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Article

*459 FICTION 101: A PRIMER FOR LAWYERS ON HOW TO USE FICTION WRITING TECHNIQUES TO WRITE PERSUASIVE FACTS SECTIONS [FNd1]

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I. INTRODUCTION

"Go that way, very fast, and if something gets in your way, turn." [FN1] A lawyer hearing a ski instructor give this advice to a skier at the top of a slope would prepare for a malpractice suit. But for years we lawyers have accepted similarly question-begging advice from our professors and more senior lawyers, who instruct, in writing the facts section of briefs and memoranda, "Tell a story" and "Don't bore your reader," without ever explaining *how*. A review of the most popular legal writing textbooks reveals the same gap. [FN2] This gap is glaring, especially since most lawyers ***460** reflexively acknowledge that it is important to tell a story to write a good facts section, and that the facts section of a brief plays an extremely important role in persuading judges. [FN3] The only books containing any instruction on legal storytelling are trial practice books, which gear lawyers up for juries. [FN4] As we will show, however, the story concept is such a ***461** powerful tool of persuasion that lawyers should not wait until the eve of trial to begin crafting the story of their case.

So, why does no one teach lawyers how to tell stories? Because few people actually know how to tell a story. Yet a story is essential to a good facts section. This implies that few lawyers know how to write good facts sections. This ignorance is not the fault of legal writing teachers, and this article is in no way meant as an indictment, but a help. For we found ourselves in the same situation in our first two years teaching legal writing, feeling increasingly uncomfortable after advising students to "Tell a story."

In this article we attempt to give lawyers some of the "how to" in telling a story. We also briefly explain why, until now, no one has taught lawyers how to tell a story. We view this article as a "primer" in legal storytelling, in that we focus on the basic building blocks of all stories-character, conflict and resolution-and two essential techniques in all storytelling-organization and point-of-view. In this "how to" spirit, we provide exercises and checklists to help writers craft stories in their legal writing. Of course, the best lawyers are often excellent storytellers, and many lawyers can, at times, weave an excellent yarn. The goal of this article is to help lawyers who never tell stories to start telling them, to assist lawyers who sometimes tell stories to tell them more often, and to make lawyers who always tell stories more conscious of their process, so that they may tell better stories. ***462** Finally, we hope that law professors will realize that they can teach this material in basic legal writing courses.

II. HISTORY 101: A BRIEF EXPLANATION OF WHY NO ONE TEACHES ANYBODY HOW TO WRITE FACTS SECTIONS

We take as a given that the facts section is the most important part of the brief for persuading judges. The reason is that most judges are moved more by fairness, common sense, and compassion to help a person who has been wronged, than by clever legal analysis. The facts section, not the argument section, appeals to judges on this level and, thus, exerts a profound influence on how they decide cases. [FN5]

Nevertheless, many law teachers do not consider the facts section worthy of detailed examination. One reason is that legal writing programs have traditionally focused on teaching legal analysis-the one form of thinking that is entirely new to law students. Another reason is that professors believe that facts sections are similar to the type of writing that students already know how to do; therefore, facts sections will "write themselves." Additionally, there exists a belief that this sort of writing cannot really be "taught." Many experienced lawyers, however, appreciate the importance of facts sections, asserting that while junior attorneys are competent to write arguments, facts sections should be reserved for those with more experience; indeed, Judge Aldisert, in his book, *Winning on Appeal*, seems to support this view. [FN6] The reasoning behind all these excuses is wrongheaded, and we will address each in turn.

A. Law School is Where the (Cold) Heart Is: The Triumph of Legal Analysis

Facts sections are not taught with the rigorous attention used in teaching argument sections. Most likely, this is because law schools are structured around teaching legal analysis, teaching students to look at cases, facts, and ***463** arguments coldly. Legal writing courses have followed suit. In addition, legal writing courses have traditionally played the role of "helper" to professors teaching "doctrinal" courses, such as Torts and Contracts. [FN7] The result is a regime where most legal writing teachers do not consider teaching storytelling, and the few who might consider it probably would not, fearing that traditional faculty would find the material too soft, too warm, or, to borrow a locution from Professor Kingsfield of *The Paper Chase*, too *mushy* for law school.

In addition, many law teachers believe that facts sections constitute a form of writing already familiar to law students, and that, given the limited time in most legal writing courses, students can figure it out for themselves. (After all, their reasoning goes, we had to, and, to a degree, we did.) This reasoning is flawed. Facts sections are familiar to most of us, but with an important caveat: they are familiar as something we *read* or *hear*, not as something we *write*. [FN8]

The third reason writing facts sections is not taught is related to the second by the law of cause and effect: No one really knows how to teach students to write a good facts section. We did not when we started teaching legal writing-and we admit that we did not know how to write good ones when we practiced law full-time. We could write something that seemed to work-it passed supervising partners' inspections (often after lots of editing), and we often won our motions-but we could not have explained how we wrote them.

B. "Look Into Your Heart!": The Solution [FN9]

Law school is not simply about learning legal analysis. It is-or should be-about learning to be a lawyer: about learning to win cases. These premises are neither "soft" nor "mushy." To learn how to win cases, lawyers need to learn about persuading people, an art that has always dealt more with emotion than with reason. As Sol

Stein writes, "like fiction, nonfiction accomplishes its purpose better when it evokes emotion in the reader. We might prefer everyone on earth to be rational, but the fact is that people are ***464** moved more by what they feel than by what they understand"; Stein concludes, "Great orators as well as great nonfiction writers have always understood that." [FN10] To Stein's list, we would add, "great lawyers." [FN11] Therefore, we have turned to the world of professional storytellers- the world of creative writing. [FN12]

However, even in the world of professional storytelling, few people *really* know how to tell a story. Complaints are on the rise that novelists and screenwriters-people who should know how to tell stories-do not know how to tell stories. [FN13] As a result, recent years have yielded a bumper crop of books and expensive traveling road show style seminars to teach the craft to would-be and professional writers. [FN14] At writers conferences, seminars on "storytelling," "structure," and "plotting" fill up fast, and are often scheduled for sold out, repeat sessions during the afternoon. [FN15]

So, if the people whose job or ambition it is to tell stories recognize that they must study extensively in order to tell stories well or even competently, [FN16] then it follows that lawyers cannot be "blamed" for not having developed this skill. Nevertheless, it follows that lawyers, who are, ***465** when all is said and done, professional storytellers, *should* develop this skill, and that those who do develop it will have a decided advantage over those who do not.

The good news is that storytelling can be taught. Our goal is not to teach lawyers how to write novels, movies, and legal thrillers. [FN17] We want to make lawyers better at their jobs.

