USING FICTION 101 WRITING TECHNIQUE TO CRAFT WINNING BRIEFS*

Abstract
This paper concerns itself with just one of the components of good writing—fiction writers' techniques—what lawyers can learn from it, particularly in drafting facts section in motion memorandums, pleadings, statement of facts and in briefs. It considers how lawyers are (un)like fiction writers and how they can master the techniques of these imaginative writers, who include film producers, novelist and visual artists.[1]

Keywords: Winning Briefs, Writing Techniques, Fiction 101, Lawyers

I. Introduction

Anyone familiar with what lawyers do will acknowledge that these days' legal practice offers meager opportunity for oral argument. Because of the centrality of writing in lawyering, lawyers need to learn to write better, brighter, tighter briefs.[2] Unfortunately, much lawyers writing has remained largely stilted and formal. It is therefore not surprising that much of legal writing rarely connect with their readers. If anything, the bulk of legal writing diminishes understanding.[3] The reason is not far-fetched. Lawyers generally 'swim in a 'sea of bad writing.'[4] Right from the university where lawyers are trained, emphasis is placed on neoclassical reasoning techniques (structured through organizational schemata like 'IRAC'), that treats law as a series of logically interwoven objective principles that define social reality in such a way that downplays facts. From that mode of reasoning, lawyers (and of course, law students) learn to write in a manner that funnels client's lived realities into what they understand the law requires. Very few develop to gain the confidence to wrestle with the law outside the IRAC reasoning model. The grand effect is that legal briefs, even those

***By Oghenemaro Festus EMIRI,** Professor of *Jurisprudence & Rhetoric, Senior Advocate of Nigeria; Delta State University, Abraka, Delta State of Nigeria. Email:* ofemiri@yahoo.co.uk).

[1] Jenoff, Pam, The Self-Assessed Writer: Harnessing Fiction-Writing Processes to Understand Ourselves as Legal Writers and Maximize Legal Writing Productivity (2013)10 *Legal Comm. & Rhetoric*: JALWD 187; Robbins, Ruth Anne, Better Storytelling in the Nonfiction World of Legal Writing–A Review of Jack Hart, Story Craft: The Complete Guide to Writing Narrative Nonfiction (2013) 10 Legal Comm. & Rhetoric: JALWD 279; Cathren Koehlert-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 (2011) 80 *UMKC L. Rev*. 399; Elyse Pepper, The Case for 'Thinking Like a Filmmaker': Using Lars von Trier's Dogville as a Modelfor Writing a Statement of Facts (2008) 14 *J. Leg. Writing* 177 (suggesting that lawyers can learn storytelling techniques from pop culture by recognizing that film makers are also advocates for outcomes based on narrative clues told throughout the movie); James P. Eyster, Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy (2008) 14 J. Leg. Writing 87 (describing the usefulness of verbal images in conveying a memorable depiction of particular events, enhancing the credibility of witnesses); Philip N. Meyer, Vignettes from a Narrative Primer (2006) 12 *J. Legal Writing* 229; Brian J. Foley and Ruth Anne Robbins, Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections (2001) 32 *Rutgers L.J.* 459. See also, Richard K. Sherwin, When Law Goes Pop (Chicago: University of Chicago Press, 2000), 106 – 139; Carol Clover, Law and the Order of Popular Culture in Austin Sarat & T. R. Kearns, eds. *Law in the Domains of Culture*, (Ann Arbor: U. Mich. Press, 1998) 99-100 ('Trials are already movie-like to begin with and movies are already trial-like to begin with... [T]he plot structures and narrative procedures (even certain visual procedures, in film and television) of a broad stripe of American popular culture are derived from the structure and procedure of the Anglo-American trial... [T]his structure and these procedures are so deeply embedded in our narrative tradition that they shape even plots that never step into a courtroom, and [...] such trial-derived forms constitute the most distinctive share of Anglo-American entertainment.'); James Boyd White, The Legal Imagination (Abridged Edition), (Chicago: Univ. Chicago Press, 1985) 110 (stating 'You are familiar, for example, with the ubiquitous personage of the law of torts, the Reasonable Man, and could write a story about him, I suppose: A Day in the Life of the Reasonable Man. Would such a story have any life or interest? Compare a similar effort on behalf of the Offeror, the Preferred Shareholder, or the Victim of Robbery. If you cannot imagine that a novel built around characters defined in that way would have any interest for you, how can legal talk about the same characters, the same events, have any interest?'); Carol Clover, 'Law and the Order of Popular Culture.'); Neal Feigenson, Accidents as Melodrama (1999-2000) 43 *NY L. Rev.* 741; Anthony Amsterdam & Randy Hertz, An Analysis of Closing Arguments to a Jury (1992) 37 *NY L. Rev*. 55. There are indeed many films that mimic trial process. Consider, for example, classic films like 'Murder on the Orient Express' (1974), and 'Seven' (1995), which exemplify the linear-causal, deductive and inductive reasoning style of the 'whodunit', a well worn plot structure favored by prosecutors in closing argument at trial; or films like Star Wars (1977), The Lord of the Rings Trilogy (2001-2003), and Spider-Man (2002), which exemplify the universal story form of the hero quest, a form criminal defense lawyers typically favor and emulate in court; Memento (2000), which tell us about the way memory, critical reflection, and emotion work together, oftentimes unreliably, in the reconstruction of past events. Or films that examine the core structure and norms of human judgment, such as the tension between mercy and retribution in films such as *Death and the Maiden* (1994) and *Unforgiven* (1992), or unadulterated revenge in films like *Taxi Driver* (1976), *Death Wish* (1974), and *Batman Begins* (2005). Or consider films that explore the rule of law without law, as in The Godfather (1972), or the consequences of rule breaking in films like Pan' s Labyrinth (2006) and Jumanji (1995). Or films that tell us about the founding of communities (Red River [1948]), the abuse of power (One Flew Over the Cuckoo's Nest [1975]), or the irrational nature of (Kafkaesque) bureaucratic 'justice' (Brazil [1985]). Or, finally, consider a film comedy like Annie Hall (1977) which, through a humorous and shrewd juxtaposition of spoken and interior monologues provides a model for a trial lawyer's visualization in court of the hidden thoughts that contradicted and mitigated the legal effect of his client's own words.

[2] Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing*, 3rd ed. 2013, 3 (stating that 'legal advocates spend a great deal more time persuading through the written word than they do through the spoken word.')

[3] Bryan A. Garner, *Garner on Language and Writing* (2009) 400 ('[I]f you wish to write well, you 'll have to resist sounding like a machine. Or an old-fashioned pontificator. You'll have to learn to sound like the best version of yourself.'). See also, Bryan A. Garner, Legal Writing in Plain English (Chi: U Chi Press, 2001) xviii (referred to as 'plain English').

[4] Ibid, xvii-xviii [plain English] (noting that '[W]e learn our trade by studying reams of linguistic dreck—jargon-filled, pretentious, flatulent legal tomes that seem designed to dim any flair for language. When on the job, we read poor prose almost exclusively. It's wordy and high-flown—oddly antique-sounding. And a little part of you may well come to believe that you must sound that way to be truly lawyerlike.')

considered well written and logically presented, come out dry, boring and simply legalistic. The IRAC[5] paradigm or any of its related brethren, such as CRAC,[6] CREAC,[7] CRuPAC,[8] TREAT,[9] CREXAC,[10] CRuPAC[11] and similar formulations, useful as they are for constructing legal proof, leave a restrict room for people and their stories in law.[12] For example, IRAC is notoriously known to mute the people in the legal conflicts. The 'I' (legal issue) has no place for them. Similarly, the 'R,' (rule), simply is the legal concepts and theories that will guide the court in reaching a decision. It has no place for the peoples' stories. Much as the 'A' (application) appears to give some impression of 'people-relevance,' it suffers from outside suffocation that cramps the peoples' stories. It has to be structured to follow the 'R.' It is shewed in such a way that the people are just interpreted as objects upon which the legal rule operates. It is therefore proper to assume that the 'A' mean analysis only in restricted perspective as defined by legal rule. It is no more than just more processing of the legal rule. The 'C,' (conclusion), is then just the legal conclusion that flows logically from the previous pieces. No story. Thus, lawyer's briefs, even those considered well-written and logical come out dry and boring.[13] Legal briefs focus so much on abstract law and overlook the people in the conflict.

Sadly, bad writing is not limited to lawyer's briefs. Judicial opinions by judges are often no better. Many are not conversational. They are solemn, highly polished and artifactual. Some run into many pages without headings and sub-headings. Not surprising, lawyers who read them as their writing 'practice-staple' turn out themselves to be bad writers.[14] Bad writing should not be associated with the profession considering the importance of legal writing to the transactional, social and economic lives of citizens. It is therefore imperative for lawyers to learn how to write. Lawyers can learn to write better if they are willing to imbibe good writing habits. It requires them to 'inoculate' themselves against legalese by embracing simplicity; writing in plain English as by emulate imaginative writers, using the fiction 101 techniques.[15] Like a fictionist, your brief must grab and keep your judge's attention. But it should more than a fiction novel. It must also persuade. While this may sound paradoxical, especially for lawyers accustomed to reasoning and writing formulaic, persuasiveness is imperative. Much as it is recognized that IRAC is a useful tool for organizing reason and writing, lawyers must also acknowledge that IRAC formulaic writing which leaves little room for people—the clients we represent, must be treated as the Sabbath.[16] Because man is not made for the Sabbath, lawyers must come to term that law and the legal system are about people.[17] After all, legal formula is supposed to be a tool to enrich and order peoples' lives. Therefore, legal briefs focus should not essentially focus on the abstract law in a way that overlook the people in the conflict.[18] We must not let slavish adherence to the IRAC paradigm suck the life out of peoples' conflicts.

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[5] Issue, rule, application, and conclusion (IRAC). See, Charles R. Calleros, *Legal Method and Writing* (5th ed., Aspen Pub. 2006) 71–94; Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing* (3d ed., Aspen Pub. 2007) 101–110.

[6] Conclusion, rule, application, and conclusion (CRAC). See, Michael R. Fontham et al., Persuasive Written and Oral Advocacy in Trial and Appellate Courts (2d ed., Aspen Pub. 2007) 11–12; 46–53; Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy and Style* (5th ed., Aspen Publishers 2005) 101.

[7] Conclusion, rule, explanation, application, and conclusion (CREAC). See, Diane B. Kraft, CREAC in the Real World (2015) 63 *Clev. St. L. Rev.* 567.

[8] Conclusion, rule, policy, application, and conclusion (CRuPAC). See, Tracy Turner, Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and Its Progenies (2012) 9 *Legal Comm. & Rhetoric: JALWD* 351.

[9] Thesis, rule, explain, apply, and thesis (TREAT). See, Michael D. Murray & Christy H. DeSanctis, *Legal Research and Writing* (Found. Press 2006) 95–112.

[10] Conclusion, rule, explanation, application, and connection-conclusion (CREXAC). See, Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* (2d ed., Aspen Publishers 2006) 61–76.

[11] Conclusion, rule, policy, application, and conclusion (CRuPAC). Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy and Style* (5th ed., Aspen Publishers 2005) 101.

[12] Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing* 101–110 (3d ed., Aspen Publishers 2007); Richard K. Neumann, Jr., Legal Reasoning and Legal Writing: Structure, Strategy and Style 101 (5th ed., Aspen Publishers 2005); Festus Emiri, Ayuba Giwa & Jonathan Ehisani, Revisiting the Traditional IRAC Organizational Structure of Legal Analysis: Towards a Multidisciplinary Approach (2017) *Nig. LJ* 1; Tracy Turner, Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and Its Progenies (2012) 9 Legal Comm. & Rhetoric: JALWD 351, 353. For a survey of writing acronym see Terrill Pollman & Judith M. Stinson, IRLAFARC! Surveying the Language of Legal Writing (2004) 56 *Me. L. Rev*. 239, 241-42.

[13] Philip Kissam, Law School Examinations (1989) 42 *Vand. L. Rev*. 433, 477–478; Harry Pregerson, The Seven Sins of Appellate Brief Writing and Other Transgressions (1986) 34 *UCLA L. Rev*. 431.

[14] Richard A. Posner, Judges Writing Styles (And Does It Matter) (1995) 62 *U. Chi. L. Rev*. 1421, 1424 ('Many judges and lawyers are disdainful of fine writing.').

[15] Garner, n. 2 [plain English] xviii. For plain English movement impact in law see, the seminal work of David Mellinkoff, The Language of Law (Boston: Little Brown & Co. 1963) (credited for giving rise to the Plain Language Movement in law); Joseph Kimble, Lifting the Fog of Legalese: Essay on Plain Language (2006); Judith D. Fischer, Why George Orwell's Ideas About Language Still Matter for Lawyers (2007) 68 Mont. L. Rev. 129; Joseph Kimble, Writing for Dollars, Writing to Please (1996-97) 6 Scribes J. Legal Writing 1. Plain language movement is a movement led by an influential group of legal scholars, judges, and practitioners who seek to advance clarity in legal writing by purging it of cumbersome sentence constructions and empty legal jargon. Proponents of the movement apply this prescription broadly to legislative and transactional drafting, as well as to expository legal writing. For example, of its use in expository text, see Richard C. Wydick, Plain English for Lawyers (1998) 9-24; Wayne Schiess, The Art of Consumer Drafting (2007) 11 *Scribes J. Legal Writing* 1.

[16] See Holy Bible, Mark 2: 27 ([T]he Sabbath came into existence for the sake of man, and not man for the sake of the Sabbath').

[17] Festus Emiri, et. al. above n. 11.

