Come a Little Closer So That I Can See You My Pretty: The Use and Limits of Fiction Point of View Techniques in Appellate Briefs

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Come a Little Closer so I can see You My Pretty

The Use and Limits of

Fiction Techniques for Establishing an Empathetic Point of View

In Appellate Briefs

By Cathren Koehlert

I. Introduction

Cold, the sheets feel like ice. She can’t sleep like this. Marcel? She reaches over and feels a warm mass. He’s still here. He’s just moved away from her in his sleep. Snuggle up. Show some love. She snuggles close to him and drifts back to sleep. She stirs. Her fingers and toes are icy again. She snuggles close and drifts back into a deep slumber. Somewhere in her dreams she feels cold again, and her body finds his warmth.

She wakes. Marcel is up.

She asks, "How did you sleep?"

"Not well."

"Oh, no, another migraine?"

"No, you tried to shove me out of the bed all night long. I couldn’t sleep, and all I could think was that I'm being pushed out of my own house."

In Family Law, there is a saying: “There is his story. There is her story. And there is the truth, which is both and neither.” However, this article presupposes that legal truths are not

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objective truths but thematic truths. Rather, each individual views the world through the lens of the individual’s experience, personality, and values. The woman and man above each have their own individual truth, which is real for each of them. Were their truths to be decided in court, the lawyer’s role is to present thematic truths supported by evidence. The fact-finder’s role is to determine which version of this truth is best supported by the evidence, assigning weight based on the burden of proof. Then the evidence becomes “fact.” From there, the judge’s role is to determine how society’s consensus on values, the law, applies to those “facts.” In a society that values space, the man's truth above might prevail. Whereas a society that values warmth and closeness, the woman's truth might prevail.

These kinds of individual thematic truths appear often in fiction re-tellings. For example, in the movie, The Wizard of Oz, the Wicked Witch of the West is the antagonist who imprisons Dorothy Gale and tries to steal her magical slippers. Gregory Maguire reinvented this story from the witch’s point of view in Wicked, the Life and Times of the Wicked Witch of the West. In Maguire’s story, the witch was mistreated from birth due to her green skin and is

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3 Cf Brian J. Foley & Ruth Anne Robbins, Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections, 32 Rutgers L.J. 459, 472 (2001) (discussing two parties’ competing truths); But see Wendy Nicole Duong, Law is Law and Art is Art and Shall the Two Ever Meet? Law and Literature: Comparative Creative Processes, 15 S. Cal. Interdisc. L.J. 1 (Fall 2005) (arguing that to see multiplicity and relativity to truths is to rethink jurisprudence).
4 Supra n. 3.
5 See generally supra n. 3.
6 See Foley & Robbins, supra n.3, at 472.
8 See Beazley, supra n.6.
9 Mauet, supra n. 7, at 1.
11 Gregory Maguire, Wicked, the Life and Times of the Wicked Witch of the West (PerfectBound 1995).
trying to retrieve her sister’s shoes from gossiping strangers.\textsuperscript{12} Readers empathize with the witch.\textsuperscript{13}

So too, readers can empathize with the law client. If each client has his or her own thematic truth, through narrative the attorney can convey that truth.\textsuperscript{14} Thus in crafting an appellate brief, lawyers can adapt fiction techniques to place judges in the client’s point of view.\textsuperscript{15} In a later article or book, I intend to explore application of these techniques to other types of legal story-telling as well, such as narrative at the trial stage. However, this article focuses on appellate briefs.

Part Two of this article touches on the debate over objective versus thematic and narrative truth in law, but as that topic is an article in and of itself, this article presupposes that law consists of thematic truths and builds on the other story-telling work of previous scholars. Part Three explains the intricacies of point of view and demonstrates how point of view is challenging even for skilled fiction writers to master. Part Four discusses the similarities and differences in the process of exploring point of view in both legal writing and fiction writing. Part Five begins the exploration of point of view techniques and discusses viewing a character or a client as though from a camera in a wide, medium, or close-up shot or viewing them from inside. Part Six explains how the writer can order the large-scale chronology of events from the character or client’s point of view. Part Seven shows writers how to convey the experience of a character or client with detailed chronological play-by-plays. Part Eight illustrates the tools a writer can use to construct those play-by-plays.

