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7-2022

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Storytelling, *The Sound of Music*, and Special Teams: Revisiting Some Basic Legal Writing Techniques with Fresh Eyes

I recently returned to teaching legal writing to first-year law students. Having spent the preceding years as an appellate attorney and a federal law clerk, I was surprised about how much of what I am teaching my students now resonates with me as a more experienced practitioner. I haven't thought about the "basics" of legal writing in a very long time. Instead, like many of us, it is something I do reflexively without really stopping to think about the steps I take while drafting motions, briefs, or orders. Being forced to think about how the parts become the whole has reminded me that revisiting the basics is a good way to refresh and reconsider the way we write every day.

The best thing about going back to that first introduction to legal writing, particularly for those of us who are more than a few years out of law school, is that legal writing scholarship and books are abundant. There is a wealth of exceptional articles and books generated by the academic legal writing community that provide ample resources for beginning writers as well as experienced practitioners. To that end, in addition to revisiting some of the basics of legal writing through materials I used this year to teach my first-year students, this article also highlights other legal writing articles and books that may be of interest.

This article revisits three important parts of any trial memorandum or appellate brief: the statement of facts, case illustrations, and point headings. First, the basics of each of these parts of persuasive writing are discussed, then suggestions for crafting these parts of persuasive writing

are offered as a refresher.

Not "Just the Facts": The Power of Narrative and Point of View

A statement of facts in a trial memorandum or an appellate brief focuses on identifying and offering legally relevant facts, explanatory/background facts, and emotionally significant facts while at the same time avoiding irrelevant or unnecessary facts.¹ The facts should be accurately stated and offered in a chronological or topical order (and, if offered topically, written chronologically within the topic).

Legally relevant facts, good or bad, are those facts that, if they were changed, the outcome would change.² Explanatory/background facts help provide context for the legally relevant facts.³ Conversely, irrelevant or unnecessary facts should be identified and discarded to ensure the narrative is not populated with unimportant details. Finally, emotionally significant facts give perspective and help a reader to understand what motivated a party's actions or reactions.⁴

While it is important that the facts offered be accurate, be properly included, and be in the proper order, the facts should also provide a point of view and should evoke a reaction from the reader.⁵ The most common advice given to novice legal writers and employed by skilled legal writers often focuses on writing techniques — the use of points of emphasis at the beginning and end of sections, paragraphs, and sentences; the length of sentences; the use of dependent and main clauses; the use of active and passive voice; the use of detail to emphasize a fact, and the lack thereof to deemphasize;

and word choice.⁶

However, a well-crafted, persuasively written statement of facts can be so much more. What often gets left out is the story within the statement. 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.⁷

Unfortunately, little attention is paid to explaining the "how" of drafting the statement of facts to tell a story.⁸

Lawyers can harness the power of storytelling by considering some of the elements of fiction writing — particularly character, conflict, and resolution — because those same elements are present in any legal dispute.⁹ The character, your client, should be developed, the conflict defined, and the resolution made to "fit" serving both poetic as well as actual justice.¹⁰ For example, your client should be likeable. This isn't always easy, but it starts with *knowing* your client and deciding how best to humanize the client or, if that is not possible, by seeking other means to frame the client for purposes of the story — by making the client a proxy for an ideal, humanizing a corporation through its employees or goals, or otherwise finding a favorable frame for your client's position in the brief.¹¹

With character, conflict, and resolution as anchoring concepts, the legal writer should next consider how to both direct the reader's gaze and shape the story's point of view. In this, there is a connection between perspective and detail that helps explain the "how" in a more tangible way — it creates a thematic truth based on the legal writer's

marshalling of the oft-fixed evidence for consumption by the factfinder and the court, packaged within a point of view.¹² The idea, of course, is not to create a work of fiction but to borrow the tools of fiction writers and use them to craft better stories.

To use point of view effectively, a legal writer should be intentional in choosing the degree of distance at each stage of the story. As she identifies character, conflict, and resolution, and as she finds the theme that carries the story within the statement of facts, a writer must then dial into the degree of distance at each stage of the story and avoid disruptive shifts of perspective.¹³ Legal writing scholar Cathren Page provides a good example of establishing distance at specific stages of the story in an appellate brief using a passage from a brief for amicus curiae in *Michigan v. Bryant*, 130 S. Ct. 2138 (2010), a decision that addressed the admissibility of dying declarations in criminal cases. The amicus brief places the reader at the pivotal scene:

On April 29, 2001, Detroit police responded

to a report of a shooting and found a car idling in the parking lot of a filling station; the car's operator, Anthony Covington, lay on the ground next to the still open driver's side door, bleeding profusely from a gunshot wound to his torso. In response to the police inquiry "what happened?" Covington, in obvious and severe distress, told police that his neighbor "Rick," later identified as the Respondent, Richard Bryant, shot him through the back door of Bryant's house a few blocks away. Covington told police that the shooting had transpired within the last half hour. Covington had managed to drive away from the scene of the shooting and had made it as far as the gas station. After making these statements to the police on the scene, Covington was taken to a nearby hospital by ambulance. He died from his wounds a few hours later.¹⁴

As the author explains,

This statement of facts begins with a wide shot of the parking lot. But police move closer to Covington, and readers see details of his last moments. As a reader, the initial wide shot of the scene orients me; it provides me with a sense of where the statement is set in space and time. Zooming in on Covington through the police officers' viewpoint creates tension for me. I feel empathy for Covington and for those who are aiding him, and I want them to succeed. I find myself thinking that it is only fair to allow the dying declaration into evidence.¹⁵

Incorporating different fiction-writing techniques into otherwise traditional legal writing can help elevate a statement of facts into a story worth telling. A compelling statement of the facts written with character, conflict, and resolution in mind will have your reader invested in the story and, more importantly, in how the story should end.

Do Re Mi: Building on the Hook

"When you know the notes to sing, you can sing most anything."¹⁶ Whether your legal writing professor referred to it CREAC, TREAC, CRUPAC, or some other iterative acronym, chances are this was the unit of discourse you were taught to use for legal analysis. Once a legal writer understands this analytical foundation, she can easily take the components of a unit of discourse to create effective legal analysis, umbrella paragraphs, roadmaps, and legal backstory to carry a reader forward with ease through any argument.¹⁷

Generally, the first "C" (or "T") is your ultimate conclusion about the

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analysis that follows. This component serves as a point of emphasis and as a preview of what will follow. “R” refers to your rule or rules that control the scope of the explanation and analysis that will follow.¹⁸ Your “E,” case explanation, is up next. The “E” allows you to explain to your reader how the rule you have identified has been applied by other courts in analogous circumstances. The application or analysis, “A,” is next, allowing the reader to see how the rule would be applied in the instant circumstance, why the results will be the same or different from the examples provided, what counterarguments may be raised, and why they do not require a different result. The final “C” then offers your conclusion again as to the rule’s application to the facts provided.

One of the workhorses of CREAC is case illustration. Case illustrations used in the “E” of CREAC are powerful tools that highlight the application of the identified rule in decided cases through discussion of that rule as applied. There is a tendency, particularly when dealing with a lot of information, to simply report the facts, holding, and reasoning from a case without considering how to tailor the information presented to the task at hand. This can lead to the “case report” (or book report) model of case illustration in which explanations of law are centered on cases instead of on legal principles.¹⁹

“A good case illustration should identify a legal principle and allow the reader to visualize how that legal principle was applied to particular facts.”²⁰ A case illustration should have four parts: “a hook, [the] ‘trigger’ facts, the court’s holding, and the court’s reasoning.”²¹ When offered correctly it can clarify a rule, prove a rule, or foreshadow application of a rule.²²

The “hook” explains up front the connection between rules and facts in prior caselaw and the current legal principle being illustrated.²³ Thus, the hook has two jobs. First, it sets forth “the legal principle that the case [illustration] will clarify and prove to be true.”²⁴ Second, the hook “tells the reader why she should keep reading” and is intended to grab the reader’s attention.²⁵ A hook can be a legal principle that can be discerned

from the case being discussed, or discerned from multiple cases, or a hook can be the court’s holding (which is particularly useful when illustrating a single case).²⁶

Next, “trigger” facts are provided. Trigger facts are those facts that were outcome determinative in a court’s holding and are offered after the hook because they will be necessary to help the court’s decision make sense.²⁷ While other facts may also be provided for context, the focus should be on providing the triggering facts that helped steer the outcome of a court’s decision.

The court’s holding and reasoning must then be provided. With respect to the court’s holding, consider what legal question the court was answering and whether that holding relates specifically to the question you are addressing.²⁸ Set extraneous holdings aside, and be ruthless in homing in on the part of the decision that relates to the discrete issue being addressed.

The court’s reasoning is the court’s explanation of how existing law, when applied to the facts presented in the case being discussed, led to its decision. The problem, however, is that courts do not always provide a separate explanation of how the application of existing law to present facts led to their decisions. In that case, you may only have the trigger facts and the court’s holding to provide a reasonable guess as to why the court decided the way it did.