[18] Richard A. *Posner, How Judges Think* (Harv. U. Press 2008) 118-119 (Judge Posner suggests that since judges in our system are [occasional] legislators as well as adjudicators, lawyers should make a greater effort to present facts to judges—not so much the facts of the case, the adjudicative facts, which most lawyers do emphasize, but rather the background or general facts that influence a

This paper therefore aims to bring life back to legal brief writing. It is designed to make us more conscious that legal briefs to court should be about resolving some human conflict. The paper contends that a persuasive brief (whether in the form of memo or statement of facts or trial or appellate brief) should centralize people-the client (whether human or institutional)-more conspicuously. It is however important to state at this opening part that this paper does not set out to suggest that brief writers should disregard the law or abandon the logic of their case in favor of making a purely emotional appeal. Rather, it posits that when we write about our clients' conflicts, in an effort to resolve them using the three rhetorical strategies of logos (logic), pathos (emotion) and ethos (credibility), we keep the clients in the story and we persuade decision makers better.[19]

2. Why Should Lawyers Write in The Narrative Form Like Novelists?

Legal advocacy is traditionally defined as argument seeking to convince a judge that a certain rule, when applied to a proffered set of facts, supports the desire of the client. As such, law students and lawyers pore over published cases seeking another instance in which a judge in the same jurisdiction held in favor of someone else having a case that was 'on all fours' with the present controversy. This dry matching game requires the sophisticated analytical abilities of both legal counsel and the finders of law and fact. While the method works, particularly for clear cases, it delivers short for what can be referred to as 'hard cases.'[20] Though a majority of cases will come under the category where '[t]he law and its application alike are plain,' in which case syllogism and deductive reasoning are often sufficient to reach a conclusion; a number will fall outside the class. A second category will interrogate cases where 'the rule of law is certain, but its application is doubtful.' A plausible third category will involve cases where the law and facts are doubtful.[21] The second category brings to mind situations readily identified by Hart as 'legal penumbra.'[22] They are cases requiring attention to facts details to determine the application of law. The third category demands even more. It requires detailed law and facts analysis. These latter two categories therefore present a situation where judges struggle to understand and retain evidence that is presented through traditional abstract analysis. They present situation where judges find it attractive to hear stories meld with abstract legal analysis and presentation to better understand.[23]

Cognitive study reveals that judges often struggle to understand and retain evidence presented only in the form of traditional abstract analysis. They would rather understand better when cases are presented in the narrative form. Yes, judges simply want briefs written as stories to make sense of them.[24] The story preference is innate to all of us. Storytelling predates written language. It is the way the brain generally is wired to understand. It was how our ancestors communicated what to fear, what to value and whom to love. That is how our brains are wired to interpret the world around us. Whether we are told a story or not, our brains will naturally try to build a story around any set of facts we hear or perceive. In other words, if a trial lawyer fails to build a story, the judge will build one anyway from the facts presented. It is how we make sense of a set of (complicated) facts. It is how we impose order upon chaos. It is how we resolve tension and conflict. It is for this reason that litigators and legal theoreticians have come to realize the importance

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legislative decision ('legislative facts,' in the conventional and in this instance useful terminology); Ruggero J Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (2nd ed., Natl. Inst. Tr. Advoc. 2003) 168; Patricia M. Wald, 19 Tips From 19 Years on the Appellate Bench (1999) 1 J. App. Prac. & Proc. 7, 11 ('Make the facts tell a story. The facts give the fix; spend time amassing them in a compelling way for your side but do not omit the ones that go the other way.'); Jacques L. Wiener, Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit (1995) 70 *Tul. L. Rev*. 187, 194 ('Judges are human—even if some of us may not exhibit all of the qualities of that species at all times—so you must demonstrate both why your client should win (the emotional element) and the proper legal way that your client can win (the intellectual element).'); Alex Kozinski, The Wrong Stuff, [1992] *B.Y.U. L. Rev.* 325, 330 (Judge Kozinski stating: 'There is a quaint notion out there that facts don't matter on appeal—that's where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn't matter a bit, except as it applies to a particular set of facts.').

[19] Michael Frost, Introduction to Classical Legal Rhetoric: A Lost Heritage (1999) 8 *St. Cal. Interdisciplinary L. J.* 613, 619 ('As Quintilian observed, an advocate has three aims with respect to the judge: '[He must instruct, move, and charm...'). See also, Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing (Aspen L. & Bus. 2002) 22-23; Marius Fabius Quintilian, *Institutio Oratoria* (H.E. Bufler trans., 1954) 397. This does not in any way discount the value of logos in structuring persuasion. Logos is a prominent part of the rhetoric triangle. In fact, it is the foundation from which legal argument proceeds and the distinctive mark of the profession that sets it apart as unique. But ancient rhetoricians were also aware of various non-rational and sometimes imponderable factors at play in persuasion; so to accommodate them, they analyzed legal arguments from three points of view: arguments based on logic (logos), arguments based on emotion (pathos), and arguments based on the credibility of the advocate (ethos).

[20] For a discussion on the distinction between clear and hard cases in law, see Ronald Dworkin, *Law's Empire* (Harv. U. Press, 1986); D.N. MacCormick, Legal Reasoning and Legal Theory (Oxford: Oxford U. Press, 1978); H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); Lon Fuller, Positivism and Fidelity to Law: A Reply to Professor Hart (1958) 71 *Harv. L. Rev*. 630.

[20] Benjamin N. Cardozo, *The Nature of the Judicial Process* (1949) 4-6.

[21] Cardozo, n. 13, 164-165 (identifying the three classes of cases before judges and the type of opinion judges need to write).

[22] HLA Hart, Positivism and the Separation of Law and Morals (1958) 71 *Harv. L. Rev*. 593 (illustrating Hart's core/penumbra analysis with the rule prohibiting 'vehicles' mounting of a working World War II truck on a pedestal in the park as a veterans' memorial).

[23] Kenneth D. Chestek, Judging by the Numbers: An Empirical Study of the Power of Story (2010) 7 *Legal Comm. & Rhetoric: JALWD* 1, 6 (noting 'a brief that relies purely on a logos-based argument will be lifeless, just as a single strand of the DNA molecule is incomplete. Winding in a solid story-based argument will bring the brief to life.').

[24] Stories stimulate cognitive preferences. See Anthony G. Amsterdam & Jerome Bruner, *Minding the Law: How Courts Rely on Storytelling: And How Their Stories Change the Ways We Understand the Law— And Ourselves* (2000) (containing illuminating insights into legal storytelling). See also, George Lakoff, *Whose Freedom? The Battle over America's Most Important Idea* (Farrar, Straus & Giroux, 2006) 16 (describing how a person's thinking is 'constrained by the frames and metaphors shaping your brain and limiting how you see the world').

of storytelling in case advocacy as an alternative (or additional) strategy to abstract legal analysis and presentation.[25] The story method relies on recounting action from a beginning to a conclusion based on evidence that is consistent with the story. Thus, evidence is organized in such a way to make logical sense based on the reader or listener's experience. It is developed and presented as stories, triggering expectations of how a story will develop and end.

The goal of this paper is to help lawyers who never tell stories to start telling them; to assist those who sometimes tell stories to tell them more often; and to make those other who always tell stories more conscious of the technique, so that they may tell better stories. It accordingly explores how lawyers should use literature to stay connected to their imaginations, to their creativity, and to their humanity as they write brighter, tighter and understandable briefs. Thinking about the practice of law as akin to fiction 101 brings us to critically look behind and between and over and under the black letter rules that comprise the law; to see how facts concretively can be explored to wrestle with the law, especially in trial or appellate stages.

The traditional trial begins with pleadings. Proper trial structure is inductive information processing. The lawyer presents fact one plus fact two plus fact three, perhaps through a series of witnesses. The presumption is that at the end of the day the judge will assimilate the information and reach the desired conclusion. But that is simply not how judges listen. Judges listen deductively. They develop a story that explains the conflict early in the trial process and then filter the evidence selectively to maintain a consistent picture. So doing they like all of us, are biased-oriented—first impressionist. It is therefore important to make your judge the 12th players, and not a referee, from start to finish of the figurative 90 minutes football match.[26] So, the trial lawyer must from the very beginning tell a complete story-which incorporates compelling themes, specific narrative structure, and narrative elements-in the opening statement if he or she is to get the judge to form a favorable story of the case. It is for this simple reason our revered IRAC presentation isn't in tandem with what win cases.[27] It presents information is the reverse form to how the brain processes information. This agrees with how cognitive studies show how we make sense of our world. Much our knowledge and thinking of the world is unconscious-built from unexamined thought processes. We transfer inferences from one domain to another, so that we can we understand abstract concepts. When we encounter a new experience, we simply place it into a familiar category and cognitive frame constructed (schema) that emerge from our prior experience to make sense of it. We use the mental blueprints to sort and organize our new experiences. In fact, at a more complex level schema is used to construct idealized cognitive model (ICMs). ICMs fossilize as 'folk' theory or cultural understanding that organizes knowledge of events, people, objects, and their characteristic relationships in a single gestalt structure that is experientially meaningful as a whole. That explains why a restaurant owner would approach anyone who enters there what sort of food or drink the fellow would like served for a price. ICMs therefore come to represent what we believe is natural through experience within a particular culture. They provide shortcuts and stereotypes, transforming new and unfamiliar situations into the normal and natural course of events. This is how judges too interpret the world of facts lawyers daily present before them. They fit the facts inductively to a worldview familiar to them and then tie the pieces of incremental evidence the lawyers present to that mental experience, which shapes their thinking. By mapping new evidence into preconceived structures, the reach 'quick judgment' and then determine whether that judgment 'makes sense, if it's logical, if it's fair, if it accords with the law, if it accords with the Constitution, if it accords with . . . sense of ethics and morality.[28] This underscores why lawyers should not ignore pathos-based storytelling argumentation.

3. How to Tell Winning Stories

Anthony Amsterdam and Jerome Bruner in their book *Minding the Law* provide lawyers fiction 101 great ways to translate literary theory into legal practice.[29] Their text demonstrates how lawyers like novelists should tell stories following the literary structures of: (a) A 'steady state'-that is, a state 'grounded in the legitimate ordinariness of things;' (b) The 'trouble'-that is, something that happened to disrupt the 'legitimate ordinariness of things;' (c) 'Efforts' at redress, or to cope or come to terms with the disruption; (d) Leading an outcome or resolution; (e) Ending coda or moral-a retrospective evaluation of what it all might mean-which returns the audience from the 'then-and-there' of the narrative to the 'here-and-now of the telling.'

Taken together, these five elements make up what is 'the plot' of the story-the 'what happened and why' of the story. Plots usually fit into particular 'genres'-'mental models representing possible ways in which events in the human world can go.' In other words, the story is recognizable to the reader or listener almost from the outset, causing him or her to register it as a comedy, tragedy, or drama. These are established frameworks for narratives or scripts that we recognize and expect to be resolved in certain ways. Making the plot move, of course, are the characters-free agents, with minds of their own, who engage in the 'what happened and why' of the story. So, in a novel story or legal story we expect to encounter and to recognize heroes, villains, lovers, enemies, good guys, bad guys, clowns, tragic figures, protagonists, and antagonists.

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[25] Chestek, n. 23. See also,

[26] Posner, n. 18, 107 (Judge Posner quoting a recent interview with current Supreme Court Justice Anthony Kennedy in which Justice Kennedy suggests that many judges begin with a 'quick judgment' and then determine whether that judgment 'makes sense, if it's logical, if it's fair, if it accords with the law, if it accords with the Constitution, if it accords with your own sense of ethics and morality).

[27] Id.

[28] Id.

[29] Anthony G. Amsterdam & Jerome S. Bruner, *Minding the Law* (Harv. U. Press, 2000) 1-165.

It is the plot and character that makes up the 'what' of the story-something happened to someone and the story is about how to fix it. The arrangement of the substantive components is what is the 'how' of the story. These are the technical pieces that literally make the story go: timing, framing, pace, language, where the story begins, where it ends, what gets described fully, what gets left out, the setting, the organization, and the structure. As with the plot and character, these elements make the story what it is, delivering it to the reader or listener in a form that he recognizes and responds to. This is only the nutshell deconstruction of a story, however. In every story, each one of those elements-character, plot, genre, timing, framing, pace, language, structure, rendering of detail, organization, setting, etc.- represents one, if not more than one, choice about the kind of story to tell and how to tell it. To know how to tell a story, then, we need to understand the choices we make and why we make them.

Lawyers are particular kinds of storytellers, influenced by variables unique to their role as tellers of their clients' stories. In that role, as makers of legal arguments, we decide what story to tell and how to tell it 'guided by some vision of *what matters*.' Put another way, to figure out what story to tell and how to tell it, the lawyer must weigh three substantive factors, the same factors that make up the theory of the case: the law, the facts, and the client's goals. In addition, of course, the lawyer must consider contextual factors, e.g., the audience, the forum, the availability of resources, and the personalities of the client and other potential supporting or detracting characters in the story. The lawyer must also consider particular cultural norms and values in deciding among different stories and ways of telling them. And finally, the lawyer must consider factors personal to himself in determining what story to tell and how to tell it: is he comfortable in a courtroom, can he pull off a humorous narrative, does she do better in a more formal or less formal setting, does the client's situation raise personal moral or ethical concerns?

Importantly, storytelling must be persuasive. That is its aim. So, when a lawyer drafts a statement of facts, for example, she does not simply record the known universe of 'relevant' facts. The relevant facts must be presented in an interesting and persuasive way. Lawyers should recognize that there is no such thing as neutral description of facts. As lawyers, we engage in fact-gathering repeatedly-at initial client interviews, after we've done some legal research, in anticipation of the other side's argument-and then we pick and choose from available facts to present a picture of what happened that most accurately reflects our sense of what matters. And the other lawyers involved do exactly the same thing, with exactly the same pool of facts, but emphasizing different details, drawing different inferences, and thus drawing quite a different picture. And this selectivity applies to the 'how' too**.** The law might define what is relevant, but it does not define how the relevant facts, in a particular case, are to be expressed. It is up to the lawyer to figure out what words to use, with what emphasis. A lawyer's statement of facts thus reflects-by its inclusions and exclusions, the emphasis of its sentence construction, and the structures of its argumentation-choices. Lawyers may also make choices about the other technical elements of a story as well: when the story should begin and when it should end, how quickly or slowly the action should move, how fleshed out each character should be. For instance, Kim Lane Scheppele provides wonderful examples of choices that can be made about the 'how' of stories by simple using words to describe same situation as either 'lightly choke' or 'heavy caress' and the framing point of stories, such as beginning with the defendant's childhood rather than beginning with the night of the crime.[30] Each word choice can significantly tell the story differently.

Thus, stories are not recipes for stringing together a set of 'hard facts.' Rather storytellers first construct the facts and then construct the stories by sorting through what is out there and figuring out both what to say and how to say it, based on the storyteller's own perspective about 'what matters.' In effect, narrative is not a linear framework structure into which events are slotted. It is instead a set of events that can be organized into alternative narratives, and the choice among them depends on perspective, circumstances, and interpretive frameworks. And those choices are governed by what the storyteller care about. Thus, the 'fabric of narrative reflects the shape of the storyteller's concern. By paying attention to narrative theory, we become better lawyers. Let us see how this can be used in crafting persuasive legal documents. As previously stated, a story in a dramatic novel embodies the following characteristics: (i) it focuses on a central character, the protagonist, who is faced with a dilemma; (ii) the dilemma develops into a crisis; (iii) the crisis builds through a series of complications to a climax; (iv) in the climax, the crisis is solved.[31] Similarly, litigation is an account of a character running into conflict, and the conflict's being resolved. By following the novelist parallel, lawyers can use character, conflict, resolution, organization and point-of-view, and, perhaps, setting to construct legal stories; with less flexibility with voice, style and word choice, largely dictated by the conventions of legal writing. This paper will address only the most important literary elements applicable to legal stories— character, conflict, resolution, organization and point-of-view.

4. Elements of Effective Stories

Narrative theory is an exploration and elaboration of the idea that the law is made up of stories that are constructed by lawyers, clients, and decision makers. Each one of these stories consists of distinct and identifiable elements, both substantive and technical, and each one of these elements is the product of choices made-consciously or not-by the story's constructor. Storytelling itself is the craft that puts this theory into practice: the act of constructing the story's elements, the choices the storyteller makes in the process, and then the actual telling of the story. Thinking about the practice of law as a practice of storytelling gives us the opportunity to look behind and between and over and under the

[30] Kim Lane Scheppele, Foreword: Telling Stories (1989) 87 *Mich. L. Rev*. 2073.

