Contents

Acknowledgments ................................................................. xxiii

Chapter 1: Writing and Professional Work  1

§1.1 Writing as a Professional ............................................. 1
§1.2 A Professional Audience ............................................. 2
§1.3 Memos and Briefs ....................................................... 2
§1.4 Predictive Writing and Persuasive Writing .................... 2
§1.5 How to Use This Book .................................................. 3

Chapter 2: Inside a Rule of Law  7

§2.1 The Inner Structure of a Rule ......................................... 7
§2.2 Two Types of Tests ...................................................... 8
§2.3 Four Types of Causal Terms ......................................... 9
§2.4 Analyzing a Rule to Figure Out What It Means ............... 10
  §2.4.1 Step 1: Break Down the Rule into Its Parts ............... 10
  §2.4.2 Step 2: Look at Each Part Separately ...................... 11
  §2.4.3 Step 3: Put the Rule Back Together in a Way That Helps You Use It ............................................. 12
  §2.4.4 The Three Steps Summarized ................................ 13

Exercise 2-A Four Rules for Law School Exams .................. 14
Exercise 2-B A Rule on Late Papers ............................... 15
Chapter 3: More about Rules 17

§3.1 Remedies, Causes of Action, and Affirmative Defenses 17

§3.2 Where Rules Come From (Sources of Law) 18

§3.2.1 Statutes 18

§3.2.2 Case Law 18

§3.3 Some Questions about Rules 19

Exercise 3-A Nansen and Byrd 23

Chapter 4: Analyzing a Statute 27

§4.1 A Statute’s Structure 27

§4.2 Outlining a Statute 27

§4.2.1 Step 1: Decide How Many Legal Rules Are in the Statute 28

§4.2.2 Step 2: Analyze Each Rule to Determine What It Means 29

§4.2.3 The Two Steps Summarized 31

Exercise 4-A Outlining U.C.C. § 2-302(1) on Unconscionability 31

Exercise 4-B Outlining a Dram Shop Liability Statute 32

Exercise 4-C Applying a Dram Shop Liability Statute 32

Chapter 5: Analyzing a Judicial Opinion 35

§5.1 The Contents of a Judicial Opinion 35

§5.2 Reading Aggressively in Law School 37

Exercise 5-A Analyzing a Judicial Opinion 39

Exercise 5-B Distinguishing Holdings, Dicta, Rules, and Reasoning 41

Chapter 6: Reading a Case for Issues, Rules, and Determinative Facts 43

§6.1 How to Identify Issues, Rules, and Determinative Facts 43

§6.2 Formulating a Narrow, Middling, or Broad Rule 45

Exercise 6-A Isolating Determinative Facts and Formulating a Rule 46

Exercise 6-B The Cow and the Swimming Pool 46
Chapter 10: Working with Cases    79

§10.1  Eight Skills for Working with Cases    79
§10.2  Analogizing and Distinguishing Precedent Cases    80
§10.3  Identifying Policy Reasoning    82
§10.4  Synthesis    83
§10.5  Reconciling Authority    84
§10.6  Testing for Realism    85

Exercise 10-A  To Google or Not to Google?    85

Chapter 11: Getting to Know Yourself as a Writer    91

§11.1  Product and Process    91
§11.2  What Do You Do When You Write?    92
§11.3  Voice    92
§11.4  Confidence    92
§11.5  Learning Styles and Writing    93

Chapter 12: Inside the Process of Writing    97

§12.1  Five Phases of Writing    97
§12.2  Managing Time    98
§12.3  Researching and Analyzing    99
§12.4  Organizing Your Raw Materials into an Outline    99
§12.5  Producing a First Draft    99
§12.6  Overcoming Writer’s Block    100
§12.7  Rewriting    101
§12.8  Using Writing to Help You Think    104
§12.9  Polishing    105
§12.10  Plagiarism    105
Contents

Chapter 13: How Professional Writers Plan Their Writing 107
§13.1 Myths about Outlines ........................................ 107
§13.2 A Method of Planning Your Writing ...................... 109
§13.3 Other Methods of Planning Your Writing ............. 110

Chapter 14: Writing an Office Memorandum 115
§14.1 Structure of an Office Memorandum ...................... 115
§14.2 Which Part of the Memo to Write First .................. 118
§14.3 An Office Memo’s Audience ............................ 119

Chapter 15: Interviewing the Client 121
§15.1 Clients and Lawyers .................................. 121
§15.2 The Interview ........................................ 122
§15.2.1 Learning What the Client Knows .................... 122
§15.2.2 The Art of the Question ............................. 123
§15.2.3 Listening and Talking ................................ 124
§15.2.4 How to Conclude ...................................... 124

Chapter 16: Predictive Writing in an Office Memorandum 125
§16.1 Predicting in Writing .................................... 125
§16.2 An Example of the Predictive Process: Taylor and Garrett ... 126
§16.3 How to Test Your Writing for Predictiveness .......... 130
Chapter 17: CREAC: A Formula for Structuring Proof of a Conclusion of Law  135