\textsuperscript{12} Id.
\textsuperscript{13} See Id.
\textsuperscript{14} See Foley & Robbins, supra n.3, at 472.
\textsuperscript{15} See Foley & Robbins, supra n.3, at 472, 478–479.
Part Eight is subdivided. Sub-part one shows how writers can use metaphors, illogical sentences, and improper grammar to place readers in the character’s point of view and illustrates the use and limits of those techniques in legal writing. Sub-part two illustrates how adverb-free, action verbs in active voice create a more vivid experience and place readers in the point of view of the character or the client. Finally, sub-part three shows how labeling dialogue and monologue with tags like “she said curtly” can distance the reader from the character or client. Part Nine concludes this article.

II. Objective Truths versus Thematic Narrative Truths

For the sake of focus, this article pre-supposes that legal truths are thematic truths; the debate regarding whether law determines objective truths or thematic truths is an entire article in and of itself. For instance, Professor Wendy Nicole Duong recognizes some value to relativity but argues that seeing relativity in truths redefines jurisprudence.

But one might argue that all truths are relative. Science itself is based on an assumption that the rules and patterns of our universe will not randomly change one day for no reason and that we are not Descartes’ dream in a demon’s mind. Our society may have adopted science’s presumption. However, jurisprudence has existed long before the pragmatists attempted to reconcile the debate between the empiricists and the rationalists—long before the scientific

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17 See Id.
18 See John Dewey, The Later Works vol. 4:1929 (Southern Illinois University Press 1988)(discussing the different lenses through which philosophers have viewed the world).
method.\textsuperscript{22} Just as our thought and perception evolves or even changes radically, so too has law been designed to evolve or even radically change and to recognize the fluidity of truths.\textsuperscript{23} For instance, a court may overturn precedent based on a scientific supposition when our science evolves.\textsuperscript{24} For example, in \textit{Daley v. LaCroix}, LaCroix ran his car into electrical lines that damaged the Daley’s property and caused them emotional distress.\textsuperscript{25} LaCroix argued that facts did not satisfy the “impact rule,” which requires a physical impact for recovery.\textsuperscript{26} The Supreme Court of Michigan considered a string of precedents that demonstrated that fright can cause bodily injuries.\textsuperscript{27} The court stated that both scientific and factual knowledge had changed and overruled the application of the principle in their previous cases.\textsuperscript{28}

However, even to say that a scientific supposition is false is to rely on a scientific consensus regarding perception. For instance, a group of a million people may view a dress in a television commercial, and all agree that it is red.\textsuperscript{29} But they might not all see the same thing when they see red.\textsuperscript{30} For example, when I see red, I see passion, strength, hutzpah, my powerful great-grandmother, and a close friend who died a few weeks ago. Another person might see

\textsuperscript{22} Compare Thomas A. Moore, \textit{Medical Malpractice}, Practising Law Inst., 12-1-12-2 (2010)(explaining the elaborate ancient Greek trial system), with James Lanshe, \textit{Morality and the Rule of Law in American Jurisprudence}, Rutgers J. of Law and Religion, 27 (Fall 2009)(discussing the pragmatists attempt to resolve the debate between empiricists and rationalists), with Daniel R. Williams, \textit{After the Gold Rush--Part I: Hamdi, 911, and the Dark Side of Enlightenment}, Penn State L.Rev. 392 (Fall 2007)(mentioning that the scientific method evolved during the enlightenment era).

\textsuperscript{23} See, e.g., \textit{Daley v. LaCroix}, 179 N.W.2d 390, 392 (Mich. 1970)(indicating that a change in scientific knowledge can change precedent).

\textsuperscript{24} See Id.

\textsuperscript{25} See Id.

\textsuperscript{26} Id. at 392.

\textsuperscript{27} Id. at 394.

\textsuperscript{28} Id. at 395.

\textsuperscript{29} See generally Dewey, \textit{supra} n.19 (discussing the bases of our knowledge); Wright State Univ. College of Liberal Arts, \textit{supra} n. 20 (discussing our perception).