Using a hook to lead in a case illustration helps ameliorate the tendency to offer book-report-style case illustrations and serves as a more natural guide to organizing case illustrations around legal principles.²⁹ Other related considerations, including purpose and order of case illustrations, can further bolster the effectiveness of a well-written case illustration.³⁰

Special Teams: Headings Are the MVPs

The more discrete components of a trial memorandum or appellate brief are critical to delivering an effective, persuasive argument. The questions presented, statement of the case, point headings, and summary of the argument (for appellate briefs) round out and complete a persuasive document. Of these, the most powerful component

is the point heading.

A point heading is a full-sentence proposition that advances a major premise (law) or a minor premise (fact), or sometimes both.³¹ Point headings serve three important functions. First, they give the court easy access to the writer’s arguments.³² In fact, point headings in an appellate brief are often the first substantive part of the argument a reader sees because they appear in the table of contents. Second, point headings are organizational tools that assist the reader in understanding the relationships between and among different parts of an argument.³³ Point headings serve as an affirmative, succinct outline of the argument, mapping your argument from beginning to end and connecting each major and minor premise as a part of a whole.³⁴ Third, point headings provide graphic breaks for the reader and readily accessible points of emphasis to the writer.³⁵

In *A Practical Guide to Appellate Advocacy*, Mary Beth Beazley likens point headings to special teams in football.³⁶ The idea is that while point headings — and similar atmospheric components — take up little time “on the field,” they can have a big (and sometimes outcome-determinative) impact on the game itself.³⁷ On legal writing’s special teams, point headings are your most valuable players, acting as a specialized offensive unit supporting the arguments presented in the brief.³⁸ Headings can be “game changers,” equal parts art, science, and strategy.³⁹

Point headings should either state an action you want the court to take or a conclusion you want the court to adopt and then provide the primary reason that the court should take that action or adopt that conclusion.⁴⁰ Bryan Garner encourages a purposeful approach to the content of point headings grounded in understanding your argument *first* and framing your point headings accordingly.⁴¹ Garner suggests becoming a “propositional writer” — a writer who first figures out the major propositions of the argument in full sentences, then begins to include supporting points to provide both structure and focus to the argument.⁴² Garner also suggests adhering to the

“triple threat” approach when drafting point headings, providing point headings in sets of three to create a complete argument.⁴³

The overarching purpose of point headings is to serve the reader, who will use the brief as a tool, as well as effectively convey the whole argument.⁴⁴ Effective point headings “give judges [and their clerks] a glimpse of the facts and law in the table of contents, state why the advocate should win the case, and tell judges where to go for more information.”⁴⁵

The basic techniques for crafting a good point heading are fairly universal: write complete declarative sentences, keep them short, format them consistently, don’t tell the court what to do, avoid acronyms, and maintain subject/verb proximity.⁴⁶ More advanced techniques include: using vibrant, concrete words and sentence structures; repeating key facts, key phrases, or themes that appear throughout your argument; and using accessible typography.⁴⁷ Just like the hook in a good case illustration, a point heading should invite the reader to read on, and just like a good statement of facts, a point heading should lead the reader to the outcome the writer desires by telling a complete story.

Headings should not be a surprise.⁴⁸ “If a fresh reader would have no idea what your headings mean or how they fit together from reading them in isolation, you aren’t getting all that you can out of this tool.”⁴⁹ Because point headings appear first in the table of contents in an appellate brief, take the opportunity to review them there.⁵⁰ Do they tell the whole story? Is there a sufficient transition from one argument or point to the next? Are they written succinctly, maximizing the use of key facts and phrases in a way that invites the reader to engage? Have someone else read them as well to confirm the point headings are complete from a fresh perspective. The importance of good point headings cannot be overstated, and the time invested in writing and rewriting good headings is time well spent.

Conclusion

Whether you are an experienced legal writer, or just starting out, being

more mindful of the *how* in writing, whether it be drafting a statement of facts, case illustrations, or point headings, can go a long way toward enhancing the work product you create. Take the time to stop and consider whether your writing takes full advantage of the tools available, including the basics upon which good legal writing is built. □

¹ See generally CHRISTINE COUGLIN, JOAN MALMUD ROCKLIN, SANDY PATRICK, A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 245-53 (3d ed. 2018) (hereinafter “A LAWYER WRITES”); LAUREL CURRIE OATES, ANNE M. ENQUIST, JEREMY FRANCIS, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING 321-31 (8th ed. 2021).