§17.1  The Need to Organize with Care (Kendrick and Jordan) ..... 135  
§17.2  A Formula for Organizing Analysis .......................... 136  
  §17.2.1  CREAC ........................................ 136  
  §17.2.2  Why Readers Prefer CREAC Organization .......... 138  
§17.3  Rule Explanation and Rule Application .................... 139  
  §17.3.1  How to Explain a Rule. ............................. 140  
  §17.3.2  How to Apply a Rule. .................................. 141  

Exercise 17-A  Changing Planes in Little Rock .................. 142

Chapter 18: Varying the Sequence and Depth of Rule Explanation and Rule Application  145

§18.1  Varying the CREAC Formula to Suit Your Needs .......... 145  
§18.2  Varying the Sequence .................................. 145  
§18.3  Varying the Depth of Rule Explanation or Rule Application 146  
§18.4  Comprehensive Analysis ................................ 146  
§18.5  Substantiating Analysis ................................... 149  
§18.6  Conclusory Analysis ..................................... 151  
§18.7  Cryptic Analysis ....................................... 151

Chapter 19: Advanced CREAC: Organizing More Than One Issue  153

§19.1  Introduction ............................................... 153  
§19.2  How to Organize When More Than One Element or Factor Is at Issue ........................................ 154  
§19.3  How to Organize When More Than One Claim or Defense Is at Issue ........................................ 155  
§19.4  How to Organize Other Types of Separate but Related Issues . 156  
§19.5  How to Work with Multi-Issue Situations ................ 156
Contents

Chapter 20: Working with CREAC in First Drafts and in Later Drafts 159

§20.1 Using CREAC to Outline and to Begin Your First Draft .... 159
§20.2 How to Test Your Writing for Effective Organization .... 161

5 Working Effectively with Details

Chapter 21: Writing Effective Paragraphs and Sentences 165

§21.1 Paragraphs Reveal the Organizational Details ............ 165
§21.2 Descriptive and Probative Paragraphs ..................... 166
§21.3 Proposition Sentences, Topic Sentences, and Transition Sentences .................................................. 167
§21.4 How to Test Your Paragraphs for Effectiveness ........ 167
§21.5 How to Test Your Sentences for Effectiveness .......... 168
Exercise 21-A Probative and Descriptive Paragraphs .......... 175
Exercise 21-B Editing for Effective Sentence Structure ........ 175

Chapter 22: Effective Style: Be Clear, Vivid, and Concise 177

§22.1 Clarity and Vividness ........................................... 177
§22.2 Conciseness ...................................................... 179
§22.3 How to Test Your Writing for Effective Style .......... 180
§22.4 Our Style and Yours .......................................... 186
Exercise 22-A Style, Sentences, and Rewriting ............... 186

Chapter 23: Citing and Quoting Authority 189

§23.1 When and Why to Cite Authority ............................ 189
§23.2 Rules Governing All Citations ............................... 190
§23.3 Notes on Quotes .................................................. 195
§23.3.1 When to Quote .............................................. 195
§23.3.2 Quote Sparingly or Not at All ......................... 195
§23.3.3 The Mechanics of Quoting ................................. 196
§24.3.4 How to Test Your Quotations for Effectiveness. ...... 197

Exercise 23-A  Quoting the First Amendment ...................... 198

Informal Analytical Writing

Chapter 24: Advising and Counseling the Client  201
§24.1 Advising and Counseling ..................................... 201
§24.2 The Role of Writing in Advice and Counseling .......... 202
§24.3 Who Decides What ............................................ 203
§24.4 Predicting ...................................................... 203

Chapter 25: Client Letters  205
§25.1 Why and How Lawyers Write Client Advice Letters .... 205
§25.2 Client Letter Format .......................................... 206

Chapter 26: Electronic Communication  209
§26.1 Professionalism, Confidentiality, and the Dangerous Send Button .............................................. 209
§26.2 Email Memos Between Lawyers ............................. 210

The Shift to Persuasion

Chapter 27: What Persuades a Court?  215
§27.1 A Compelling Theory and Theme Persuade .............. 215
§27.2 A Compelling Story Persuades ............................... 216
Contents

§27.3 Compelling Arguments Persuade ......................... 218
§27.4 How Arguments and Stories Work Together ............... 218
§27.5 Overcoming Your Weaknesses Persuades .................. 220
§27.6 Solving Judges’ Problems Persuades ..................... 221
§27.7 Professionalism Persuades ................................. 222

Chapter 28: Writing a Motion Memorandum  223

§28.1 Persuasive Writing in Trial Courts ....................... 223
§28.2 Motion Memorandum Format ............................. 224
§28.3 Writing the Memorandum .................................. 225
§28.4 Handling the Procedural Posture .......................... 226
  §28.4.1 Researching the Law Governing the Procedural Posture 226
  §28.4.2 Writing within the Procedural Posture ................ 227

Chapter 29: The Statement of the Case in a Motion Memo or Appellate Brief  231

§29.1 How a Statement of the Case Persuades ................... 231
§29.2 The Record ................................................. 233
§29.3 Fact Ethics .................................................. 234

