

Civil Litigation

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FEATURED ARTICLE

Make Your Briefs Tell a Winning Story: Ten Techniques from Creative Writing

M.C. Sungaila

Introduction

Good writing—whatever its form—is good storytelling. In a trial court or appellate brief, the purpose of the narrative is to persuade. In a piece of literary fiction or a literary essay, in contrast, the purpose is often purely to entertain, or to describe a situation so perfectly that it resonates with the reader. Although legal briefs have a different purpose than fiction or creative nonfiction, basic storytelling principles from creative writing can inform and improve legal writing. This article discusses ten helpful principles to improve your legal brief writing.

1. Grab Your Reader Early

A short story typically centers on a pivotal point in a character's life, *i.e.*, a scene in which an important choice must be made, or in which a character is "moved" or changed in some way. The questions are always "Why this particular day?" and "How is this day different from the other 364 days in the year?" The difference in this day—the action that takes place and its impact on the characters—is what grabs the reader.

In contrast, most legal briefs tend to begin with a recitation of the established law along with the history of everything that came before. With the context set, the brief then explains how *this* case either falls within that precedent, or is distinguishable from it. In other words, most legal writers tend to provide a lot of information about *other* cases before getting around to the facts of their case.

But like the short story writer, a legal writer should also take care to answer the question "why should I care about these people?" relatively quickly. Legal writing should set the scene and introduce the parties early. It is important to describe why the judge should care and want to rule in your client's favor. In an appeal, the brief should state whether the result below was unfair, whether the client is particularly sympathetic, and whether the case falls squarely within established precedent or, if existing case law dictates an adverse result, whether the facts demonstrate why the precedent should be limited or overturned.

2. Sometimes Show; Sometimes Tell

Good fiction writers blend "showing" and "telling." In other words, they both show the action (as though a video camera were recording a scene) and tell what the characters are thinking. Fiction writers tend to "show" the scenes they want to emphasize, spending a lot of time setting out exactly what was said and how the characters

interacted. Less important scenes or facts are given short shrift or are “told” in a few sentences.

Good legal writing should also contain a mix of “showing” and “telling.” It is important to choose the right vehicle for your particular purpose, however. A brief writer might choose, for example, to “show” what prior courts have said about an issue by quoting from case law extensively, in block paragraphs. “Showing” in this manner, however, is probably not the best choice for a persuasive brief. Extensive quoting tends to bore the reader, or worse, cause the judge to skip over or skim this language. A better choice is to “tell” the court about the same precedent by either (1) summarizing the rule of law and citing to a series of cases with parenthetical quotations or explanations of those decisions, or (2) setting out a more narrative-based discussion of the case, with some shorter quotations.

3. Be Efficient

Good fiction writing exhibits an economy of words and purpose. Each word and each sentence serves a role in the story, *e.g.*, to flesh out a character or to move the action forward.

Superfluous language should likewise be eliminated from legal briefs. Get to the point and reiterate that point in different ways throughout. Use three words instead of four. Use the simplest and most elegant method (telling versus showing, for example) for each passage in the brief. Always keep the purpose of a particular section—and the overall persuasive goal—of the brief in mind and consistently work toward it.

4. Be Vivid and Specific

Character is often in the details. It is always better to paint a specific picture of those details rather than to generalize about them. For example, it is one thing to say that a woman is a rich, imperious snob, but it is quite another to describe the same woman as follows:

Mrs. Morgan wore \$1 million in diamonds, five-inch heels, and a red Yves Saint Laurent vintage couture evening dress. Many guests at the ball approached her (she was a Morgan, after all), but she spoke to only two of them (Pamela Rothschild and Lucy Cooper, whose husbands played golf with hers at the club). When she ordered a martini at the bar she looked the bartender in the eye only long enough to make sure he understood her order. She had never looked Robert, the Morgan family driver for over 20 years, in the eye. He already knew what she expected of him.

Likewise, in a personal essay, the writer drops readers immediately into a scene, and then reflects on those events. Placing the reader directly into the pivotal scene ensures the story is grounded and helps the reader identify with the author and the author’s subsequent observations.

In a legal brief, it is also important to paint a detailed picture. The more a legal brief contains specific details about the client, the facts, and legal analysis of similar

cases, the more the case comes alive. You should set the scene, using factual details from the record, rather than broadly generalizing about the character of the parties or witnesses. In addition to bringing the case alive, this makes your factual descriptions less argumentative and more credible and persuasive because it will lead the court to draw conclusions without being hit too hard over the head with your view of the case.

5. Tell the Truth, Not Just the Facts

In essay writing, the following maxim prevails: “Write the truth, not the facts.” This means that an essay’s focus is the writer’s own truth of what an event meant to him or her, not the factual events themselves. It can take some digging to discover the truth, even your own. For example, the facts about why a woman joins the board of a domestic violence charity could be the following: She is generally quite active philanthropically, has devoted a lot of time to women’s issues, and recently ended her term on another board, thereby allowing her time to join this board. But the truth of her decision to join this board might be that she herself was involved with a controlling and potentially abusive man whom the organization helped her leave, and she wants to ensure that young women do not make the same mistake that she did. The truth is not only more interesting, but it provides a gateway to a story.

In a legal brief, the facts must be told, of course, but you should also consider what the dispute you are litigating is really about. Tell the court about it—whether it is the other side’s real motivation for bringing the suit, or the real-world impact of an adverse decision for your client.