² Thus, relevant facts are also referred to as outcome determinative facts.

³ Of course, a relevant fact may also provide explanation or background.

⁴ See A LAWYER WRITES at 246, 347-48.

⁵ See Raymond T. Elligett, Jr., and John T. Scheb, *Stating the Case and Facts: Foundation of the Appellate Brief*, 32 STETSON L. REV. 415, 416 (2003) (observing that facts should be written so the judge reading the facts wants to rule for the party and that the party’s theme or themes permeate the facts as well as the argument).

⁶ THE LEGAL WRITING HANDBOOK at 326-30.

⁷ Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L. J. 459, 465 (Winter 2001) (quoting DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 66-98 (1994)) (hereinafter “*Fiction 101*”).

⁸ *Id.* at 459. “[F]or years we lawyers have accepted...question-begging advice from our professors and more senior lawyers, who instruct, in writing the fact section of briefs and memoranda, ‘Tell a story’... ‘Don’t bore your reader,’ without ever explaining *how*.”

⁹ *Id.* at 467. As Foley and Robbins explain: “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.” *Id.*

¹⁰ *Id.* at 467-73; see Ruth Anne Robbins, Ken Chestek & Steve Johansen, *Your Client’s Story: Persuasive Legal Writing* 171-80 (2013). Chestek conducted an experiment in which he sent a storytelling brief and a non-storytelling brief to judges for them to rate;

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and the judges found the storytelling brief more persuasive. Cathren Page, *Stranger Than Fiction: How Lawyers Can Accurately and Realistically Tell a True Story by Using Fiction Writers' Techniques that Make Fiction Seem More Realistic than Reality*, 78 LA. L. REV. 908, 911 (2018) (citing Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N LEGAL WRITING DIRS. JALWD 1, 10, 18 (2010)).

¹¹ Foley & Robbins, *Fiction 101* at 467.

¹² Cathren Page, *Come a Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. REV. 399, 400-03 (2011) (hereinafter "*Come a Little Closer*"). "Point of view is the perspective from which the reader or viewer experiences the story. Although point of view can be divided into general categories such as omniscient, first person, or third person, the perspective's closeness can vary even within these divisions. In the most intimate of these perspectives, the reader inhabits the protagonist." *Id.* at 404.

¹³ *Id.* at 401 ("In fiction, the writer may choose a wide shot for the beginning and then zero in for intense scenes...the writer may vary the distance to structural beats, zooming out for openings and transitions and zooming in for dramatic tension. The problem arises when the writer either carelessly shifts point of view or tries to establish closeness and fails.")

¹⁴ *Come a Little Closer* at 415.

¹⁵ *Id.*

¹⁶ Julie Andrews, *Do-Re-Mi*, THE SOUND OF MUSIC (1965).

¹⁷ Mary Beth Beazley, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 262 (5th ed. 2018) (citing Linda Edwards, LEGAL WRITING PROCESS, ANALYSIS, AND ORGANIZATION 69-74, 133-37, 160-61 (5th ed. 2010) (umbrella paragraphs are a combination of introductory material and roadmap that provide context common to all points, or subpoints (depending on their location in the argument), and that connect the subpoints to the writer's thesis). Legal backstory is what has already happened in the law. "[T]hink of it as a complicated movie. Thus, the beginning of any argument can be thought of as the middle of the movie. And the court just came in late, sat down next to you, and whispered 'What's happened so far?'" *Id.* at 263. As Beazley explains: "If you are saying that the defendant did not have a reasonable expectation of privacy, don't dive into the reasonable expectation of privacy analysis, presuming that the reader knows how it is relevant to the defendant's rights. Instead, set the argument in the context of the Fourth Amendment. Likewise, if you are arguing that the public policy exception to the employment-at-will doctrine does not apply, make sure that you tell the reader what the employment-at-will doctrine is. Furthermore, if there is a split in the circuits, don't make the court figure that out five pages later; tell that important detail right away." *Id.*

¹⁸ Also called a rule proof, it requires synthesis of general principles from mandatory

authority, in addition to any rule set forth in a statute or case. Rule synthesis requires the writer to find the common thread within the case law and provide a rule or a definition for part of a rule to set the parameters for how the rule should be stated and then interpreted.

¹⁹ A LAWYER WRITES at 132.

²⁰ *Id.*

²¹ *Id.* at 115. These parts of a case illustration may sometimes overlap. *Id.*

²² *Id.* at 114-15.

