listener is a powerful tool for persuading that listener because that feeling comes from within the listener.

We call our approach to teaching "client-centered" because we believe the role of the lawyer is to show the court the client's story. But this text is more than just a theoretical discussion of how client stories work. We have organized this book around the central reality of a lawyer's life: handling a client's case, from start to finish. That process includes

- getting to know your client (his character, his goals, and the obstacles he faces in achieving his goals);
- investigating the law;

- formulating a strategy to tell your client's story within the confines of the law; and
- implementing the strategy through written and oral communication to the decision maker.

Notice that this organizational structure starts long before you actually place your fingertips on the keyboard to write something. While you might think that a book on legal writing would focus on the final product (the brief), the actual writing process begins long before you sit down to write. You need to know what to write about, which means getting to know your client's story intimately.

But before getting to that process, it's helpful to know about some basic principles of persuasion. The first few chapters introduce you to the fundamental principles of persuasive lawyering: understanding your client, understanding the process of persuasion, and understanding how legal stories are structured through legal argument. We will explore such questions as How do readers react to what you are saying? and How do you reach into the minds of readers and persuade them?

Think of the first chapters as creating the "setting" for the rest of the book. Our ultimate objective, of course, is to teach you how to produce writing that will persuade judges to rule in your clients' favor and how storytelling techniques can help you accomplish this.

Embracing curiosity

> *"Curiouser and curiouser!" cried Alice (she was so much surprised, that for the moment she quite forgot how to speak good English); "now I'm opening out like the largest telescope that ever was! Good-bye, feet!" (for when she looked down at her feet, they seemed to be almost out of sight, they were getting so far off).*

Lewis Carroll, from *Alice's Adventures in Wonderland*, Chapter 2

Curiosity is an essential lawyering skill. Curiosity leads to investigation and discovery. It harnesses confusion and staves off frustration. Curiosity leads to better thinking, better ways of doing things, better solutions to problems. A good lawyer is curious about the parties to a dispute. Why did they behave the way they did? What does my client hope to get out of this? Why does the opposing party think its position is right? What facts do I need to know to understand this case? Only by answering all of these questions can the lawyer craft a credible story.

A good lawyer is also curious about the law: why, exactly, is the rule the way it is? Does the rule make sense in the context to which it is now being applied? Does the rule produce a result that is intuitively correct? Is there another way of looking at a problem, using different rules, that might produce a more satisfying answer?

A good lawyer is curious yet again about the nature of a lawsuit. What court would be the best place to file this lawsuit? How can I make sure I have sued the right party? What is the most effective way to make this claim against my client go away? By continuing to ask questions like these, a good lawyer better understands her client's story and consequently can better help resolve her client's problem.

Think about Linda Brown's lawyer, Thurgood Marshall. The rule of "separate but equal" had been settled for almost 60 years by the time the case was brought into court. But Marshall was curious: What impact did the "separate but equal" doctrine have on young children? What if the rule were different? How would that affect his client's life? Would a different rule improve Linda Brown's life? How can we make Linda Brown's story resonate with the Supreme Court?

Just like Alice, you may need to stretch yourself into shapes you never imagined in order to see things more clearly. As we will learn later, stories involve characters (typically your client) striving to overcome obstacles to achieve important goals. The obstacle might be an inconvenient fact, or it may be unfavorable law. But if the goal is

worthy, it is your job to help your client find a way to achieve that goal. And that may involve stretching yourself to be able to see over, or around, the obstacle; to find a new route to success; to stay curious.

The recursive process of writing

The writing process consists of four major stages:

1. Prewriting (research and planning)
2. Writing a first working draft (a "brain dump," or getting it all on paper)
3. Revising and rewriting (rethinking, reorganizing, improving)
4. Polishing (proofreading, formatting, editing for writing mechanics, word choices, concision, etc.)