\textsuperscript{30} See \textit{supra} n. 28. Cf. ScienceDaily, \textit{Color Perception is not in the Eye of the Beholder: It’s in the Brain}, http://www.sciencedaily.com/releases/2005/10/051026082313.htm (accessed September 20, 2010)(discussing research that shows that people may reach a consensus about a color despite the fact that the color cones in their retinas are vastly different).
caution, alarm, violence, rebellion, and blasphemy. Those are thoughts red triggers. But even if we were to perceive red in a vacuum absent extraneous thoughts, no one knows whether my red looks the same as other people’s red. We simply all agree that the color is red.

Moreover, the truths of human relationships are even more fragile than the perceptions upon which science is based. Human relationships are based on memory, perception, and unknowable intent.

If truths are relative, then to deny their relativity is to lie. Thus if jurisprudence is truly based on the falsity of objective truth, it should be redefined. However, it’s unnecessary to do so as jurisprudence has always evolved and even transformed.

In any event, other scholars have already presented cogent arguments that law already tells a non-fiction story based on relative truths. This article is an expansion of that work.

III. Intricacies of Point of View

Point of view in both fiction and non-fiction can be nuanced. Details can increase the closeness the reader feels with the viewpoint party or character.

32 See supra n.17; see also ScienceDaily, supra n. 25.
33 See supra n.17; ; see also ScienceDaily, supra n. 25.
34 See Liisa Renée Salmi, Don’t Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial, 18 Rev. Litig. 135, 157 (Winter 1999)(discussing the fragility of witness perception).
35 See Id.
36 See Helene S. Shapo, Marilyn R. Walter, & Elizabeth Fajans, Writing and Analysis in the Law 13-17 (Foundation Press 2008)(providing the basics on the evolution of precedent).
37 See, e.g., supra n. 3.
A. Degrees of Distance in Fiction

I was once unaware of these nuances. Early in my fiction writing study, I thought “point of view” simply meant First Person, Third Person, or Omniscient point of view.\(^{38}\) While working with my professor, Sharon Darrow, on my novel in progress, *The Velvet Teen*, as part of Vermont College’s Masters of Fine Arts program, I clung to my old concepts and thus had difficulty understanding her comments about point of view shifts. I thought that I was writing from an omniscient point of view and could just bounce around in and out of my protagonist at random.\(^{39}\) I could back away as though zooming out with a video camera for a wide shot of my character whenever I wanted, and then I could bounce back inside my character at random.\(^{40}\) Later I learned that while I could back away at random, upper-classmen would call me out in workshop and say that they felt too much “psychic distance.”\(^{41}\) And we first year MFA students thought that the upper-classmen were talking about some kind of séance or Tarot card reading. Little did we know that “psychic distance” would become a regular part of our vocabulary. With that said, I studied point of view and distance for two years in the program, and, like many writers, I still find these issues challenging to master.

Now when I edit or critique fiction work, I am hyper-aware of shifts in distance and other point of view shifts. And these ideas are heavily on my mind when I teach and grade Statements of Facts. My power-point slides include examples on point of view, and we even view and discuss the point of view in a portion of *Mystic River*\(^{42}\) in my Appellate Advocacy class. We

\(^{38}\) *See generally* Ursula K. Le Guin, *Steering the Craft* 83-113 (The Eighth Mountain Press 1998)(discussing these different points of view).

\(^{39}\) *See generally Id.* at 86-88 (defining omniscient point of view).

\(^{40}\) *See generally* John Gardner, *The Art of Fiction* 111-112 (Vintage Books 1991)(explaining how the distance the reader feels from the story is similar to wide, medium, and close camera shots).

\(^{41}\) *See generally Id.* (discussing psychic distance).

discuss using the techniques from the movie to place readers in the client’s point of view. Thus evolved this article.

Point of view is the perspective from which the reader or viewer experiences the story. Although point of view can be divided into general categories such as omniscient, first person, or third person, the perspective’s closeness can vary even within these divisions. In the most intimate of these perspectives, the reader inhabits the protagonist. To better understand these levels of distance, I turn to the fiction writer, John Gardner’s craft book *The Art of Fiction*.

