

## ORGANIZING FACTS TO TELL STORIES

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“Chronology is, then, the bread and butter of fact writers.”

We have encountered very few writers—legal or otherwise—who have ever been taught how to organize and develop facts. Facts are just facts, right? You get them down on the page as best you can in some sort of order, usually chronological. Indeed, law school often reinforces this hasty approach with the unfortunate impression that facts are grubby little details that get in the way of the writer's true responsibility, which is to present “the law.” In this atmosphere, fact sections of memos or briefs, for example, too often become rote, uninspiring sequences.

Organizing facts chronologically is not foolish, of course, for most clumps of facts have a chronological thread running through them. That is why we usually try to get our hands around new facts by putting them in chronological order. As a result, by the time we start to write, we probably have created a chronology that we can simply let fall on the page without any more organizational effort.

This temptation increases because chronology is often not only the easiest organization, but the most effective. If we are writing about facts, we are probably trying to tell a story, and—at least in legal prose as opposed to more inventive Hollywood scripts that use flashbacks, interwoven plot strands, and the like—stories are best told chronologically. Chronology is, then, the bread and butter of fact writers.

But precisely because it can so often be useful, chronology can become what we call a “default organization,” structurally similar to the automatic moves a computer program will make unless the user instructs it otherwise. Defaults can be quite dangerous, and for facts, chronology can produce three different problems. In this short article we will cover one: Habitual chronology can distract us from telling an effective story that complements and enhances our legal argument. In a future column we will discuss the other two: the tendency of chronological presentations to include too much distracting detail, and the occasional inconsistency between chronology and the key factual issues at the center of a matter.

### Using Facts to Tell Stories

To someone not personally connected to an incident, the facts are, well, just the facts. Even when they are organized sequentially to show connected events, the facts are still just a string of facts. A story is much more. It leads us to infer motive, to judge the nature of the acts performed, to understand their consequences, and to empathize with or distance ourselves from the people involved. In other words, a story can show us who is in the right, and where justice lies. Not that an artfully told story distorts the facts or forces conclusions on us. It simply arranges facts to lead us toward inferences that favor the writer's position. All this can be done without violating any duty to describe the facts accurately and thoroughly.

Here, for example, are two stories crafted from the same facts, but leading us to quite different conclusions:

#### The prosecution version

On September 5, 1998, G.L., a minor, was arrested by the Smithville police and charged with trespass and destruction of property under Sections 250.17 and 137.55, respectively, of the West Carolina Criminal Code.

At approximately 9:00 p.m. on September 5, John and Julia Barr and their son, Roger, returned home from a PTA meeting. When they reached their front door, they found that it was ajar. Mr. Barr entered the house and

noticed muddy footprints leading across the living room carpet toward the kitchen. In the kitchen, he found food strewn across the kitchen table, and a broken plate on the floor. He then looked through the other rooms on that floor and proceeded upstairs. In his son's bedroom, he saw that clothes had been pulled from an open drawer and dropped on the floor. In the master bedroom, he found G.L. asleep on the bed. As he entered, she awoke, knocked him over as she pushed by him, and ran out of the house. She was later found and arrested by the police on the nearby golf course.

#### The defense version

On September 4, 1998, G.L., a 15-year-old girl living in the Smithville Home for Orphans, had an argument with her dormitory supervisor and ran away from the Home. She had no money or food with her and only the clothes she was wearing. She spent the night of September 4 and most of September 5 hiding on the Smithville Country Club golf course.

On the evening of September 5, it began to rain. Her clothing became drenched. At that point, she had not eaten since her lunch on September 4. She left the golf course and began to walk through the adjoining neighborhood. In the fourth block after leaving the golf course, she walked up the drive to the largest house she had so far passed. She rang the doorbell, but no one responded. She rang again and knocked, but still received no response. She then tried the door handle, and found the door unlocked.

Entering the house, she went directly to the kitchen, took some food from the refrigerator, and ate some of it. In the process, she dropped and broke a plate on which there had been a piece of chocolate cake. She then went upstairs, found some dry clothes in a bedroom, and put them on. She then went into another bedroom and fell asleep on the bed.

When the Barrs returned, she awoke and ran out of the room. Mr. Barr tried to grab her as she went past, and was knocked over as she

pulled away from him. He was not injured. She then ran out of the house and back to the country club grounds, where she hid in a clump of bushes. After being apprehended by the Smithville police, she was incarcerated in the Smithville City Jail and charged with trespass and destruction of property under sections 250.17 and 137.55, respectively, of the West Carolina Criminal Code.