[31] Janet Burroway & Elizabeth Stuckey-French, Writing Fiction: A Guide to Narrative Craft (7th ed. 2007) 263; *Josip Novakovich, Fiction Writer's Workshop* (1995) 74-75.

black letter rules that comprise the law.[32] By paying conscious attention to stories, lawyers can discover the interstices between facts, language, structure and ideas that go well beyond the reasoning of courts or the mandate of a statute.[33] Because through a narrative lens, we discover not only 'how law is found but how it is made.' We can begin the narrative journey by exploring character, conflict, and resolution as the first building blocks of all stories. For just like stories, lawsuits have elements of characters, conflict, and resolution. Since the lawyer cannot construct the resolution until the trial ends or the case settles, the goal of the lawyer like the fiction writer will be directed to portray the characters and conflict in such a way that the resolution the lawyer seeks 'fits,' so the judge will *choose* the resolution sought over the competing resolution offered by the opposing party. The elements of an effective, persuasive story are:

Organizing Theme

In fiction writing, the theme is the main point that the novelist wants the reader to get. Invariably in all cases, the theme is the moral of the story, often built around human qualities of revenge, love, jealousy, goal, authority and obedience, and the like. Similarly, for lawyers, the theme is the overarching moral (message) of the case, styled the theory of the case. It is the ultimate reason the brief writer conveys to the judge why the client should prevail. So, a good theme should be a statement about the law, the facts, or about how the law and the facts meld, which if true should vindicate the right sought. Thus, the very first tip to writing a winning brief is to have an organizing theme or what some would loosely refer to as the case theory.[34] Simply put, theme is 'a view of how facts, law and circumstances can be put together to produce the outcome you and your client seek.'[35] It is therefore a unifying statement of the theory that favors the client's position. Essentially, it requires the lawyer to find what really ties her case together in such a way that portrays the client in a sympathetic light and is consistent with a common sense notion of fairness. Once identified, that message must be one able to drive the case story and to carry the judge's mind through the brief. A lawyer who crafts a compelling story with powerful theme coasts home usually with a winning brief. Without a strong theme, the lawyer has no good story. Themes are easy to develop because there are not that many of them, even in fiction writing. In fiction writing it is the theme that prompts the novelist to write a story. It is not different from that which should motivate a lawyer to write a brief. Themes are moral precepts that emotively move us to action-wanting the status quo to be removed or changed for the better. That after all is what judges do on a regular basis. Typical examples of themes include such things as justice, fairness, equity, truth, responsibility, perseverance, truth, and redemption. An example will do. Suppose you represent a professor allegedly sacked by the university, your case theory could look like this: 'Defendant University fired the Plaintiff Prof. Smith's from her employment without notice or a hearing.' The simple statement unites the law and the facts in a theoretical way that projects what you want the trier to hold for your client-reverse the sack because it is unjust-the plaintiff was not given an opportunity to defend herself. It does so without explicitly stating what the law on employment requires, as in mentioning the relevant statute or common law provision. But the crafting of the theme reveals that they are the very basis on which the theory is formulated. Once the theme is aptly chosen, every part of the brief should support it: the facts section, the headings, the introductory paragraph summarizing the argument, the explanation of the governing law, the key facts selected to support the legal argument, and, in an appellate brief, the question presented. And like the theme lyric of a song, it should be repeated in most part of the brief to make conscious the reason for the brief. Thus, an organizing theme should be a message that shines through detailed facts and case law for a busy judge. It should be logical and easy to grasp, while making emotional sense and permeating every part of the brief.

Despite the importance of theme in brief writing lying at the heart of lawyering, especially the techniques and strategies of effective persuasion, it is surprising that the majority of briefs written by lawyers have no organizing theme.[36] This is because much of legal education and even everyday practice do not teach lawyer the need for developing theories of litigation as strategy for persuasion. At best the strategy legal education gives the mint lawyer is some dose of adjectival law in the form of evidence and procedure law.[37] Effective strategies of persuasion get little or no attention. So, law students do not cross the 'fact-law' divide until after graduation, and when they do, they have to learn persuasion through everyday pick-up practice. Unfortunately, even everyday legal practice can rarely cure the defect. Many lawyers deride theory. If anything, the mere mention of 'theory' can be annoying to practice-lawyers who generally are contemptuous of theory. They are home with 'practice' and the 'concrete'-considered the real business of lawyering; not mindful that theory is just another name for thinking.[38] Since case theory actually lies in the heart of lawyering, especially the

[32] Amsterdam & Bruner, n. 7.

[33] Paul Gewirtz, Narrative and Rhetoric in the Law, in Peter Brooks & Paul Gewirtz eds. *Law's Stories: Narrative and Rhetoric in the Law* (Yale U. Press 1996) 2.

[34] The terms 'theme' and 'case theory' share certain similarities but do not necessarily mean the same thing. See Festus Emiri, *Essentials*. But for simplicity and clarity this paper treats both as synonym.

[35] Gary Bellow & Bea Moulton, The Lawyering Process: Materials for Clinical Instruction in Advocacy, (1978) 305. See also, Linda H. Edwards, Legal Writing and Analysis (2003) 186-87; Steven D. Stark, Writing To Win (1999) 69-70 (recommending a writer '[d]evise a one-or two-sentence slogan that embodies your position').

[36] Festus Emiri, *Essentials* (noting that the typical trial lawyers give no conscious thought to case theory because they hardly think of it as important strategy in litigation). See also, See Binny Miller, Give Them Back Their Lives: Recognizing Client Narrative in Case Theory (1994-1995) 93 *Mich. L. Rev*. 485, 487 ('Despite the view of many lawyers that case theory is central to the task of lawyering, and despite its prominence in highly publicized trials, most account of lawyering do not explore the richness of case theory.')

[37] For example, typical evidence law teaches little about case theory because it narrowly skewed to focus on the assumption that facts leap from the testimony of witnesses and exhibits tendered in hearing, and that should be sufficient to teach strategy.

[38] Ruthann Robson, Lesbian (Out)law: Survival Under the Rule of Law (1992) 15 (noting '[T]he most important criticism of theory, it seems to me, is that it is useless. And theory can be useless: meditation at its most abstract and inapplicable. Yet theory is also just another name for thinking, for deciding, for arguing and examining one's own beliefs and principles as well as the beliefs and

techniques and strategies of effective persuasion, and most briefs have none, even though no novel is without one, brief reading is often boring and uninteresting. Lawyers should therefore not expect brief readers to be generally interested and persuaded by what they write.[39]

Sheppard gives the following tip on how to craft a good theme: first consider what the client's case is *about*; ensure it is closely related to how the conflict is defined; in such a way that it provides answer to the statement-my client should win because . . . .[40] In doing so the 'lawyer should search for answers that allow him or her to fill in the blanks of the following statements:-This is a story about a (man) (woman) who (is) (was) . . . [describe client] . . . and who is struggling to . . . .'[41] The strategy for crafting the theme works because once the brief writer is able to find answer to the question 'my client should win because . . .,' it becomes easy to identify a public policy that supports an outcome in the client's favor. Tying a good theme to public policy is advised because legal interpretation presents to judges choosing between competing interpretations of the law. In that circumstance, judges will generally lean towards a compelling policy theme interrogated in the particular facts of the litigation. As summary, an organizing theme is all about why your client's cause is *just*, or why is the other side's cause is *unjust*.[42]

Character

Character development is central in a novel. While a variety of characters can be crafted in a fiction story, the prominent and familiar characters are those of the protagonist and the antagonist. The protagonist is the main character of the story. The protagonist is the person or institution the writer wants the reader to empathize with. On the other hand, the antagonist is the person or institution that is in conflict with the protagonist-the protagonist nemesis, who must not prevail. This explains why a novel will quickly reveal in its opening part revealing both the protagonist and antagonist. Readers however are quick to spot who the writer root for-the protagonists. The writer describes the protagonist admirable qualities in the opener. It is not difficult to know the character (whether as person, people or institutions). To elicit the reader's sympathy, the writer project positive qualities of the protagonist. From there the reader sees a likable person. On the other hand, the antagonist is painted negatively. This creates reader's dislike for the character. However, the skillful fiction writer does not make it too obvious that she roots for the protagonist least the reader comes to feel that the story is simplistic or unrealistic. The writer has to create something believable, not purely good nor purely evil, but essentially human that fits the experience of how readers differentiate a protagonist from an antagonist. So, to prevent being unreal the skillful writer provides certain proof, a level of objective detail, arranged carefully to evoke the emotional response desired. That is what legal writers do in most opening briefs. They tell the court who they root for, either the plaintiff or defendant. And depending on the facts, present their client as the protagonist and the adverse party as antagonist. But in doing so, many lawyers do not capture the very essence of character development—the emotive content of their client's case. The majority of briefs simply adopt a rational, legalistic description of their clients; thereby failing to fully convey to the reader, the client's character. For example, many briefs I have read follow this everyday mill-description: 'the plaintiff is a company incorporated under the laws of Nigeria carrying on business of [ex]import at its registered office at 5 XYZ street, Warri.' Nothing emotional whatsoever is revealed as by way of character introduction.[43] The effect such bland description is predictable. Failing to develop the client's characters leads to inattention by the court.[44] This kind of character introduction misses the point. It is unhelpful in many respects. It fails to recognize that character development is essentially a 'pathos-based concept'; that client's introduction is an opportunity to project the client as the protagonist worthy of court sympathy; that favorable client introduction is an important subject to quickly project to create a reason for the court to want to rule in the client's favor. It discounts the value of the common intuitive approach new experience—'first impression last.' First impression often creates cognitive bias.

The bland description, 'the plaintiff is a company incorporated under the laws of Nigeria carrying on business of [ex]import at its registered office at 5 XYZ street, Warri.' does not make the client (corporation) look like a real person (with feelings, motives, goals) to the reader. Readers know of corporations in the real world with thoughts, goals, feelings, and dreams. In effect, the reader who encounters the flat corporation description will not empathize with it and will not see compelling reason to resolve the matter in its favor. The character description in the brief does not get a judge to empathize with the client. But a good writer can change all that by showing that the client is a valuable,

principles we have been taught. Theorizing is something we all do.').

[39] Lucie E. White, Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G (1990) 38 *Buffalo L. Rev.* 1 (exploring case theory, telling the deep emotional story of enforced silence, and the rhetorical survival of a poor woman engaged in a welfare administrative hearing). See also Robert M. Bastrees & Joseph D. Harbaugh, *Interviewing, Counselling and Negotiating: Skills for Effective Representation,* 1990 (exploring how case theory applies to trial and non-trial lawyering).

[40] Jennifer Sheppard, Once Upon A Time, Happy Ever After, And In A Galaxy Far, Far Away: Using Narrative To Fill The Cognitive Gap Left By Overreliance On Pure Logic In Appellate Briefs And Motion Memoranda (2009) 44 *Willamette L. Rev*. 255, 274.

[41] Id.

[42] Mary B. Beazley, A Practical Guide To Appellate Advocacy (2d ed. 2006) 38 (reminding writers that case theory, or theme combines appeals to logic, emotion, and credibility in the form of factual, legal, and policy arguments, but the emphasis is on emotional appeals).

[43] Kenneth Chestek, The Plot Thickens: The Appellate Brief as Story (2008) 14 *Leg. Writing* 127, 141 (suggested that lawyers possibly use such obscure description because some court rules and rules of ethics require the statement of the case to be presented in a balanced fashion, or without argument, or some other formulation of that concept).

[44] See Richard K. Neumann, Jr. & Sheila Simon, *Legal Writing* (Aspen Pub. 2008) § 28.3, 201 (encouraging writers to 'build' a story when writing a brief because most stories start in a state of equilibrium; then, 'bad things happen to disrupt the equilibrium; for which the protagonist struggles to restore matters to their rightful place, stating that when the story is presented in this way, the judge will naturally want to restore equilibrium by deciding the case in the favor of the protagonist).

productive member of society by simply humanizing the client. One of the easiest ways to humanize the client will be to state charitable, volunteer works of the corporation, says its support for humanitarian works and service in the military, Peace Corps, or the Red Cross, or the community. By presenting the goals, thoughts, public good of the corporation as an institutional client, the client becomes likable and empathy is evoked. It is therefore appropriate to mention why the client's products or services benefit society. In fact, it may not be out of place to mention the nature of the client's business or goals, its past adversities and how it overcame.

Aside making the client likable, good character development can help the judge to see the reason why the client acted in the manner in which it did; provide an explanatory basis to understand possibly the client goals and motivations and why they seem sensible. It also creates favorable, appealing emotions in the reader causing the reader empathizing with the client. Accordingly, a fuller character description should help the trier to understand why the protagonist acted as it did; understand the client's motivation; determine whether the motivation make human sense; determine whether the client should be allowed to behave in such manners; whether responsibility should follow actions; whether the client is deserving of court protection, and many other such principles. This probably explains why some legal writing teachers advocate that lawyers should portray their clients in the protagonist archetypal hero roles, which help the court to see why the client needs assistance to restore the equilibrium. Such a picture can be magical, considering that heroes have quests and fears and must overcome obstacles them in pursuit of their goals. The thinking is that by assigning the client the role of 'hero,' the lawyer invests the court with the role of 'right-vindicator.'[45]

Character development also involves use of concrete description of the client. The practice of simply referring to clients as either plaintiff' or 'defendant' is unhelpful. Such a practice is what Garner refers to as 'noxious habit that violates the principles of good writing.'[46] Rather the good writer refers to the parties by their names, or worse, by generic description, like the bank or the company or the university. Think for once how absurd it is to use legal describer such as plaintiff or defendant, as you 'imagine a world in which all novelists used the words 'protagonist' and 'antagonist' instead of the real character names in novels.' Truth be told, reading them will not be tedious. It is for the same reason why lawyers should eschew legal describers. Rather it will make sense to refer to parties by their real names.

In developing character, the brief writer should recognize that stock stories provide a ready stock of characters, which cast both people and things in particular archetypal roles. The roles include—sadist, champions, benefactor, change-changer, lover, children, tricksters, mentors, kings, mothers, demons, and sages. The writer can cast her client into any of these recognized stock characters. Interestingly, not only does the model fit individual and institutions, the archetypal roles can also be used for abstract concepts, when reified as though a concrete character. For example, a legal principle can be made to take the shape of a character in a brief if the writer seeks to interrogate public policy or a statute like the Constitution. In that case the writer will focus on the Constitution as though it takes on an archetypal character of its own.[47] So, much as we all know the provision does not *actually* think, or want, or do anything like the character of an individual, the brief writer can yet give the qualities when presenting it as a character in a story. This can be achieved by breathing character into the statute by reifying its goals, motivations and achievement. For example, the brief may highlight the notable achievements of the statute or law, its flaws and any other features, which speak to its peculiar nature. For instance, the constitutional provision on fair hearing can be characterized as laudable in preventing the government and deep-pocket entities from unreasonable terminating employment without due process. Interestingly, developing character of the client is challenging for some lawyers not because they are presented with 'bad' character facts, but often because they do not have *enough* facts. Not having enough character facts often is the result of inadequate facts gathering and investigation. Investigation could involve things considered minor, even obtuse, but significant when put alongside other facts. Information such as the client's age or occupation or adversities can be used to plant 'flowers' in a facts section. In crafting character, lawyers should pay attention to the client's needs and goals, because 'inhere' is where character facts often spring from.[48] The reader must like the character and agree with, or at least understand, the character's goal.

Lawyers need to recognize how conflict intertwines with character. It is the conflict between the parties that creates the litigation and puts forward the character at play. However, most readers are more interested in the character of the case. Character, not necessarily the action of the case, is what interest readers most, because it is the character that makes the action meaningful. Litigation stories are presented as struggle. *How* a character struggles reveals *who* he is. So, good stories should engage readers on the level of character more so than on the level of conflict. It is therefore helpful to focus on the client's personal struggles by relating the lawsuit to the client's goals and needs. This explains why lawyers desirous of writing persuasively should pay attention to character development. The bottom line advice is: make your client's characters come alive, so that the judge will identify with and like her.