III. THE STORY ELEMENTS-CHARACTER, CONFLICT, RESOLUTION, ORGANIZATION, AND POINT-OF-VIEW, AND HOW TO USE THEM

The most powerful tool for persuasion may be the *story*. "Story is the strongest non-violent persuasive method we know. Tell me facts and maybe I will hear a few of them. Tell me an argument and I might consider it. Tell me a story and I am yours. That is why every persuasive enterprise from the Bible to television commercials relies on story." [FN18] Again, we consider it given that lawyers should "tell a story" in facts sections, and that the legal community by and large agrees with this principle. [FN19]

So, how does one tell a story? The first thing to do is to understand what a story is. Surprisingly, few books on writing actually define "story." [FN20] ***466** Perhaps, as with pornography, we know a story when we see (or hear or read) one. That said, here is an example of about as close as any of these books gets to defining "story": "A dramatic novel embodies the following characteristics: it focuses on a central character, the protagonist, who is faced with a dilemma; the dilemma develops into a crisis; the crisis builds through a series of complications to a climax; in the climax, the crisis is solved." [FN21] Likewise, here is a working definition from a general book on writing: "All storytelling from the beginning of recorded time is based on somebody wanting something, facing obstacles, not getting it, trying to get it, trying to overcome obstacles, and finally getting or not getting what he wanted." [FN22] For our purposes, when we talk about story, we mean an account of a character running into conflict, and the conflict's being resolved. Sometimes the conflict relates directly to the character's goal, but it need not; there may be a freak occurrence or accident, such as a shipwreck on a deserted island, or the loss of a friend. [FN23]

A review of books on fiction writing shows the general topics in storytelling: character, conflict, resolution, organization (plot), point-of-view, setting, voice, style, description, and word choice. [FN24] The elements most

useful and accessible to lawyers are character, conflict, resolution, organization and point-of-view, and, perhaps, setting. Voice and style are largely dictated by the conventions of legal writing, and description boils down to a matter of emphasis-how, or how much, a writer describes an event or person. Word choice pervades all other elements: what we call something goes a long way toward what or how a reader will think of that thing. For example, do we call the dog that bit the plaintiff a "pet," a "guard dog," a "Doberman," or, simply by its name, "Chocolate"?

Therefore, in this primer, we address only the most important elements for lawyers: character, conflict, resolution, organization and point-of-view. We will address character, conflict, and resolution first, because they are the basic building blocks of all stories.

***467** *A. Character, Conflict, and Resolution-These Basic Elements of Stories are the Basic Elements of Lawsuits*

Fiction 101 courses bombard would-be writers with the teaching that all stories require three things: Character, Conflict, and Resolution. It makes sense. Stories are about characters. These characters have a goal. Readers enjoy seeing characters placed in situations where they must fight for their goals-no one wants to read a story where the character moseys toward these goals unmolested. [FN25] Finally, readers want resolution-to see how it all ends: Does the character achieve his goal? Or does he achieve it in a way different from what he thought? Does he learn anything? Resolution is important because readers do not want to be "left hanging." The key to a *good* story is that the reader cares about the characters throughout their conflicts, and that the resolution "fits" the character and the conflict.

Just like stories, lawsuits have characters, conflict, and resolution. But until the trial ends or the case settles, there is no resolution. The goal of the lawyer, then, is much like the fiction writer's, but with a twist-to portray the characters and conflict in such a way that the resolution the lawyer seeks "fits," and so the judge will naturally *choose* that resolution over the competing resolution offered by the opposing party. And here is a further twist-the resolution that fits a lawsuit must meet certain standards. Instead of poetic justice, judges seek *actual* justice.

An important caveat, of course, is that the fiction writer can invent aspects of the story to propel the characters and events to a particular resolution. The legal writer, however, lacks such literary license. This difference amplifies the legal writer's need to discover information about the characters and the conflict. The legal writer's main problem often is not that he has "bad" facts, that is, facts that do not tend to lead toward the desired resolution, but instead that he does not have *enough* facts, that he has not done enough investigation. [FN26]

***468** That said, we take in turn the three most basic elements of stories: Character, Conflict, and Resolution, and present some "hands-on" ways to develop a story in facts sections.

B. How to Make Characters Come Alive, so that the Judge Will Identify With and Like Them (or the Opposite), Which Will Help You Win

In stories, there are all sorts of characters: main character, or protagonist; an opposing character, who may be a villain or the protagonist's nemesis; minor, less-developed characters who help these main characters in some way. As readers know, some characters are portrayed "more equally" than others. [FN27]

One of the most important facts about characters is that they have needs and goals. [FN28] The protagonist's

are usually conveyed clearly. Something lies between the protagonist and his goal, thus creating the conflict. Odysseus tries to get home. Scarlett O'Hara decides never to go hungry again. How characters deal with this trouble, this adversity, and whether they will prevail, is what keeps readers interested. [FN29]

In general, the reader must like the character and agree with, or at least understand, the character's goal. [FN30] The more the reader understands and likes a character, the more the reader will root for him. Although some forms of fiction, such as satire, may not strive for this formula, the lawyer telling a story should aim for judges and juries to like the client.

So, how does a lawyer make a client "likeable"? By *investigating*. Most lawyers fail to obtain enough information about their clients. If lawyers knew that they should be working on portraying people and the conflict in such a way that the proposed resolution will "fit," then they would seek certain information. Suddenly, lawyers would understand certain bits of "background" about a client to be, for all intents and purposes, "relevant." At the very least, looking for such information would be regarded as a worthy endeavor. How many lawyers have been told by more senior lawyers-and law professors-that including information such as the client's age or occupation in a facts section is "irrelevant"? [FN31]

***469** Lawyers, often a bit "negative" by training, [FN32] routinely do engage in the converse practice of "digging up dirt" on opponents. Lawyers often incur this expense without asking their client about the client's own goals, or without asking for information as simple as the client's resume. Lawyers should still dig up dirt, but they should be mindful of planting flowers about their own clients. [FN33]

C. How to Define Conflict Such That The Resolution in Your Client's Favor Will Seem Self-Evident

Stories need conflict. Will the sherriff get his man? Will the hero find his way out of the danger? Will the world, or an ideal, be saved? How the writer defines the conflict defines the "theme." We confess that we never really understood "theme" until we thought about "Conflict Definition." [FN34]

What is meant by "Conflict Definition"? We mean that most conflicts in stories can be classified. Here is what one well-known author on writing fiction calls the "famous list":

Man Against Man
Man Against Self
Man Against Nature
Man Against Society
Man Against Machine
Man Against God
God Against Everybody [FN35]

Some of these can be phrased as, "Man Against Institution," "Man Against Leader," or "Man Against Powerful Entity." [FN36]

***470** How the writer defines the conflict goes a long way toward how a reader will want the conflict resolved. For example, if the writer pitches a conflict as Man Against Society, or Man Against Machine, in the sense of "little guy" v. "big guy," many readers instinctively root for the "little guy." If the conflict is Man Against Self, most readers want the person's better nature to prevail. What we are really talking about is the rhetorical skill of "issue framing." Whether a particular legal or non-legal argument prevails often depends upon

how the arguer frames the issue. Lawyers do not learn this skill in the general sense, but in the limited context of framing *legal* issues.

