WINNING THE GAME OF APPELLATE MUSICAL SHOES: WHEN THE APPEALS BAND PLAYS, JUMP FROM THE CLIENT'S TO THE JUDGE'S SHOES TO WRITE THE STATEMENT OF FACTS BALLAD

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ABSTRACT

An appellate brief's Statement of Facts is critical to a successful appeal. The client trusts the attorney with his or her story. To fully hear it, the attorney must actively listen and demonstrate empathy in the initial interview. The attorney needs to step into the client's shoes to retell the story at trial. On appeal, however, the attorney needs to step into the appellate judge's shoes. The story must be recast for an audience knowing nothing about the client. It must be interesting, and appeal to the judge's spirit of justice. If the client suffered an injustice in the court below, the judge will seek to "do justice" for the client.

For the judge to right a wrong, the attorney must respect the appellate venue. Not only must the attorney craft the client's brief with a strong theme of justice, but also in accordance with the appropriate standard of review and court rules. Then the attorney must polish the client's story to achieve a clear, crisp, and captivating narrative. Writing an appellate brief requires sufficient training in people-oriented, appellate advocacy, and composition skills. Yet, the current legal education model falls short in providing these skills. The current model is more rules based than people based. Moot court competitions and mandatory appellate advocacy coursework typically involve canned fact patterns, denying the student opportunities for client interviewing and counseling. Clinical legal education offers excellent practical skills training, but participation is elective and opportunities are limited.

Therefore, most law school graduates and junior attorneys lack practice-ready skills. This Article calls for changes in the law school

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curriculum to better prepare students for lawyering. Indeed, employers in this tight legal job market are demanding change. Client-centered skills in interviewing and counseling should be required. Appellate advocacy and composition skills training should be strengthened. Doctrinal classes should integrate appellate practice into their curricula. Proper skills training will equip the attorney to step into the client's and the judge's shoes and write a clear, crisp, and captivating client story that is consistent with appellate standards of review and court rules. In reaching a just result, the judge, the attorney, and the client are all winners in the game of appellate musical shoes.

INTRODUCTION

As the attorney, you are your client's voice. Your client trusts you with his or her story. Assume that your client loses at trial. When you and your client perceive an injustice, you appeal. This provides yet another opportunity to tell your client's story and to see that justice is served. What is one of the most critical things you can do to help your client prevail?[1] The answer: write a clear, crisp, and captivating Statement of Facts.[2]

It sounds simple. It is not. Writing such a Statement of Facts in an appellate brief takes a large amount of reflection, planning, and practice. Indeed, writing a convincing narrative is tedious work, and often the part of the appellate brief that many attorneys labor over the most.[3] This is because, as with a musical score, there are so many possible variations.[4] Some narratives will be pleasing to some listeners, while others will fall upon deaf, or worse yet, uncaring ears. The listeners, the appellate judges, are human.[5] It is

1. Many legal experts believe that on appeal, the Statement of Facts is the most critical part of the appellate brief. *See, e.g.*, ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 271–72 (2d ed. 1989); FREDERICK BERNAYS WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 44 (1967).

2. In the words of the Honorable Irving R. Kaufman, writing as Chief Judge of the U.S. Court of Appeals for the Second Circuit: "Let the narrative of the facts tell a compelling story. The facts are, almost without exception, the heart of the case on appeal. They should be set forth as a story about a very real human situation." Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 166 (1978).

3. As one commentator noted: "The writing of [an appellate] brief is an arduous task; and the writing of a simple, yet compelling, brief is even more arduous." Jennifer S. Carroll, *Appellate Specialization and the Art of Appellate Advocacy*, 74 FLA. B.J. 107, 108 (2000).

4. "The notion that the facts, whether simple or complicated, speak for themselves is sheer nonsense. In reality there are as many ways of telling the story of any case as there are fleas on a dog." Harold R. Medina, *The Oral Argument on Appeal*, *in* ADVOCACY AND THE KING'S ENGLISH 537, 540 (George Rossman ed., 1960).

5. The appellate advocate must remember who the listeners are. Appellate "[b]riefs are written for one audience and one audience only—judges

to their humanity and spirit of justice that the appellate advocate must appeal.[6]

Making an appeal to the judge's humanity, however, does not mean writing a Statement of Facts that is a heart-tugging "sob" story. "[O]vert appeal to emotion is likely to be regarded as an insult. ('What does this lawyer think I am, an impressionable juror?')"[7] But you can write your client's story to appeal to the judge's sense of justice so that, in the end, the judge will intuit a wrong has been committed against your client.[8] And if there is a way the judge can "do justice" to redress this wrong, he or she most likely will.[9] The appellate judge generally has an amazing degree of freedom to decide the case as he or she deems best.[10] In seeking to do justice, the judge has the intrinsic satisfaction of knowing not only that your client is receiving justice under the law, but so will future similarly situated persons. Indeed, appellate judges perceive that their job is to demand just results for the benefit of society as a whole.

Your job is to make the appellate judge *want* to provide justice to your wronged client. Whatever the area of law, its basic legal principles are generally well-established in the "black letter law."

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and their law clerks. . . . You write to persuade a court, and not to impress a client." RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 17 (rev. 1st ed. 1996).

6. "Appellate court judges are not automatons who mindlessly look up the law and mechanically apply it to your case. They want to 'do justice.' If the established law gets in the way, 'justice' will usually prevail." MYRON MOSKOVITZ, WINNING AN APPEAL 1 (4th ed. 2007).

7. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 32 (2008). In the words of the Honorable Alex Kozinski:

> When a lawyer resorts to a jury argument on appeal, you can just see the judges sit back and give a big sigh of relief. We understand that you have to say all these things to keep your client happy, but we also understand that you know, and we know, and you know we know, that your case doesn't amount to a hill of beans, so we can go back there in the conference room and flush it with an unpublished disposition.

Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 333.

8. "[E]ach case presents its own human drama. This drama should be carefully arranged into a statement of facts that makes the reader conclude there is a wrong that must be righted." Karl Linde, *Appellate Brief Writing: Some (Hopefully) Helpful Hints*, WYO. LAW., Dec. 2002, at 18, 19.

9. As stated by the Honorable Roger J. Miner of the U.S. Court of Appeals for the Second Circuit: "Elicit sympathy for your cause. Don't overdo it, but don't be afraid to show how an injustice may occur if we don't decide in your client's favor. Sometimes the law requires an unjust result, but we certainly try to avoid it." Roger J. Miner, *Twenty-Five "Dos" for Appellate Brief Writers*, 3 SCRIBES J. LEGAL WRITING 19, 24 (1993).

10. *See* MOSKOVITZ, *supra* note 6, at 21. If a judge *wants* to reach a particular result, he can usually manage to do so and still look "respectable." He can distinguish cases, overrule or "disapprove" cases, twist the facts a bit, and sometimes even overlook cases or facts. And that's just what he will do, to achieve "justice"—as he sees it. *Id.*

The appellate judge is an expert in such legal principles, whether derived from statutory or common law.[11] Within certain constraints, the judge sitting on an appellate bench customarily has some "wiggle room" to reach a just result in any given case.[12] Furthermore, the appellate judge is an expert on briefs. Before receiving yours, the judge is likely to have read hundreds or thousands of briefs. The judge will be familiar with most of the pivotal cases and will be aware of how laws have been applied to many fact scenarios. The judge will not, however, know anything about your client.[13] It is you who must convincingly tell the judge your client's story.

The story or ballad needs to be "good."[14] It should reflect a moral or theme, set out in as clear and captivating a manner as possible.[15] The ballad should come to life through word imagery and

11. *See* Clyde H. Hamilton, *Effective Appellate Brief Writing*, 50 S.C. L. REV. 581, 584–85 (1999). The Honorable Clyde H. Hamilton observes: "Because experienced federal appellate judges are familiar with almost all well-worn areas of the law, the facts often speak for themselves before the party has a chance to do so in the argument component of the brief. Thus, the opportunity to persuade actually begins with the statement of the facts." *Id.*

12. Cases reaching appellate courts are rarely controlled completely by precedent. *See* Andrew L. Frey & Roy T. Englert, Jr., *How to Write a Good Appellate Brief*, APPELLATE.NET (1994), http://www.appellate.net/articles/gdaplbrf799.asp.

13. "When writing the Statement of Facts, remember: the judge knows *nothing* about this case. Reread your Statement to make sure that you have not unconsciously made any assumptions that the judge knows the case the way you do." MOSKOVITZ, *supra* note 6, at 24. For a succinct overview on writing a persuasive Statement of Facts, see *id.* at 21–27.

14. Using storytelling concepts can help because, like storytelling, appellate advocacy is an art form. *See* MARSH CASSADY, THE ART OF STORYTELLING 15 (1994) ("[The storyteller] takes a story, original or already in existence, adds his or her sense of humanity to it, and makes it come alive for an audience of one or more. The storyteller interprets life, presents truth and helps an audience enter into other realities for enjoyment and to gain understanding."). One legal scholar describes the importance of storytelling as follows: "I submit that paying closer attention to the elements of narrative can help an appellate brief writer produce a far more compelling, and thus persuasive, work." Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127, 131–32 (2008).

15. *See* MICHAEL D. MURRAY & CHRISTY HALLAM DESANCTIS, APPELLATE ADVOCACY AND MOOT COURT 30 (2006). Scholars suggest the following about a writer's theme:

> The moral of the story is the theme of your case, and it should be able to be stated in a single sentence no matter how long it takes you to boil the case down to a single sentence theme. As with most good stories, the reader (the court) should be pulled into it so that they care what happens to the main character (your client) and are eager to know what happens next until they get to the end of the story.

Id. Indeed, the value of a strong moral theme is a concept at least as old as Aristotle's Rhetoric. As one scholar has observed:

selective record excerpts.[16] The product should result from, first, putting yourself in the client's shoes at trial, and, second, putting yourself in the judge's shoes on appeal.[17] When you do, your musical variation may be heard, appreciated, and published not only for your client's benefit, but for others in like circumstances.

The influence of a well-conceived and well-constructed Statement of Facts cannot be overstated.[18] As one of America's greatest appellate experts, John W. Davis, said, "[I]t cannot be too often emphasized that in an appellate court the statement of the facts is not merely a part of the argument, it is more often than not the argument itself."[19] It is imperative, then, that we teach law students and junior attorneys the skills required to produce clear, crisp, and captivating client stories for the appellate venue.[20]

This Article focuses on an effective writing process of an appellate brief's Statement of Facts in the academic and practitioner contexts. Part I considers the importance of actively listening to a client's story and stepping into the client's shoes for trial. Part II

> [T]o Aristotle, logical argument . . . is less about logic per se and less about form than *about knowing and connecting with the audience.* To Aristotle, logical arguments are persuasive not because of something inherently true about logic, but rather because the audience values and responds to logical arguments. . . . What's more, not just any logical arguments will do; the premises for the arguments *must be drawn from the experience and values of the audience.*

Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEGAL WRITING 61, 62 (2002) (emphasis added).

16. *See* STEVEN D. STARK, WRITING TO WIN: THE LEGAL WRITER 110 (1999).

17. The Honorable Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit observed: "A sense of the audience is the key to rhetorical effectiveness. It follows pretty directly that the key to effective appellate advocacy is to imagine yourself an appellate judge." Richard A. Posner, *From the Bench: Convincing a Federal Court of Appeals*, LITIG., Winter 1999, at 3.