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[45] Ruth Anne Robbins, Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey, (2006) 29 *Seattle U. L. Rev*. 767, 778-782.

[46] Garner, n. 1 [plain English] § 17. 44.

[47] See an example in the Riley brief where the writer reifies the character of the Fourth Amendment of the US Constitution there by removing focus from the defendant not particularly of good character. The facts will be discussed in the next section in this paper. See *David Leon Riley v. California*, US SC appeal no. 13-132 (appellant's brief) reported 573 U.S. 373 (2014).

[48] For reading on character, see Bret Rappaport, Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRA C (2008) 25 *Thomas M. Cooley L. Rev.* 267; Ruth Anne Robbins, Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey (2006) 29 *Seattle U. L. Rev*. 767.

Define the Conflict

Defining the conflict is at the heart of brief writing. After all, it is the conflict between the parties that triggers litigation. So, naturally the reader of a brief wants to understand how the conflict begins-and how it should be resolved. Lawyers do not have to rack their brains about this because every case comes with a ready-made conflict. But this is by no mean unchallenging. While litigation comes with a ready-made conflict, the difficulty lies in how a lawyer *defines* the conflict. Defining the conflict is essential to success because how the conflict is defined largely determines how a reader will want the conflict resolved. Novelists define conflicts into known categories. The defined conflict is then used to drive the story. Since every litigation is about conflict, it will be important to learn from novelists what categories work for them. Conflicts are known to fail within certain known categories. The broad categories are: person v. person, person v. nature, person v. society, man v. god, man v. everybody, person v. machine, person v. institution, person v. leader, person v. powerful entity and so forth. They are used to capture readers' interest as they make writing thematic. Once the conflict is defined in any of the known category, it pops the reader's imagination. The reader becomes interested in understanding the conflict-what causes the conflict, how conflict should be resolved, how it eventually gets resolved to restore equilibrium. And if there are multiple conflicts, the reader wants them all resolved.

Lawyers, like fiction writers, also should describe conflicts using the recognized categories into which conflicts fall. Just as it is with a novel, in law it is conflict that drives brief writing. The brief reader wants to know how the conflict arose and how it can be, or should be, resolved. Typically, there are two types of conflicts: the factual (the dispute that caused the parties to bring the case to the attention of the court), and legal conflict (i.e., the legal issue). In defining the conflict, lawyer converts factual conflicts into substantive law. Thus, if A strike B with her fist, the lawyer will likely label the legal conflict as tort of 'assault.' Converted it into fiction 101 square 'assault' would readily come within the category of person v. person conflict. So will be most tort conflicts, except those with public element. In a similar manner, most crime will come within the category of person v. society conflict. So, in a typical criminal case, the prosecution will frame the conflict as one between society v. person. The reason is because from the prosecutor's perspective the defendant's criminal act harms not only the victim, but also society as a whole. In such a case it will be foolhardy for the defendant to adopt a similar categorization. The strategic path for the defence if it seeks to rely on say, diminished responsibility arising from drug or substance abuse, would be to choose a different frame. It could frame the conflict as person v. self to create sympathy. If the defence does, it will create the impression of the defendant struggling against addiction or mental illness, thereby deserving of assistance rather than punishment. When litigating against deep-pocket entities and government, it may for example, be useful to frame such conflict as between person v. society, or to invoke the emotional David v. Goliath imagery or some other images of a powerful bully entity coming against an underdog. The strategy can prove useful especially recognizing the innate sympathy underdog description triggers for many who will root for the underdog. Similarly, the person v. society category can work well for client on the fringes of society or those marginalized by society, subjected to discriminatory laws.[49]

Reconstruction or framing of conflict from the perspective of the client works silently like metaphor in law, serving as umbrella to understand the world. Thus, mastering the skills of defining the conflict recognizes the cognitive effect that category speaks to improve understanding of conflicts.[50] This is because framing, like metaphor, carries with it certain attributes, inferences and characteristics that is transported from one thing to another, and good lawyers ought to know how to make the leap (from one thing to another) to make what is described appear compelling and convincing.[51] How the conflict is defined, determines to a large extent the appropriate 'theme.' Also, how the writer defines the conflict goes a long way to shape how a reader will want the conflict resolved. For example, if the writer pitches the conflict as man v. society, or man v. machine, in the sense of 'little guy' v. 'big guy,' many readers instinctively will root for the 'little guy.' If the conflict is man v. self, most readers will want the person's better nature to prevail. Legal writing teachers suggest that lawyers borrow fiction-writing concepts for categorizing conflicts, such as man v. machine and the like to frame the facts and infuse the client's legal position with emotional force.[52] It is however important to note that the category man v. man is not thematic. It can hardly be used to paint the client as totally wonderful, and the opponent as totally evil.[53] It is often a bland category that does not attract sympathy.

It is always important to define a conflict from the client's perspective. After all, the reason for being in court is to protect and promote the client's interest. Adopting the client's perspective requires drawing attention to the client's peculiarities. For example, if your client, a woman loses a special job or opportunity as the result of an auto accident and is seeking damages for the injury, a smart lawyer will define the conflict beyond the scope of person v. person by infusing facts that take it away from that mundane category. The person v. person category simply gives the impression that the bottom-line of the injured client's interest is damages. But aside that bottom-line, the lawyer can pick up other

[49] A good example of narrative strategy using the framing notion is the child custody brief in from Chestek, n. 31.

[50] Linda H. Edwards, 'The Trouble with Categories: What Theory Can Teach Us about the Doctrine-Skills Divide' (2014) 20 *J. Legal Educ*. 181. See also *Berkey v. Third Ave. Ry. Co.* (1926) 155 N.E. 58, per Benjamin Cardozo, J;

[51] See for example First Amendment in *Nike, Inc. v. Kasky*, 539 U.S. 654, 123 S. Ct. 2554 (2003) discussed in Linda L. Berger, What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law (2004) 2 JALWD 169, 180-204 (discussing the US Constitution First Amendment relating to 'corporation-as-a-person' metaphor, whether Nike is indistinguishable from other competitors in the market or other participants in a debate under the First Amendment (protecting the speech) under the US Constitution). See Festus Emiri, *et al, Essentials of Lawyering Skills*, p.

[52] Id, 469.

[53] Foley & Robbins, n. 8, 472, 482. See also, Jennifer Sheppard, Once Upon A Time, Happy Ever After, And In A Galaxy Far, Far Away: Using Narrative To Fill The Cognitive Gap Left By Overreliance On Pure Logic In Appellate Briefs And Motion Memoranda (2009) 44 *Willamette L. Rev*. 255, 270-71.

goals for the client arising from the injury. Yes, money need not be her ultimate goal. Her goal might be revenge, though revenge is not an attractive goal. If the lawyer properly conducts background facts and investigation, the lawyer could learn for instance, that the injured client is an aspiring Olympic 100-meter racer. Armed with such facts, counsel can plead that at the time of the crash the injured victim was on her way to practice at the stadium. Now however, her injuries keep her from athletics. Highlighting such facts certainly redefines the conflict. It removes it from the person v. person category. It transports it into one that fits person v. goal. The mere change in defining the conflict bring it with the category of how an accident potentially destroys a dream and budding athletic career. The change in defining the conflict gives the judge the impression that much as damages is what the injured victim desires, damages is primarily sought after for how the money is to be *used*-in this case, how money will be used to make the athlete's life easier, perhaps to help her in the struggle to get back to the track again.[54]

Good briefs will emphasize favorable facts and infuse the client's legal position with emotional force using concrete, easily visualized words and by supplying more detail that empathizes the client's position. In this respect, unfavorable facts should be neutralized by interspersed with other facts that explain, counterbalance, or justify it. What this means is that proper words should be used to define the conflict. Word choice matters in defining conflict. Lawyer should pay attention to how they describe facts. Foley tells: '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'?'[55]

The lawyer's job in defining the conflict requires her to create empathy for the client by working in relevant facts about the client's desirable qualities that humanizes the client. This can be done by showing for example, the clients struggle to overcome a violent childhood or if the client is a commercial entity, its laudable social programs, making it a socially responsible corporate citizen. The bottom-line advice is: always define the conflict because it determines to a large extent how a reader will want the conflict resolved.

Setting

The setting is the narrative of the time and place in which the story occurs. It provides the reader with context to understand the story. The time is the historical setting, such as relating an event through its pre-colonial period. It helps the reader understand the significance of what takes place or being described. On the other hand, the place is the physical location of the event. Both time and place help the reader understand the events in the story and why they happen. In fiction writing, the writer sets both time and place to fit the story. Once it is set, they define how the story is developed. Similarly, the legal writer should provide the factual and legal setting for the reader to understand the events in the story and why they happen. The factual setting provides the reader with facts about the dispute. It is designed to assist the reader to understand why and how the dispute arose. At the stage the brief writer should state the factual setting all—legally relevant facts, as well as any necessary or helpful background facts that the reader needs to know to make sense of the legally relevant facts. This should also include any facts the court may examine before reaching its decision, e.g. appeal record of proceedings, statement of facts or affidavit.

The legal setting, on the other hand, provides the legal backdrop against which the dispute between the parties will be evaluated. Here the brief writer must identify the relevant area of law, and governing precedent. Just as the fiction writer's story is constrained by time and place, the brief writer is similarly limited by the factual and legal settings of her case. This being so, it will be foolhardy for the brief writer to ignore unfavorable factual and legal settings. Thus, if the facts do not fit with the writer's version of a likable client, the lawyer must find a way to explain the facts away or minimize the importance of the facts, or juxtapose the facts with other more favorable facts to make less harmful the unfavorable facts. A simple way to do this as seen in the *Riley* brief is that the writer focuses less of the defendant as a person (arrested with two loaded guns in his car); but reifies the governing precedent (the Fourth Amendment of the US Constitution.[56] Likewise, if the legal setting is unfavorable, the brief writer should attempt to distinguish the client's case from the adverse authority or establish that the adverse authority is not controlling precedent, or she can provide another legal theory that supersedes the adverse authority.[57]

The bottom line advice is: the legal writer should provide the factual and legal setting for the reader to understand the events in the story and why they happen.

Plot

Plot is structure of the story. It tells what happened and in what order. Without a good plot the fiction writer has no story. Plot line is not simple a sequential record of events narrated, but is the glue that holds all the elements [of a story] together in an organized form. It is structured as cause-and-effect trajectory. An important element for telling an

[54] In this respect, lawyers need to learn some of the smart 'tricks' for maximizing recoverable damages using theories of horizontal inequality, heuristic, fusion and isolation hypothesis to meld client's facts in manners that thematically defines conflict.

[55] Foley & Robbins, n. 8, 466

[56] See appellant brief in Riley, 573 U.S. 373 (2014).

[57] One deal with an adverse case by arguing it conflicts with binding authority; by distinguishing the case; by submitting it actually supports the client's argument or position; by arguing that the adverse case does not actually address the precise issue in the client's case; by positing that the case is mere dictum or obiter; by attacking or limiting its reasoning; by arguing that the majority of courts agree with the client's legal authorities and not that of the opponent's authority; and by stating that the other party has failed to cite any legal authority to support the party's argument or has cited just one weak authority. With this approach, you should highlight the absence of legal authority in the other side's motion or brief or should identify the weak authority. See Festus Emiri, Lecture notes on legal method (Delsu).

effective story is the *order* in which the writer presents information. Fiction writers pay attention to how the plot is developed because how information is presented affects how the reader views what is read. What a reader knows, and when he knows it, is information that affects how the reader perceives and understands the material.[58] For example, if a movie opens with a car chase, the viewer might not know which driver to cheer. However, if before the car chased 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 capture. But if on the other hand, 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 legal writing, especially in the 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 she should root for. Therefore, a good brief writer should start with some background information. Naturally, all fiction stories are developed along three simple lines: a beginning, middle, and an end. Aristotle almost 2,500 years ago stated that a story should be organized in three parts: the beginning, the middle, and the end. This three-part structure has been is commonly described as: (i) order, (b) disorder or chaos, (iii) re-order.[59] Though the classic structure is not a given formula, but a good primer for storytelling, it is a useful for organizing stories in a way that aids reader's clear understanding. Most stories start 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 stories fit this structure. How can a lawyer use this classic structure? A good brief writer can do so by starting in the facts section setting the context of the conflict. The lawyer does it by telling the reader (the judge) about who the client is, and what she needs the judge to do. For brief writing, the development of the plot line would generally along five stages of (i) introduction, (ii) rising action, (iii) climax, (iv) falling action, and (v) resolution. The introduction serves as the exposition. It provides background information about the characters, the setting, and the events in the case. The background information provides context for the story and helps the reader to understand the story that is to come. It can be referred to as the steady state, or the status quo. After this, the writer introduces the rising action, or the complicating event or events that upset the status quo. This is the stage where trouble starts. It is here that the writer reveals the conflict to the reader. The rising action builds until the climax of the story. This is the stage where the protagonist is at the height of peril. It is the most exciting point of the story because it is the point where the reader interest heightens, wanting to know how the events will unfold, how the story will end, hoping for a return to the status quo. The climax is the moment when the protagonist accomplishes some great feat, or achieves her goal, such as defeating the antagonist, or making some profound discovery. Because the climax is the point where the story's main conflict is resolved, it necessarily occurs near the end of the story. The climax resolves the story's main conflict. The protagonist achieves her goal. But that is not all about the conflict. Some other minor plot threads may remain unresolved, such what will the protagonist do with the accomplish feat or goal. The falling action is what wraps up those unresolved plot threads and brings the story to a satisfying close. The final stage in the plot development is the resolution, or conclusion, of the story. It is the coda or denouement. The stage brings the conflict to an end. It is the return to the status quo that existed at the start of the narrative, or it may result in a -new, yet tranquil and satisfying, condition. The reader is happy about the ending and is persuaded. In addition to understanding the five basis stages through which a plot progresses, an effective brief writer must also be aware that several basic plots exist and almost all stories conform to one of these. They are either about overcoming an obstacle, rags to riches, the quest, voyage and return, comedy, tragedy, rebirth, rebellion against the one, and the detective story. It is for the brief writer to choose the one that promotes the client's cause. The bottom line advice is: the setting should be structured as cause and effect trajectory as a glue that holds all the elements [of a story] together in an organized form.

Point of View

The client's perspective, or point-of-view (POV) represents the perspective through which the story is told. Fiction writers present perspective by determining the question of which character to tell the story through. POV makes a difference as to how the reader is moved about a story. So, 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 therefore really a matter of focus, emphasis, and perspective. In general, it is advised to tell 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 at the heart of the story. Again, POV can be reified. As in the *Riley,* the POV was the Fourth Amendment, not the defendant. The bottom line advice is: always tell the story through the perspective of the client.