Conflict is intertwined with character. Conflict is what brings out character-and it seems that characters are what interest readers. "We see who the characters are by the way they respond to ... resistance; conflict heightens and exposes them. Character, not action, is what interests readers most. It is character that makes action meaningful. Story is struggle. *How* a character struggles reveals *who* he is." [FN37] Good stories engage readers on the level of character more so than on the level of conflict. There is "something more" than the outward conflict. For example, in the movie *Rocky*, [FN38] is the conflict the prizefight with Apollo Creed, or is it Rocky's struggle to become more than "just another bum from the neighborhood"? (Remember, Rocky loses the title bout). In *Platoon*, [FN39] is the American platoon's conflict with the North Vietnamese Army, or is it a battle between good and evil within the platoon? Interestingly, works where the surface conflict is *the* actual conflict are rare-this is the stuff of Saturday morning cartoons, where good guys battle bad guys, and UltraMan is never left reeling from inner conflict.

Therefore, we come full circle: lawyers must learn more about their clients to breathe life into their conflict, to make it more meaningful for a judge. As one book on fiction says, "It's all about the who." [FN40] Although each lawsuit provides a ready-made conflict-the lawsuit itself-this conflict seldom breathes life into the parties. And most clients likely would not want a judge to know them only in the context of their struggle within the confines of the lawsuit itself, or within the underlying transaction that led up to it. Instead, lawyers should strive to make the client knowable as a person to the judge, by focusing on the client's personal struggles, the "something more." [FN41] In other words, it's not just about the money. [FN42] ***471** Instead, the lawyer should try to relate the lawsuit to the client's goals and needs.

Doing so is not difficult, and it need not take up lots of precious space. For example, say the client is a woman who lost a special job or opportunity as the result of an auto accident. She seeks money, certainly, but money is likely not her ultimate goal. It might be revenge, to make the other driver hurt, though revenge is not an attractive goal. Say her lawyer investigates, i.e., talks with his client, and learns that she was an aspiring Olympic speed skater who, at the time of the crash, was on her way to practice? And now her injuries keep her from skating? The case is about a dream destroyed, or at least deferred. The money, the prize of the outward conflict that is the lawsuit, is nothing more than metal and paper. Its value is in how it can be *used*; here, it can be used to make the skater's life easier, perhaps to help her in her struggle to skate again. [FN43]

We need not look far to see how some of the best lawyers deploy this weapon. In the Justice Department's case against Microsoft, Inc., the public was saturated with media stories and the in-and-out-of-court statements of litigants and lawyers. CEO Bill Gates defined the conflict as Man Against Machine (Big Institution). The U.S. government, the machine, was seeking to crush Bill Gates, the man. Bill Gates' lawyers (and public relations army) "developed" him as a man with a noble goal, innovation. And the conflict was about something more: If the government were to succeed, we would all pay with higher prices and a lower standard of living brought about by a lack of innovation.

The government responded in kind. The Justice Department portrayed itself as wearing the white hat to protect innovation. The Justice Department pitched the conflict as Man Against Machine-where the "Machine" was Microsoft, Inc. and the larger-than-life Bill Gates (who is, after all, the richest man in the world), and "Man" was all the budding computer companies. Certainly, no matter how the story is sliced, the case is commonly understood to implicate more than money alone.

Conflict definition and character development are not limited to appellate briefs or trials. These concepts work for simple motion briefs as well. A motion *in limine* regarding the admissibility of certain evidence has ***472** many of the same conflict elements. The overall case should be discussed in the facts section, so that the judge sees deciding the motion *in limine* as part of the greater conflict-and as a way of helping someone who needs help. For example, a prosecutor could argue that admitting the fruits of a search of an alleged drug dealer could help the government protect children against the scourge of illegal drugs-certainly a noble goal. [FN44]

Lawyers must choose carefully how to define the conflict. They should be especially careful in considering "Man Against Man." Why? Because it is hard to paint any person as totally wonderful and her opponent as totally evil. This strategy can backfire. [FN45]

D. How to Make Your Resolution "Fit," or Seem Like Poetic Justice as well as Actual Justice

Resolution is the third building block of a story. The key is for the judge to *want* to resolve the conflict in favor of your client; after all, it is the judge who writes the ending. The key to a happy ending for your client is to propose a resolution that fits the description of the character and conflict in the facts section of the brief.

How do you make a resolution fit? In a lawsuit, the good person with the worthy goal should win. The lawyer must have faith that the judge will want such an outcome. For example, most people probably would want to see our Olympic speed skater skate again. Most people will probably wish her to be compensated for her broken dreams. Better yet if the other driver did something wrong and caused the accident, and better yet if the driver is not also an Olympic hopeful. Although the legal resolution may satisfy the rule that "drivers who break the speed limit must pay for any injuries resulting," the storytelling lawyer knows that it is more powerful if the resolution is not merely legalistic, but rather emotional, thus fulfilling the desire that "drivers who shatter a young Olympic athlete's dreams through carelessness and recklessness ought to pay." Including more information about the client, i.e., ***473** treating "background" information as "relevant" information, can help lawyers obtain gratifying resolutions.

Ultimately, the resolution will "write itself." For example, if the lawyer does a good job pitching her client as "Man Against (Corrupt) Society," she will probably win. If the lawyer has done a good job of pitching her client as having been prevented from achieving a worthy goal, a goal that the client could achieve with some judicial help, then she will probably win.

In other words, and as we have said earlier, it's not just about the money. It is about what the money can be used for. In fact, there is no reason why a lawyer cannot include even *that* bit of information in the facts section.

E. Two Special Problems in Character, Conflict, and Resolution

When we presented this material in the course we created and led at Rutgers, "Advanced Brief Writing," and in the November, 1999 New Jersey CLE course, "How to Write Winning Briefs," which we created and led with two other legal writing mavens, Ann Marie Iannone and Deborah Shore, several participants asked how to deal with two particular types of client: the criminal defendant and the corporation. Because readers of this article are probably asking the same questions, we are including what we gave as our suggestions. Although we have labeled these "special cases," they are not really special at all, and the same guidelines pertain.

1. Special Case One: The Criminal Defendant

The lawyer representing a criminal defendant has a problem: the client is often unsavory. It is unlikely that the lawyer can make the judge "like" the client. How does the lawyer proceed?

The lawyer can downplay facts about the client, and instead make him a proxy for an "ideal," such as the Fourth or Fifth Amendment: a holding against the client is a holding against the Fourth Amendment. President Clinton followed this strategy at one point in the Monica Lewinsky scandal, essentially saying that, though his behavior was unsavory, punishing him for it could affirm a general, public right to delve into people's private lives. In addition, even if you do not want to ask your client if he committed the crime, you should still ask your client about himself. Maybe he used to sing in a choir. Maybe he is a computer whiz. Something like that may help humanize your client for the judge. [FN46]

***474** Another strategy (also "President Clinton-tested") is to portray the criminal client as embroiled in "Man Against Self." In the case of a drug addict charged with possession, the lawyer can present his client as a hapless victim of drugs, a nemesis that is in essence a character in the case story. [FN47] If the client is portrayed as struggling against this nemesis, and as is likely to prevail with appropriate court-ordered assistance, such as drug rehabilitation treatment, the client might have a chance of spending less time in prison.