Starting with the most distant level and ending with the most intimate, John Gardner illustrates these levels of distance in examples he crafted for *The Art of Fiction*:

1. It was winter of the year 1853. A large man stepped out of a doorway.
2. Henry J. Warburton had never much cared for snowstorms.
3. Henry hated snowstorms.
4. God how he hated these damn snowstorms.
5. Snow. Under your collar, down inside your shoes, freezing and plugging up your miserable soul . . .

Gardner uses the term “psychic distance” for the remote points of view in the first four examples. To explain this distance, he also analogizes to a video camera that zooms in for narrow shots and zooms out for medium or distant shots. The psychic distance in these wide shots is sometimes appropriate, and Gardner does not argue that it should never be used. For instance, the writer may start with a long shot and zero in. Alternatively, Gardner explains

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44 See id. at 158-172; see also Gardner, supra n.29 at 111 (illustrating levels of closeness).
45 See Gardner, supra n. 29 at 111-124.
46 See Id. at 111-124.
47 See Id. at 111.
48 Id.
49 Id. at 111-112.
50 Id.
51 Id. at 112.
sometimes the writer may want to use distance to establish an icy effect. Similarly, the writer may want to establish the point of view character as an unreliable narrator and create greater distance. Gardner merely cautions against using distance unintentionally or carelessly shifting distances.

Moreover, if a writer wishes to create empathy and reliability with no icy effect, the writer will need to substantially use the more intimate point of view illustrated in the final sentence. In that sentence, the writer burrows into the details and includes both sensation and thoughts so that the reader feels Henry’s winter from inside Henry. In contrast, the reader sees Henry from a distance in the first sentence and zooms in closer with each new sentence. The distancing examples in Gardner’s list tell the reader about Henry’s experience rather than recreating the experience for the reader.

### B. Degrees of Distance in Legal Writing

Many of these techniques can be applied to persuasive legal communications, including appellate briefs upon which this article focuses. A lawyer can persuade in part by creating empathy for the client’s thematic point of view, the theory of the case. Thus a lawyer may

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52 Id.
53 See Le Guin, supra n. 37, at 84 (discussing how unreliable first person narrators often make mistakes in interpreting events and how those mistakes are obvious to the reader).
54 Gardner, supra n. 29 at 112.
55 Id.
56 Id.
57 Id.
58 See Id.
59 See Kenneth D. Chestek, The Plot Thickens: Appellate Brief as Story, 14 Leg. Writing 127 (2008)(discussing point of view in appellate brief writing); cf. Michael N. Burt The Importance of Storytelling at all Stages of a Capital Case 77 UMKC L. Rev. 877 (Summer 2009)(discussing general story-telling techniques at each stage of a capital case); but cf. Duong, supra n. 16 (recognizing the role of story-telling in law but also drawing boundaries).
60 See Beazley, supra n. 6, at 37-38 (discussing how facts raise competing themes for each party and how developing those themes can be persuasive in appellate advocacy); see also Foley and Robins, supra n. 2, at 465-466, 478-479.
often want to establish closeness with the client or viewpoint party.\textsuperscript{61} However, at times, lawyers may want to create distance between their clients and bad facts.\textsuperscript{62} Moreover, on appeal, the record will limit the closeness the lawyer can establish. Finally, some of these fiction methods are more appropriate for appellate briefs than others.\textsuperscript{63} Nonetheless, awareness of the techniques and their limitations can increase closeness in appellate brief writing.\textsuperscript{64}

\section*{IV. Process}

Before I studied fiction so intensely, I might have thought that the fiction writing process was much easier than the legal writing process because fiction writers can just invent. But the more fiction I wrote and studied, the more clear it became that fiction writers must seek “the truth” as diligently as lawyers and that the two processes do overlap.\textsuperscript{65} The chief difference is that fiction writers may sometimes have more time, and their record is not frozen. Moreover, the outside the world does not share in story’s reality until the writing is good.