Resolution

The key to a happy ending for your client is to propose a resolution that fits the description of the character and conflict. Lawyers should have faith that the judge will want a worthy, just outcome as resolution. Most people probably would want to see our aspiring Olympic athlete again recover and start her athletic career. Most people will probably wish her to be compensated for her broken dreams. Better if the other driver did something wrong and caused the accident. In that case the injured athlete should win, triumph in damages to sustain her dream. So, most reasonable people, and judges are, would wish as resolution. So, in the injured athlete case, though the legal resolution may satisfy the rule

[58] Chestek, n. 31; Rappaport, n. 36.
[59] Aristotle's *Poetics* (Francis Fergusson & S.H Butcher, ed. trans. Hill & Wing, 1961) 65.

that 'drivers who drive reckless or 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 also laced with emotions. In effect, the rule gets expanded to include: 'drivers who shatter a young Olympic athlete's dreams through carelessness and recklessness ought to pay.' Thus, by including more information about the client, i.e., treating 'background' information as 'relevant' information, lawyers can persuade judges to reach more gratifying resolutions in their clients' favor. By just adding more information about the client's goals or aspirations, the count changes from not just concern about the money. It becomes also, about what the money can be used for. The bottom line advice is: consciously propose a resolution that fits the description of the character and conflict.

5. Putting It Together: Using the Twitter and Riley Briefs to Map Elements of the Story

Background

It is now time to put the various elements of the story into our brief (address in the form of an appellate brief or a motion memorandum). Fiction technique must be used to tell an effective story in the facts section of the brief. That's where it primarily belongs. But it should be used in other parts of the brief too because if it is only told in the facts section it will be incomplete. The facts section reveals only part of the story. So, to tell an effective story, the brief writer should centralize the story throughout the brief. Therefore, the story should continue in the argument section of the brief. Facts must be melded with law in the argument section for the reader to appreciate the build up. In effect, the story plotline must be prominent throughout the brief, especially in the facts and argument sections. The IRAC structure conscripts injecting sufficient humanness in the brief, because it is too formulaic, and somewhat incongruent with stories. Whatever writing organizational structure the writer however chooses, whether IRAC or any of the formulaic structure, the brief writer should still write in a way that centralizes the story technique of fiction 101. This paper uses two briefs to illustrate how brief writers have employed fiction techniques in crafting winning briefs: the *Twitter* and *Riley* briefs. The former is a structured memorandum statement of facts brief, while the latter is an appellate brief.

Twitter Brief

The Twitter brief was about complaint filed on July 2, 2022 by Twitter in its widely-followed case against Elon Musk in the Court of Chancery in the State of Delaware in the US.[60] Essentially, the claim stated that in April 2022, Elon Musk entered into a binding merger agreement with Twitter, promising to use his best efforts to get the deal done. Less than three months later, Musk refuses to honor his obligations to Twitter and its stockholders because the deal he signed no longer served his personal interests. Having mounted a public spectacle to put Twitter in play, and having proposed and then signed a seller-friendly merger agreement, Musk apparently believes that he-unlike every other party subject to Delaware contract law-is free to change his mind, trashed the company, disrupted its operations, destroyed stockholder value, and opted to walk away. His contract repudiation followed a long list of material contractual breaches by which he cast a pall over Twitter and its business. Twitter therefore sought to enjoin Musk from further breaches, to compel Musk to fulfill his legal obligations, and to compel consummation of the merger upon satisfaction of the few outstanding conditions. How did the statement of facts by Twitter use the fiction technique? Let us see.

Organizing Theme of Brief

Since the organizing theme is all about why one's client's cause is *just*, or why the other side's cause is *unjust,* the brief starts with an expose in the *Twitter* case that there is a binding merger agreement that the defendant wants to feel free to thrash as though it means nothing. Accordingly, the complaint makes prominent as theme the defendants' callous belief that he (Musk) thinks he 'is free to change his mind, trash the company, disrupt its operations, destroy stockholder value, and walk away,' despite the binding merger agreement: 'In April 2022, Elon Musk entered into a binding merger agreement with Twitter, promising to use his best efforts to get the deal done. Now, less than three months later, Musk refuses to honor his obligations to Twitter and its stockholders because the deal he signed no longer serves his personal interests. Having mounted a public spectacle to put Twitter in play, and having proposed and then signed a seller-friendly merger agreement, Musk apparently believes that he-unlike every other party subject to Delaware contract law-is free to change his mind, trash the company, disrupt its operations, destroy stockholder value, and walk away. This repudiation follows a long list of material contractual breaches by Musk that have cast a pall over Twitter and its business. Twitter brings this action to enjoin Musk from further breaches, to compel Musk to fulfill his legal obligations, and to compel consummation of the merger upon satisfaction of the few outstanding conditions.' [see paragraph 1 of compliant statement of facts]. It therefore centralizes the idea that Musk simply tries to disparage Twitter, an unjust behavior that the court must not allow. In the pattern of keeping the theme in the triers mind why it should get justice-to compel Musk to close the deal, the brief repeatedly mentions the disparaging behavior of Musk: 'Since signing the merger agreement, Musk has repeatedly disparaged Twitter and the deal, creating business risk for Twitter and downward pressure on its share price;'[61] 'Musk has been working furiously-albeit fruitlessly-to try to show that the company he promised to buy and not disparage has made material misrepresentations about its business to regulators and investors;'[62] 'He has purported to put the deal on 'hold' pending satisfaction of imaginary conditions, breached his financing efforts obligations in the process, violated his obligations to treat requests for consent reasonably and to provide information about financing status, violated his non-disparagement obligation, misused confidential information, and otherwise failed to employ required efforts to consummate the acquisition;'[63] 'Public Statements and

[60] See https://corpgov.law.harvard.edu/2022/07/14/twitter-vs-musk-the-complaint/ visited June 25, 2023.
[61] Id. para. 3.
[62] Id. para. 8.
[63] Id. para. 10.

Non-Disparagement[SEP];' [64] 'Under the provision, Musk may so Tweet only 'so long as such Tweets do not disparage the Company or any of its Representatives.'[65] 'Musk's Tweets on May 13 and 14 violated his obligations under the merger agreement, including the provisions prohibiting public comments not consented to by Twitter, disparagement, misuse of information provided under Section 6.4, requiring best efforts to consummate the merger.'[66] 'In yet another breach of his non-disparagement obligation and efforts covenants, Musk encouraged the SEC to investigate the accuracy of Twitter's disclosures:'[67] 'Most notably, Musk has unreasonably withheld consent to two employee retention programs designed to keep selected top talent during a period of intense uncertainty generated in large part by Musk's erratic conduct and public disparagement of the company and its personnel.'[68] 'Defendants' actions in derogation of the deal's consummation, and Musk's repeated disparagement of Twitter and its personnel, create uncertainty and delay that harm Twitter and its stockholders and deprive them of their bargained- for rights.'[69] Unmistaken, the trier gets to know the central message the brief conveys-a callous 'promise and fail' situation Musk want to foist on Twitter; why it is unjust to leave Twitter without legal remedy. That is how to weave the organizing theme into every part of a winning brief-its classic five stages (introduction, rising action, climax, falling action, and resolution) and possibly, its plotline development.

Brief's Character

Next, the brief writer takes on the character of the parties. Since the writer roots for the plaintiff Twitter, it humanizes Twitter as the protagonist, drawing attention to it as a useful corporate citizen, mentioning its likable qualities: a company that 'operates a global platform for real-time self-expression and conversation.'[70] The brief goes further to show that defendant Musk, is the antagonist, who behaves as though his financial muscle can crush Twitter without remedy. A David v. Goliath scenario is painted: 'Musk apparently believes that he - unlike every other party subject to Delaware contract law-is free to change his mind, trash the company, disrupt its operations, destroy stockholder value, and walk away.'[71] Series of Musk breaches were mentioned to show his callous refusal to close deal. The good character of the protagonist and the bad of the antagonist are put in the fore: 'Twitter had been buffeted by Musk's reversals before. For the benefit of stockholders and employees, the board needed assurance that this agreement would stick. It received that assurance in the terms it was able to negotiate.'[72] For example, it referred to Musk information seeking as 'outlandish,' yet Twitter cooperated to bring the agreement to fruition: 'From the outset, defendants' information requests were designed to try to tank the deal. Musk's increasingly outlandish requests reflect not a genuine examination of Twitter's processes but a litigation-driven campaign to try to create a record of non-cooperation on Twitter's part. When Twitter nonetheless bent over backwards to address the increasingly burdensome requests, Musk resorted to false assertions that it had not.' [73] It mentions for example, how Twitter used its best endeavor to close the deal, even agreeing to more seller-friendly agreement with Musk: 'The agreement was negotiated through the night and, in the process, became even more seller-friendly.'[74] It plays up the seller-friendliness of the agreement to show why it is improper for Musk to renege in many paragraphs: 'As one would expect with a 'seller friendly' merger agreement, the contract identifies numerous changes, events, and circumstances expressly excluded from the determination of whether a Company Material Adverse Effect has occurred:'[75] Mention of the friendly agreement portrays Twitter as likable and so the refusal to close by Musk as unjust. It even draws attention to Musk being 'a sophisticated entrepreneur who owns approximately 9.6% of Twitter's stock,' so could not have been fooled into entering the merger agreement. The only reason why he refuses to close is an 'ego' stuff to damage Twitter: 'Musk's conduct simply confirms that he wants to escape the binding contract he freely signed, and to damage Twitter in the process.'[76] 'because the deal he signed no longer serves his personal interests.'[77] It mentions in paragraph 7 that 'Musk's exit strategy is a model of hypocrisy,' then goes on to state why it is so, in several pleaded facts. For example, paragraphs 82 reveal how despite unreasonable behavior of Musk, the plaintiff Twitter acts cooperatively to ensure close of deal: 'Even as Musk was violating his own contractual obligations, Twitter continued to respond cooperatively to his representatives' increasingly unreasonable inquiries;' describing Mush inquiry as 'litigation-style discovery' and 'highly unusual requests in the context of good faith efforts toward completion of any merger transaction, and absurd in the context of this one, which has no diligence condition.'[78] The character impression the reader gets from this is that Twitter is a good corporate citizen that deals on the basis of 'yes mean yes,' but that the defendant Musk is a 'promise and fail' dislikable person.

Defining the Brief's Conflict

Defining the conflict is at the heart of brief writing because it is what triggers the litigation and is what helps the reader to understand the brief—how the conflict began and how it should be resolved. Using the known fiction categories such

[64] Id. para. 52 subheading.
[65] Id. para. 52.
[66] Id. para. 77.
[67] Id. para. 81.
[68] Id. para. 161.
[69] Id. para. 146.
[70] Id. para. 12.
[71] Id. para. 1.
[72] Id. para. 38.
[73] Id. para. 102.
[74] Id. para. 32.
[75] Id. para. 42. See also para. 1, 4, 32, 33, 37, 42, and 51.
[76] Id. para. 143.
[77] Id. para. 1.
[78] Id. para. 95.

person v. person, person v. nature, person v. society, etc. the brief writer in the *Twitter* brief, paints the known thematic category of person v. powerful entity. Twitter is made to look like a vulnerable corporate person up against the powerful, deep-pocket entity, Musk and his take-over companies. So, it catalogues Musk social and financial muscle in the face of the plaintiff Twitter's sorry financial state. Musk social influence is brought to the fore: 'he opened a Twitter account in 2009. His presence on the Twitter platform is ubiquitous. With over 100 million followers, Musk's account is one of the most followed on Twitter, and he has Tweeted more than 18,000 times. He has also suggested he would consider starting his own company to compete with Twitter.'[79] Paragraph 3 tells his financial muscle: 'Musk, acting through and with his solely-owned entities, Parent and Acquisition Sub, agreed to buy Twitter for $54.20 per share in cash, for a total of about $44 billion.' No question about it-offering $44 billion to buy a company is no mean sum. 'That price, presented by Musk on a take-it-or-leave-it basis in an unsolicited public offer, represented a 38% premium over Twitter's unaffected share price.'[80] The brief paints Twitter's vulnerability in the deal. It mentions that the company is suffering, its employees are suffering, and that uncertainty in consummating the agreement exposes the company to stock price depreciation with attendant averse business effects: 'Defendants' actions in derogation of the deal's consummation, and Musk's repeated disparagement of Twitter and its personnel, create uncertainty and delay that harm Twitter and its stockholders and deprive them of their bargained-for rights. They also expose Twitter to adverse effects on its business operations, employees, and stock price.'[81] The reader thus comes down with the impression that the oppressive defendant must be made to restore the equilibrium.

Brief Setting

Since the setting of the time and place helps the reader understand the brief and why what happened occurred, the Twitter brief tells the reader why Musk is seeking to renege from his promised agreement. For example, it states that the fortune of Musk suffered nose-dive when the stock market fell and that characteristic of Musk he wants to cancel rather than keep his words: 'After the merger agreement was signed, the market fell. As the Wall Street Journal reported recently, the value of Musk's stake in Tesla, the anchor of his personal wealth, has declined by more than $100 billion from its November 2021 peak;'[82] 'So Musk wants out. Rather than bear the cost of the market downturn, as the merger agreement requires, Musk wants to shift it to Twitter's stockholders. This is in keeping with the tactics Musk has deployed against Twitter and its stockholders since earlier this year, when he started amassing an undisclosed stake in the company and continued to grow his position without required notification. It tracks the disdain he has shown for the company that one would have expected Musk, as its would-be steward, to protect. Since signing the merger agreement, Musk has repeatedly disparaged Twitter and the deal, creating business risk for Twitter and downward pressure on its share price.'[83] Since setting also interrogates the legal backdrop against which the dispute between the parties will be evaluated, the Twitter brief writer identifies the relevant area of law, and governing precedent unmistakably. In the closing part of the brief, it repeats the 'promise and fail' behavior of Musk as amounting to breach of contract, for which the court ought to enjoin by decrees of specific performance and injunction.[84] It then goes on to tie it to the prayers sought.

Recognizing like a fiction writer, that the brief can be constrained by the factual and legal settings of her case, the brief writer in *Twitter* did not ignore any seeming unfavorable factual and legal facts. The writer acknowledge the stock market downturn that affected the financial fortunes of Musk after entering the merger agreement, but explains it as insufficient reason for Musk to disregard his words.[85] The brief tells that Musk would be unfair to do so because Musk wants to rather shift that burden to Twitter's stockholders in keeping with his unfair tactics deployed against 'Twitter and its stockholders since earlier this year, when he started amassing an undisclosed stake in the company and continued to grow his position without required notification.'[86] What is more, it draws attention to Musk violation of SEC regulation in secretly buying Twitter's shares without disclosure in a bid to takeover the company. To then, want to opt out because his promise would not serve his financial interest would be playing smart at the detriment of other-a thing the court should not allow. It is for the reason that the brief mentions how Musk by March 2022, had secretly accumulated a substantial position-about 5% of the company's outstanding shares, without complying with SEC regulations requiring that he disclose that position. Rather he kept amassing Twitter stock that by April 2022 he had accumulated about 9.1% of the company's outstanding shares, still in secret. In effect, between March and April, over 112 million Twitter shares were traded in ignorance of Musk's mounting ownership. Thus, by the time he discloses his holdings, he was Twitter's largest stockholder.[87] What the brief writer sets to achieve by these facts is to make the client likable. If not, so likable by the reader, then to explain the unfavorable facts away (effect of the fall on stock prices on Wall Street) or to juxtapose those facts with other more favorable facts on Twitter's side to lessen the harm the facts of market downturn may have on the brief reader.