There are many other ways of telling an up-to-date version of "Goldilocks and the Three Bears." But these two demonstrate how easy it is to construct different stories from the same facts without distorting them.<sup>1</sup>

At the core of a story—a legal one, at least—is a theme: a proposition about the nature and meaning of what happened. For example, "My client, desperate to find food and shelter, meant no harm—and did very little harm." Or "Morissette took only what appeared to be old, valueless junk abandoned on uninhabited land." At some point in a brief, you may want to state this theme explicitly. In the fact section, however, the rules of brief writing forbid you from characterizing facts or drawing explicit inferences from them. You have more leeway in introductions and preliminary statements but, even there, you will usually be more persuasive if you allow inferences about the equities of a situation to emerge as if spontaneously in your readers' minds. If you try to make those inferences explicit, your readers—lawyers and judges, at least—are likely to take that as a challenge: Does your characterization of the facts really hold up?

To organize facts to create inferences, lawyers need to think more methodically about how to tell a story than they are usually trained to do. Here is a framework for that thinking. The basic elements of a story are:

*Opening situation*

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*Primary character — Plot — Secondary characters*

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*Closing situation*

<sup>1</sup> Our thanks to Paul Perrell, of the Toronto firm of Weir & Foulds, for introducing us to the Goldilocks litigation during a writing program in Toronto several years ago. We have since seen it used also in Steven Stark's *Writing to Win* (Doubleday, 1999).

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With each of these components, your job is to create inferences that favor your client. More specifically, you want the reader to

- characterize the plot in both legal and common-sense, human terms. Are we dealing with the malicious invasion of a home, or a desperate search for food and shelter?
- characterize the opening situation: What circumstances led the characters to act as they did?
- characterize the closing situation: What were the consequences?
- characterize the motives of the people involved, and feel empathy with or distance from them.

To achieve these goals, four choices turn out to be critical:

1. Where does the story begin? If we begin at the Smithville orphanage, as G.L. runs away with only the clothes she is wearing, we tell one story. If we begin with a list of G.L.'s alleged crimes, followed by a vignette of the Barrs' returning from a PTA meeting to find their home violated, we tell a very different story.
2. Where does the story end? With an intruder running out of the house, or with a frightened child hiding in the bushes, then captured and "incarcerated" by the police?
3. Through whose eyes do we see the story? Generally, though not always, we tend to empathize with someone when the story is told from his or her perspective. Are we looking through the eyes of family members coming home to find their house violated, or through the eyes of a wet, hungry child?
4. Where do we add detail, and where do we omit it? With important facts, we have no choice but to include them even if they are bad for our side. With "color" facts, the facts that add flavor and descriptive fullness, we usually have a good deal of choice. Do we add the details that suggest the Barrs are wealthy? What about the chocolate cake, which contributes to the portrait of G.L. as a child? Or, on the other hand, the muddy footprints, "strewn" food, and clothes dumped on the floor, which contribute to the portrait of a home invaded?

The following example shows how much trouble litigators can get into if they do not know how to tell a story, and instead fall back on a chronological recital of facts, especially facts drawn from a record. These facts come from a brief appealing the conviction of a prison guard who was caught carrying drugs into the prison. The brief makes two arguments:

- Although the guard had signed a form consenting to being searched by the prison authorities, the consent applied only if they had reason to suspect him of possessing drugs.
- Although he had drugs in his possession, there was no evidence that he intended to distribute them.

As you read these facts, think about how the first, third, and fourth of the decisions above were made: Where does the story begin? Through whose eyes are we looking? And where is detail added or omitted?

#### Statement of Facts

The evidence presented at the motion to suppress hearing showed that on Sunday, March 18, 1990, Drug Enforcement Administration (DEA) Agent Thomas Jones was called to the Sam Houston Correctional Facility in Hilltop, Texas. (3 R. 8) Jones indicated that Sandra Smith, the prison administrator in charge of security, had obtained information from an unidentified inmate that a number of correctional officers had been bringing narcotics into the facility. (3 R. 10) Prior to March 18, 1990, Jones had conducted surveillance of the facility on the basis of these communications, but he had not obtained any evidence or further information. (3 R. 18)

Smith had informed Jones on Friday, March 16, 1990, that she intended to conduct searches of all the officers at the prison as they arrived for work on the morning and evening duty shifts on March 18. (3 R. 12, 31) Jones was asked to remain in the area of the facility in the event that contraband was found during these searches. (3 R. 21)

Smith had also told Jones that there was a

facility policy that allowed the prison administrators to conduct searches of entire shifts. (3 R. 11–12) The policy was admitted into evidence at the hearing, as was Defendant’s signature showing that he had read and understood it. (3 R. 6–7) In pertinent part, the manual stated as follows:

It is not the policy of [the prison] to routinely search its employees or their property. However, when the Facility Administrator has reason to suspect that an employee is in possession of contraband items, which, if introduced, could endanger the institution, the Facility Administrator may authorize the search of an employee or his personal property. Searches may also be authorized where the Facility Administrator has reason to suspect that an employee is removing contraband from the facility.