2. Special Case Two: The Corporate Client

Corporations may not be "likable" at first blush: faceless and wealthy, corporations generally do not inspire empathy. But there is likely a treasure trove of information that will help the lawyer. The lawyer should investigate the company's "goals." Most corporations are formed to carry out socially beneficial functions, and many employ lots of decent, hardworking people. An insurance company allows people to protect their hard work and gain peace of mind. A mortgage company allows qualified people to achieve the "American Dream" of home ownership. A tobacco behemoth may contribute large sums of money to charities. The lawyer can include this information in ***475** the facts section as brief background information when introducing the client. [FN48] Here is a rough example:

XYZ Corporation, which employs 45,000 people and has provided automobiles for 3.5 million families, is a Delaware corporation with an address of 2345 Main Street, Wilmington, Delaware.

Just a little bit of information, but a powerful bit that can reverberate throughout the case.

The lawyer can also focus on individuals within the corporation. If certain managers are themselves "likeable," the lawyer can present them in a brief. For example, think of Chrysler and Lee Iaccoca. Instead of attributing actions to XYZ Corp., the lawyer can attribute the acts to "Mr. Jones, the personnel manager." Out of necessity, lawyers do this all the time at trial. [FN49] The lawyer can also focus on individuals to help a corporation that has been accused of wrongdoing. The lawyer can investigate to determine whether an individual employee, or group of employees, was responsible. If so, the corporation itself can be portrayed as a victim (perhaps even of betrayal); it has been dealt a setback in trying to achieve its socially useful goals.

F. Organizing a Facts Section for Maximum Persuasive Effect

A large part of telling an effective story is the *order* in which the writer presents information. What a reader

knows, and when he knows it, affects how he views the material. For example, when a movie opens with a car chase, the viewer might not know which driver to cheer. If before the car chase, however, it is shown that the driver of the car being chased is a single mother of three struggling to raise her children and has been wrongfully accused of murder, most viewers would want her to escape. If the woman was not wrongly accused and viewers saw her commit murder, then they might want the police to catch her- perhaps, depending on why she killed.

The same idea of order and sympathy holds true for facts sections. If the lawyer jumps in immediately and details a car crash or a business deal gone sour, the writer risks that the reader might not understand for whom he should root. The writer generally should start with some background information.

Indeed, few movies actually start off as *in medias res* as the hypothetical example above. The common way of organizing a story is, as Aristotle ***476** wrote almost 2,500 years ago, in three parts: the beginning, the middle, and the end. [FN50] This three-part structure has been is commonly described as:

Order
Disorder/Chaos
Re-Order [FN51]

This classic structure is not a formula, but an observation. [FN52] The story starts with a *status quo*, with the readers getting to know a character. Then, something happens, and the character's world is thrown off kilter. Most movies fit this structure. If not, the Order is often shown in flashback.

How can a lawyer use this classic structure? We believe that it is almost always best to start your facts section by setting the context, the order. The lawyer should tell the judge who the client is, and what he needs the judge to do. [FN53]

Here is an example of a standard but effective start:

> *Plaintiff, John Q. Publish, filed a complaint for tortious interference with contract on September 1, 2000, alleging that defendant Mark Millions made representations to XYZ Corporation to cause it shut off Mr. Publish's Internet service. The shut-off left Mr. Publish without the means to power the business that was his livelihood. In this motion, Mr. Publish seeks to exclude evidence of the psychological counseling that he successfully completed between 1985 and 1987 on the basis that the information is irrelevant and would violate Mr. Publish's privacy.*

***477** Not overly exciting, perhaps, but it is necessary to get this information in front of the reader immediately. [FN54] Also, a judge *expects* such a beginning; it is a legal writing convention. Understood within the context of storytelling, it is probably a convention worth keeping.

So, in the beginning, the lawyer should introduce the client, and only then go on to the middle to describe what happened: the disruption, the chaos. The lawyer should tell how the disruption has affected the client. Of course, there are many ways to organize this middle, just as there are many ways to tell a story. The lawyer can proceed chronologically, in a linear, cause-and-effect manner, or topically, for when the court needs to examine separate factual issues. There are many strategies that the legal writer, like the fiction writer, has to choose from. That is all we will say here, in this primer, about organizing the middle. [FN55]

Finally, we come to “Re-order.” At the end of the facts section, it can be effective for the lawyer to state the proposed resolution-often repeating it from the first paragraph, where the lawyer told the judge why she was writing a motion or brief in the first place. This may be “repetitive,” but repetition can play an important role in

helping readers learn. And, based on a story framework, it makes sense to place it at the end of a story. Here is an example:

> *Therefore, Mr. Williams respectfully requests that this Court deny ABC Corporation's motion for summary judgment, because there is a genuine issue of material fact concerning whether ABC Corporation's personnel manager, Debra Adams, used information of Mr. Williams' marital status when she rejected his application.* [FN56]

If the lawyer has done a good job in making the client "likeable" and in defining the conflict, the judge may even nod as she reads the proposed resolution, *wanting* to deliver it, because it is fair, because it "fits." Another ***478** solution, of course, is to include *no* resolution, proposed or otherwise. The reader may be able to "fill it in." In an impressionistic sense, the reader may *feel* that resolution is lacking - and work to provide it. Here is an example of a last sentence in a facts section where the writer has left out the resolution:

> *Now Mary Speedskater awaits trial in this case, struggling through her painful physical therapy regimen each day, hoping to skate again.*

Mary is waiting; Mary is hoping. The judge may be an invisible character, but an important one: the hero, the savior. The example is perhaps a bit heavy handed, but our point is that resolution is necessary, and where there is none, the reader will want it. All the better where the reader is empowered to *create* that resolution. Therefore, breaking the rule of the three-part structure might be the most effective tactic in some cases. Our goal is not for lawyers to strictly adhere to these rules, but instead to recognize these concepts so that they may employ them for the greatest effect. [FN57]

G. Whose Story is it Anyway? Point-of-View, and How to Use it for Maximum Persuasive Effect

The last tool we address in this primer is perspective, or point-of-view (POV). POV is through whom the story is told. Fiction writers often grapple with the question of which character to tell the story through.