²³ *Id.* at 117. The hook appears first in a case illustration.

²⁴ *Id.* at 116.

²⁵ *Id.* at 116, 119.

²⁶ *Id.* If you use a court's holding as the hook, you should focus on the general legal principle along with any key determinative facts. *Id.* For example, a good hook might be a statement of principle, such as, "A person may reasonably believe his liberty has been restrained if a police officer blocks that person's car." *Id.* at 116. Alternatively, the same concept may be used in a hook by citing a court's holding to anchor a case illustration: "By contrast, in *Wenger*, the court held that the defendant reasonably believed his liberty had been restrained when officer's blocked in the defendant's car." *Id.* at 117.

²⁷ *Id.* at 117, 120 (explaining that certain facts are "trigger" facts because they "triggered" the court's decision).

²⁸ *Id.* at 118. In discussing the court's holding, you may want to note the procedural posture that relates to the holding as well. *Id.* at 118-19.

²⁹ *Id.* at 127.

³⁰ For a more complete discussion of case illustrations, including the role of case illustrations, the parts, determining whether case illustration is necessary, and using and choosing cases, among other things, refer to §7.2 of A LAWYER WRITES.

³¹ See Bryan A. Garner, *Good Headings Show You've Thought Out Your Arguments Well in Advance*, ABA J. (Sept. 1, 2015), available at https://www.abajournal.com/magazine/article/good_headings_show_youve_thought_out_your_arguments_well_in_advance.

³² A PRACTICAL GUIDE TO APPELLATE ADVOCACY at 239.

³³ *Id.* at 240.

³⁴ See Garner, *Good Headings* ("In any clear-headed view of written advocacy, point headings should be high on the list of priorities.")

³⁵ A PRACTICAL GUIDE TO APPELLATE ADVOCACY at 240.

³⁶ *Id.* at 208.

³⁷ For an overview of what makes special teams so special in football, see Coach Martin, *What Are Special Teams in Football? (Explained)*, FOOTBALL ADVANTAGE, www.footballadvantage.com/special-teams-football/.

³⁸ Point headings act as a unit much like the long snapper, the holder, and the place kicker on special teams. Without unity of movement and precision the unit suffers, and as a result, the team suffers.

³⁹ Joseph Regalia, *Head(ings) I Win, Tails I Lose*, Law Professors Blogs Network (Dec. 22, 2018), https://lawprofessors.typepad.com/appellate_advocacy/2018/12/headings-i-win-tails-i-lose.html.

com/appellate_advocacy/2018/12/headings-i-win-tails-i-lose.html.

⁴⁰ A LAWYER WRITES at 362; A PRACTICAL GUIDE TO APPELLATE ADVOCACY at 240-41.

⁴¹ Garner, *Good Headings* ("Not even 5[%] of the hundreds of briefs I review every year — mostly from major firms — contain competent point headings. My standards? Those of the Office of the U.S. Solicitor General, almost all of whose tables of contents are virtuoso performances.")

⁴² *Id.*

⁴³ *Id.* Garner prefers sets of three because any more than three points feels like one too many and any fewer feels like an underdeveloped argument. While I don't believe that three argument points are always necessary, I think Garner's suggested structure serves as a good place to start. The fact is most writers don't use enough headings. There is no reason to force the reader to go looking for points, nor any reasons to "drop a reader into a factual abyss with mountains of detail and no headings to guide them." Regalia, *Head(ings) I Win, Tails I Lose*.

⁴⁴ Ideally, the content of point headings should be mirrored in the question presented, the summary of the argument, and any introduction. But point headings must also be able to stand alone and convey both story and argument, so a writer cannot get too into the weeds in point headings and rely solely on other parts of the brief to support them.

⁴⁵ Gerald Lebovits, *Getting to the Point: Pointers About Point Headings*, 82 NY STATE BAR ASSOC. J. (2010), available at https://works.bepress.com/gerald_lebovits/177/.

⁴⁶ See Garner, *Good Headings*; Lebovits, *Getting to the Point*; Regalia, *Head(ings) I Win, Tails I Lose*.

⁴⁷ See Regalia, *Head(ings) I Win, Tails I Lose*.

⁴⁸ See *Id.*

⁴⁹ *Id.*

⁵⁰ For a trial memorandum, copy and paste all the point headings into a separate document for review.

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This column is submitted on behalf of the Appellate Practice Section, Carrie Ann Wozniak, chair, and Heather Kolinsky, editor.