Brief Plot

It is now time to plot is structure of the story—present the brief in a logical, coherent order that stimulates how the

[79] Id. para. 2.
[80] Id. para. 4.
[81] Id. para. 142.
[82] Id. para.5.
[83] Id. para. 6.
[84] Id. para. 148-155.
[85] Id. para. 5 & 6.
[86] Id.
[87] Id. para. 19

reader should view what is read. The brief writer captures the plotline appropriately by stating in the facts section, the context of the conflict. The subheading entitled 'nature of the action,' spanning paragraphs 1-11 provides the context of Twitter's complaint.[88] In them, Twitter shows how the merger agreement was negotiated and agreed by the parties; its binding nature; subsequent Wall Street downturn of stock prices; how Musk wants to use it as excuse for not closing the deal; and why it is bad-faith dealing by Musk. The brief presses context further under the subheading 'the parties,'[89] describing the parties. By so doing the brief tells the reader (the judge) about who the client is, and what she needs the judge to do. Unquestionably, that is a powerful introduction. Those facts provide background information about the characters, the setting, and the events in the case. The background information provides context for the story and helps the reader to understand the story that is to come.

Because the brief writer must then quickly tell why Twitter is in court, the brief goes to narrate how trouble started, the complicating event or events that upset the status quo. The brief reveals the conflict to the reader under the subheading 'factual allegations.'[90] Under it Twitter states how Musk set his eyes on Twitter; offers to buy Twitter; the final, agreed merger agreement; its closing conditions, including those on information sharing, best endeavors and non-disparagement terms; etc. It further goes to tell ' how Musk seeks to renege from the agreement because of Wall Street downturn in stock prices causing Musk to 'finance the merger at prices as low as $822.68 per share, substantially below their pre-Twitter-signing price of $1,005 per share;'[91] how Musk tries to conjure excuses such as spam account; use of litigation-style discovery to demand for information and make outlandish request, while seeking to manufacture a record of covenant breach that never existed against Twitter, etc. The reader at this rising action stage overtly sees how the conflict arises.

Building on the conflict, the brief enters into the climax stage of the story-the most exciting part of the brief—where the reader would like to know how the events will unfold, how the story will end, and hoping for a return to the status quo. This is the stage where the protagonist Twitter appears to accomplish its goal to close the deal. Remember, like is in fiction, the climax is the point at which the story's main conflict is resolved, it necessarily occurs-near the end of the story. The brief in climax under subhead 'Musk delays and stymies key operational decisions'[92] shows that Musk has approved some of Twitter's requests, but slowly. It would appear that the deal would click for Twitter, but no way. Nothing close to closure of deal is in sight because Musk raise three more obstacles: (i) purported breach of the information-sharing and cooperation covenants contained in Sections 6.4 and 6.11; (ii) supposed 'materially inaccurate representations' incorporated by reference in the merger agreement that allegedly are 'reasonably likely to result in' a Company Material Adverse Effect; and (iii) purported failure to comply with the ordinary course covenant by terminating certain employees, slowing hiring, and failing to retain key personnel.'[93] Accordingly, the brief wrap up with the concluding message: 'Defendants' actions in derogation of the deal's consummation, and Musk's repeated disparagement of Twitter and its personnel, create uncertainty and delay that harm Twitter and its stockholders and deprive them of their bargained- for rights. They also expose Twitter to adverse effects on its business operations, employees, and stock price. Swift remedial action in the form of specific performance and injunctive relief is warranted.'[94] It is the return to the status quo appeal. The reader is happy with the five basic stages plotted in the brief, particularly as it reveals the protagonist struggling to overcome an obstacle. This is what makes the brief persuasive to the reader.

Brief Point of View

The perspective through which the brief writer wants the reader to perceive the story makes a difference as to how the reader is moved about a story. Because the reader will root for the character she identifies with, the Twitter brief contains many facts showing how plaintiff Twitter demonstrated its faith in the sanctity of contract and was willing, even in the face of defendant Musk to treat the agreement as of no effect, bent backwards to accommodate Musk's unreasonable actions and inactions if that could possibly cause Musk to change his mind and close the deal. For example, paragraph 95 states that despite Musk overtly violating several of his own contractual obligations, Twitter continued to respond cooperatively to his representatives' 'increasingly unreasonable inquiries' and his 'litigation-style discovery.' The brief further goes to show the options Musk has and how he has or contemplates to use them in bad faith against Twitter: '. . Musk had said he would do one of three things with Twitter: sit on its board, buy it, or build a competitor. He had already accepted and then rejected the first option, and was plotting a pretextual escape from the second. Musk's third option-building a competitor to Twitter-remained. Still, Twitter again responded constructively and reiterated its commitment to work with Musk's team to provide reasonable access to requested information.'[95] As though to provide the context of Twitter's good faith in the deal, the brief tells the reader that a merger agreement was actually hard work for Twitter and so for Musk to trash the effort is unfair: Consummating a merger agreement involves substantial effort and requires a serious deployment of resources by the seller. Defendants thus are subject to contractual obligations requiring them to take actions necessary to close and to allow Twitter to operate as efficiently as possible in the interim. Defendants violated two important obligations of this kind: the duty to work toward finalizing the financing for the

[88] Id. para. 1-11.
[89] Id. paragraphs 12-15.
[90] Id. paragraphs 19-107.
[91] Id. para. 60.
[92] Id. paragraphs 115- .
[93] Id. para. 124.
[94] Id. para. 146 & 147.
[95] Id. para. 89.

closing and the obligation to consider consents reasonably.[96] Speaking graphically and conclusively from the perspective of Twitter, it tells the reader the unjust motive of Musk: 'Musk's conduct simply confirms that he wants to escape the binding contract he freely signed, and to damage Twitter in the process.'[97] The reader is left in no doubt that Twitter is a likable corporate person in the litigation and that as protagonist its disorder caused by Musk is at the heart of the brief

Resolution

The brief writer recognizes that the key to a happy ending is to propose a resolution that fits the description of the character and conflict. In the *Twitter* brief, the reader sees Twitter as the 'good guy' suffering from the callous, bad behavior of Musk. Just as most readers of the broken dreams of the aspiring Olympic athlete will like it restored, a reader of the *Twitter* brief will like to see the deal closed the way Twitter contracted. The happy ending (resolution) is more assured if the brief writer powerfully closes with an emotional appeal beyond the merely legalistic basis. The *Twitter* brief writer does this by including specific information about the client and the deal. The brief for example reiterates that the agreement is a valid and enforceable contract; that Twitter has fully performed all of its obligations under the merger agreement, and is ready, willing, and able to continue so performing; that it is rather the defendant Musk who has breached the merger agreement (specifically mentioning section of the merger agreement violated); and directly referring to the document agreement stipulating that the non-offending party is entitled to an injunction, specific performance and other equitable relief to prevent breaches of the agreement.[98] By so doing, the brief emotionally appeals to the trier that outside legalistic parameters, there is good reason to grant the equitable reliefs sought by Twitter. The (repeated) background information will undoubtedly help the client obtain gratifying resolutions. In essence, the brief writer tells the reader that resolution is not just about 'money,' but also more—the place of promise, bargained morality in law. What a beautiful way to close a brief.

Summary

One prominent feature of the Twitter brief is that it is written is plain English. It is quite interesting to read. It is robust and direct—the brief writer uses the simplest, most straightforward way of expressing the facts of the case. The brief is divided into sections, and the sections are divided subsections and subsections into smaller parts as subheadings, using informative headings for the sections and subsections. The reader can see through the logical sequence of the brief story. Related facts are put together and presented in chronological order making for clear understandable. This is a writing style winning brief writer should emulate.[99] Though written in plain English, the brief uses powerful word sentences and uses the active voice style structure of subject, verb, and direct object(S-V-O), it goes beyond. Unlike routine briefs containing only bland sentences which only tells, the brief uses a sophisticated method for showing, through appropriate use of metaphors. It uses word pictures to evokes the reader's emotional response. It delicately mentions subjects and actions.[100] Word pictures acting like metaphors carry subtle, natural emotional messages to the reader. Their impact is strong not only because they are emotionally engaging, but also that they offer unique wholeness to intellectual insights without any loss of logical integrity. For example, the brief writer uses skillfully the word picture 'seller-friendly' to portray much of what the client did to ensure fair closure of the deal. The brief repeated describes the agreement as such, thereby making it appear unfair for Musk to want out.[101] It also uses the picture of 'hell-or-high-water' to describe Musk obligation to close.[102] The use of such terms 'seller-friendly' and 'hell-or-high-water' invites the reader to see, feel, hear and even smell and taste what happened. The reader is transposed to reflect on what those words mean and how they apply in the circumstances of the facts. Very remarkable, the *Twitter* brief does something uncommon—it uses another effective technique for stimulating empathetic understanding—visuals.[103] The 15 visuals contained in the brief no doubt carry with them powerful persuasive messages.[104] It is time for winning brief writers to recognize the centrality of images in persuasion. We all need to embrace the communicative power of multimedia writing.

Also noteworthy of mention is that the brief comprises of 155 well laid out paragraphs statement of facts. The reader is led along with 7 main, sectional headings, divided as (i) verified complaint, (ii) nature of the action, (iii) the parties, (iv) jurisdiction, (v) factual allegations, (vi) cause of action, and (vii) prayer for relief. Because the section on factual

[96] Id. para. 108.
[97] Id. para. 143.
[98] Id. para. 148-155.
[99] Garner, n. 1 § 4, 14 [plain English] (noting that judges recommend the use of headings and subheadings because it 'help them keep their bearings, let them actually see the organization, and afford them mental rest stops'. . . 'allow[ing] them to focus on the points they're most interested in.'
[100] Cognitive studies reveal that people understand better if see than if they are told. So just telling 'that' instead of showin g 'how' is ineffective because the truism is 'tell them and they won't believe you, but show them and they will have no choice but to agree.
[101] See id. para. 1, 4, 32, 33, 37, 42 & 51.
[102] Id. para. 47 & 138.
[103] Festus Emiri, *Essentials*; Jennifer Baumgartner, *Visualize it, Psychology Today* (Nov. 8, 2011), www.psychologytoday.com/blog/the-psychology-dress/201111/visualize-it; visited May 23, 2023 (stating visualization is 'a cognitive tool accessing imagination to realize all aspects of an object, action or outcome.'). See also, Sandifer v. United States Steel Corp 188 F.3d 893, 895 (7th Cir. 1999) per Richard Posner, J (judge uses visual in describing); Steve Johnson & Ruth A. Robbins, Art-Iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning (2015) 20 J. Leg. Writing 57; Elizabeth Porter, Taking Images Seriously (2014) 114 *Colum. L. Rev*. 1687; Adam L. Rosman, Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs, (2013) 63 *J. Legal Educ*. 70.
[104] Fernand Gobet & Herbert A. Simon, Templates in Chess Memory: A Mechanism for Recalling Several Boards (1996) 31 *Cognitive Psychol.* 1, 31 (studies of master chess players found that these players remembered games by preserving a picture of the chessboard and its pieces; this way they could preserve information about strategy, not just the pieces).

allegations is where the heart of Twitter's complaint is located, the section uses 10 informative, sentence-like subsections to drive the facts. These include subheadings like: (i) Musk sets his sights on Twitter; (ii) Musk offers to buy Twitter; (iii) The final, agreed-upon deal terms; (iv) The financing structure; (v) The market turns; (vi) Musk grasps for an out; (vii) Defendants materially breach their obligations to work toward closing and refrain from unreasonable withholding of consent to operational changes; (viii) Defendants purport to terminate the merger agreement; (ix) After purporting to terminate, Musk keeps violating and confirms his earlier violations; (x) Twitter faces irreparable harm absent relief.

To mark and make really meaningful the main theme and idea in the brief, some of the subsections are further divided into subheads, further using informative, sentence-like format. For example, subsection III on 'the final, agreed-upon deal terms,' list the various terms of the merger agreement under the subheading: Closing Conditions; Efforts Covenants; Information Sharing; Ordinary Course Covenant; Public Statements and Non-Disparagement; Termination; and Specific Performance. All of this gives the reader incisive insight to the agreed deal. Unlike many worthless briefs that often end like: 'Based on the foregoing, Plaintiff's prays the court for a decree of . . . ,' the Twitter brief writer makes an effective conclusion by highlighting the brief's main points in only a few words, then wraps it up with a committed pitch for justice.[105] Another interesting feature in the Twitter brief is that the parties' character is developed not as abstract persons such as 'plaintiff' and 'defendant.' The brief writer brings out the personhood of the parties, describing them by their names, 'Twitter and Musk.' This is how good writers write winning brief.[106] Fiction writers catch the readers' attention not by describing the main actors simply as 'protagonist' and 'antagonist' because they recognize it will make reading tedious, sucking action out of the story. By referring to the parties by their real names the *Twitter* narrative gives life-blood of conflict as a case worthy of the trier's attention. No doubt, the Twitter brief is written like a fiction novel, using the many elements of developing a story that grabs and keep the reader's attention, while at the same time persuading the trier to reach conclusion favorable to the client.

The Riley Brief[107]

Riley v. California is a landmark US Supreme Court case in which the court ruled that the warrantless search and seizure of the digital contents of a cell phone cell during an arrest is unconstitutional under the Fourth Amendment. The case arose from inconsistent rulings on cell phone searches from various state and federal courts. Some circuits had ruled that police officers can search cell phones incident to arrest under various standards, but some others ruled otherwise. The Supreme Courts of Georgia, Massachusetts and California also accepted searches. The Riley appeal was from California. David Leon Riley was pulled over in San Diego, California in 2009 for expired registration tags on his vehicle. The officer then found that Riley was driving with a suspended driver's license. The San Diego Police Department's policy at the time was to impound a vehicle after stopping a driver with a suspended license in order to prevent them from driving again. Additionally, department policy required officers to perform an inventory search of the vehicle, which in Riley's case led to the discovery of two loaded handguns under the hood of his vehicle. Later ballistic testing confirmed that the handguns were the weapons used in a gangland murder that had taken place a few weeks previously, for which Riley had been a suspect. Because of the discovery of the concealed and loaded handguns, along with gang paraphernalia, during the vehicle search, police placed Riley under arrest and searched his cell phone without a warrant. The cell phone search yielded information indicating that Riley was a member of the Lincoln Park gang; evidence included pictures, cell phone contacts, text messages, and video clips. Included in the photos was a picture of a different vehicle that Riley owned, which was also the vehicle involved in the gang shooting. Based in part on the pictures and videos recovered from the cell phone, police charged Riley in connection with the gang shooting. Riley moved to suppress the cell phone evidence at his criminal trial, but the judge permitted the evidence to be included. Ultimately, Riley was convicted and the California Court of Appeal affirmed the verdict. That court ruled that the search incident to arrest doctrine permits police to conduct a full exploratory search of a cell phone (even if the search is conducted later and at a different location) whenever the phone is found near the suspect at the time of arrest. Riley then appealed that ruling to the United States Supreme Court.

Difficult Defendant's Brief

Writing an appellate brief for Riley will no doubt would be difficult. This is a criminal defendant, unlike the Twitter plaintiff. The lawyer representing a criminal defendant will most likely have challenges: the client is often unsavory and disliked by the judge. A good strategy to overcome the obstacle would be to adopt the narrative brief writing style, and if possible, downplay the unfavorable facts about the client. Such a strategy uses the client as a proxy for an 'ideal,' such as the Constitution or a statute. For example, President Clinton followed a similar strategy at one point during the Monica Lewinsky scandal. He played the card by implying that punishing a defendant for his moral deficiency could be tantamount to affirming a general, public right to delve into people's private lives-a frightful thing to contemplate. What some good writer do to play the card if the 'proxy' ideal is far-fetched is ask the client to give likable information about herself. Maybe she used to sing in a choir; is a computer whiz and any such facts, and then, use it to humanize your client before the judge.[108] Another strategy (also 'President Clinton-tested') is to portray the criminal client as embroiled in 'man v. self' conflict. In the case of a drug addict charged with possession, the lawyer can present his

[105] See, id. para. 148-155.