18. As emphasized by appellate experts:

> [T]he statement of facts is the heart of the brief upon which all of the other parts depend and to which they are related. If no part of the brief can be downgraded by describing it as less important than any other part, then the statement of facts is *primus inter pares.* No matter how good all the other parts are, a brief cannot be effective unless the statement of facts provides the appellate court with a sufficient factual basis upon which to decide the appeal in favor of the party upon whose behalf the brief is filed.

ROBERT J. MARTINEAU ET AL., APPELLATE PRACTICE AND PROCEDURE 824 (2d ed. 2005).

19. John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 896 (1940).

20. Through writing such narratives, the advocate stands a chance of overriding the appellate judges' natural inclination to affirm. *See* Jim Regnier, *Appellate Briefing: A Judicial Perspective*, PERSP.: TEACHING LEGAL RES. & WRITING, Winter 2003, at 72 ("Your task is daunting. . . . A sterile, legalistic approach will not carry the day. You must, in good taste, persuade through a combination of a legally compelling and emotional presentation. [Appellate] [j]udges are most concerned about fairness.").

considers the importance of moving into the judge's shoes on appeal, and how doing so guides the writing of the story. Part III discusses the critical need to respect the context in which the appeals band is playing and to write in accordance with the appropriate standard of review and court rules. Part IV addresses the urgency of practical skills training, and for law students and junior attorneys to wear both sets of shoes. Finally, Part V offers some practical notes on how to write a clear, crisp, and captivating Statement of Facts ballad in an appellate brief. Doing so could mean more than a new pair of shoes for you and your client. It could mean having your ballad heard and subsequently prevailing on appeal—which is sweet music indeed for you both.

I. STEPPING INTO THE CLIENT'S SHOES: THE ART OF ACTIVE LISTENING TO HEAR AND TELL A CAPTIVATING STORY

The narrative originates with the initial client interview. I do not mean an intake procedure to obtain some of the client's personal information. Rather, I mean the first "real" interview, when the client comes to tell you her story in hopes that you can be her legal voice to redress perceived wrongs. Some clients are more educated, articulate, and legally savvy than others. All clients, however, keenly want to be heard.[21] That is why they are in your office—to tell their story. "The story is central to the way we process facts. It is the basic system we use to teach, to understand, to instill moral precepts and to memorialize important events."[22] You need to have more than legal knowledge to hear and tell your client's story fully and accurately. You also need empathy, as well as listening and composition skills.

A. Active Listening to Be Present

Client-centered legal interviewing and counseling has been around for several decades.[23] This approach to lawyering originated

21. Clients generally have nonlegal concerns in their stories as well. "Whatever the legal aspects of a problem, nonlegal aspects frequently are at the heart of a client's concerns. Effective counseling inevitably requires that you elicit information about these nonlegal aspects and factor them into a problem's resolution." DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 5 (1991).

22. Jim McElhaney, *Dirty Dozen: Do You Want to Write a Really Bad Brief? Here Are 12 Ways to Do It*, A.B.A. J., June 2011, at 24, 61. Most of us identify more with events that are expressed as narratives. *See* Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2271 (1989) ("[The] narrative's communicative capacity is rooted in the way that the mind interprets, processes, and understands information.").

23. Over the last fifty years, interviewing techniques have become increasingly client-centered. Rather than the attorney-interviewer being in primary control, the client-interviewee shares in the interview process. The

when law professor David Binder collaborated with psychologist Susan Price to release a textbook that focused on a nondirective, problem-solving model.[24] Today, their ground-breaking textbook remains a predominant influence in clinical legal education.[25] Although different models of such client-centered counseling are advanced, most agree that you first need to actively listen to what the client says in order to obtain the client's story.[26]

In active listening, you reflect back to the client what you heard the client say.[27] You do not simply repeat, or "parrot," what the client said. Rather, your response conveys an understanding of the

client is encouraged to participate more, which in turn allows for a greater sense of empowerment. *See generally* DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974) (arguing that neither the lawyer nor client should be completely in control, but rather that the power should be shared). Contrast the client-centered model with the "lawyer-centered" model of counseling. In the latter model the client is essentially passive and relinquishes all control to the attorney in their professional relationship. *See* PAUL J. ZWIER & ANTHONY J. BOCCHINO, FACT INVESTIGATION: A PRACTICAL GUIDE TO INTERVIEWING, COUNSELING, AND CASE THEORY DEVELOPMENT 143 (2000).

24. *See generally* BINDER ET AL., *supra* note 21 (discussing the factors that are necessary in utilizing a client-centered approach); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation,* 12 CLINICAL L. REV. 369 (2006) (examining the history of the client-centered approach to lawyering).

25. *See generally* DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977) (proposing that a dynamic dialogue between lawyer and client is the most effective means of legal interviewing).

26. For other discussions of counseling models, see generally ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990) (arguing that fact-gathering is essential for effective client representation); DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS (2002) (explaining that clinical programs allow students to be exposed to the work of real lawyers for the first time); STEFAN H. KRIEGER ET AL., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS (1999) (emphasizing the need for good interviewing skills); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994) (suggesting that lawyers must be sensitive to their clients); John Basten, *Control and the Lawyer-Client Relationship*, 6 J. LEGAL PROF. 10 (1981) (discussing the attorney's role in representing the client's cause); Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984) (stressing the need for client input on attorney decisions).

27. "Reflection is a 'process of internally examining and exploring an issue of concern, triggered by an experience, which creates and clarifies meaning in terms of self, and which results in a changed conceptual perspective.'" Sayantani DasGupta & Rita Charon, *Personal Illness Narratives: Using Reflective Writing to Teach Empathy*, 79 ACAD. MED. 351, 351–52 (2004) (quoting Sue Atkins & Kathy Murphy, *Reflection: A Review of the Literature*, 18 J. ADVANCED NURSING 1188, 1189 (1993)).

client's feelings as well as of the incident itself.[28] But you can only do this if you are "present" with the client. This means closing your laptop, stopping incoming calls, avoiding looking at your watch, and putting away your smart phone, iPod, iPad, and other electronic devices. It also means giving your legal pad and pen a rest, at least during the early stages of the interview. Doing so enables you to maintain eye contact and overtly demonstrate interest in what your client is saying.

In addition to the outward signs of showing interest, pay attention to what is going on inside your head. Put aside what you need to find out; do not think about your response before the client finishes speaking; and, most importantly, refrain from jumping to a premature legal analysis.[29] After the client tells her story, including why she is seeking your help and what kind of relief she desires, you can follow up with clarifying questions, frame suitable responses to what she has told you, and consider feasible legal solutions.[30] And, yes, write on your legal pad.[31]

Active listening embodies not only what you hear your client say but also what you reflect back to your client. Thus, active listening is, first, hearing the content and emotion of your client's story, and, second, verbalizing—using different words to repeat what your client just said.[32] By reflecting back not only the

28. *See generally* BINDER ET AL., *supra* note 21 (arguing that problems should be viewed from the client's point of view and not pigeonholed into narrow legal categories).

29. *See* ROGER S. HAYDOCK & PETER B. KNAPP, LAWYERING PRACTICE AND PLANNING 62 (3d ed. 2011) ("Listening is as important to building trust as talking. Good listening is more than simply keeping quiet while a client talks. Good listening begins with the ability to listen to a client while keeping an open mind. No client is well-served by a lawyer who is impatient and overly judgmental. A lawyer needs to be able to listen to a client and suspend judgment until all the facts are in. Snap decisions and quick judgments close the mind and interfere with good listening. The good listener learns to wait patiently—not for the client to finish talking, but for the story to unfold completely. Good listening helps build trust only so long as the client believes that the lawyer is indeed hearing what is being said.").

30. For the same legal problem, different clients may desire different relief. *See* BINDER ET AL., *supra* note 21, at 3 ("[I]dentifying and helping clients resolve problems requires more than knowledge of relevant legal principles. You also need to know about clients' individual circumstances if you are to help them shape satisfactory solutions. Thus, two clients may have the same 'legal' problem, but a solution that satisfies one may be unthinkable to the other.").

31. The attorney must permit the client to tell an uninterrupted narrative story. While there can be some clarifying questions and reflective statements, the focus during the initial interview should be to encourage the client to tell her story. *See id.*

32. *See, e.g.*, Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 348 (1998) ("[Interviewers] should expect and be prepared to see, hear and accept emotion. . . . The critical piece is to recognize and explicitly . . . acknowledge emotional content.").

substance of what your client says but also reflecting back your client's feelings, you can show a depth of understanding not otherwise possible by merely stating, "Yes, I understand."[33] Such a statement is more characteristic of passive listening than of active listening. It is not enough to let your client do all the talking. Through active listening and restating your client's words, you build rapport and encourage more in-depth expression.[34]

B. Demonstrating Empathy to Build Rapport

Stepping into your client's shoes and permitting yourself to capture their feelings shows empathy. Try to see the situation from your client's perspective.[35] You need not agree with your client's perspective but you must try to respect and honor her feelings. In the words of Atticus Finch, "You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it."[36]

You show empathy when you consider your client's dilemma from her perspective. Showing empathy builds trust in the attorney-client relationship. Trust is pivotal. It includes faith in your loyalty, a belief in your competence, and a level of comfort in dealing with you as the case progresses. Trust emboldens the client, who is generally under stress, to share more freely.[37]

Client stress manifests itself in many forms. Consider, for example, the client who is slouching over, head bent, avoiding eye contact, acting hesitantly, mumbling timidly, and sighing frequently.[38] In active listening, you acknowledge and reflect back such nonverbal signs of emotion. We lawyers tend to shy away from our clients' emotions, whether these are implicitly or explicitly

33. *See* Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 CLINICAL L. REV. 541, 585–86 (1995) ("The 'client-centered' model places great emphasis upon the attorney's empathizing with the client by 'reflecting' his or her emotions.").

34. *See* John Barkai, *Active Listening: One Way to Be a Better Advocate, Counselor, and Businessperson*, TRIAL, Aug. 1984, at 66, 66 ("Used effectively, active listening will enable lawyers to discover more facts in interviews, prepare stronger cases, and build better rapport with clients. Active listening will encourage clients to discuss critical facts and emotions at an early stage in the case that might not be discovered with other techniques.").

35. To demonstrate empathy, "a lawyer must actually experience the legal world from the client's point of view; the lawyer must try to figuratively 'walk in the skin' of her client." Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1, 23 (2008).

36. HARPER LEE, TO KILL A MOCKINGBIRD 30 (1960).

37. *See* HAYDOCK & KNAPP, *supra* note 29, at 59–61.

38. *See* Gellhorn, *supra* note 32, at 347–48 ("Emotional expression—the eyes filling with tears, the hands sheltering a head hung low—are vital clues to a person's database. These are part of the client's first words.").

expressed.[39] Most of us are not trained psychologists or therapists. But naming our client's emotions shows an understanding of their entire person, not just their legal problem.

Often the law school experience encourages students to focus on the legal rule to the exclusion of the client as a person.[40] Experienced practicing attorneys, however, know that every legal problem is interwoven with facts and feelings. Wrapped up in any client's problem is a host of feelings—whether shame, embarrassment, bewilderment, rage, desperation, hate, or despair. A client can be remorseful and a client can be revengeful. Having practiced domestic relations law, I was confronted with a full range of client emotions. Yet, even in other less volatile areas of the law, clients have and express emotions. "All clients arrive at the law office with some kind of emotional stake in the matter that has prompted them to seek legal advice. A client may feel concern and anxiety, pain and outrage, happiness and joy, or sadness and depression."[41]

Through the reflection process, you identify your client's emotions. Do not concern yourself with the chance you will not get them "right." Most clients will appreciate your showing empathic responses and simply correct any errors of perception you might have.[42] Do not be concerned that consideration of your client's feelings wastes time. To the contrary, authentic empathic responses centered on your client's emotions will save time.[43] Once relieved of their emotional burden, your client is more willing to listen to and work with you to elicit needed case information.[44] Try to empathize fully with your client's position so that, when it comes to telling your client's story, the ballad will be authentic, vibrant, and compelling.