POV makes a difference. For example, what if *Rocky* were told through the POV not of Rocky Balboa but through his opponent in the prizefight, Apollo Creed? The story would be about a champion struggling to defend his title. It might be about how Apollo is being used by promoters and managers, who are risking the fighter's reputation and safety. Although Rocky is chosen as a pushover, Apollo's handlers cannot miss seeing that "the Italian Stallion" may not be so easy after all, such as when a TV newscast shows him pounding away on sides of beef so hard that the ribs snap. But Apollo fights, perhaps to protect his honor, or his family-the ***479** possibilities are endless. The point we are tying to make is that, through Apollo's POV, most of the audience would root for Apollo Creed over Rocky in the climactic fight.

Likewise, lawyers should ask, "Whose story is this, anyway?" Because readers often root for the character they identify with or like or know, it is probably best to tell the story through the client's POV. For example, a prosecutor may tell the story of the arrest by focusing on the police officers in the case, telling what they were trying to accomplish, what they were thinking, what they saw and understood. The lawyer for a business owner involved in a contract dispute might tell the story of how the owner struggled to start the business and why, and then tell the tale of the broken contract, and the effects of the breach on the business and the business owner. POV is really a matter of focus, emphasis, and perspective.

In general, we advise telling the story from the client's POV. It is no surprise that in books and movies, the protagonist is introduced early. Why? Because it is the *protagonist's* disorder, the protagonist's experience of

chaos, that is the at the heart of the story. Here is an example of the same incident as told from competing POVs, taken from a leading legal writing textbook:

EXAMPLE 1. FIRST PARAGRAPH OF APPELLANT'S STATEMENT OF FACTS

> *On the evening of May 17, 1997, **William Strong** was standing on the corner of Lincoln and Chicago in Tacoma talking to a friend when Officer Hanson approached him and began questioning him. RP 18. Standing only a foot or two from Strong, **Officer Hanson** asked Strong to identify himself and to explain what he was doing in the area. RP 18. **Mr. Strong** willingly answered Officer Hanson's questions, telling him that his name was William Strong. RP 19.* [FN58]

EXAMPLE 2. FIRST PARAGRAPH OF THE RESPONDENT'S STATEMENT OF FACTS

> *At approximately 11:00 p.m. on May 17, 1997, **Officer Hanson** noticed the appellant, an individual he did not recognize, in the McChord Gate area, an area noted for its high incidence of drug trafficking. RP 17. Because he ***480** makes a point to meet the people in his patrol area, **Officer Hanson** initiated a social contact. RP 18.* [FN59]

Note the different information that emerges through the different POVs. Through a person's POV, a writer can learn, and then set forth, the person's reasoning behind, and motivation for, his actions.

Again, POV is a concept to be used, not a rule to be followed. For example, a lawyer representing a corporation defending against an employment discrimination suit, in a brief on the issue of damages, may discover that the plaintiff has fared well since she was fired. Perhaps she has landed a job she enjoys. As a result, the lawyer may write the facts section for the brief on this issue from the POV of the plaintiff, detailing her situation to show that the damages are not so great as alleged. The lawyer must keep in mind his overall goal at all times. [FN60]

IV. CONCLUSION

Judge Aldisert's observation, that it may be more appropriate for senior attorneys to write facts sections, leaving younger attorneys to write the argument, confirms both the importance of facts sections and our point that lawyers are never taught how to write them. [FN61] Judge Aldisert most likely offers this view because under our current system of educating lawyers, the skills necessary to write good facts sections-and to persuade judges-can be acquired only through years of trial and error. Yet facts sections are too important not to be taught-and what if Rumpole does not work at the firm? Clearly, the current system of legal education needs to be reformed to include teaching lawyers how to tell stories in facts sections. This article, we hope, is a step in that direction.

***481 APPENDIX A**

Developing Your Client's Character

Answer these questions to help build a more rounded character in your client. You do not necessarily

have to include all of these facts in your brief, but you should be thinking about them when deciding what to present. You should be thinking about the opposing attorneys, and how they might answer the questions about their client.

Client's Name: _____

Type of Action: _____

What makes your client likeable?

1. How is your client a valuable member of society?
2. Does your client have any noble goals?
3. Is your client good at what she does?
4. Is your client someone who has overcome past adversity?
5. Is your client a victim or someone who has been wronged?
6. What is your client's family situation?
7. Has your client somehow served our country or the world at large (example: military service, Peace Corps, Red Cross)?

***482 APPENDIX B**

Developing Your Client's Conflict

Try to re-characterize legal conflicts in terms of the types of conflicts that appear in storytelling. You should try to steer away from person vs. person as much as possible, because the winner in that conflict is not so easy to identify.

The Types of Conflict:

Person v. Person
Person v. Self
Person v. Nature
Person v. Society
Person v. Machine (variation: Society v. Machine)
Person v. God
God v. Everyone

Exercise: Identify the types of conflicts:

1. Drug Addict charged with possession and intent to distribute.

A. Person v. Self-person v. drug addiction, cannot help self.

2. Person charged with tax evasion.

A. Person v. Machine-the red tape of government.

3. U.S. v. Microsoft (you represent the U.S. government).

A. Person/Society v. Machine-U.S. government seeks to protect the little guy from innovation-crushing company.

4. U.S. v. Microsoft (you represent Microsoft).

A. Person v. Machine-Big U.S. government seeks to crush innovating Microsoft who is genuinely out to help the small computer user.

***483 APPENDIX C**

Developing Your Corporate Client's Character

Answer these questions to help build a more rounded character in your corporate client. You don't necessarily have to include all of these facts in your brief, but you should be thinking about them when deciding what to present.

Client's Name _____

Type of Action: _____

What makes your client likeable?

1. How does your client provide a valuable service to society?
2. Does your client have any notable achievements (awards, innovations)?
3. Does your client contribute to charities, fund the arts, etc.?
4. Has your client overcome adversity or extreme odds to become successful?
5. Does your client have a person as a symbol or figurehead whom the public identifies as a "good person" (e.g., Chrysler and Lee Iaccoca)?
6. Has your client served our country in times of adversity?

[FNd1]. This paper is based on a presentation we gave at the Biennial Legal Writing Institute Conference on July 22, 2000, at Seattle University School of Law, and is part of what we teach in our continuing legal education program, "Storytelling for Lawyers: How to Use the Most Powerful Tool of Persuasion to Win Your Cases." For encouragement and help on this article we wish to thank the Legal Writing Institute; Mary Ellen Maatman, Associate Professor and Director of Legal Methods, Widener University School of Law; Anne Enquist, Writing Advisor, Seattle University School of Law; Linda Holdeman Edwards, Professor of Law and Director of Legal Writing, Mercer University; Rayman Solomon, Dean, Rutgers University School of Law-Camden; Susan A. King, Reference Librarian, Rutgers University School of Law-Camden; Edmund B. Luce, Legal Methods Professor and Director of Graduate Programs, Widener University School of Law; Dino Capasso, Third Year Law Student, Rutgers University School of Law-Camden; Lisa Raufer, Second Year Law Student, Rutgers University School of Law-Camden; Alan B. Epstein, Esq., Spector Gadon & Rosen P.C., Philadelphia, P.A.; and M.G. Piety, Visiting Professor, Drexel University.