[106] Garner, n. 1 [Plain English] § 17. 44 (stating that describing parties as simply plaintiff and defendant is 'a noxious habit that violates the principles of good writing.')

[107] 573 U.S. 373 (2014).

[108] James P. Eyster, Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy (2008) 14 *J. Leg. Writing* 87

client as a hapless victim of drugs, a nemesis that is in essence a character in the case story. If the client is portrayed as struggling against the nemesis, the client would likely prevail with appropriate court-ordered assistance, such as drug rehabilitation treatment. The good effect is that the client might have a chance of spending less time in prison. If the unlikable client is however a corporation (not likable at first blush, such as one that is faceless and wealthy, not inspiring empathy), good brief writing can turn things round by alluding to the company's social 'goals.' Most corporations are formed to carry out socially beneficial functions, and many employ lots of decent, hardworking people. These facts can be highlighted. For example, the lawyer can highlight facts such as that an insurance company allows people to protect their hard work and gain peace of mind; that a mortgage company allows qualified people to achieve the 'Nigerian Dream' of home ownership; that a tobacco behemoth may contribute large sums of money to charities. The lawyer can include such information in the facts section as brief background when introducing the client. Let us now see how the *Riley* brief effectively uses fiction strategy to present its case.

Organizing Theme

A brief without a theme is rudderless.[109] Constructing the moral of the story; lesson(s) put forth by the brief as its 'bottom line' is important. Recognizing that the court will dislike a client like Riley[110], the brief downplays specific facts about his person. It rather trumps up a reified thing-the provision of the law that sets the stage for the status quo-not circumstances that brings Riley before the court. The brief reified the US Constitution, especially the Fourth Amendment, highlighting it in the introduction: 'Every day across the country, thousands of people are arrested-reality that results in over twelve million people being arrested each year, a majority of whom are never convicted of any crime. . . While some of these arrests arise from felony investigations, the vast majority are for alleged misdemeanors such as driving under the influence, simple assault, or petty theft. In California, for example, about two-thirds of adult arrests are for misdemeanors; in New York, almost three-fourths are for misdemeanors. What is more, in California as in most other states, the police may-and sometimes do-arrest people for traffic and other 'fine only' infractions such as jaywalking, littering, or riding a bicycle the wrong direction on a residential street. . . According to the California Supreme Court, every time the police effectuate one of these arrests and searches, officers may not only seize and secure any smart phone the arrestee is carrying but also may rummage through the digital contents of the device. See People v. Diaz, 244 P.3d 501 (Cal. 2011) (reprinted at Pet. App. 25a-65a). Furthermore, the police may undertake such warrantless examinations not only briefly at the scene of arrest but also later at the police station after booking the arrestee. Diaz, Pet. App. 33a. This case concerns whether granting such a new police entitlement comports with the Fourth Amendment. The stakes are high: Americans use smart phones to generate and store a vast array of their most sensitive thoughts, communications and expressive material. Because the core purpose of the Fourth Amendment has always been to safeguard such personal and professional information from exploratory searches, this Court should hold that even when officers seize smart phones incident to lawful arrests, they may not search the phones' digital contents without first obtaining a warrant.'[111] The defendant, caught with two loaded guns in his car wasn't highlighted. That certainly makes him unlikable. So, the brief writer catches on the Fourth Amendment and makes it the central message.

In choosing the organizing theme around the question whether evidence admitted at Riley's trial obtained through a search of petitioner's cell phone violated petitioner's Fourth Amendment rights, the focus turned on the US Constitution. This was a cleaver strategy not to risked alienating the conservative judges in the Supreme Court who might come down heavily on the defendant's perceived criminality. So, the brief writer chose as the theme, the concept that over-generalizations of police powers of search can create terrible injustice in specific cases, particularly with regards to smart phones. Accordingly, the brief writer weaves the central theme showing how police sweeping powers exposes all citizens to exploratory searches for even misdemeanor. It must be so if 'in California, for example, about two-thirds of adult arrests are for misdemeanors; in New York, almost three-fourths are for misdemeanors.' By using such a graphic picture showing the invasiveness of police sweeping powers, the court is made to feel the unjustness of insidious power, and by direct extension, why the Fourth Amendment must stop the police powers. Like a fiction writer, the brief projects its main point, the theme, in every section of the brief. In fact, the Fourth Amendment is mentioned many times, in the section on 'question presented,' 'relevant constitutional provision,' when discussing and analyzing cases, showing how subjecting smart phones seized on arrest or police exploratory searches at the whim of police officers strike at the heart of the Fourth Amendment's fundamental concerns, and the like.[112] Noteworthy of mention, the Riley brief writer drives the theme also through policy-based analysis when discussing the conflicting case authorities from the various jurisdictions on police search powers, pitching a preference for stop to warrantless search and seizure of the digital contents of cell phones as the better policy choice between the competing interpretations of the law.

Character

Good brief writers recognize that to succeed the judge must be made to empathize with their client. Having favorable law helps, but having favorable facts is always a better bet.[113] Because character is inherently a pathos-based concept

[109] Aldisert, n. 11, 25-27 (Judge Ruggero J. Aldisert listing as 'rudderless' briefs with no central theme(s); 'failure to disclose the equitable heart of the appeal and the legal problem involved; 'lack of focus; and uninteresting and irrelevant fact statements).

[110] For this reason, the brief only mentions the name Riley in 3 places; in the brief suit tittle, notation of whose behalf the brief is filed, and tersely at p. 4 statement of facts describing his pull-over for traffic infraction by officer Dunnigan. On the other hand, the US Constitution Fourth Amendment is mentioned and discussed over 30 times in the brief.

[111] See appellant brief, 2-3.

[112] See for example, pp. 1, 2, 3, 7, 8, 10, 11, 12, 13, 14, 15, 17, 20, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 38, 39, 40, 44, 46, 49, 53 & 53.

[113] Ruth Anne Robbins, Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey, 29 *Seattle U. L. Rev*. 767, 771 (2006) ('[A]ny decent trial lawyer already knows that storytelling is a

and the projected protagonist must be presented in a likable manner, using Riley as the protagonist in this case will not fly. He is an alleged criminal, mostly disliked by judges. So, beginning the fact section with his character development will not be strategic.

There is therefore the need for the writer to play an alternative card-reify the law as the 'character' in the brief. This is exactly what the brief writer did. The brief writer developed the Fourth Amendment as the character in the story, using the same techniques used to develop the character of individuals and institutions. Accordingly, the brief shows how the law has goals and motivations, as well as notable achievements. It mentions repeatedly the worthy goals of the Fourth Amendment-preventing the government from conducting unreasonable searches of persons and places.[114] The brief, particularly in summary of argument section, pointedly puts the goals of the law as protecting right to privacy; enforcing the right to be left alone; and then it extolls the fact that each time the courts strike down a police practice as violative of the Fourth Amendment, the Amendment (so to speak) achieves a worthwhile goal for the American people.[115] In effect, the brief writer attributes to the Fourth Amendment concrete qualities of 'thinking and doing' as though it were a real person by presenting the Amendment as a character in the story. For example, it compares the objective of the Amendment to the historical Bill of rights that protects citizens from invasive incursion of privacy, showing why there is heightening need to preserve the inviolability of the protection, particularly recognizing that smart phones are profoundly expressive of citizen's thoughts, wonders, and concerns: 'Indeed, subjecting smart phones seized at the time of arrest to exploratory searches at the whim of police officers would strike at the heart of the Fourth Amendment's fundamental concerns. The Framers incorporated the prohibition against unreasonable searches into the Bill of Rights primarily in response to the odious colonial-era practice of executing general warrants-warrants that enabled officers to rummage through people's homes and offices for whatever incriminating items they might find. Such searches were deemed particularly problematic when directed at people's 'private papers' or other expressive documents. Searching through a smart phone's text, photo, and video files is painted as the modern equivalent of odious colonial-era searches. It vividly tells how before the development of smart phones, people kept their information stored in sin homes and warehouses. That now has changed with the advent of smart phones. So, if the Bill of Rights would prevent intrusive entry into homes and warehouses during the colonial-era for being privacy invasion, there was more compelling reasons to protect the content of smart phones that stores peoples' information, thoughts, feelings, fears and emotions in larger quantity than any home or warehouse. By revealing that information in smart phones are profoundly expressive-revealing thoughts, wonders, and concerns of a phone's owner-as well as of those with whom the owner has interacted in various ways-it demonstrates why the protection the Fourth Amendment affords such writings and other expression should not evaporate. Yes, if for more than two hundred years after the Bill of Rights, home, office and warehouse no longer are the centers of information, but information is now reduced to computer chip carried in the pocket, then there is more compelling reason to protect it.[116] This is how the brief writer uses the fact and argument sections to develop the characters that inhabit the story, and introduces how the conflict is defined.

Defining the Conflict

The brief writer having centralized the Fourth Amendment is the concern of the brief certainly would find it less attractive to create empathy for Riley working through the appeal record about his honorable traits, such as his struggles to overcome a violent childhood. That is certain out of the question. While most conflicts fall into well-recognized categories such as person v. person, person v. self, and the like, this case is different. It implicates the excessive use of police search power against the goals of the Fourth Amendment protection of privacy. Therefore, in constructing the conflict, the person of Riley isn't as important as the worthy goals of the Amendment to citizen's freedom. Accordingly, the conflict definition that pitches the state (police search power) against citizen's entrenched rights would better capture how the conflict is to be understood. Accordingly, the category of state v. constitution definition, would capture the essence of the brief. Citizens (not just Riley) are made to look like vulnerable against the powerful, leviathan state, particularly its sweeping police powers of exploratory searches akin to the odious colonial-era practice of executing general warrants that enabled police officers to rummage through people's homes and offices for whatever incriminating items they might find, which the Bill of Right stopped; reenacted substantially in the Fourth Amendment. This explains why the brief reminds the judges that all persons (possible including the judges themselves and their loved ones) are subject to police exploratory searches for even minor offences once arrested. It tells why this must be a concern to all. The numbers of even minor offences that will give the police explorative search powers can be alarming, if not curtailed. What is more, the powers, if left unchecked, can be triggered by innocuous infractions of law. The brief makes the points graphic: 'the over twelve million people being arrested each year;' '[I]n California, for example, about two-thirds of adult arrests;' and for simple, innocuous offences like 'traffic and other 'fine only infractions such as jaywalking, littering, or riding a bicycle the wrong direction on a residential street.' What a horror picture the brief paints of citizens' (not just of Riley) vulnerability to the state, if the US Supreme Court does not uphold the prohibition against warrantless searches.[117] By so doing, it pitches the stakes as high:

> This case concerns whether granting such a new police entitlement comports with the Fourth Amendment. The stakes are high: Americans use smart phones to generate and store a vast array of

critical part of effective advocacy.').

[114] US Constitution, Amend. IV.

[115] P. 10-13.

[116] P. 11-12. See also, p. 31-34 (relating the Bill of Right as precursor of the Fourth Amendment Bill fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression).

[117] See p. 2-3.

> their most sensitive thoughts, communications and expressive material. Because the core purpose of the Fourth Amendment has always been to safeguard such personal and professional information from exploratory searches, this Court should hold that even when officers seize smart phones incident to lawful arrests, they may not search the phones' digital contents without first obtaining a warrant.[118]

By defining the conflict as one between the 'state v. people,' the reader comes down with the impression that the oppressive defendant must be made to respect the people, their cherished freedom, protected by the *grundnorm*, the US Constitution Fourth Amendment against any unreasonable infraction.

Setting

Strategically, discussing the factual setting of the time and place that would help the reader understand the brief in *Riley's* case would be unimportant because the facts are not anything near what will make Riley likable. The records on appeal, catalogues clearly that search of Riley's smart phone shows him to be indictable of criminal offences.[119] Not only were two loaded guns found concealed in his car; the cell phone search yielded information indicating that Riley is a member of the Lincoln Park gang; is also involved in the gang shooting. However, since the writer chose the Fourth Amendment as the brief's theme and has reified it as the brief's character, it is strategic to highlight more the 'no basis' of the search: (i) that warrantless searches is only justified if incident to arrest in order to search for what is capable of threatening officer safety and to prevent the destruction of evidence (absent in the *Riley* case); and (ii) the substantially non-contemporaneous search of Riley's smart phone immediately on arrest. On the first point, the brief relates how 'unlike physical items inside a container, the digital contents of a smart phone are categorically incapable of threatening officer safety.' It states categorical that 'Once police seize a smart phone and have it securely in their possession, it is perfectly reasonable for officers to inspect the physical components of the phone (including any protective cover or case) to ensure that it does not pose a safety threat. But once that task is complete, there is no need to examine the phone's digital contents.'[120] It goes on further: 'And once the police have seized and secured a smart phone, there is no risk that the arrestee might destroy or alter its digital contents. Nor should there be any danger that a third party might do so; so long as the police prevent the phone from receiving a signal-for example, by placing it into a Faraday bag.'[121] On the second point, the substantially non-contemporaneous search, the brief tells the reader that the police did two warrantless searches of the digital contents, even naming the particular officer who was responsible for it. By naming, it makes more concrete the facts: 'First, Officer Dunnigan scrolled through the phone's 'text entries' at the scene. . . The second search of petitioner's phone took place 'about two hours later' at the police station.'[122]

The brief writer recognized that the legal setting for Riley was problematic. Riley clearly had legal barriers standing in his way, chief among them was the governing precedent used to decide his fate in the California appeal-the California Supreme Court decision in *People v. Diaz*.[123] In that decision the California Supreme Court held by a 5-2 voted that the Fourth Amendment's 'search-incident-to-arrest' doctrine permits the police to conduct full exploratory search of cell phone (even some time later at the stationhouse) if ever the phone is immediately associated with the arrestee's person at the time of the arrest. The significant legal barrier cannot be swept under the carpet. A good brief writer must address it. The brief writer would have to encourage the US Supreme Court to scrutinize the decision. The first strategy the writer employed was to shows that the California decision should be treated as an isolate decision because some other jurisdictions, for good reason, differ from it. The writer quickly refers to the Ohio Supreme Court decision in *State v. Smith*.[124] It fortifies the argument by giving the reason why the Ohio Supreme Court reached the writer's preferred conclusion: 'modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object' that might otherwise be seized incident to arrest.[125] By doing so, the brief invites the US Supreme Court to consider how the jurisprudence dealing with physical containers subject to seizure and exploratory search should apply to the 'modern technology' of the digital age, such as smart phones. Next, the brief urges the court to scrutinize *Diaz* as a decision reached per incuriam. Why? The writer says it does not represent good law because: (i) it fails to take account of how 'the advance of technology should be read in tandem with the Fourth Amendment; (ii) it discounts the 'practical' reality interrogating the legality of the police practice; (iii) it prevents the court from remaining ever alert to 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted; (iv) it fails to recognize that warrantless searches of smart phones fail to further any legitimate law enforcement interest related to effectuating arrests; and (v) it acknowledges that unwarranted searches impinge upon personal privacy to an unprecedented degree not countenanced by the Fourth Amendment as within the concept of search-incident-to-arrest.'[126] It presses further its legal setting showing that the *Diaz* decision misses the point, particularly when it reasoned that 'when the police seize property from the person of an arrestee, it is the fact of the lawful arrest—not any safety the officer or other concern which establishes the authority for search.'[127] The writer submits that that is a wrong legal

[118] P. 3.
[119] Unfortunately, many appellate brief writers believe the appellate court is only interested in the law, so they only state the legal issue without setting it in the relevant factual context, thus removing the pathos basis for most briefs.
[120] P. 16-17.
[121] P. 10.
[122] P. 5.
[123] 244 P.3d 501 (Cal. 2011)
[124] 920 N.E.2d 949, 954 (Ohio 2009).
[125] P. 8.
[126] P. 13-15.
[127] P. 17.

proposition by the California Supreme Court.[128] It points even the California Supreme Court in its decision in *Diaz* the never disputed this reality. But it deemed it immaterial. Quoting language from the Court's opinion in *Robinson*, the California Supreme Court reasoned that when the police seize property from the person of an arrestee, '[i]t is the fact of the lawful arrest'-not any safety or other concern-'which establishes the authority to search.' *Diaz*, Pet. App. 30a (quoting *Robinson*, 414 U.S. at 235). The brief further explains the unfavorable *Diaz* decision as unrepresentative of the law not only on the basis of the Fourth Amendment but also in the face of other federal wiretapping statutes as bad precedent that must not be followed.[129] Noteworthy of mention, the brief writer in describing the factual setting included all legally relevant facts as well as any necessary or helpful background facts, such as the pre-colonial era history of warrantless searches by the police, which prompted the enactment of the Bill of Right. This gives the reader perspective understanding. The reader can then make sense of the legally relevant facts being interrogated-the Fourth Amendment its-its reach and application. The brief writer by tweaking the factual setting to project warrantless searches of the digital phone and explaining away the unfavorable legal decision in *Diaz* as reached per incuriam, then sets the brief plot in the classic division for understanding the logical thread in the brief.