C. Composing the Story to Show Injustice

The need for composition skills arises when, after actively listening and demonstrating empathy, your legal training comes to

39. *See* Laurie Shanks, *Whose Story Is It, Anyway?—Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 CLINICAL L. REV. 509, 509 (2008) ("Law students don't know how to listen to a client's pain, fear, anger or despair. Such a connection isn't lawyer-like, they feel.").

40. *See* STARK, *supra* note 16, at 265 ("To write like a lawyer, at least in traditional terms, is to choose a perspective that cheapens language and forces us to relate to a narrow world of rules, not people.").

41. HAYDOCK & KNAPP, *supra* note 29, at 59.

42. Expressions of authentic empathy facilitate forming a bond with the client, one that can result in a compelling client story grounded in both legal and emotional language. *See* Gellhorn, *supra* note 32, at 350.

43. Barkai, *supra* note 34, at 69.

44. Showing empathy toward your client can also facilitate more rapid solutions. *See, e.g.*, TOM RUSK WITH D. PATRICK MILLER, THE POWER OF ETHICAL PERSUASION (1993) (pointing out that psychiatrists often recommend that counselors and negotiators listen before attempting to persuade so that emotions do not bias the decision-making process).

the fore. Licensed as an attorney and counselor at law, you have what your client does not: legal acumen and the ability to bring her story into a court of law.[45] To compose a persuasive narrative, you need to integrate your legal knowledge with the client's accounting of her situation so that justice comes into play.[46] But you must also write in a concise, clear, and grammatically correct fashion.[47]

At the trial level, composing the story usually involves considerable detail, drawing upon documents, exhibits, and witness testimonies. Your focus is on gathering facts and presenting them, consistent with legal principles, to support your client's position. The story you write often involves an emotional appeal to jurors, who are presumed not to have an understanding of the interrelationship between facts and law. You are, in effect, in your client's shoes when telling the narrative at trial. On appeal, you are not writing for a jury but rather for a judge, who is well versed in fact-law interrelationships. The judge does not, however, know anything about your client's *unique* facts. If you can present these well—making them leap off the page to engage the judge's interest and spirit of justice—then you are that much closer to winning the appeal.[48] For at the appellate stage, you step out of your client's shoes and jump into the judge's to write a narrative that resonates with humanity and justice not only for your client but for society.[49]

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45. *See generally* Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1970*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 52–53 (Gerald W. Gawalt ed., 1984). Once the client tells his or her story, then the attorney moves from a description of the client's problem and goals to the attorney's dispensing advice about options available to the client. This reflects less the initial interview than it does legal counseling. *See id.* at 53 ("[T]he lawyer's job is selling legitimacy: reassurance to the client and its potential regulators, investors, or business partners that what [the client] wants to do is basically all right.").

46. As an officer of the court, you have a duty to report all facts that are legally significant. But the Statement of Facts is also an opportunity to portray your client in a favorable light. *See* ROBIN WELLFORD SLOCUM, LEGAL REASONING, WRITING, AND OTHER LAWYERING SKILLS 513 (3d ed. 2011) ("[T]he factual statement is an ideal place to begin *subtly* painting a picture that portrays the client's position in an appealing, favorable light.").

47. *See infra* Part V. For some recommended writing style texts, see generally ANNE ENQUIST & LAUREL CURRIE OATES, JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER (3d ed. 2009); BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (2d ed. 2002); TERRI LECLERCQ & KARIN MIKA, GUIDE TO LEGAL WRITING STYLE (5th ed. 2011); WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE (4th ed. 2006); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (5th ed. 2005).

48. As the Honorable Alex Kozinski glibly stated: "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." Kozinski, *supra* note 7, at 330.

49. Not only does the narrative need to be well written but so does the entire appellate brief. With fewer cases being heard, the brief's importance has

II. STEPPING INTO THE APPELLATE JUDGE'S SHOES: RETELLING THE CLIENT'S STORY WITH A FOCUS ON JUSTICE

Once you jump into the appellate judge's shoes, keep in mind two critical points. First, the judge knows nothing about your case.[50] Second, how the judge decides your case will affect not only the immediate parties but also parties in other cases.[51] If you keep these points in mind, you will remain in the judge's shoes.[52] And this is the best vantage point from which to write a persuasive Statement of Facts.[53]

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escalated dramatically. *See* Federal Judicial Caseload Statistics, ADMIN. OFFICE OF THE U.S. COURTS, Table B-1 (June 30, 2010), *available at* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/B01Jun10.pdf. In the twelve-month period ending on June 30, 2010, the federal circuit courts of appeals held oral arguments in approximately 27% of the cases terminated on the merits, the D.C. and Seventh Circuits heard argument in the largest percentage of appeals (49% and 48% respectively), and the Third and Fourth Circuits the lowest (15% and 13% respectively). *Id. See also* Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 TUL. L. REV. 187, 189 (1995) ("[A]lmost two-thirds of the appeals filed in the Fifth Circuit are decided without oral argument. And the factors that influence our decision to hear oral argument in just over one-third of our appeals are brought to our attention by the briefs of the parties, primarily the briefs of the appellants.").

50. It is critical, therefore, to write a story that leaves a favorable impression. Doing so requires the advocate to walk on a tight rope. It is a balancing act:

> [You need] the balance between being scrupulously accurate and putting the most favorable emphasis on your version of what happened; the balance between furnishing the relevant facts favoring your client and protecting yourself from a possible charge by your opponent that you have withheld vital facts from the court; and the balance between putting your best evidence before the appellate court and adhering to the actual findings in the trial court. The exceptional advocate balances these conflicting duties and still conveys the impression that his or her client deserves to win.

ALDISERT, *supra* note 5, at 152–53.

51. Appellate judges have two concerns: first, rendering a decision that is just for the parties involved; and second, ensuring that their decision is consistent with precedent or establishes a rule that will be applied to future similar cases. *See* MARTINEAU ET AL., *supra* note 18, at 812. Thus, they are concerned with both error correction and development of the law.

52. From the perspective of most appellate judges, the well-written appellate brief is vital to effective advocacy. *See* Harry Pregerson & Suzianne D. Painter-Thorne, *The Seven Virtues of Appellate Brief Writing: An Update from the Bench*, 38 SW. L. REV. 221, 222 (2008) (explaining that judges rely heavily on the briefs to understand the litigants' positions and if a brief is poorly written, the judges may dispense with oral argument on the theory that the brief's author would not assist the court in making a determination).

53. *See, e.g.*, Richard A. Posner, *supra* note 17, at 4 ("If you engage in the imaginative exercise that I have suggested is the key to successful appellate advocacy—that of imagining yourself in the judge's shoes—you will quickly see that only rarely is it effective advocacy to try to convince the judges that the case law compels them to rule in your [client's] favor.").

Persuade you must. Appellate judges look for any way they can affirm the lower court's findings. "The appellant, particularly, must tell an eloquent tale, for he must overcome the court's natural disinclination to disturb the resolution of the controversy in the lower court."[54] Your story must be so captivating that a busy judge, having no experience with or empathy for your client, will sit up and take notice.[55] But it is no small feat to grab the judge's attention. A judge's workload is tremendous.[56] Justice Sarah B. Duncan points out that "[t]o write a [q]uality brief, a lawyer must first understand an aspect of being a judge I frankly did not comprehend until I became one—volume and limited resources."[57] Given such logistical challenges, appellate judges appreciate all the more briefs with accurate, clear, and concise client narratives based upon "common-sense justice" within the context of a "legal doctrine."[58]

Even if your brief is well written overall, a judge may lose interest in your story.[59] Your brief is likely not the only brief the

54. Kaufman, *supra* note 2, at 167. With regard to the probability of an appellant's success, reversal rates are notoriously low. *See* Federal Judicial Caseload Statistics, *supra* note 49, at Table B-5, *available at* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/B05Jun10.pdf. For example, figures available for the federal circuit courts of appeal for the twelve-month period ending June 30, 2010, indicate an overall reversal rate of district court decisions of 8.2%. *Id.* The Fourth Circuit had the lowest reversal rate (4.9%) and the Seventh Circuit the highest reversal rate (14.4%). *Id.*

55. *See* Pregerson & Painter-Thorne, *supra* note 52, at 225 (identifying the first virtue of appellate brief writing as telling the client's story and stating that "[a] virtuous brief tells the client's story in a compelling way that holds the reader's attention").

56. *See* Linde, *supra* note 8, at 18 (noting that an appellate judge generally faces great time pressures). Reading briefs is only one part of a judge's day and other tasks can include drafting opinions, reviewing opinions written by other judges, hearing oral arguments, reading case law, interpreting statutes, attending court conferences, supervising staff, training clerks, conducting interviews, and participating on state bar committees. *See id.*

57. Sarah B. Duncan, *Pursuing Quality: Writing a Helpful Brief*, 30 ST. MARY'S L.J. 1093, 1098 (1999).

58. *Id.* at 1096.

59. When interviewed by Bryan Garner, Justice Kennedy of the United States Supreme Court said: "I have to be honest. I have read briefs now for 33-plus years, and I can't remember one I couldn't put down in the middle [laughing]. I have to tell you that. On the other hand, I do admire well-written briefs." Bryan A. Garner, *Interviews with United States Supreme Court Justices: Justice Anthony M. Kennedy*, 13 SCRIBES J. LEGAL WRITING 79, 87 (2010). When Chief Justice Roberts was interviewed, he said:

> [T]here's nothing better than a well-written brief, and it kind of carries you on. . . . [but] I have yet to put down a brief and say, "I wish that had been longer." So while I enjoy it, there isn't a judge alive who won't say the same thing. Almost every brief I've read could be shorter.

Bryan A. Garner, *Interviews with United States Supreme Court Justices: Chief Justice John G. Roberts Jr.*, 13 SCRIBES J. LEGAL WRITING 5, 35 (2010).

judge will read on any given day.[60] Hence, the story must be compelling and captivating.[61] Even if the story is complex, you must employ the art of a storyteller to make it come alive for the judge. Once immersed in a human drama, the judge looks for the interplay between the captivating story and justice. For the appellate judge is keenly sensitive to the possibility that your client was the unwitting victim of an injustice. "The consummate advocate will inspire his narrative with meaning so that only the legal doctrines that favor his client seem relevant and appropriate. . . . [If] the facts are written compellingly, your discussion of the law need only articulate and confirm the decision your tale demands."[62]

The appellate judge is also highly sensitive to whether you write the tale consistent with the appropriate standard of review.[63] If you do not, you may miss an opportunity to persuade the court that your

60. It is perhaps instructive to translate the appellate judge's monthly duties into those of an appellate lawyer's. Duncan, *supra* note 57, at 1100. The Honorable Sarah B. Duncan of the Fourth Court of Appeals in San Antonio, Texas did just this:

> [W]rite, heavily edit, or substantially rewrite around eight briefs; review around sixteen briefs written by other lawyers and decide whether I believe they are sufficiently correct for me to sign; prepare for, attend, and participate in my oral arguments and those of two of my colleagues; research and write approximately fifty motions; continually train and supervise one first-year lawyer; continually train and supervise another more experienced lawyer; participate in firm management; write and present seminar papers; attend committee meetings and do committee work; and impress the partners so they will let me keep my job.