\subsection*{A. Fiction Process}

While much of this article explains point of view techniques as they appear on the page, first the writer must engage in a writing process that explores a character from that character’s point of view.\textsuperscript{66} The fiction writer steps inside a character and sees and feels each moment

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{61} See Foley and Robins, \textit{supra} n. 2, at 478-479.
\item \textsuperscript{62} See Beazley, \textit{supra} n. 6 at 148-149.
\item \textsuperscript{63} See generally Id.
\item \textsuperscript{64} See, e.g., Sarah Guidry and Cathren Koehlert, \textit{Supervisor Training: Good Documentation = Good Preparation} (unpublished agency training materials, Texas Department of Protective and Regulatory Services 2001)(copy on file with Cathren Koehlert).
\item \textsuperscript{65} See Rita Williams-Garcia, \textit{Letter to Cathren Koehlert} (October 9, 2007);(encouraging Koehlert to experience her protagonist’s thoughts and feelings)(copy on file with Cathren Koehlert); Sharon Darrow, \textit{Conversation with Cathren Koehlert} (March 15 2006)(instructing Koehlert to experience each moment of the story from inside the protagonist).
\item \textsuperscript{66} See \textit{supra} n. 58.
\end{itemize}
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through that character’s eyes first. The writer looks at the scene through that character’s eyes, hears the dialogue, speaks to other characters, re-enacts action, and feels sensations and emotions. The techniques below are simply tools for translating that experience.

This experience may sound as though it comes easily to the fiction writer, but often the story does not unfold in such a lucid manner. It begins as some vague seed—a line of dialogue, an image, a crying girl. For instance, Laurie Halse Anderson author of the popular young adult book Speak says that she kept hearing a girl crying. She stuck with the girl, and the novel unfolded. Similarly, author Jandy Nelson says that her novel The Sky is Everywhere began with images of a girl scattering poems everywhere she went.

Often still unaware of the theme, the author begins to explore this thread and starts a long process of spending hours inside the character, sometimes interviewing the character, viewing each scene as it unfolds. For instance, in my final semester at Vermont College, I was fortunate enough to work with Rita Williams-Garcia, a Coretta Scott King Award winner, a two-time National Book Award nominee, and a beautiful writer, teacher, and person. She instructed me:

You do have an understanding of behavior patterns of abused children, but sometimes the

67 Id.
68 Id.
69 Jandy Nelson, Book Release Party (San Francisco, Cal. March 13 2010) (explaining that she started writing The Sky is Everywhere because she kept receiving images of a grieving girl who was scattering poems everywhere); Laurie Halse Anderson Society for Children’s Book Writer’s and Illustrators: Austin Chapter Fall Conference (October 2004) (explaining that her novel, Speak, began as an image of a girl crying);
70 See Anderson, supra n. 56.
71 See Id.
72 See Nelson, supra n. 56.
73 Rita Williams-Garcia, Letter to Cathren Koehler (October 9, 2007); Sharon Darrow, Conversation with Cathren Koehler March 15 2006)(instructing Koehler to experience each moment of the story from inside the protagonist); Cynthia Leitich-Smith, Writefest (Austin, Tex. June 14 2005)(assigning participants character interviews and scene re-writes from other perspectives); Gail Carson Levine, Society for Children’s Book Writers and Illustrators Mid-Winter Conference (New York, New York February 2005)(explaining that the personal thematic symbolic importance unfolds for her after penning a novel).
exact profile doesn’t fit because of the actual development of the character. . . . Really look at [Cori], setting aside the anticipated behavior[]. Based on where she is at that moment, what do you think her response is? [Then Rita responded to a portion of my novel where Cori’s mother has just poured dish water down her throat.] . . . . At the end, rage is boiling. What is it like to sleep with that much anger? Even so, the next morning when she awakens, the first thing she says is, "Maybe I should tell someone." Maybe? What happened to that anger? That well deserved rage? What happened to Cori? We need the moment to build more. She is angry and she has no help. She has nothing to lose.74

With Rita’s guidance, I invoked the trance that I needed to invoke and went back inside Cori at that moment. As it turns out, the thoughts running through her head were much different from “maybe I’ll should tell someone.” Here they are:

Alone. Finally. She would tell. Fuck Mom! Fuck Dad! She’d love to see the look on their faces when the cops arrested them both. They could rot in prison.

Handcuffs on their wrists. A big man in a blue uniform telling them they were wrong. A big man in a black robe telling them they were wrong. . . . 75

Having stepped inside Cori’s shoes for this passage, I stepped closer to the theme of the novel, which is that love does not require obedience.