Plot

The structure of the brief is compelling. It is effectively developed with a logical beginning, middle, and an end. The reader can see the plotline appropriately starting with the facts section. It introduces the importance of the brief through the context of the conflict. Immediately after stating the central question, whether the search of petitioner's cell phone violated Fourth Amendment rights, the introduction tells the very invasiveness of unchecked police search powers by stating how the right opens up over 12 million American citizens phones for exploratory search, even for simple, fine offences.[130] That kind of description invites the reader to graphically see, feel, hear and even smell and taste the dangerousness of warrantless searches. It makes the reader to shift her seat a bit, asking 'is it really so.' Once the writer has achieved that goal, the brief goes on to present the facts in statement of the case section-why Riley is in court-how trouble started, the complicating event or events that bring him to appeal. Here, it narrates Riley brush with the law leading to his arrest, the subsequent warrantless searches by the police, and his three unsuccessful trials (appeals) to suppress the evidence before the trial court, thereafter the California Court of Appeal, and then the California Supreme Court and why the court should uphold the appeal. Because the brief rest heavily on the warrantless search of the digital content of Riley's phone (not his person) the brief develops a plotline that centralizes the phone and search. For example, it goes at great length to describe the make of the phone, its capacity to hold information unlike most repositories, such as a warehouse. In the writer's word-picture description, a smart phone is indeed a 'virtual warehouse[s]' of people's 'most intimate communications and photographs.'[131] This is so because Riley's phone described as a smart Samsung phone 'could store up to eight gigabytes of information.' If it were an Apple's iPhone 5 that one could 'comes with up to sixty-four gigabytes of storage, which is enough to hold about four million pages of Microsoft Word documents.' It then submits that '[G]iven the volume and sensitivity of information on an average person's smart phone, it would be hard to overstate the seriousness of the warrantless intrusions the California Supreme Court's rule (in *Diaz*) would countenance.'[132]

As is done in fiction writing, the *Riley* brief uses the argument section to complete the introduction and the 'rising action' by adequately describing the legal principles needed to resolve the conflict-how the Fourth Amendment ought to be interpreted in the light of warrantless searches. The brief next takes the reader to the climax. Since the climax *must* occur within the argument section of the brief when the legal setting and the 'rising action' of the legal issue are fully developed; where the reader is wondering 'how are these issues going to be resolved,' Riley's shows how, under either strict interpretation the search of the phone exceeded the bounds of legitimate search incidental to arrest. It is unlawful because it is unnecessary to serve any legitimate government purpose. Also, the digital data does not threaten officer's safety. It therefore, unnecessary for the police to conduct any exploratory search without warrant.[133] It then goes on to do, what can be referred as to an 'intermediate analysis,' why the court should hold unlawful warrantless searches: the very facts that smart phones hold extraordinary sensitive personal information; and that the extraordinary holding implicates (further) US Constitution First Amendment concerns; that the search in question (Riley's) was too remote from his arrest to qualify as search incident-to-arrest; all of which renders the search intrusive and unreasonable.[134] No doubt at this climax stage of the brief, any reader's interest is at the highest. The reader sees the protagonist (Fourth Amendment) is at the height of peril and so the reader is uncomfortable and aching for things to get better, to return to a condition of stasis. The Riley brief captures the moment well in the argument section with those major headings. While the climax resolves the briefs main conflict on warrantless searches. The other minor plot threads unresolved, such as whether as a general matter, search-incident-to-arrest doctrine allows police officers to conduct delayed searches of personal items seized at the time of arrest are quickly wraps up in the falling action.[135]

[128] P. 17.
[129] 18 U.S.C. §§ 2511-2522 (making it unlawful for governmental entities to intercept wire communications without meeting a series of statutory requirements), and the Stored Communications Act, see 18 U.S.C. §§ 2701, 2703(a) (making it unlawful for governmental entities to retrieve electronic communications, such as email, from service providers without a warrant). See p. 52-53 of appellant brief.
[130] P. 2-3.
[131] P.26.
[132] p. 27.
[133] P. 13-24.
[134] P. 24-44.
[135] P. 52

The brief finally ends with the conclusion urging the court to reverse the California decision. The 54-page brief follows the coherent pattern of question presented, table of authorities, opinion below, jurisdiction, relevant constitutional provision, introduction, statement of the case, summary of argument, argument and conclusion. The reader is happy that the five basic stages plotted in the brief are logical for clear understanding, particularly as it reveals the protagonist struggling to overcome an obstacle. This contributes to make the brief persuasive to the reader.

Brief Point of View

The perspective through which the brief writer wants the reader to perceive the story makes a difference as to how the reader is moved by the story. Much as point of view in a brief is largely circumscribed in legal writing rules on professional balance and credibility, unlike much of fiction writing, brief writers must not shy away from presenting the brief from the client's perspective. Readers expect brief writers to project their clients' perspectives. It is therefore not surprising that the *Riley* writer presents the narrative from his perspective. Recognizing that Riley is not likely a likable person, the brief reifies as 'character,' in his stead, the Fourth Amendment.[136] Since the reader will generally root for the character she identifies with, the *Riley* brief centralizes the worthy objective of the Amendment, asking the court to further its objective by holding that warrantless exploratory searches are unconstitutional. Unmistaken, the *Riley* brief contains many facts showing how the Fourth Amendment projects worthy social and political goals. It alludes that the Bill of Right is the virtuous precursor of the Amendment. It reminds the reader that the Bill had this enviable objective: 'The Framers incorporated the prohibition against unreasonable searches into the Bill of Rights primarily in response to the odious colonial-era practice of executing general warrants – warrants that enabled officers to rummage through people's homes and offices for whatever incriminating items they might find.'[137] It further invites the judges to see the Fourth Amendment through the mischief the bill seeks to cure: 'The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression,' and that the framers of the Fourth Amendment were similarly motivated. [138] The reader's impression prompted is therefore of like for the Fourth Amendment, for it to prevail over police warrantless search powers.

Resolution

Readers identify and are persuaded easily with the resolution that seems plausible. It is a happy ending for them. Having downplayed the character of Riley and reified the Fourth Amendment (and the Bill of Right) as the brief's character, with all its long protectiveness against state oppression, right from pre-colonial America to the present, the reader is quick to see the Amendment as the 'thing' that should trump police warrantless search powers. This kind of ending satisfies the reader's sense of justice.

Summary

The Riley brief has many other interesting features (subtle, less overt fiction techniques) winning brief writer should emulate. It is an appellate brief that recognizes the importance of pathos-oriented writing. Rather than simply use what most brief writers call 'list' of cases, in which cited cases are listed, it uses 'table' of authorities. While the difference may not be apparent to some, the difference is fundamental. The 'table' is a pincite strategy that adds to the brief writer's credibility.[139] It tells the exact pages where an authority is located. Credibility also implicates brief organization. Organization, particularly in the form of a good summary or roadmap of the arguments helps the judge to follow a lawyer's argument. Because it does so, it comes with persuasive reward. Not only does it provide a better guide to the judge, it evidences thoroughness, which goes to credibility.[140] The *Riley* brief uses another unique persuasive style to put forward its viewpoint-what can be described as a powerful opening statement. In jurisdiction where the practice permits, an opening statement is used to frame in concise nature the main arguments of the parties. The opening statement is a powerful persuasion strategy because some studies suggest that more than 80 percent of jurors (in legal systems that still use the jury system) make up their minds about what side to root for during opening statements.[141] The reason for this is simple. The opening statement establishes the lens through which triers will view the case. If that lens is clear and focused on the issues and the evidence presented, the usual confirmation bias drives to victory. Once triers encode the first information and it turns out persuasive in their view, they simple interpret every other thing that is foggy

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[136] The brief contains nearly 40 mentions of the Fourth Amendment.

[137] P. 11.

[138] P. 32. Citing cases like *Wilkes v. Wood* (1763) 98 Eng. Rep. 489; Boyd, 116 U.S. 625-26; *Stanford v. Texas*, 379 U.S. 476, 484 (1965) (all in which the court treated invasion to privacy as totally subversive of the liberty of the subject, while noting that they serve as the wellspring of the rights now protected by the Fourth Amendment).

[139] Bryan A. Garner, *The Redbook: Manual on Legal Style* (2d ed. 2006) 127 ('Failing to pinpoint a reference can hurt a writer's credibility by making it hard ... to evaluate the validity of an argument.').

[140] Kristen K. Robbins, The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write (2002) 8 *Legal Writing: J. Legal Writing Inst.* 257, 264 (noting from a survey of 355 federal judges that '[J]udges value well organized, tightly constructed briefs second only to good legal analysis. For efficiency reasons, they seem to prefer traditional methods of organization, such as the use of a summary or roadmap of the arguments to follow and the placement of an advocate's strongest arguments first.'); Wayne Schiess, *Writing for the Legal Audience* (2003) 87-90 (advising that the 'best way to ensure that a trial judge will understand your case is to ... [m]ake your organizational plan overt' by using section headings, tabulation, and enumeration). See also, Richard K. Neumann, Jr. *Legal Reasoning and Legal Writing* (4th ed. 2001) 95-100; Bryan A Garner, *The Redbook: A Manual on Legal Style* (2nd ed. 2006) (cautioning that '[t]he IRAC (issue-rule-application-conclusion) model familiar from law-school exams is inappropriate for structuring memos and briefs because it relegates the answer to the end of the document'); Michael R. Fontham, et. al. *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* (2002) 71 (recommending CRAC as 'a simple organizational structure in which to lay out your legal analysis' while keeping in mind that the goal 'is not to follow CRAC rotely, but to make a persuasive legal argument').

[141] Ryan H. Flax, Ways to Maximize Persuasion During Opening Statements in Opening Statement Toolkit, *A2L Consulting*, 1.

in a litigation into the encode gestalt created in the opening.

A good brief writer can use a well-craft table of content to achieve what powerful opening statement does. The *Riley* brief writer captures the essence by skillfully presenting upfront the brief argument in the table of content section. For example, using sentence-like heading in the sections, it contains (with page pincite) argument summaries such as: 'the search of the digital contents of petitioner's smart phone exceeded the bounds of a legitimate search incident to arrest; the search was unnecessary to serve any legitimate governmental interest; digital data does not threaten officer safety; once seized, it is unnecessary to search a smart phone without a warrant to preserve evidence; the degree of intrusiveness of the search of petitioner's phone rendered the search unreasonable; smart phones hold extraordinary amounts of sensitive personal information; smart phones hold information that implicates First Amendment concerns; limiting searches of smart phones to situations in which officers believe such phones contain evidence of the crime of arrest would not solve the constitutional problems inherent in such searches; the search of petitioner's phone at the stationhouse was too remote from his arrest to qualify as a search incident to arrest.' By presenting the main points of the argument this way the reader gets the judges' attention and make them care about the case and the client. Good brief writers should likewise learn how to skillfully present argument upfront, as quick as possibly to get judge's confirmation biases operate in their favor. Many writing teachers cautioning that the IRAC (issue-rule-application-conclusion) paradigm inherited from the university is inappropriate for structuring memos and briefs because it relegates the answer to the end of the document, and that it constrains an intersperse, robust discussion of both facts and law in the argument section.[142] The use of CREAC (Conclusion-Rule-Application-Conclusion) as a default analytical structure is therefore recommended.[143] A briefs that employ the style is often more persuasive because it develops the brief through the route of: (i) upfront summary of how the law applies to the client's facts-telling the judge the legal conclusion the brief writer wants the court to reach; (ii) next, it explains the legal propositions upon which the brief relies; (iii) goes on to explain the significance of the rule; (iv) then explains how the legal proposition apply to the facts; and (v) finally reiterate the legal conclusion the writer advocates.[144] The *Riley* brief written using the CRAC model freely intersperses in the argument facts and law in persuasive manner worthy of emulation.

6. Conclusion

The *Twitter* and *Riley* briefs demonstrate how using fiction 101 can help lawyers' craft better memoranda motions and appellate briefs. Although brief writers do not write fiction, by learning to write narrative and tell stories melded with law, policy and doctrine, good writers play the ethos card—whether about justice, responsibility, perseverance, truth or redemption that moves judges. Lawyers who use fiction techniques to tell thematic story in a persuasive and technically sound way, end up writing killer briefs and are rewarded for it. No wonder why Judge Aldisert recommends that senior lawyers should be assigned to write brief facts section. It is where persuasive stories can be better told to persuade judges.[145] The advice is quite useful because current system of educating lawyers does not centralize persuasion—the skills necessary to write good facts sections. Lawyers only acquire the skill through years of practice experience and learning how to use fiction writing style. There is therefore a need to tweak current legal curriculum to educate lawyers on how to write narrative and tell client's live-in experiences as stories. I urge the teaching of lawyers in techniques and strategies of persuasion. This paper I hope, is a step in the direction.

[142] Garner, n. 124. See also, Fontham, n. 124.

[143] See however the caution about slavish use of CRAC in Fontham, n. 124.

[144] Sarah E. Ricks & Jane L. Istvan, Effective Brief Writing Despite High Volume: Ten Misconceptions That Results in Bad Brief (2007) 38 *Toledo L. Rev*. 1113, 1115-1116.

[145] Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument (rvsd. 1st ed. 1996) 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.'').