Id.

61. Judge Pregerson states that a good story needs the following components:

> First, the story must have a strong opening. The reader is most attentive at the beginning of the brief and the opening sets the tone . . . . [It] is the place to grab the reader's attention and make the reader want to continue reading. Second, to write a good story, avoid irrelevant or random facts—just because something is true does not make it relevant to the matter before the court. . . . [I]ncluding wholly irrelevant information can interrupt narrative flow and make a statement of facts seem garbled and disjointed. Third, the facts argue the case. Thus, the recitation of facts should naturally lead to the conclusion the brief advocates.

Pregerson & Painter-Thorne, *supra* note 52, at 225.

62. Kaufman, *supra* note 2, at 167. Judge Kaufman suggests the advocate strive for the standard set by one of the greatest English judges, Lord Mansfield: "It was said that when he finished his statement of facts, the argument of the law seemed superfluous." *Id.*

63. *See* Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 437 (1986); *see also infra* Part III.A.

client's position is just.[64] And that is, after all, your primary role as advocate.

Finally, you must learn about the judges who are likely to read your brief. Just as at the trial level, you pour over the jury list to anticipate strategy, you need to research the appellate judges who are likely to rule on your client's fate. Consider recent trends and approaches to the law to brainstorm the message you want the judges to hear.[65] Learning about the appellate judges can help you wear their shoes when recasting your client's story. Finding the proper fit of their shoes, however, requires respecting the appellate venue.

III. KNOW THE THEATRE WHERE THE APPEALS BAND IS PLAYING: RESPECT THE STANDARD OF REVIEW AND COURT RULES

Regardless of how well you write your client's ballad, your arduous work is to no avail if you fail to pay careful attention to the appropriate standard of review and the appellate court's rules. The theatre in which the audience sits is pivotal for determining how best to write the ballad. If you fail to heed the appellate process, your client's ballad may never be heard.[66]

A. Understand the Standard of Review's Impact on the Story

While the standard of review impacts most significantly upon your argument, it also implicates how you write your client's narrative. The Statement of Facts must be set forth consistent with the appropriate standard of review.[67] This standard is the degree of scrutiny an appellate court will give an issue already decided in the lower court.[68]

64. If you can convince the appellate bench that the lower court incorrectly decided a factual conflict, then you stand a greater chance of prevailing on appeal with a justice theme. *See* Chestek, *supra* note 14, at 141.

65. *See* Regnier, *supra* note 20, at 72.

66. For an overview of the appellate process, including who can appeal, when to appeal, and the depth of review the appellate court gives to the lower court's disposition, see generally Amy E. Sloan, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U. BALT. L. REV. 43 (2005).

67. It is vital that the advocate understand the degree of deference an appellate court will accord a lower court's decision, as the review standard is often dispositive in appeals. Stella J. Phillips, *Putting It All Together: Law Schools' Role In Improving Appellate Practice*, 31 U. ARK. LITTLE ROCK L. REV. 135, 148 (2008).

68. *See generally* MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY (3d ed. 2010); MARTINEAU ET AL., *supra* note 18; Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 ME. L. REV. 367 (1997) (describing the importance of the standard of review and that it is often ignored by lawyers); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11 (1994) (identifying and discussing the standards of review).

Appellate courts usually apply one of three standards of review: de novo, abuse of discretion, or clearly erroneous.[69] De novo review is applied to questions of law or mixed questions of law and fact.[70] Such review essentially affords no deference to the decision below and the appellate court is free to decide the legal issue as if it had not come before the trial court in the first place.[71] Some examples of issues reviewed de novo include motions for summary judgment, statutory interpretations, and constitutional questions.[72]

Under the abuse of discretion standard, the appellate court reviews matters entrusted to the trial judge's discretion. This standard is the most situation-specific and affords the most deference to a trial judge's decisions. Only if abuse or arbitrariness can be shown will an appellate court overrule the lower court.[73] In the words of the U.S. Court of Appeals for the First Circuit concerning evidentiary rulings, "[o]nly rarely—and in extraordinarily compelling circumstances—will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect."[74] Some examples include discovery issues, Rule 11 sanctions, and courtroom management.

Similar to the abuse of discretion standard, under the clearly erroneous standard the appellate court accords substantial deference to the findings of fact made by the trial court judge. The appellate court reviews the entire evidence and will overturn a lower court's decision only if it is left with the clear conviction that a mistake has been committed.[75] According to the U.S. Court of Appeals for the Seventh Circuit, "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated

69. Another standard of review is the substantial evidence standard, in which extreme deference is accorded to findings of fact made by a jury. *See* Glasser v. United States, 315 U.S. 60, 80 (1942). This review standard is often applied to administrative agency decisions. *See* BEAZLEY, *supra* note 68, at 18. Strict scrutiny, intermediate or heightened scrutiny, and rational basis standards of review are often applied to certain government actions. *See* Sloan, *supra* note 66, at 65.

70. A two-part paradigm can be framed around findings of facts versus conclusions of law. This paradigm flows from the well-established belief that "lawmaking is best performed at the appellate level and fact finding at the trial level." HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 6 (2007).

71. *See, e.g.*, Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1990).

72. *See* Phillips, *supra* note 67, at 149.

73. *See* Libby *ex rel.* Libby v. Illinois High Sch. Ass'n, 921 F.2d 96, 98 (7th Cir. 1990).

74. Freeman v. Package Mach. Co., 865 F.2d 1331, 1340 (1st Cir. 1988).

75. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

dead fish."[76] Some examples include ultimate fact, motivation, and who, what, when, and where questions.

In recasting your client's story, you must respect the applicable standard of review.[77] Do not state facts as if they were true if the finder of fact below, whether bench or jury, has determined differently. You are not retrying the matter anew.[78] Fact-findings are not reversible unless clearly erroneous. In claiming that there was prejudicial error, such as when the trial court refused to allow certain evidence, you need to include factual evidence for both sides of an issue. Then you can demonstrate that, but for this error, the verdict might have been otherwise.[79] Arguing insufficiency of evidence requires that you not only provide evidence favorable to your client but also note all evidence favorable to the opposition; only then can you show why that evidence was insufficient.[80] On the other hand, if your appeal follows a nonsuit or directed verdict, then you can assume all of your evidence was true.[81] Thus, always respect the standard of review when presenting your client's story; the same is true with regard to court rules.

B. Scrupulously Follow Court Rules

Whether in federal or state court, intermediate or highest courts of appeals, courts have specific rules. In federal circuit courts of appeals, for example, you must comply with both the Federal Rules of Appellate Procedure and the relevant circuit court's local rules. Courts expect these rules to be followed.[82] You *do* need to sweat the details. "A court's insistence on a particular format, font size, page limitation, or word limitation may appear arbitrary, but it is not.

76. Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988).

77. Judge Pregerson considers ignoring the standard of review or attempting to relitigate the facts as the fifth sin in appellate brief writing. *See* Pregerson, *supra* note 63, at 437.

78. *See id.* ("Many times counsel enter the appellate arena as if they were retrying the case from scratch. This wastes the time and energy of both counsel and the court. The standard of review is the keystone of appellate decision making.").

79. *See* MOSKOVITZ, *supra* note 6, at 26.

80. *See* Pregerson, *supra* note 63, at 437.

81. *See* MOSKOVITZ, *supra* note 6, at 26.

82. According to Judge Pregerson, following the court's rules is yet another virtue in appellate brief writing. *See* Pregerson & Painter-Thorne, *supra* note 52, at 230 ("A virtuous brief follows the court's local rules to the letter and to the spirit."). Failure to comport with court rules can have serious consequences. *See, e.g.*, Christian v. Mattel, Inc., 286 F.3d 1118, 1129 (9th Cir. 2002) (affirming lower court's refusal to consider plaintiff's additional filings because they failed to conform to local rules for typefaces and page restrictions); Hamblen v. Cnty. of L.A., 803 F.2d 462, 463–65 (9th Cir. 1986) (dismissing appeal and ordering sanctions for counsel who repeatedly ignored court rules).

The rules exist because judges have concluded that they can more effectively decide cases if briefs are in the correct format . . . ."[83]

If you fail to follow court rules, your reputation suffers; when your reputation suffers, it negatively impacts your client's case. Moreover, not only may the judges be irritated but they may also strike your brief entirely.[84] Attorneys who try to circumvent rules by using slightly smaller margins and condensing font drew this terse response from Judge Kozinski: "It tells the judges that the lawyer is the type of sleazeball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite to controlling authority."[85]

Court rules address the format for facts. Two general types of facts are required: procedural and substantive.[86] Some courts require a Statement of the Case that includes both procedural history and narrative history. Other courts require the procedural and narrative facts to be presented separately.[87] All facts must be

83. Stephen J. Dwyer, Leonard J. Feldman & Ryan P. McBride, *How to Write, Edit, and Review Persuasive Briefs: Seven Guidelines from One Judge and Two Lawyers*, 31 SEATTLE U. L. REV. 417, 426 (2008); *see also* Pregerson & Painter-Thorne, *supra* note 52, at 230 ("These rules were not adopted to vex the litigants. Rather, they provide some uniformity and fairness to the process. Compliance with the rules makes the busy court's job easier.").

84. The U.S. Court of Appeals for the Ninth Circuit did just that with a brief that did not comply with rules for a table of contents, a table of authorities, or citations to the record. In its opinion striking the brief and dismissing the appeal, the court explained:

> Federal Rule of Appellate Procedure 28 and our corresponding Circuit Rules . . . clearly outline the mandatory components of a brief on appeal. These rules exist for good reason. "In order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief."

Sekiya v. Gates, 508 F.3d 1198, 1200 (9th Cir. 2007) (quoting N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997)).

85. Kozinski, *supra* note 7, at 327. Other federal judges have similarly written about the critical importance of compliance with court rules. *See, e.g.*, ALDISERT, *supra* note 5, at 17 (reminding the appellate advocate that the goal of brief writing is to persuade the judge and not the client); Pregerson, *supra* note 63 (detailing the "seven sins" of appellate brief writing, most of which stem from failure to adequately comply with court rules).

86. *See* CAROLE C. BERRY, EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT 95 (3d ed. 2003) ("Procedural facts inform the reader how the case made its way through the court system. Substantive facts relate what happened prior to the litigation.").

87. The Honorable Clyde H. Hamilton summarized what should be in a separate appellant's statement of the case involving pertinent procedural facts as follows:

> (1) [T]he filing of the complaint, whether in state or federal court; (2) the removal of the case to federal court, if applicable; (3) the filing of a motion to remand to state court, if applicable; (4) a general statement regarding whether discovery was conducted; (5) the filing of all dispositive motions such as motions to dismiss, motions for summary

honest and accurate. "Accuracy makes you a friend of the court and keeps you one throughout your career."[88] If you are caught misstating the record, everything you write thereafter will be viewed with suspicion.[89] Your dishonesty and misrepresentation could also anger a busy judge.[90] And, for *every* fact you write, an exact citation to the record must be provided.[91] It makes the judge's work easier, and it enhances your credibility.