As you probably know already, this is not a simple, step-by-step process. Not all of these steps need to occur in this exact sequence, although all of them have to occur at some point. The process of writing in any field is recursive, with the writer revisiting the different stages in a looping manner. A writer might have a document's organization initially set but then decide to completely reorganize the document. The same recursive process occurs in persuasive legal writing. The process begins when a client presents a problem. The lawyer may identify the likely legal means to resolve that problem and even have some ideas about how to connect the law to the facts of the client's story. However, before the lawyer can formulate a solution, she might need more information—more facts and more knowledge of the applicable law. That information will lead to a different understanding of the best legal argument for the client. The lawyer may begin writing an outline and a draft of a document. But the act of writing may also cause her to revise her understanding of the problem. Perhaps the lawyer will discard her initial legal theories and adopt new ones. Or perhaps she will maintain her same understanding but will deepen the analysis. Each of those outcomes will cause her, in turn, to search for new information.

All of this leads to a truism that you may have heard before: **writing is thinking**. Good lawyers begin to write even before they completely understand how to best solve their clients' problems. The act of writing leads the writer to have more ideas and to further refine her analysis. Indeed, some aspects of a persuasive argument become clear to the lawyer only after she has completed at least one—and often two or three—drafts. For example, it is sometimes difficult to determine the most effective theme of the client's case until later in the revising process.

The take-home point is this: because the writing process helps you to clarify your ideas, you will want to start the writing process early, creating preliminary documents that will help you begin to put together the client's story.

If writing were linear, we might identify the stages of the writing process as shown in Figure P-1.