Often after having burrowed into these characters in trances like the one I invoked to get the passage above, authors speak of these characters as separate and real individuals whom they are getting to know.76 For instance, right now, I have a noisy mermaid-siren in my head who keeps telling me to go to the beach and listen to her song-story instead of writing dry-sand words for dry-land four-limbs. Sorry, she is wise in her own way, but she can be more impatient with our world than I am. Now, she’s telling me that I do not understand, and I am telling her that I cannot argue right now and that I am turning her off.

74See Williams-Garcia, supra n. 66.
75 Cathren Koehlert, Disobedient (unpublished novel)(on file with Cathren Koehlert).
76 Elizabeth Strout, The JCCSF Presents Elizabeth Strout, Author of Olive Kittredge (San Francisco, Ca May 11 2010).
Song, my mermaid, and these other separate individuals at times may be stubborn or closed-mouth and difficult to engage, just as real people are. They often refuse to show up when scheduled. They may lie. And writers may have to treat them to a great deal of therapy, empathy, trickery, interviews, and even deposition-tactics to get them to reveal themselves. Of these tactics, trickery may often fail, and then the characters may trust the author less. Authors may often have to fact-check their stories to fill in the blanks let by the characters by doing research.

Though fiction writers may be labeled as inventive, artistic, or creative, they must be accurate. If the fiction writer steps outside of her character and puts words in his mouth, then the writing will ring false. The same is true of each bit of every feeling, sensation, and scene. In a third or first person story, these must all come from the story seen through the viewpoint character’s eyes and not from the writer. If the point of view character is an unreliable narrator, then the fiction writer must explore the nuances of the character’s lies to expose them.

B. Legal Writing Process Similarities and Differences

While the legal writer may also expose deception and even borrow some ideas from the fiction writer’s process, unlike the fiction writer, the lawyer must take great care that the facts

77 See Strout, supra n. 69 (discussing the difficulty in engaging the predecessor character to the title character in her Pulitzer Prize winning novel Olive Kittredge).
78 See Id.
79 See Le Guin, supra n. 37, at 84 (explaining how unreliable narrators may lie or confuse the truth).
80 See, e.g., Nancy Kress, Characters, Emotions, and Viewpoint (Writer’s Digest Books 2005)(providing exercises as the end of each chapter to draw out characters).
81 See Anne Lamott, Bird by Bird 145-150 (Anchor Books 1995)(discussing how research can increase authenticity).
82 See Rita Williams-Garcia, Vermont College of Fine Arts MFA in Writing for Children and Young Adults Faculty Lectures: You Can Handle the Truth (Montpelier, Vt. July 2007)(CD on file with Vermont College of Fine Arts MFA in Writing for Children and Young Adults Store).
83 See generally Id.
84 See Id.
85 See Id.
86 Compare Id. with Le Guin, supra n. 37, at 84 (explaining the concept of an unreliable narrator).
come from outside of the lawyer. Moreover, while fiction writers can explore the details over and over at liberty until they are ready to submit a final draft to their editors, the evidence in a lawsuit becomes frozen to some extent at the end of discovery and frozen completely at the end of trial. It is at this last most frozen stage that the appellate brief writer becomes involved.

Despite this frozen evidence, there are process similarities. Just as the writer’s imagination generates a seed of a theme, bits of evidence generate a theory of the case for the lawyer. Like the fiction writer who then spends months, years, or decades exploring, researching, and interviewing, the lawyer spends months or years interviewing and discovering. As each learn new information, they each may need to develop, change, and fine-tune their theme or theory of the case. And even as a fiction writer must sometimes abandon a novel, a lawyer must sometimes drop a case. Most importantly, to fully flesh the point of view, the lawyer must look for gaps and lies just as the fiction writer does. In so doing, as the fiction writer empathizes with the viewpoint character, the lawyer might empathize with the client at times. This empathy creates an environment where the client will share information and aids the lawyer in generating theories and asking questions.