In addition to correct citations to the record, you must also comply with *Bluebook* citation rules.[92] Sloppy citations to the record and authorities similarly undermine your credibility.[93] Appellate judges and their law clerks check many, if not all, sources and

> judgment, and motions for entry of judgment as a matter of law; (6) the filing of any orders and any accompanying memorandum opinions filed by the district court in response to any dispositive motions; (7) the entry of final judgment; (8) the filing of any post-trial or post-judgment motions and the district court's rulings on these motions; (9) the filing of any notice of appeal; and (10) the filing of any motion to stay the effect of the district court's entry of final judgment pending appeal and the district court's ruling on these motions. Furthermore, unless any of the following items are relevant to the issues on appeal, an appellant should not include: (1) the filing of an answer; (2) the details of discovery proceedings, including discovery motions and the district court's rulings on these motions; and (3) motions to continue and the district court's rulings on these motions. In sum, after reading the appellant's statement of the case, the appellate court should have a clear picture of the case's procedural history.

Hamilton, *supra* note 11, at 584.

88. Duncan, *supra* note 57, at 1101.

89. ALDISERT, *supra* note 5, at 164–65 ("The principal directive in narrating the facts is accuracy. Be honest. . . . Judges may well forgive a lawyer for reading a putative precedent differently than they do, but they find it difficult to forgive a misstatement of fact. Indeed, a lawyer may gain sympathy in misconstruing a point of law but be written off as untrustworthy in misstating the facts.").

90. Justice Duncan related this story:

> At about 11:00 p.m., I was reading an appellant's brief, slowly but surely coming to believe we would have to reverse the judgment. Then I turned to the appellee's brief, which was replete with quotations from the record and the relevant cases—no paraphrasing or ellipses to mistrust—and it began to become apparent that the appellant's lawyer had misrepresented the record and the applicable law. At that moment, the appellant's lawyer not only lost the case, but he also lost me to anger.

Duncan, *supra* note 57, at 1101.

91. *See* MOSKOVITZ, *supra* note 6, at 25.

92. *See generally* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

93. Credibility also suffers with grammatical errors. Justice John Paul Stevens emphasized the importance of proper grammar: "[Grammar] does matter. It really does. And it's perhaps unfair, but if someone uses improper grammar, you begin to think, well, maybe the person isn't as careful about . . . his or her work, as he or she should be. . . . Grammar is really quite important." Garner, *supra* note 59, at 49.

citations. If your brief is replete with citation errors, its strength is diminished.[94] Poor citations send a message that you did not spend the time needed to polish your brief or, worse, that you do not respect the court.[95] I tell students that when opposing briefs are submitted and yours has poor citation form, the judge is likely to use the other side's brief. The judge may infer that the brief with correct citation form is likely to have the more reliable legal analysis as well.[96]

IV. TEACHING LAW STUDENTS AND JUNIOR ATTORNEYS: EMPHASIZE THE SKILLS NEEDED TO WEAR THE CLIENT'S AND JUDGE'S SHOES

Many budding and newly minted attorneys have not been taught the practical skills needed to equip them for appellate practice generally, much less to hear and retell a captivating client narrative.[97] Law school teaching has traditionally focused on the

94. Typographical and grammatical errors also significantly undermine the brief's persuasiveness. The U.S. Court of Appeals for the Fifth Circuit recently issued this scathing admonishment:

> Usually we do not comment on technical and grammatical errors, because anyone can make such an occasional mistake, but here the miscues are so egregious and obvious that an average fourth grader would have avoided most of them. For example, the word "principals" should have been "principles." The word "vacatur" is misspelled. The subject and verb are not in agreement in one of the sentences, which has a singular subject ("incompetence") and a plural verb ("are"). Magistrate Judge Stickney is referred to as "it" instead of "he" and is called a "magistrate" instead of a "magistrate judge." And finally, the sentence containing the word "incompetence" makes no sense as a matter of standard English prose, so it is not reasonably possible to understand the thought, if any, that is being conveyed. It is ironic that the term "incompetence" is used here, because the only thing that is incompetent is the passage itself.

Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., No. 10-10325, 2011 WL 2698975, at *13 n.13 (5th Cir. July 13, 2011).

95. *See* Dwyer, Feldman & McBride, *supra* note 83, at 428 (using the following relevant analogy: "Citation form is like the handshake of a secret society: it conveys important information while simultaneously announcing membership. A brief with correctly formatted citations not only provides information . . . but also conveys a sense of completeness and thoroughness. Conversely, a brief marred by incorrectly formatted citations raises hackles and invites suspicion; it is the lawyer-author's tacit admission that 'I really don't belong here.' If you send the message that it is not important to you, you identify yourself as a careless outsider. That cannot possibly help your client's cause.").

96. *See generally* Laurie A. Lewis, *The Stellar Parenthetical Illustration: A Tool to Open Doors in a Tight Job Market*, PERSP.: TEACHING LEGAL RES. & WRITING, Fall 2010, at 35 (discussing the importance of both accurate citations and well-written parentheticals).

97. There is, however, an ever-increasing emphasis on the importance of teaching law students practical skills. *See generally* CATHERINE L. CARPENTER ET AL., AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR,

application of theory, instead of focusing on the application of practical skills to better prepare for competent lawyering.[98] Legal education experts are becoming increasingly more vocal about the need to change the academic environment to produce more competent, "practice-ready" attorneys.[99] Under the current academic model, however, law students are taught to research legal issues, write briefs, and present oral arguments. In broad terms, law students are taught to "think like a lawyer."[100] "Law professors almost universally refer to their task as teaching their students to 'think like a lawyer' or teaching their students 'legal analysis.'"[101] The emphasis is upon written and oral persuasive analysis, not practical skills.[102]

"Thinking like a lawyer" is a ubiquitous phrase heard throughout law school. The infamous Professor Kingsfield in *The Paper Chase* contrasts this form of thinking, which is reputedly clear and coherent, with the "minds full of mush" that students show up with.[103] To be sure, "thinking like a lawyer" is a vital

INTERIM REPORT OF THE OUTCOME MEASURES COMMITTEE (2008), *available at* http://www.abanet.org/legaled/committees/OutcomeMeasures.doc.

98. John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 308 (2007).

99. *See generally* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007). This report builds on similar ones before it, notably the MacCrate Report, published in 1992, and is based on the following premise:

> There is a compelling need to change legal education in the United States in significant ways. . . . [and w]hile law schools help students acquire some of the essential skills and knowledge required for law practice . . . [i]t is generally conceded that most law school graduates are not as prepared for law practice as they could be and should be. Law schools can do much better.

Id. at 7; *see also* AM. BAR ASS'N, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap 4–7 (1992) (criticizing the American legal education system and urging a more practice-oriented rather than theory-oriented model).

100. Many definitions exist for "thinking like a lawyer." *See, e.g.*, MICHAEL HUNTER SCHWARTZ, EXPERT LEARNING FOR LAW STUDENTS 203 (2005); David T. ButleRitchie, *Situating "Thinking Like A Lawyer" Within Legal Pedagogy*, 50 CLEV. ST. L. REV. 29, 29–30 (2003) (discussing the traditional notion of "thinking like a lawyer" as the instructional philosophy that is the foundation of the law school curriculum); Jack Chorowsky, *Thinking Like a Lawyer*, 80 U. DET. MERCY L. REV. 463, 463–464 (2003) (defining "thinking like a lawyer" as developing and honing analytical skills).

101. SCHWARTZ, *supra* note 100.

102. *See* Gerdy, *supra* note 35, at 31 ("Perhaps the most stinging critique of modern legal education is that it teaches students to disregard, if not ignore, the client whom the lawyer is called to serve.").

103. THE PAPER CHASE (Thompson Films 1973).

tool.[104] But too much focus on legal analysis produces law graduates who are ill-equipped to counsel people.[105] And to be successful in practice, attorneys must know how to communicate and empathize with their clients.[106] They need to learn to "*listen like lawyers*."[107]

In short, law students must be taught practical, people-oriented skills.[108] Learning to listen to clients is one of those skills.[109] Most law schools do a fine job of teaching legal analysis, but not people analysis.[110] Chief Justice Warren E. Burger stated: "The

104. So, too, is "reading like a lawyer" a valuable tool. *See generally* RUTH ANN MCKINNEY, READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT (2005).

105. The image of the legal profession overall suffers from many attorneys treating their clients more as fact patterns in hypotheticals rather than persons with real-life problems. *See generally* Barkai, *supra* note 34. Put more dramatically:

> [L]aw school was a soul-ectomy. Our minds are well trained but to say that our emotions and matters of spirit are discouraged in our profession would be an understatement. . . . There is nothing wrong with thinking like a lawyer, which has many uses, but there is more to a human being than a mind. No one told us that after graduation we could return to those disowned parts of ourselves.

J. KIM WRIGHT, LAWYERS AS PEACEMAKERS: PRACTICING HOLISTIC, PROBLEM-SOLVING LAW 175 (2010).

106. *See* Gerdy, *supra* note 35, at 3–4 ("Understanding clients and exercising empathy and compassion comprise the 'heart' of lawyering. . . . Unfortunately, the traditional law school curriculum devotes little emphasis to teaching students about clients or about the role of empathy and compassion in law practice.").

107. *See* Smith, *supra* note 33, at 567 ("[A] successful narrative may depend more upon the interviewer's listening receptively than upon his or her asking questions in a particular form.").

108. *See* Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 437–38 (2008) ("Practicing law means working with people. To be effective in working with clients, witnesses, judges, mediators, arbitrators, experts, jurors, and other lawyers, attorneys must have a good understanding of how people think and make decisions, and must possess good people skills. Yet, law schools have tended to teach very little, directly, about how to be good with people." (footnotes omitted)).

109. V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLINICAL L. REV. 83, 90–91 (2002) ("One discreet skill that is essential and often under-emphasized is listening, especially as it relates to interviewing. . . . Our goal is to impress upon the students that it is through listening and being responsive to a client in a less directive way that more accurate and relevant information relating to the problem . . . is gained.").

110. *See, e.g.*, Chestek, *supra* note 14, at 130 ("Law, law, law. Where did all the people go in this process? Law, and the legal system, should be about people. It decides disputes between people and provides people with neutral rules for conduct in civilized society. It is a tool to enrich and order peoples' lives. So why do legal briefs focus so much on the abstract law and overlook the people?").

shortcomings of today's law graduate [lie] not in a decent knowledge of law but that he has little, if any, training in dealing with facts or people—the stuff of which cases are really made."[111] Practicing law means working with people and not rules.[112]

First year law students are introduced to the IRAC (Issue-Rule-Application-Conclusion) paradigm as a useful tool for applying legal rules to a set of facts.[113] For a given case, the Issue is the legal issue in the case; the Rule is the rule formulated by the court in the case; the Application is the application of that rule to the facts of the case; and the Conclusion is what that rule means for the parties involved in the case.[114] This paradigm helps students make logical connections between pieces in a legal puzzle. The drawback with the IRAC model, however, is that it does not really include people.[115]

Although legal educators are increasingly recognizing the importance of teaching practical, people-oriented skills, legal education changes at a glacial pace.[116] Thus, while legal skills such as interviewing, counseling, mediation, negotiation, and conflict resolution are recognized as important, they are generally taught in elective courses. If students do not enroll in such courses, they may sometimes pick up "people skills" in externship and internship

111. William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View From the First Floor*, 28 AKRON L. REV. 463, 469–70 (1995).