[FNa1]. Legal Methods Professor and Director of Continuing Legal Education Programs, Widener University School of Law. A.B., Dartmouth College; J.D., Boalt Hall School of Law, University of California, Berkeley.

[FNaa1]. Clinical Attorney, Supervising Attorney, Rutgers Pro Bono Domestic Violence Project, Rutgers School of Law-Camden; Legal Writing Faculty, Rutgers University School of Law - Camden. B.A., University of Pennsylvania; J.D., Rutgers School of Law-Camden.

[FN1]. BETTER OFF DEAD (Warner Bros. 1985).

[FN2]. *See, e.g.*, RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 156 (Revised 1st ed. 1996); LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION 341-43 (2d ed. 1999); BRYAN A. GARNER, THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS 310-11 (1999); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE 323-24 (3d ed. 1998); LAUREL CURRIE OATES, ET AL., THE LEGAL WRITING HANDBOOK 285-87 (2d ed. 1998); LOUIS J. SIRICO, JR. & NANCY L. SCHULTZ, PERSUASIVE WRITING FOR LAWYERS AND THE LEGAL PROCESSION 37-46 (1997); STEVEN D. STARK, WRITING TO WIN THE COMPLETE GUIDE TO WRITING STRATEGIES THAT WILL MAKE YOUR CASE-AND WIN IT 93-115 (2000); ALAN L. DWORSKY, THE LITTLE BOOK ON LEGAL WRITING 127-30 (2d. ed. 1992); HELEN S. SHAPO, ET AL., WRITING AND ANALYSIS IN THE LAW 311-25 (4th ed. 1999); JOHN C. DERNBACK, ET AL., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 259-71 (2d ed. 1994); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 276-91 (2d ed. 1993); GERTRUDE BLOCK, EFFECTIVE LEGAL WRITING FOR LAW STUDENTS AND LAWYERS 196-99 (5th ed. 1999); NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS 250-51, 294-97 (3rd ed. 1998). Notably, the only advice we found that goes beyond mere encouragement to tell a story is in a "Writing Tips" column in PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING, which appeared just days before this article went to the printer. *See* Stephen V. Armstrong & Timothy P. Terrell, *Organizing Facts to Tell Stories*, 9 PERSP. 90 (2001). Armstrong and Terrell, who lead excellent legal writing workshops, point out, "We have encountered very few writers-legal or otherwise-who have been taught how to organize or develop facts." *Id*. The authors advise writers not to rely on chronology as a "default organization," because it can prevent effective storytelling, and use examples to briefly introduce some of the topics we present in greater depth in this article.-

[FN3]. *See* Albert Tate, Jr., *The Art of Brief Writing: What a Judge Wants to Read, in* THE LITIGATION MANUAL: SPECIAL PROBLEMS AND APPEALS 235-36 (John G. Koeltl & John Kiernan, eds., 3d ed. 1999) ("The statement of the facts is regarded by many advocates and judges as the most important part of the brief."). Judge Tate cites several sources, including U.S. Supreme Court Justice Robert H. Jackson, former Chief Judge of the United States Court of Appeals for the Second Circuit, Judge Irving R. Kaufman and Karl Llewellyn in support of this proposition, which has reached the point of being a truism amongst lawyers. *Id*. at 234-36. As can be expected, most of the popular legal writing textbooks echo this point. *See, e.g.*, EDWARDS, *supra* note 2, at 337; NEUMANN, *supra* note 2, at 319-22; SIRICO & SCHULTZ, *supra* note 2, at 37. The same goes for law review articles directed at legal writing teachers. *See, e.g.*, Gregory G. Colomb & Joseph M. Williams, *The Writer's Golden Rule*, 7 PERSP. 78 (1999); Gary Gaffney, *Drafting an Effective Appellate Brief*, 67 FLA B. J. 43 (1993); Jethro K. Lieberman, *The Art of the Fact*, 5 J. OF THE LEGAL WRITING INST. 25 (1999).

[FN4]. A few sources give some advice on how to tell a story to a jury. *See, e.g.*, DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 66-98 (1994); Richard J. Crawford, *Opening Statement for the Defense in Criminal Cases, in* THE LITIGATION MANUAL: SPECIAL PROBLEMS AND APPEALS 188-90 (John G. Koeltl & John Kiernan, eds., 3d ed. 1999) (providing example of a "well told story" in opening statement); THOMAS A. MAUET, TRIAL TECHNIQUES 45-47 (1996) (storytelling in opening statements). For an illuminating critique of an outstanding closing argument in cinematic terms, see Philip N. Meyer, *Desperate for Love: Cinematic Influences Upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994) (detailing closing argument by attorney Jeremiah Donovan in trial of U.S. v. Bianco (D. Conn. July 16, 1991, No. H-90-18), and showing how it is more like a movie than a "textbook" closing argument). *See also Some Off-*

the-Cuff Remarks about Lawyers as Storytellers, 18 VT. L. REV. 751 (1994) (transcript of Donovan's response to Meyer's piece, given at "Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law," in which Donovan expresses how he structures closings, and that he does not consciously follow a movie structure). Meyer's and Donovan's pieces are more descriptive than prescriptive, but they are extremely helpful to any lawyer thinking about how to craft a story in light of "the limitations on these storytelling techniques [for attorneys]. You are not writing on a clean slate. There are facts you have to answer and incriminating tapes to which you have to respond." *Id.* at 760. Finally, popular books on pretrial practice provide *no* advice on how to tell a story in a pretrial motion-the level where most litigators work. *See, e.g.*, THE LITIGATION MANUAL: PRETRIAL (John G. Koeltl & John Kiernan, eds., 3d ed. 1999); THOMAS A. MAUET, FUNDAMENTALS OF PRE-TRIAL TECHNIQUES (1988). Neither do books on law "as" narrative, or story, which present literary criticism and arguments that law is narrative instead of presenting helpful instruction to lawyers. *See, e.g.*, PETER BROOKS & PAUL GEWIRTZ, LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (1996) (collecting essays that locate law in the broader context of narrative and rhetoric).

[FN5]. *See* Tate, *supra* note 3, at 235-36 ("The real importance of the facts is that courts want to do substantial justice and they are sensitive to the 'equities.' Consequently the objective of the advocate must be to write his statement [of facts] that the court will want to decide the case his way after reading just that portion of the brief.") (quoting Frederick B. Weiner, *Essentials of an Effective Appellate Brief*, 17 GEO. WASH. L. REV.. 143, 145 (1949)).

[FN6]. *See* ALDISERT, *supra* note 2, at 156 (noting that "[a]ttorney James D. Crawford of Philadelphia says that writing the facts in an appellate brief should not be entrusted to a junior litigator: 'Many of the most effective appellate lawyers have told their junior partners and associates: "You write the law. Let me write the statement of facts because that is where the biggest difference can be made."').