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88 See Beazley, supra n. 6, at 142-148 (explaining that the citations to the record below must be accurate); 5 Am. Jur. 2d Appellate Review § 503 (2010)(explaining that appeal is limited to the record).
89 See n. 83, supra.
91 Cf. Wydick, supra n. 86, at 1-9.
92 See n 86, supra.
94 Cf. Wydick, supra n. 86, at 1-9.
95 Linda F. Smith, Always Judged- Case Study of an Interview Using Conversation Analysis, 16 Clinical L. Rev. 423, 442 (Spring 2010).
96 Id.
means stepping into the client’s shoes and seeing the record through the client’s thematic point of view.\textsuperscript{97}

Since the appellate record is set, these techniques are limited by the unembellished evidence.\textsuperscript{98} Many of the details may not have made it into the record for a variety of reasons. For instance, the average witness, client representative, or collateral may not have the recall skills or communication abilities to produce the details needed to fully flesh the events.\textsuperscript{99} Moreover, in training client representatives or coaching witnesses, the trial court lawyer must be aware of the danger of fictionalizing reports.\textsuperscript{100} While borrowing fiction-techniques can help judges to see from the client’s perspective, the lawyer must ensure that the report itself is not fictional.\textsuperscript{101} Finally, trial counsel may not have asked questions to elucidate all the details.\textsuperscript{102} Appellate counsel’s job is to truthfully and accurately cast this limited evidence in the best thematic light.\textsuperscript{103}

V. Wide Camera Shots versus Closer Points of View

Once this information is gathered, in both legal writing and fiction, a writer should intentionally choose the degree of distance at each stage of the story.\textsuperscript{104} To establish empathy, both appellate briefs and fiction works might eventually zoom in close to the viewpoint party/character and avoid careless distance shifts. That being said, the reader in fiction works may sometimes be inside the character whereas this internal perspective is likely to be fleeting.

\textsuperscript{97} See Foley and Robins, \textit{supra} n. 2.
\textsuperscript{98} See generally Duong, \textit{supra} n. 16 (recognizing the role of story-telling in law but also drawing boundaries).
\textsuperscript{99} See generally \textit{Id}.
\textsuperscript{100} See generally \textit{Id}.; see also Wydick, \textit{supra} n. 86, at 1-9.
\textsuperscript{101} See generally \textit{Id}.
\textsuperscript{102} Cf. Wydick, \textit{supra} n. 86, at 1-9.
\textsuperscript{103} See Beazley, \textit{supra} n. 6 at 37-38, 142-148
\textsuperscript{104} Gardner, \textit{supra} n.29.
in appellate briefs. Below wide shots and distance shifts are discussed for fiction works first and then for appellate briefs.

A. The Fiction Techniques

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

Likely no such failure occurred in the Book Thief, when writer Marcus Zusak presumably intends to reveal humanity’s beauty and brutality by zooming in at some points and out at others. Death narrates this holocaust tale, and at points, the reader is in Death’s point of view. At other points, the reader zooms in on Liesel, a child who steals books from the burn pile in Nazi Germany. Just as a police officer, doctor, or social worker may have to wall off from trauma, it seems appropriate that at times Death’s viewpoint of Liesel and the holocaust is distant. In fact, Liesel is a stranger when Death first glimpses her, and perhaps Death shies away from the horror of her experience. Thus the reader’s viewpoint is distant as shown in the wide-shot below:

As you might expect, someone had died.

They couldn’t just leave him on the ground. For now, it wasn’t such a problem, but very soon the track ahead would need to be cleared and the train would need to move on.

105 Id.
106 Id.
107 Id. at 111-114.
109 See Id.
110 See Id.
111 See Id.
112 See Id. at 7.
There were two guards.
There was one mother and her daughter.
One corpse.
The mother, the girl, and the corpse remained stubborn and silent.\textsuperscript{113}

In the passage above, it is as though the reader is standing from a distance watching an anonymous mother, daughter, and corpse.\textsuperscript{114} Even the word choice “corpse” distances the reader. The “corpse” is in fact Liesel’s younger brother.\textsuperscript{115}

However, just as the police officer, doctor, or social worker sometimes gets involved, so Death is compelled by the beauty in Liesel’s actions and becomes involved with Liesel.\textsuperscript{116} Thus readers later experience events inside Liesel.\textsuperscript{117} It is only by doing so that Death and readers can be so moved by Liesel’s story.\textsuperscript{118} After experiencing Death’s remote viewpoint and later experiencing events inside Liesel, the theme rings true in Death’s revelation: we are brutal and beautiful, and thus, he says, “I am haunted by humans.”\textsuperscript{119} In this context, Death’s distance in the beginning and the reader’s later closeness to Liesel makes sense.\textsuperscript{120}