112. Rules, regardless of how well entrenched, are not dispositive. *See* Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (1951) ("It may sound paradoxical, but most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other. A large part of the time of conference is given to discussion of facts, to determine under what rule of law they fall. Dissents are not usually rooted in disagreement as to a rule of law but as to whether the facts warrant its application.").

113. There are variations on this paradigm, such as CREAC. This model is Conclusion-Rule-Explanation of the Law-Application of the Law-Conclusion. DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL 89–103 (1998).

114. *See* NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS 42 (5th ed. 2010).

115. Chestek, *supra* note 14, at 129–30. The IRAC model also has a number of limitations. *See id.* ("'I' refers to the legal issue under consideration. No people in there. The same goes for 'R,' the rule, which refers to the legal concepts and theories that will guide the court in reaching a decision. 'A' has a bit of promise, if you take 'A' to mean application, but even then, people are just objects upon which the rule operates. And if you take 'A' to mean analysis, that is just more processing of the legal rule. The 'C,' or conclusion, is then just the legal conclusion that flows logically from the previous pieces.").

116. *See* WRIGHT, *supra* note 105, at 15; Patrick G. Lee, *Law Schools Get Practical*, WALL ST. J. (July 11, 2011) http://online.barrons.com/article/SB10001424052702304793504576434074172649718.html.

settings. But the skills instruction is rarely in-depth enough to prepare law school graduates for competent lawyering.[117]

Most law students have an introduction to the appellate advocacy process in their mandatory legal research and writing classes, including the writing of an appellate brief. But problems are designed around a canned set of facts, depriving students of the opportunity to conduct client interviews to obtain a client's story.[118] Students are not able to practice skills of active listening and demonstrating empathy, much less determine which witnesses and documents to use when creating narratives. Therefore, most law students are already starting from a disadvantage when it comes time to write a compelling Statement of Facts in an appellate brief. Often the result is that this critical section lacks people orientation.[119] These canned problems become an artificial exercise in appellate writing by failing to offer students a realistic window into appellate practice.

Appellate moot court competitions similarly fail to provide law students with realistic opportunities, both for written and oral legal argument.[120] The Statement of Facts is often perceived as a "throw-away—a section to be done after the argument sections have been completed," rather than as an opportunity for persuasive advocacy.[121] Such competitions also generally do not emphasize brevity. Writing concisely should, however, be a high priority for both moot court competitions and the classroom experience overall.[122] Moreover, as with the mandatory appellate advocacy

117. *See* Lee, *supra* note 116 (stating that law schools tend to lag behind other institutions, such as business schools, in terms of launching practical improvements).

118. *See* STARK, *supra* note 16, at 71 ("The facts tend to be far more important to many arguments than most lawyers and law students think. Certainly law school gives us the impression that facts are interchangeable; law professors hand out canned facts and always concentrate on 'the law' to the exclusion of almost anything else.").

119. *See* Chestek, *supra* note 14, at 130–32. "[A] persuasive appellate brief should bring people—the client . . . —more conspicuously into the picture. I am not suggesting that brief writers can, or should, disregard the law. . . . [But] when we write about our clients' conflicts . . . we need to keep clients in the story." *Id.* at 130–31.

120. As helpful as the moot court experience can be in orienting the student to practice, it has its limitations. *See* MARK HERRMANN, THE CURMUDGEON'S GUIDE TO PRACTICING LAW 30 (2006) (observing, brashly, that moot court "was a practical experience, designed to show you what lawyers really do. Surely lawyers must spend most of their professional lives arguing cutting-edge legal questions before three robed scholars, familiar with the briefs and underlying issues, who pepper counsel with thoughtful questions. Poppycock!").

121. Jonathan K. Van Patten, *Twenty-Five Propositions on Writing and Persuasion*, 49 S.D. L. REV. 250, 268 (2004).

122. Customarily, students writing appellate briefs have page limit restrictions, whether they are writing the briefs for classes or moot court competitions. Such restrictions often do not, however, force them to write as

instruction, moot court participants usually receive a canned set of facts. But in legal practice obtaining facts can take months or even years of painstaking work. Such work involves not only client counseling, but sifting through piles of witness testimonies and document exhibits.[123] Most law schools therefore fall short of providing students with practice-ready appellate skills.[124]

The rapidly growing clinical legal education movement, however, does hold promise for people-oriented skills instruction. Much of the clinical teaching methodology is structured around attorney-supervised student representation of real clients.[125] It has the appeal of not only teaching students practice-ready lawyering skills, but also professional ethics and social justice advocacy. But clinical opportunities are optional and limited in number.[126]

As the job market remains very tight for law school graduates, and employers increasingly demand that graduates have a certain level of lawyering competency, offering elective participation in clinics is not enough.[127] Nor is it enough that the ABA Standards for Approval of Law Schools mandate that each student receive substantial instruction in "other professional skills generally

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clearly and precisely as would otherwise be desirable in the "real" world of lawyering. *See infra* Part V.A–B.

123. *See generally* ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE § 8.10 (2009) (describing the intricacies of the discovery process).

124. As one expert litigator in a large firm explains:

> Law school also never burdened you with a true understanding of the word "discovery." That word does not mean 3,000 pages of documents that you can read, understand, and inquire about intelligently at depositions and trial. . . . "[D]iscovery" means documents beyond human comprehension. At our firm, a case with only 2 million pages of documents is a small case; big cases involve tens—or hundreds—of millions of pages of information. The information is so vast that we could never read it all in a lifetime. . . . We run word searches . . . of our databases and hope we find the important stuff. . . . [N]either we nor the jury could ever comprehend the true meaning and interrelationship of all the facts.

HERRMANN, *supra* note 120, at 35.

125. One of the advantages of students representing real clients is that they learn the valuable input of the nonlegal dimension in problem solving. *See id.* at 121 ("We solicit input into every significant decision, even when we know what's best for the client . . . because only the client knows its goals . . . [and] clients actually know things. Some nonlawyers have a fine legal sense . . . others are simply aware of relevant facts that are new to you.").

126. Clinical placements are "far fewer in number than theory-based courses." Lee, *supra* note 116.

127. In the wake of an extended downturn in the legal job market, some law schools are becoming more practice-oriented. *See id.* Harvard Law School recently implemented a problem-solving class for first-years; New York Law School recently hired fifteen new faculty members to teach practical skills, such as client counseling, negotiation, and fact investigation; and Washington and Lee University School of Law recently restructured its third-year curriculum to incorporate case-based simulations for practicing attorneys. *Id.*

regarded as necessary for effective and responsible participation in the legal profession."[128] Courses that fulfill this requirement may still fall short of the people-oriented skills instruction that provides students with opportunities to practice client-counseling skills.

More needs to be done to ensure our law school graduates are "practice ready." Given that legal writing programs integrate substantive law with appellate brief writing, doctrinal courses should similarly integrate appellate practice into their substantive law curricula.[129] Procedure and the law go hand-in-hand. Moreover, although few lawyers actually practice appellate advocacy, law students who learn to integrate appellate practice skills with legal principles will be that much better prepared as trial advocates.[130]

Legal writing and doctrinal classes should also reinforce strong written composition skills. Law school is a professional school and "[s]tudents should learn to regard their course work as the first work product of their legal careers."[131] Papers and exams should be assessed not only for their substantive content, but also for grammar, spelling, citations, and typographical errors. If higher standards of professionalism were demanded in law school, then perhaps newly minted attorneys would take greater care with their brief writing.[132]

In light of current legal education, then, it comes as no surprise that most junior attorneys require further training in appellate advocacy. In particular, advanced legal training should include client-centered practical skills.[133] Experienced litigators know not to entrust junior litigators with writing the Statement of Facts in

128. 2011-2012 ABA STANDARDS FOR APPROVAL OF LAW SCHS. 20 (2011), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_chapter3.authcheckdam.pdf.

129. *See, e.g.*, Phillips, *supra* note 67, at 135–36.

130. *Id.* at 135; *see also id.* at 136 ("All trial lawyers should try their cases with an eye toward a potential appeal. After all, half of the litigants who go to trial will lose. If the trial lawyer fails to lay a good foundation for a potential appeal, the client will lose in the appellate court too.").

131. *Id.* at 156.

132. As noted by the American Academy of Appellate Lawyers: "Unfortunately, too many appellate briefs reflect ignorance of critical elements of the appellate process, including concepts of standard of review, prejudicial error, and remedy." Am. Acad. of Appellate Lawyers, *Statement on the Functions and Future of Appellate Lawyers*, 8 J. APP. PRAC. & PROCESS 1, 11 (2006).

133. Such skills should include the essential techniques of interviewing and counseling, understanding the dynamics of attorney-client interactions, and learning and practicing appropriate fact gathering and decision making. *See* Smith, *supra* note 33, at 567. Moreover, requiring the introduction of these skills in the law school curriculum will teach students not only to think and read like a lawyer, but also to listen like one.

appellate briefs.[134] They recognize and respect the critical role this narrative plays on appeal. In the words of one seasoned litigator to an inexperienced associate, "You write the law. Let me write the statement of facts because that is where the biggest difference can be made."[135]

Usually, the client's story should not be written by the litigator who handled the trial. Precisely because the trial litigator is the most familiar with the case, she might fail in writing a clear and captivating narrative.[136] Whether or not it is the trial litigator who writes the Statement of Facts on appeal, the writer should be grounded in storytelling techniques.[137] The attorney should also be well versed in appellate advocacy more generally, in the event the attorney is called upon to write an appellate brief.[138]

Legal education must change to equip graduates with practice-ready skills. Among these skills are interviewing and counseling clients, which includes active listening to hear clients' stories. Such listening will facilitate accurate storytelling. Given that most junior attorneys were trained under the traditional legal education model, these attorneys require advanced legal training in people-oriented skills. Therefore, both law students and junior attorneys should have more appellate advocacy instruction because proper legal skills training will better prepare attorneys to play the game of appellate musical shoes. But playing to win requires writing a persuasive Statement of Facts ballad.

V. PRACTICAL NOTES FOR COMPOSITION: HOW TO WRITE A CLEAR, CRISP, AND CAPTIVATING BALLAD

Before you begin to write, prepare a detailed outline of your brief.[139] This is a mantra I invoke with students each time they

134. ALDISERT, *supra* note 5, at 154.

135. *Id.*

136. *See id.* ("Familiarity can breed obscurity in the narrative. . . . [trial lawyers] may know the facts so well that [they] are unable to put [themselves] in the position of someone unacquainted with the case.").

137. Writing the appellate brief Statement of Facts as a story encourages its expression as a human narrative, which in turn increases the likelihood it will grab the judges' attention. *See* Chestek, *supra* note 14, at 135–36. "[N]arrative forces the writer to focus on the human elements of the controversy, and thus serves as a reminder to include a strong narrative strand of argumentation." *Id.* at 162.

138. Lawyers rarely set foot in appellate courts. HERRMANN, *supra* note 120, at 31 ("For most lawyers—those who are not appellate specialists—appellate arguments are rare as hen's teeth."). Given that the vast majority of civil cases settle before trial, there are a limited number of final judgments from which to appeal. *Id.* at 30.

139. As stated by Judge Wiener, "Prepare a detailed outline of the brief you propose to write before ever writing the first sentence of prose. . . . Your outline is the womb of your tactical and strategic planning: Be sure you go full term and avoid premature birth." Wiener, *supra* note 49, at 190–91. Prior to

write a brief. For the Statement of Facts in an appellate brief, this means first conducting a painstaking review of the record. Create an abstract that addresses all procedural matters and evidentiary rulings, and details all facts on the issues.[140] Remember to include unfavorable as well as favorable facts.[141] Sometimes students complain it is too time-consuming to create an abstract and then write an outline. In the long run, however, this initial process saves time.