Chapter 30: Developing a Persuasive Story  235

§30.1 The Power of Stories ........................................ 235
§30.2 How Stories Persuade ....................................... 236
§30.3 Building the Story—Generally ............................. 237
§30.4 Characters ................................................... 238
§30.5 Imagery ....................................................... 239
§30.6 Finding the Story ............................................ 240
§30.7 Two Last Questions ........................................ 240
## Chapter 31: Telling the Story Persuasively 241

### §31.1 Selecting Facts to Tell the Story 241

### §31.2 How to Test a Statement of the Case for Persuasiveness 243

**Exercise 31-A** Storytelling 246

**Exercise 31-B** Factual Inferences 246

**Exercise 31-C** Evaluating a Story 247

## Chapter 32: The Argument in a Motion Memo or Appellate Brief 251

### §32.1 Arguments 251

### §32.2 Understanding the Judicial Audience 252

### §32.3 How to Test Your Arguments for Effectiveness 255

### §32.4 Argumentation Ethics and Professionalism 259

**Exercise 32-A** Organizing Arguments 260

## Chapter 33: Point Headings and Subheadings 261

### §33.1 What Point Headings Do 261

### §33.2 What Each Point Heading Should Include 263

### §33.3 Subheadings 264

### §33.4 Organizing Your Point Headings and Subheadings 265

### §33.5 How to Test Your Point Headings for Effectiveness 266

**Exercise 33-A** Evaluating Point Headings 268

**Exercise 33-B** Creating a Point Heading 270

**Exercise 33-C** Revising Point Headings 270
# Contents

## Appellate Briefs and Oral Argument

### Chapter 34: Appellate Practice  275

<table>
<thead>
<tr>
<th>§34.1</th>
<th>Introduction to Appeals</th>
<th>275</th>
</tr>
</thead>
<tbody>
<tr>
<td>§34.2</td>
<td>The Roles of the Brief and the Oral Argument</td>
<td>275</td>
</tr>
<tr>
<td>§34.3</td>
<td>How Judges Read Appellate Briefs</td>
<td>276</td>
</tr>
</tbody>
</table>

### Chapter 35: Writing the Appellate Brief  279

<table>
<thead>
<tr>
<th>§35.1</th>
<th>Appellate Brief Format</th>
<th>279</th>
</tr>
</thead>
<tbody>
<tr>
<td>§35.2</td>
<td>Three Brief-Writing Suggestions</td>
<td>281</td>
</tr>
<tr>
<td>§35.3</td>
<td>What Part of the Brief to Write First</td>
<td>282</td>
</tr>
<tr>
<td>§35.4</td>
<td>The Last Step: Creating the Table of Contents and the Table of Authorities</td>
<td>283</td>
</tr>
</tbody>
</table>

### Chapter 36: Handling Standards of Review  285

<table>
<thead>
<tr>
<th>§36.1</th>
<th>The Three Main Standards of Review</th>
<th>285</th>
</tr>
</thead>
<tbody>
<tr>
<td>§36.2</td>
<td>How to Figure Out Which Standard of Review Governs Your Issue</td>
<td>289</td>
</tr>
<tr>
<td>§36.3</td>
<td>How to Use Standards of Review in a Brief</td>
<td>290</td>
</tr>
</tbody>
</table>

### Chapter 37: Questions Presented  293

<table>
<thead>
<tr>
<th>§37.1</th>
<th>The Purpose of a Question Presented</th>
<th>293</th>
</tr>
</thead>
<tbody>
<tr>
<td>§37.2</td>
<td>Two Generally Effective Formats</td>
<td>293</td>
</tr>
<tr>
<td>§37.3</td>
<td>Incorporating Determinative Facts</td>
<td>295</td>
</tr>
<tr>
<td>§37.4</td>
<td>Formats to Use Only in Certain Situations</td>
<td>296</td>
</tr>
<tr>
<td>§37.5</td>
<td>How to Write a Question Presented</td>
<td>297</td>
</tr>
<tr>
<td>§37.6</td>
<td>How to Test Your Questions Presented for Effectiveness</td>
<td>297</td>
</tr>
</tbody>
</table>

**Exercise 37-A**  Questions Presented and Google Glass  302
Chapter 38: Making Policy Arguments  305

§38.1  Why Policy Is Especially Important in an Appeal ............ 305
§38.2  Types of Policy Arguments ......................................... 306
§38.3  How to Make a Policy Argument ................................. 306

Chapter 39: Oral Argument  309

§39.1  Three Goals at Oral Argument ................................. 309
§39.2  Structure of an Oral Argument .................................... 309
§39.3  Questions from the Bench ........................................... 312
§39.4  Affect, Delivery, and Style ......................................... 314
§39.5  Formalities and Customs of the Courtroom .................... 316
§39.6  Preparation for Oral Argument .................................... 316

Appendices ................................................................. 319

Appendix A  Sample Office Memorandum .............................. 321
Appendix B  Sample Client Letter ........................................ 327
Appendix C  Sample Motion Memorandum ............................ 331
Appendix D  Sample Appellate Brief .................................... 343

Index  357