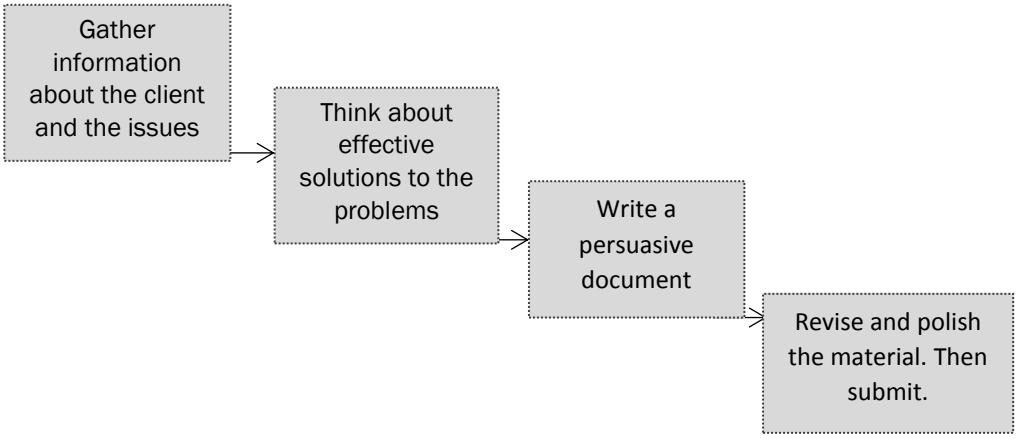

Figure P-1: Four stages of the writing process

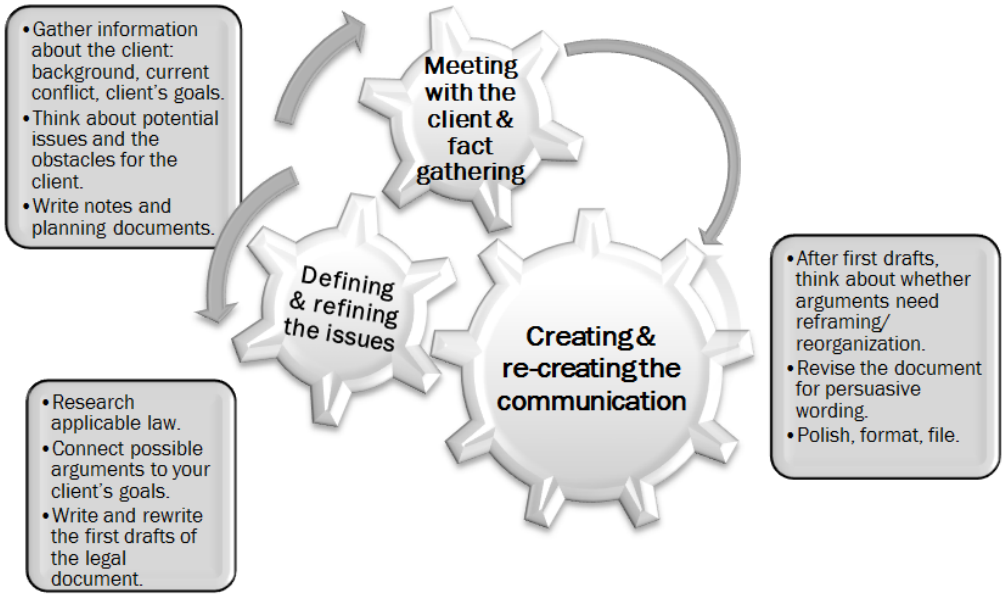

Figure P-2: Recursive writing process

This is, however, an oversimplification of how we really write. Though this is a useful *general* approach, in reality, we need to write, think, and gather information at each step of the process. Figure P-2, then, shows a more realistic approach to the process of effective writing.

This book has been structured to reflect this recursive process. The first chapter starts with the ultimate foundation of legal advocacy: the client. The second chapter then provides the foundational background about what persuades us, from classical rhetoric, to types of reader responses, to storytelling structures that deliver persuasive messages to the audience. The book next moves to the intermediate stages of researching the facts and bringing the law and facts together to form the outline and working drafts of the client's persuasive story. The third part of the book discusses revising the working drafts for persuasion. The book concludes

with the last steps: completing and formatting the written persuasive document, and creating the oral argument that accompanies it.

The recursive nature of writing leads to what may be counterintuitive strategies. For example, the parts of a brief are not usually written in the same order that they will appear in the finished document. This book is written in the manner that a lawyer might approach a situation involving a brief: fact gathering, initial case planning, researching and drafting the legal arguments, and then revising the facts section of the document. Keep in mind the key idea that every stage of the writing process builds on what has come before. At each step, the lawyer gathers additional information, reflects on how that information fits with (or changes) what he has done before, and adds detail to the working drafts.

How to use this book

To demonstrate how these principles work in practice, this book uses two hypothetical cases that former law students worked on in prior legal writing courses. We chose these scenarios specifically because they are easy to imagine and represent understandable legal stories. One of the two scenarios involves a question of statutory interpretation about the phrase "dating relationship," as interpreted in an Internet situation, and the other involves a question of common-law contract interpretation and enforcement relating to unused hotel room reservations. From time to time throughout these chapters, we discuss how the lawyers representing clients in those cases might approach their various tasks. The appendices include sample briefs from these two simulation-case files, and are the result of the processes we describe in this book. The sample briefs are largely based on briefs submitted by our former law students—and for their permission to use their work, we again thank those former students. We have added annotations to those briefs to assist you in spotting the things the briefs do well.

The first hypothetical case, *Hawthorne v. Beagle*, turns on the statutory interpretation of the phrase "dating relationship" and involves a domestic violence situation. The two parties meet at a speed-dating event, correspond online via video conferencing and Facebook, and then end that correspondence unhappily. We generally refer to this example as the "Internet dating case" or the "statutory construction case" throughout the book.

The second hypothetical case, *Gloucester Hotel v. Save Our Forest Trees, Inc.,* involves two parties in a dispute over hotel rooms. The defendant, SOFT, Inc., is a small nonprofit organization that plans a conference at a hypothetical chain hotel in Indiana. It signs a contract with the hotel to reserve a block of rooms for conference attendees but does not attract enough registrants to fill the guaranteed block of rooms. The hotel sells those rooms to nonconference guests after the reservation deadline passes, but it still seeks to enforce a liquidated damages clause in the contract to the tune of about $9,000 (an amount larger than the profit SOFT actually earns from putting on the conference). We generally refer to this as the "hotel reservation case" or the "common law case" throughout the book.

Additional details about both of these cases appear in the various chapters as they become relevant. But for now, in the next chapter we see what happens when a lawyer first meets her client.