Working with a detailed abstract facilitates providing record citations throughout the Statement of Facts. Most judges will expect a record citation for every fact so that they can be assured of the accuracy of that fact.[142] Citations must be exacting, forthright, and in proper form.[143]

Working from an outline helps ensure that you write a narrative helpful to an appellate audience that is hearing your client's story for the first time. But remember this is not the place to argue the story.[144] Save characterizations of the events, assessments of witness credibility, and legal claims for the

drafting, many United States Supreme Court Justices write outlines and rewrite many of their draft opinions. *See generally* Garner, *supra* note 59 (discussing Justice Kennedy's routine for drafting opinions). Justice Breyer is also a firm believer in outlining. *Id.* at 146 ("Without outlining, you don't know where you're going. . . . [T]he way that I think you get people to understand something is you have a broad outline, and then you fill in the details, like a tree. And they can understand it once they see the tree. But if you don't outline it, they won't ever see it—because you won't see it yourself.").

140. *See* BEAZLEY, *supra* note 68, at 35 (defining an abstract as "a referenced summary of the information contained in the record" and stating that the purpose of an abstract is "to help the lawyer . . . easily find important information from the record throughout the writing process").

141. *See infra* notes 182–87 and accompanying text.

142. In the words of Judge Hamilton of the U.S. Court of Appeals for the Fourth Circuit:

> [The necessity of] appropriate citations to the appendix . . . cannot be overemphasized. Little else makes my blood boil quicker than reading an appellate brief that lacks appropriate citations to the appendix in the statement of facts. . . . Apparently, the parties submitting these briefs are under the serious misimpression that appellate judges have endless hours to spend combing the appendix in an effort to match up scattered pieces of evidence with a party's unreferenced factual assertions.

Hamilton, *supra* note 11, at 586.

143. The importance of honesty cannot be overstated. *See* Morey L. Sear, *Briefing in the United States District Court for the Eastern District of Louisiana*, 70 TUL. L. REV. 207, 219 (1995) ("[I]f a lawyer's brief . . . fudges on the content of clear testimony, credibility is immediately destroyed. In my view, credibility is one of the most important virtues a litigator can possess.").

144. Strive for persuasion and not argumentation. *See* Dwyer et al,, *supra* note 83, at 418 ("If your presentation of the facts is too argumentative, unbalanced, or misleading, your credibility will suffer and your otherwise valid legal arguments may be discounted.").

Argument section. The challenge is to tell a story that starts to condition the court to rule in your client's favor without leaping into the legal argument.[145] Keep your focus on a spirit of justice. You must convince the appellate judges early on that ruling in favor of your client would be just, and to rule against her would be unjust.[146] Because at the end of the day, judges strive for justice.

A. Make the Story Clear; Seek the Heart of the Matter

Strive hard for clear writing.[147] Write with conviction. "All the careful strategy in the world will be of no assistance to you unless you write clearly and forcefully. And, clarity and power are above all the fruit of simplicity."[148] Remove extraneous facts.[149] But leave in all those facts necessary for persons unfamiliar with the story—the appellate judges and their clerks—to be able to follow it. Judge Wiener suggests that you "impose on someone—a spouse, a grown child, a secretary, a colleague, a friend—to read through your fact statement and tell you what the case is about and ask you 'fill-in' questions."[150] Then revise the story to answer those questions, so that the story is complete and self-contained.[151]

Remember the importance of conveying a theme or moral.[152] Organization is key. Facts should be organized in a manner that rings out a clear theme without your having to spell the theme out.

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145. *See* Pregerson & Painter-Thorne, *supra* note 52, at 226.

146. *See* MOSKOVITZ, *supra* note 6, at 21. "The Statement of Facts is especially important for the appellant. [O]nly a small minority of appeals are successful. To have a decent chance of success, the appellant must 'touch the judge's heart' fairly early in the brief—in the Statement of Facts." *Id.* at 22.

147. Judge Pregerson points to clear writing as a virtue in appellate brief writing. "[W]rite for clarity. Clear writing is essential to making a brief easy to read." Pregerson & Painter-Thorne, *supra* note 52, at 226.

148. Kaufman, *supra* note 2, at 169.

149. Determining which facts are extraneous can be hard. You know your client's story because you have lived with it, and you have become an expert on how the law should apply to your client because you have examined the law thoroughly. Therefore, achieving clarity in story composition can be exceedingly difficult. As explained by Justice Stephen G. Breyer:

> It's not easy [to achieve clarity], because the trouble is often you know too much about it by the time you've gotten into the subject, and so you assume a lot of knowledge on the part of the reader, and the reader might not have that knowledge. . . . [M]ake an effort and think [as if] you're explaining it to your spouse, your wife, your husband, your daughter, your son. . . . Go through the explanation so that they can understand it, and then the reader will understand it. That's why for me it requires a lot of drafts.

Garner, *supra* note 59, at 155.

150. Wiener, *supra* note 49, at 192. Judge Wiener also emphasizes that, as an officer of the court, you must provide a forthright account of the story—"the truth, the whole truth, and nothing but the truth"—to uphold your credibility. *Id.* at 193.

151. *See id.* at 192.

152. *See supra* note 15 and accompanying text.

Whether you write a chronological or topical narrative, you should begin with a succinct summary of the procedural and legal context. From the start of the story, focus on clearly communicating why you are in court seeking justice for your client.[153] Help the judge by pushing aside complicated, detailed record facts that are set out in the appendix and may be referenced later.[154] "[E]ven those numerous, complex facts must be related in a narrative that is distilled to the most succinct and unadorned rendition practicable."[155]

Make the story visually appealing. Identify topics that can form the basis for headings.[156] Providing such guideposts will enhance clarity. Whether or not you present those topics in chronological order, the judge will appreciate your organization and will infer that you carefully thought through the facts most salient to a review of the issues. A thoughtful advocate is highly regarded.

The advocate who writes with an affirmative tone is also viewed favorably. Do not harshly criticize the opposition.[157] If, for example, the opposition misstates the record facts, show the judge the misstatement. The judge will reach his or her own conclusions.[158] Taking the high road in telling your client's story is generally much more effective in garnering the judge's interest and respect.

Play these notes for a clear story:

> *Compose* a complete narrative for new readers
>
> *Compose* topical headings to organize procedural and substantive facts
>
> *Count on* a justice theme early
>
> *Count on* an affirmative tone

153. Keep your focus on justice for your client, and bring your client's narrative into focus through artful storytelling. "[W]hen you approach the facts section, view yourself as a careful storyteller, not just a neutral historian, and certainly not a fiction writer either." Dwyer et al., *supra* note 83, at 420.

154. Appellate judges depend on advocates to focus on the thrust of the appeal. *See* John W. Davis, *The Argument of an Appeal*, *in* ADVOCACY AND THE KING'S ENGLISH, *supra* note 4 at 212, 216 ("If the places were reversed and you sat where they do, think what it is you would want first to know about the case. How and in what order would you want the story told? How would you want the skein unraveled? What would make easier your approach to the true solution?").

155. Wiener, *supra* note 49, at 192–93.

156. *See* BEAZLEY, *supra* note 68, at 180.

157. *See* Duncan, *supra* note 57, at 1115–16. Justice Duncan observes that affirmatively presenting your client's story in a favorable light goes a long way toward refuting the other side's position. *Id.* at 1116.

158. *See* STARK, *supra* note 16, at 106–07.

Cut extraneous facts

Cut arguments

B. Make the Story Crisp; Seek Conciseness in Prose

An appellate brief should be brief and concise.[159] Be ruthless in cutting out words, phrases, paragraphs, and pages of your story. Judge Kaufman urges advocates to "[m]ake every word count; every sentence should take you a step closer to your goal. Do not tarry on interesting problems peripheral to the case: go to the heart with vigor and élan."[160]

The brief is not the place for flowery prose or for entertaining the reader. As Judge Wiener advises, "[U]se plain, crisp prose and avoid the use of hackneyed legal terms, stilted and archaic phrases, unnecessary Latin, and polysyllabic words."[161] Judge Kaufman put it more bluntly: "Edit fiercely; reduce your language to muscle and bone."[162] Justice Ruth Bader Ginsburg offers the tip not to fill all fifty pages allotted.[163] She acknowledges some cases may be so complex that they require the full fifty pages but finds that most arguments could be written in twenty to thirty pages. "Lawyers somehow can't give up the extra space, so they fill the brief unnecessarily, not realizing that eye-fatigue and even annoyance will be the response they get for writing an overlong brief."[164]

Writing an unnecessarily long story is also counterproductive.[165] Verbose prose reduces the "persuasive edge" of the narrative.[166] Avoid an overblown recitation of the facts. Also avoid a story with a

159. For some excellent resources for concise writing see sources cited *supra* note 47.

160. Kaufman, *supra* note 2, at 169. Judge Kaufman analogizes to Edgar Allen Poe's advice to aspiring poets: "[Poe] maintained that a poem should be so disciplined that every word, every sound, led to a single, predetermined effect. An advocate should strive, within the limits imposed by legal doctrine and method, toward a similar goal." *Id.*

161. Wiener, *supra* note 49, at 198. "[D]o not feel compelled to use the entire page limit permitted under the rules. A brief that is not repetitive, redundant or verbose, and that 'gives back' pages to the court, will create a favorable impression every time." *Id.*

162. Kaufman, *supra* note 2, at 170.

163. Garner, *supra* note 59, at 137.

164. *Id.* One appellate expert advises, "Discard the fifty-page draft that would have impressed your moot court panel; this is real court now." HERMANN, *supra* note 120, at 32.

165. For one thing, you severely test the patience of the audience.

> [It] is not difficult to imagine our frustration when we are required to trudge through a fifty-page brief that could have presented its points effectively in fewer than twenty-five pages. . . . Although the rules allow a fifty-page maximum for briefs, in my view, an appeal that merits fifty pages is a rare bird.

Pregerson, *supra* note 63, at 434.

166. *Id.*

succession of dates.[167] Include only those dates that are significant for the appeal, such as statutes of limitations, discovery deadlines, pre-suit notice requirements, and other such time-sensitive issues.[168] Do not clutter the story; keep it interesting.[169] Using active rather than passive voice can help propel the story forward.[170]

Conciseness is a virtue in brief writing.[171] And it comes only from writing . . . and then rewriting, rewriting, and rewriting again.[172] Not only is the judge apt to be annoyed by a long-winded brief, but may also infer that the lawyer's thinking lacks precision. In the words of Justice Antonin Scalia: "If you see somebody who has written a sloppy brief, I'm inclined to think this person is a sloppy thinker. It is rare that a person thinks clearly, precisely,

167. *See* Wiener, *supra* note 49, at 192 ("[S]uch factual details as day, date, time of day, season of year, names, places, and the like should be included only if such information is truly important to understanding and deciding the case. When we judges see a date or series of dates, or time of day, or day of the week, or names and descriptions of persons, or detailed descriptions of vehicles, most of us assume that such information presages something of importance and we start looking for it.").

168. *See* Brian L. Porto, *Improving Your Appellate Briefs: The Best Advice from the Bench, Bar, and Academy*, VT. B.J., Winter 2011, at 1, 4, *available at* http://www.vtbar.org/images/journal/journalarticles/winter2011/AppellateBriefs.pdf.