[FN7]. We do not believe that we need any citation for this assertion. Some professors and attorneys from the older guard believe that legal writing is not an academic discipline, and that the way to teach legal writing is merely by writing and rewriting the same piece until the student gets it.

[FN8]. Recently, many schools, such as Widener University School of Law, have adopted a three-semester program, which should take the "lack of time" component out of this excuse.

[FN9]. GOODFELLAS (Warner Bros. 1990).

[FN10]. SOL STEIN, STEIN ON WRITING: A MASTER EDITOR OF SOME OF THE MOST SUCCESSFUL WRITERS OF OUR CENTURY SHARES HIS CRAFT TECHNIQUES AND STRATEGIES 224 (1995). James Carville, the celebrated political adviser, has noted that: "[t]he best indicator of who will win a presidential race is which candidate is the most optimistic. In the past fifty years, every elected president, with one exception, has presented the most optimistic message. The optimist appeals to the 'better angels within us."' James Carville, Address at Cherry Hill High School East (Jan. 12, 2000).

[FN11]. *See, e.g.*, HERBERT J. STERN, TRYING CASES TO WIN 87-114 (1991) (chapter entitled "Make the Case Bigger Than Its Facts").

[FN12]. Lawyers, often uncomfortable with breaking tradition, can take comfort that they will not be the first group of nonfiction writers urged to brave this old world. *See* STEIN, *supra* note 10, at 223 ("It is immensely

valuable for the journalist, biographer, and other writers of nonfiction to examine the techniques that novelists and short story writers use."). Stein includes chapters entitled, "Using the Techniques of Fiction to Enhance Nonfiction," *id*. at 223-31, and "Conflict, Suspense, and Tension in Nonfiction," *id*. at 232-39.

[FN13]. *See, e.g.*, ROBERT MCKEE, STORY: SUBSTANCE, STRUCTURE, STYLE AND THE PRINCIPLES OF SCREENWRITING 11-28 (1997) (chapter entitled "The Story Problem").

[FN14]. The best known seminar is Robert McKee's *Story Seminar, The World's Ultimate Screenwriting and Storytelling Class, available at* http:// www.mckeestory.com (costing $495 for three-day, thirty-hour boot camp and $295 for repeat attendees.).

[FN15]. On November 20, 1999, Brian Foley had no choice but to sneak into the added-on repeat session on "Narrative Structure" by Justin Cronin of LaSalle University at the Penn Writers' Conference at the University of Pennsylvania.

[FN16]. *See* MCKEE, *supra* note 13, at 15 (analogizing writing training to music training, saying that writers should think more like composers and recognize that they need formal training in the craft).

[FN17]. Many observers may believe that most lawyers are great storytellers, because of the fame achieved by some lawyer-writers, mostly in the genre of legal thrillers. But how many lawyers actually are famous writers? Here is a somewhat off-the-cuff list, which is not that large when one considers the number of lawyers out there: Louis Auchincloss (novelist), David Baldacci (novelist), Ron Bass (screenwriter), Louis Begley (novelist); Philip Friedman (novelist), John Grisham (novelist), David Kelley (television and screenwriter), Bonnie MacDougal (novelist); Richard North Patterson (novelist), Lisa Scottoline (novelist), Scott Turow (novelist), and Andrew Vachss (novelist). Our apologies to any we have left out.

[FN18]. BALL, *supra* note 4, at 66.

[FN19]. *See supra* note 3, and accompanying text.

[FN20]. *See, e.g.*, SYD FIELD, SCREENPLAY: THE FOUNDATIONS OF SCREENWRITING (1982) (does not define "story"); MICHAEL HAUGE, WRITING SCREENPLAYS THAT SELL (1988) (does not define "story"); VIKI KING, HOW TO WRITE A MOVIE IN 21 DAYS: THE INNER MOVIE METHOD (1988) (does not define "story"); MCKEE, *supra* note 13, at 41 (does not clearly define story other than saying, "[a] story is simply one huge master event"); JOSIP NOVAKOVICH, FICTION WRITER'S WORKSHOP (1995) (does not define "story"); DAVID TROTTIER, THE SCREENWRITER'S BIBLE 3 (Silman-James Press 1995). Trotter does not define "story," but tells writers to "write a script that features a character who has a clear and specific goal, where there is strong opposition to that goal leading to a crisis and an emotionally satisfying ending." *Id*. at 3. In the next paragraph, Trotter tells the writer to write a script that "also presents a well-crafted story with a strong story concept and an original character people can sympathize with." *Id*. The number of books on how to write films and fiction grows monthly. We have tried to focus on a few of those books, ones that are especially hands-on and that are prevalent in writing classes and writing groups.

[FN21]. JAMES N. FREY, HOW TO WRITE A DAMN GOOD NOVEL xiii (1987).

[FN22]. STEIN, *supra* note 10, at 232.

[FN23]. *See, e.g.*, DANIEL DEFOE, ROBINSON CRUSOE (1719); JOHN KNOWLES, A SEPARATE PEACE

(1959).

[FN24]. *See, e.g.*, the Tables of Contents in FREY, *supra* note 21, at vii-ix, and Table of Contents in NOVAKOWICH, *supra* note 20.

[FN25]. *See, e.g.*, STEIN, *supra* note 10, at 232.

> In life we prefer an absence of conflict. In what we read, an absence of conflict means an absence of stimulation .... In articles, newspapers stories, and books, the reader's interest often flags because the writer did not keep in mind that dramatic conflict has been the basis of stories from the beginning of time.

Id. *See also* Natalie A. Markman, *Bringing Journalism Pedagogy into the Legal Writing Class*, 43 J. LEGAL EDUC. 551 (1993).

[FN26]. *See* STEIN, *supra* note 10, at 229 (a checklist on "characterizing" an actual person for a nonfiction piece); TROTTIER, *supra* note 20, at 40, 121-22 (checklists for creating characters). The checklists that we provide in the appendices to this article should help lawyers improve their investigations. *See infra* APPENDIX A-C, at 481-83.

[FN27]. *See* MICHAEL E. TIGAR, PERSUASION: THE LITIGATOR'S ART, 35-8 (1999) (good explanation of "round" and "flat" characters in the context of a lawsuit). *See also* HAUGE, *supra* note 19, at 62-68.

[FN28]. TROTTIER, *supra* note 20, at 19-20, 29.

[FN29]. *Cf*. ALDISERT, *supra* note 2, at 154 ("[d]o not bore the judge.").

[FN30]. *See* HAUGE, *supra* note 20, at 40-70.

[FN31]. MAUET, THE FUNDAMENTALS OF PRETRIAL TECHNIQUES, *supra* note 4, at 31 (telling lawyers to investigate client background to deem whether client would make good trial witness, and to find out whether client has adequate financial resources for representation). If lawyers are supposed to tell a story at trial, *see* MAUET, TRIAL TECHNIQUES, *supra* note 4, at 45-46, then when are they supposed to gather the background information necessary for the story?