Secure Corrections Corporation, *Standards of Employee Conduct*, § D.2. Jones did not know whether a similar search of all employees had been conducted at any time before March 18, 1990, or at any time between that date and May 2, 1990, the day of the suppression hearing. (3 R. 18–19) No evidence of any other such search was presented to the district court at the suppression hearing or at trial. (6 R. 59)

Beginning with the morning shift, each of the officers appearing for work was searched. (3 R. 13. 30) The procedure followed during these searches was that each officer would be stopped in the “sally port,” an area between a barred outside door and a barred door leading to the inside of the facility. (3 R. 14) The searches were conducted by prison supervisors. (3 R. 29) At 8:00 a.m. Smith called Jones and told him that they had found contraband, including marijuana, syringes, and a balloon of heroin, during the search of James Green, a guard assigned to the morning shift. (3 R. 12) Green told Jones that he obtained the contraband from a person at a store across from the facility. (3 R. 21) This was consistent with the prior information that Jones had obtained from the prison employees. *Id.* Jones

conducted surveillance of the store and of a residence, without result. (3 R. 13–14, 21)

At 3:15 p.m. Smith again called Jones and told him that controlled substances had been found during a search of Defendant. (3 R. 14) Defendant had been subjected to a pat-down search and to a search of his shoes and socks, during which marijuana was discovered. (3 R. 16) Defendant had been taken to the captain’s office, and other contraband had been found in a wastebasket into which Defendant had thrown some tissue paper. (3 R. 17) Defendant was advised of his constitutional rights, and he admitted that the marijuana was his, but he denied that he had possessed any other contraband. (3 R. 18) Although Agent Jones searched and questioned Defendant after contraband had been found, (3 R. 26) he did not witness the circumstances of Defendant’s initial and subsequent searches. (3 R. 22)

Because the writer relies so much on pure chronology, he falls into two traps. First, a key fact—the language in the prison manual about the circumstances under which the prison could search its employees, language that is at the core of the first issue on appeal—does not receive the emphasis it deserves. Even worse, because the writer begins with the first pieces of the chronology the record contained, and recites those facts from the perspective of the witnesses who described them, the story he tells creates exactly the wrong theme: The prison had a legitimate problem, and it tackled it energetically and professionally. The DEA agents were just going about their jobs. With whom, then, are we likely to be empathizing by the time we first see the defendant (especially, of course, because we are introduced to him as “Defendant,” not by name)?

Consider the different effect if the story had been told from the guard’s perspective, beginning differently and focusing on different details:

**Mr. McKay’s limited consent to being searched.**

When Robert McKay was hired as a guard at the Sam Houston Correctional Facility, he signed a form that provided [here follows a description of the form’s language, with the emphasis on its limited scope].

“[A]s effective stories will, it brings you around to that reaction as if you discovered it yourself.”

**The prison administration's grounds for searching Mr. McKay**

[A brief summary of the prison's reasons for suspecting drugs were entering the prison, emphasizing that they had no reason to suspect the defendant individually—a key to his defense.]

**The search of the defendant**

On March 18, 1990, Mr. McKay arrived at the prison for his shift. He was immediately taken aside by [name ] and subjected to a strip search . . .

This story was about the underlying facts of a case. But stories can be made out of the legal process as well. Here is a final example:

David Smith, a professional art dealer and an expert in prints, bought “The Blue Seal,” a well-known print by Pablo Picasso (the “Print”), at an auction conducted by defendant Galerie Moderne in June 1990. Galerie Moderne shipped the Print to Smith shortly thereafter, but Smith never paid for it. For the next 16 months, Galerie Moderne pursued Smith to collect the debt, but Smith consistently claimed he was unable to pay. Smith, meanwhile, attempted to sell the Print, but could not find a buyer at the price he was demanding, apparently because of the decline in the art market.

Finally, after extending the payment period again and again, Moderne threatened to take action to collect the debt. Smith then made the charge that underlies every count of his Complaint: that the Picasso signature on the Print (the “Signature”) was not authentic. Ten days after he first made this allegation, he filed suit in this Court seeking to rescind his purchase of the Print—that is, seeking to be relieved of his payment obligation—and claiming \$20 million in alleged “punitive damages.” The defendants later counterclaimed to recover the debt Smith still owes.

After these paragraphs, can you avoid a strong suspicion about why Smith is suing? Yet the story never makes this suspicion explicit. Instead, as

effective stories will, it brings you around to that reaction as if you discovered it yourself. From the reader's perspective, the story's theme now seems legitimate rather than manipulative or heavy-handed.

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