169. *See* ALDISERT, *supra* note 5, at 154. The author suggests that the responsibility of a historian applies with equal measure to a lawyer writing a narrative:

> The writer of history, I believe, has a number of duties vis-à-vis the reader, if he wants to keep him reading. The first is to distill. He must do the preliminary work for the reader, assemble the information, make sense of it, select the essential, discard the irrelevant—above all, discard the irrelevant—and put the rest together so that it forms a developing dramatic narrative. Narrative, it has been said, is the lifeblood of history. To offer a mass of undigested facts, of names not identified and places not located, is of no use to the reader and is simple laziness on the part of the author. . . . To discard the unnecessary requires courage and also extra work, as exemplified by Pascal's effort to explain an idea to a friend in a letter which rambled on for pages and ended, "I am sorry to have wearied you with so long a letter but I did not have time to write a short one."

Id. (citations omitted).

170. *See* NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS 91 (5th ed. 2010) (acknowledging that while passive voice is sometimes necessary or even preferred, active voice is a more powerful and compelling way to express your ideas).

171. *See* Pregerson & Painter-Thorne, *supra* note 52, at 227.

172. Rewriting is different from proofreading, which is error correction. Rewriting is writing anew what has already been written. *See* Duncan, *supra* note 57, at 1127. The importance of the rewriting process is highlighted by Justice Brandeis' admonishment: "There is no such thing as good writing. There is only good rewriting." *Id.* (citation omitted).

carefully and does not write that way."[173] Do not, however, sacrifice clarity for conciseness.[174] While brevity is admirable, your first priority is to clearly convey your theme of justice.

Play these notes for a crisp story:

Compose outline, draft, rewrite, rewrite & rewrite again

Compose with simple, concrete words

Count on every word to matter

Count on active voice

Cut unnecessary dates

Cut unnecessary Latin words

C. Make the Story Captivating; Seek a Spirit of Justice

Seek hard to write a captivating story.[175] To keep an appellate judge focused, you must write an interesting story that conveys your theme. Chief Justice John G. Roberts, Jr., states: "It's got to be a good story. Every lawsuit is a story. I don't care if it's about a dry contract interpretation; you've got two people who want to accomplish something, and they're coming together—that's a story."[176] Justice Roberts also suggests incorporating a "couple of hooks" in the story to pique interest, even if they do not have that much to do with the substantive legal issues.[177]

Judges are overwhelmed with dry briefs; thus, a great story is a perfect panacea for boredom.[178] You need to elevate your client's

173. Garner, *supra* note 59, at 71. Justice Scalia also stated that typographical errors undermine credibility, as they reflect a lawyer's lack of care in proofreading. *See id.*

174. Clarity can be sacrificed when shortcuts are used for referencing parties through initials or acronyms. *See* Kettle Range Conservation Grp. v. U.S. Forest Serv., 147 F.3d 1155, 1156 n.1 (9th Cir. 1998) ("Acronyms facilitate error by obscuring meaning. We therefore use English."); *see also* ALDISERT, *supra* note 5, at 152.

175. "People are captivated by other people's stories and how they experienced factual events." SLOCUM, *supra* note 46, at 514.

176. Garner, *supra* note 59, at 16. Justice Clarence Thomas, however, places little importance on the Statement of Facts in an appellate brief. "I don't read the facts. I go right to what you have to say. . . . I don't as a matter of course read them. I read the court-of-appeals opinion, and that has a statement of facts." *Id.* at 114.

177. *Id.* at 17.

178. *See* Pregerson, *supra* note 63, at 433–34 (stating that the first sin of appellate brief writing is writing a long, boring brief).

story above all else.[179] In a captivating story, it is "difficult to separate the teller from the story."[180] Draw in the judge by your riveting tale. In the words of Judge Kaufman, "The facts generate the force that impels the judge's will in your direction. Particularly in complex situations it is vital to make the facts *sing* out as clearly and simply as possible."[181]

Your audience is not a passive recipient of the sung facts. By virtue of his experience, the judge will be constantly evaluating the narrative, using both inductive and deductive reasoning to reach preliminary conclusions.[182] The skillful appellate advocate writes such a captivating story that the judge will be agreeing with him or her by the end of it, before even reaching the brief's Argument section.[183] The well-written story draws in the judge through its persuasive, common-sense approach to justice.[184]

While you want to persuade, you must also be fair.[185] Not only must you accurately state the facts, but you must also include

179. Most lawsuits can be characterized as a clash of competing stories. You want your client's story to be the one that stands out and demands justice. *See* SLOCUM, *supra* note 46, at 514 ("Like people everywhere, a judge will be drawn to the better story. A good story is one that focuses on people and portrays the story from the sympathetic perspective of the client.").

180. CASSADY, *supra* note 14, at 16.

181. *See* Kaufman, *supra* note 2, at 166 (emphasis added).

182. *See* BEAZLEY, *supra* note 68, at 181. Consider, for example, this story about a United States Coast Guard Captain and his mate:

> One day, when the sailors took shore leave, the first mate returned to the ship drunk. The Captain recorded this event, noting, "The first mate was drunk today" in the Captain's log. The first mate has the responsibility for keeping the log when the Captain is off duty, so he soon saw the note. He was furious; he had never been drunk before, he had been off duty when he was drunk, and he was one of a dozen drunken sailors, none of whose drunkenness was recorded in the log. He decided to retaliate. He knew he couldn't lie about the Captain, for the Captain would be seeing the log the very next day. So he wrote the simple truth: "The Captain was sober today."

Id. This is an example of understated advocacy. By just reading this log and not knowing all the details, the reader will most likely jump to the conclusion that the Captain is usually drunk, as it was worth recording his soberness.

183. For some excellent guidance on writing persuasive fact statements, see, for example, LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 345–52 (5th ed. 2010); LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING 349–61 (5th ed. 2010); SLOCUM, *supra* note 46, at 513–23.

184. *See* RAY & RAMSFIELD, *supra* note 159, at 394 ("The Statement of the Case should leave the court wanting to find in favor of your client, while the Argument should leave the court believing that such a finding is legally justified.").

185. Justice Ruth Bader Ginsberg emphasizes this practice:

> [B]e scrupulously honest because if a brief-writer is going to slant something or miscite an authority, if the judge spots that one time, the brief will be distrusted—the rest of it. And lawyers should remember that most of us do not turn to their briefs as the first thing

significant facts bearing upon issues that are unfavorable to your client.[186] Omitting unfavorable facts will only imply to the court that you realize and fear that you will lose the case if all the facts are on the table—your job is to convince the court that your client ought to prevail irrespective of any "bad" facts.[187]

Artfully emphasizing "good" facts and downplaying "bad" facts can strengthen your client's story. Positions of emphasis align with certain physical locations in a brief.[188] The judge is apt to pay more attention to facts that appear before or after a mental or physical break in your Statement of Facts. Thus, emphasize "good" facts by placing them in positions of emphasis or through creating subheadings or paragraph breaks. Correspondingly, de-emphasize "bad" facts by moving them away from white space and natural breaks.[189] Exploiting positions of emphasis can make your client's story more persuasive.[190]

Persuasion can be enhanced through use of selective record excerpts. Sometimes short quotations can have a more captivating appeal than paraphrasing.[191] These excerpts can help paint a picture for the court, one deftly designed to cast your client in a positive light. "As in a literary story, quotations from witnesses can be effective, because they make the characters come alive. We *hear* their pleas."[192] Do not, however, give in to the temptation to "embellish or to throw in irrelevant but juicy facts to liven up the plot. Stick to the essentials."[193] Also resist direct criticism of your opponents. "A lawsuit should be a clash of ideas, not personalities."[194] Of course, you can—and should—inform the court when your opponent's characterization of the story is lacking. When

> we read. The first thing we read is the decision we're reviewing. If you read a decision and then find that the lawyer is characterizing it in an unfair way, we will tend to be impatient with that advocate.

Garner, *supra* note 59, at 137.

186. *See* Fred I. Parker, *Appellate Advocacy and Practice in the Second Circuit*, 64 BROOK. L. REV. 457, 462 (1998) (stating that when Judge Parker reads a brief, "distortions [of facts] will actually make me stop reading the brief and go to the district court's opinion, or even the opposing brief").

187. *See* Duncan, *supra* note 57, at 1111 (urging advocates to approach the facts section with imagination and artistry). An effective appellate advocate ought to view the story through the appellate judge's eyes, and incorporate all necessary facts for narrative overview, objectivity, and fairness. *Id.* at 1111–12.

188. *See* BEAZLEY, *supra* note 68, at 183–85.

189. *Id.* at 185.

190. Another technique to emphasize certain facts and words is to place them at the end of a sentence. *See* STRUNK & WHITE, *supra* note 47, at 32–33.

191. *See* STARK, *supra* note 16, at 110–11.

192. STARK, *supra* note 16, at 110 (emphasis added).

193. ALDISERT, *supra* note 5, at 152.

194. STARK, *supra* note 16, at 134.

you do so, however, "attack the position, not the person."[195] Write to let the story's truth sing out justice for your client.[196]

Play these notes for a captivating story:

Compose singing facts

Compose with colorful pictures

Count on hooks

Count on positions of emphasis

Cut inflammatory rhetoric

Cut criticisms of opponent

CONCLUSION

The Statement of Facts is arguably the most critical section of an appellate brief. A persuasive client story greatly enhances chances of success on appeal. To write such a narrative, the attorney must first wear the client's shoes, beginning with the initial interview. Active listening and demonstrating empathy are cornerstones of client-centered counseling that permit the attorney to fully hear the client's story. This legal model also permits the attorney to be the client's voice and retell the client's story accurately at trial.

If the client loses and appeals, the attorney must then jump into the appellate judge's shoes. From this vantage point, the attorney is better equipped to write a compelling narrative for an audience that knows nothing about the client. The attorney will know to grab the judge's attention early with an interesting story. The narrative must sing out a strong theme of correcting an injustice imposed on the client in the court below. Not only must the narrative be consistent with the appropriate standard of review and court rules but it must also be an eloquent tale. It should be a clear, crisp, and captivating ballad. A clear story focuses on the heart of the legal

195. STARK, *supra* note 16, at 135. Stark suggests the following example when pointing out a mischaracterization: "From the record thus amassed the material facts emerged essentially undisputed. Petitioner's statement distorts that record, and thus we are compelled to set forth the facts in a comprehensive manner." *Id.* at 135 (quoting Brief for Petitioner, Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) No 84-127, 1984 WL 565589 at *1). On the other hand, the author cautions not to follow this example from a federal appellate brief: "With all due respect for my colleague, I have to tell this court that it's been told an incredible fairy tale, packed with lies and misrepresentations." *Id.*

196. *See, e.g.*, *supra* notes 175–78 and accompanying text.

matter; a crisp story maintains momentum and the judge's interest; and a captivating story impels the judge to "do justice" for the client.

Attorneys can only write such ballads, however, with proper practical skills training. Legal education should focus less on the rules and more on the people. Law students and junior attorneys alike need more client counseling, appellate advocacy, and brief-writing skills to prepare them for competent lawyering. These skills are required for wearing the client's and appellate judge's shoes. A snug fit of both pairs of shoes can enable the attorney to sing the client's ballad persuasively in the Statement of Facts, producing a just result. This music makes everyone—the judge, the attorney, and the client—winners in the game of appellate musical shoes.