[FN32]. Lawyers are trained to think up reasonably likely "bad" scenarios, and to be skeptical and suspicious.

[FN33]. *See infra* Appendix A, where we provide some seeds for these flowers.

[FN34]. Our experience is that once lawyers have investigated and developed their client's character, the conflict (and theme) often becomes readily apparent.

[FN35]. NOVAKOVICH, *supra* note 20, at 74-75. We agree with Novakovich that it would be preferable to say "Person Against Person," "but it would sound odd, since this old list is famous in this shape." *Id*. at 74.

[FN36]. *See id*. at 75.

[FN37]. FREY, *supra* note 21, at 30.

[FN38]. (Universal 1976).

[FN39]. (Orion 1986).

[FN40]. FREY, *supra* note 21, at 1 (entitling first chapter *What It's All About is 'Who'*).

[FN41]. *See* NEUMANN, *supra* note 2, at 322 ("[h]umanize the client.").

[FN42]. As wise lawyers know. *See e.g.*, STERN, *supra* note 10, at 88 ("The knowledgeable advocate attempts to make the case bigger than the mere movement of money from one side of the room to the other. He tries to make his case stand for a principle that is important to the jurors, or rest on an emotional appeal that will move them.").

[FN43]. Plaintiffs lawyers often show juries "Day in the Life" videos, which depict the daily struggle of the plaintiff in hopes that the jury will want to help.

[FN44]. Wise attorneys know that a pretrial motion should seek "something more" than the precise object of the motion: the motion should provide information and frame the case to position it for favorable rulings and settlement.

[FN45]. The sort of case where one sees the "Person v. Person" conflict presentation misused most often is in child custody issues. Both characters have the same goal-the child's welfare. The strategy is to portray the other as "evil," as less capable of achieving this ideal. But the same sort of thing can happen in any type of lawsuit, from simple negligence to criminal cases, and turns cases into what many judges pejoratively call "pissing matches."

[FN46]. There have even been times we know of when a court has reversed and remanded *because* of an attorney's failure to learn about his own client. For example, one of this article's authors, while clerking for a New Jersey Appellate Division judge, worked on an appeal which was largely decided based on the factual statement contained in the appellant's brief. *See, e.g.*, State v. Ferguson, 255 N.J. Super. 530, 605 A.2d 765 (App. Div. 1992), *on remand*, 273 N.J. Super. 486, 642 A.2d 1008 (App. Div.), *certif. denied*, 138 N.J. 265, 649 A.2d 1285 (1994), where the New Jersey Appellate Division reversed and remanded an adult murder conviction based on ineffective assistance of counsel. The defendant, a juvenile boy charged with first degree murder, was eventually tried as an adult despite a plethora of evidence that he was a very strong candidate for rehabilitation. The court took stern issue with the defense attorney's failure to conduct a factual inquiry about his client's background or the circumstances leading up to the homicide. *Id.* at 541, 605 A.2d 770-71. Specifically detailed were "several examples, among many, from the record of what could have been included in the defense counsel's presentation to keep the case in family court." *Id.* at 542, 605 A.2d at 771. The court admonished "[w]ithout some presentation of this kind of background [defendant's history and the circumstances that caused him to carry a knife to school], whether this information is actually accurate and reliable or not, any chance to grasp and evaluate the defendant's claim that he should not be waived to adult court was probably almost impossible for the judge." *Id.* at 543, 605 A.2d at 772.

[FN47]. A wonderful, and accessible, example of this is seen in a sample appellate brief in NEUMANN, *supra* note 2, app. F at 447-62. A pre-operative transsexual born as a man, arrested for wearing a dress, under a New York statute prohibiting disguises, is shown as the victim of Gender Dysphoria Syndrome. *See id.* In the facts section, the syndrome is introduced first, and the client is introduced afterward. *Id.* at 448. After the reader has learned the plight of those battling this syndrome, the character immediately emerges as a sympathetic character, a victim.

[FN48]. We have adapted our exercise on character for corporate clients and included it in Appendix C to this

article.

[FN49]. *See* TIGAR, *supra* note 27, at 41-45.

[FN50]. ARISTOTLE'S POETICS 65 (Francis Fergusson ed. & S.H. Butcher, trans., Hill & Wang 1961).

[FN51]. Justin Cronin, Presentation, *Narrative Structure* (Penn Writers Conference, Nov. 20, 1999).

[FN52]. *See* STEIN, *supra* note 10, at 232 ("All storytelling from the beginning of recorded time is based on somebody wanting something, facing obstacles, not getting it, trying to get it, trying to overcome obstacles, and finally getting or not getting what he wanted."). What the character often wants is a return to Order. How many characters-and clients, for that matter- have we heard say, "I want my life back!"

[FN53]. *Cf*. NEUMANN, *supra* note 2, at 319, 322, 325. Although, Neumann urges writers to "start with a punch," we caution against doing so unless the brief has an "Introduction" before the facts section (as Neumann's samples do), or if the "punch" helps locate the reader's sympathies and provides adequate context. Notably, Neumann's advice for writing facts sections, presented as eight separate points, are actually unified by the focus that we present on character, conflict, resolution, organization, and point-of-view.

[FN54]. *See* STEVEN V. ARMSTRONG & TIMOTHY P. TERRELL, THINKING LIKE A WRITER: A LAWYER'S GUIDE TO EFFECTIVE WRITING AND EDITING 3-3 to 3-7 (1992) (stressing the importance of "context before detail").

[FN55]. Many novelists and screenwriters talk privately about "the difficult middle," how hard it is to write Act II of a three-act work. Part of the difficulty is the plethora of choices available. Our goal here is to make the legal writer see that there is a middle, and how to organize the facts section overall. We will present further, more narrowly tailored advice on this topic in our legal writing book.

[FN56]. This is an effective ending because it is advocacy, bordering on legal argument. But it is not legal argument: it is merely a description of the legal argument, a description of why the plaintiff wants the court to deny the motion.

[FN57]. For one way to structure a *trial, see* TIGAR, *supra* note 27, at 50 for the structure of a typical plaintiff's suit and the structure of the defense: "In a typical plaintiff's case, the overall structure will be (1) who this person, our client, is; (2) what happened to this person and what the other side did or failed to do that brought us to court to get justice; and (3) what the jury can do to set things right. The typical defense case organizes the elements differently-as 2, 1, 3 and not as 1, 2, 3. This gives us (2) what 'really happened,' (1) who our client is and why this lawsuit is being brought, and (3) why neither damages or other relief is proper." *Id*.

[FN58]. OATES, ET AL., *supra* note 2, at 288.

[FN59]. *Id*. at 289.

[FN60]. For this example, we are grateful to Edmund B. Luce, Legal Methods Professor and Director of Graduate Programs at Widener University School of Law.

[FN61]. *See supra* note 6 and accompanying text.

32 Rutgers L.J. 459

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