6. Never Forget You Are First and Foremost Telling a Story

The brief that wins is the one that tells the most compelling story, within the limits of the facts and the law. Never forget that the story is king. This should prevent a common mistake: focusing too much on the procedural history in a case (unless that itself is the story).

It is never too soon to start telling your story. Consider the opportunities for storytelling in the complaint. For example, the complaint in *Altmann v Republic of Austria* (CD Cal 2004) 335 F Supp 2d 1066, *aff’d* (2004) 540 US 1101, 157 L Ed 2d 885, 124 S Ct 1128, a case in which the plaintiff ultimately famously succeeded in gaining possession of Nazi-looted Gustav Klimt paintings, begins as follows:

This case seeks recovery of six paintings by Gustav Klimt owned by Maria V. Altmann, but in the wrongful possession of the Republic of Austria and the Austrian Gallery.

Mrs. Altmann was born in Austria but fled, for her life, when Austria delivered itself into the hands of the Nazis in 1938. In 1938 as well, the Nazis and their Austrian accomplices seized the property not only of Mrs. Altmann, but the rest of her family, including all prop-

erty of her uncle, Ferdinand Bloch-Bauer. They did so for no other reason than because Altmann and her family were Jewish. Included among Ferdinand's possessions at the time were six fabulous paintings by Gustav Klimt....

Ferdinand died in exile in Zurich, childless and a widower, in November 1945. He left his entire estate to three of his brother Gustav Bloch-Bauer's children.... Mrs. Altmann, age 84, is the last surviving named heir.

Notwithstanding Ferdinand's bequest to his nieces and nephews; notwithstanding the fact that the paintings were stolen from Ferdinand; notwithstanding the fact that no party took good title from the defeated Nazis and their Austrian accomplices; and notwithstanding that the Republic of Austria had the legal — not to say moral — obligation to deliver the paintings to the heirs upon probate of Ferdinand's will, the Republic of Austria and the Austrian Gallery did not do so. Instead, motivated entirely by a now-admitted hatred of the Jews that continued even *after* they and their Axis partners were defeated in World War II and *after* the depths of the Holocaust were exposed, the Republic of Austria and the Austrian Gallery extorted the heirs out of their possessory rights in exchange for purported "export permits" allowing the heirs to retrieve other property stolen from them.

By the second page of the complaint, the entire story has been told, and the court has been provided with compelling reasons to rule in Mrs. Altmann's favor.

7. For There to Be a Story, Something Needs to Be at Stake; Be Clear About What That Is

A story cannot consist of simply a list of events; something must be at stake, *i.e.*, there must be a sense of consequence or a character wanting something. Legal briefs can tell a story by identifying what is at stake and describing the potential consequence of a particular decision by the court. You can describe how a ruling against your client would lead to an unjust result (for example, by depriving your client of the family farm) or require overturning long-established, sound case law (which would in turn threaten an entire industry that had previously relied on the law for its business transactions).

Be sure to identify these consequences clearly at the outset, or as soon as it makes sense to do so.

8. Write Yourself Into the First Draft

In essay writing authors are told to write themselves into the story. But sometimes, to discover the truth of a piece, *i.e.*, the real reason for writing it and the reason it may resonate with others, the author has to write all of the facts, scenes, and vignettes that come to mind. From those vignettes the true story will emerge. Sometimes this means cutting all but two lines from the first draft and starting over in a whole new direction.

Legal brief writing seldom benefits from such purely stream of consciousness techniques. Nonetheless, there is something to be learned from this approach. In writing

your first draft of a brief, you may have an approach and a story clearly in mind. Be open to revising it, however. A better story may emerge once you have written the first draft.

9. Organize Arguments Carefully and Thematically

Once the first draft of an essay is written and the story has been revealed, the author then decides which scenes to highlight and which themes to present.

Similarly, in an appellate brief, once individual legal arguments are written, the author should consider the most effective order in which to place these arguments. You may wish to put your strongest legal argument first. Or you may choose to place the arguments that give you the most complete relief (judgment in your client's favor) first, followed by alternative arguments that provide less complete relief, such as a new trial or a reduction in a damages award.

10. Edit Again and Again, and Again

In fiction and in law, first drafts are just the beginning. Self-editing is crucial. Make sure the persuasive purpose of the brief is clear throughout. Eliminate adverbs. For example, if the brief says the result should "clearly" be a certain way, that usually means the result in fact is far from clear—or the reader would not need to be told this. Instead, provide a better overall description of analogous case law and an explanation of why the result here should be favorable to the client.

After self-editing, ask a colleague to edit the brief. An objective reader inevitably spots weaknesses in a brief's narrative and can help improve it. Continue editing until the brief is as persuasive as possible.

DEVELOPMENTS

Arbitration and Mediation

Contractual Arbitration

Arbitration panel had jurisdiction to sanction party's attorney for copying privileged material.

Bak v MCL Fin. Group, Inc. (2009) 170 CA4th 1118, 88 CR3d 800

After a dispute arose over their commissions, plaintiffs left defendants' employ and sued them. The trial court issued a stay and directed that the parties' dispute be arbitrated before a panel appointed by the Financial Industry Regulatory Authority (FINRA). During a prehearing document production and information exchange, plaintiffs delivered documents to defendants that they later discovered included many pages they claimed were subject to the attorney-client privilege. Plaintiffs sent defendants a letter informing them of the inadvertent production and