In contrast, clumsy, perhaps accidental viewpoint shifts fail to convey a coherent theme.\textsuperscript{121} For instance, in the novel Eragon, the reader is presumably supposed to empathize with Eragon, the dragon-riding viewpoint character and protagonist.\textsuperscript{122} I confess that I find the theme

\textsuperscript{113} Id.
\textsuperscript{114} See Id.
\textsuperscript{115} See Id. at 19.
\textsuperscript{116} See Id. at 7-550.
\textsuperscript{117} See Id.
\textsuperscript{118} See Id.
\textsuperscript{119} See Id. at 550.
\textsuperscript{120} See Id. at 1-550.
\textsuperscript{121} See Gardner, supra n. 29, at 112-115.
\textsuperscript{122} See Christopher Paolini, Eragon 83 (Laurel Leaf 2003).
of the novel difficult to discern, but I believe that it may be that some heroes are simply good and
gifted and do not need to work hard to succeed.\textsuperscript{123} In the novel, Eragon often finds that he has a
natural gift for magic and dragon-riding, and the reader is likely supposed to cheer for this hero.\textsuperscript{124} Presumably, the reader is also supposed to empathize with him in the passage below
when Eragon discovers that his brother is marrying Katrina.\textsuperscript{125} However, it is difficult to identify
with Eragon or understand his emotions and their bases in the passages like the shifting one
below:

Bewilderment and astonishment overwhelmed Eragon. He remembered seeing Katrina and Roran during the trader’s visit, but marriage? “Katrina?” he asked weakly, just to confirm.\textsuperscript{126}

To an extent, the reader is inside Eragon when bewilderment and astonishment overwhelm him
and he remembers seeing Katrina and Roran.\textsuperscript{127} This description of his emotions and memory is
vague, but it happens inside nonetheless.\textsuperscript{128} However, the experience becomes more vivid with
the line, “but marriage?”\textsuperscript{129} This specific thought happens in the moment.\textsuperscript{130} But when Eragon
“ask[s] weakly,” the reader steps outside of Eragon.\textsuperscript{131} The reader is hearing the intonation of
Eragon’s voice rather than experiencing Eragon’s search for words.\textsuperscript{132} The overall effect is to
leave the readers wondering where they are in relation to Eragon and wondering what the
writer’s point is.\textsuperscript{133}

\textsuperscript{123} See Id.  
\textsuperscript{124} See Id.  
\textsuperscript{125} See Id.  
\textsuperscript{126} See Id.  
\textsuperscript{127} See Id.  
\textsuperscript{128} See Id.  
\textsuperscript{129} See Id.  
\textsuperscript{130} See Id.  
\textsuperscript{131} See Id.  
\textsuperscript{132} See Id.  
\textsuperscript{133} See Id.
In some instances these shifts may be even more obvious and jarring.\textsuperscript{134} For instance, if I wanted readers to agonize for a character hit by a flaming ember, I would confuse them were I to write:

Pain. Burning. Right in the forearm. Damn that hurts! Beth looked like a war victim when she bent down to examine the flaming ember that hit her arm. She was a shadowy figure standing on the hilltop in the sunset.\textsuperscript{135} The pain and burning happen inside Beth. But then the reader views her from outside when she bends down to examine the flaming ember. By the time Beth is standing on the hilltop, we seem to be viewing her from a great distance. This sudden jump outside of Beth is jarring and disorientating, and it doesn’t appear to happen for any good reason.

Not only are sudden jumps disorienting, but also steadily distanced writing can make the reader feel more removed from and thus less vested in the story. For instance, although I find the story readable, I have trouble engaging with the protagonist and viewpoint character of \textit{Twilight}, Bella Swan.\textsuperscript{136} In the novel, awkward new girl, Bella, falls for a dark and mysterious boy, Edward.\textsuperscript{137} Edward turns out to be a vampire, and he rescues Bella numerous times.\textsuperscript{138} But throughout, despite continual temptation, Bella abstains from sharing her blood with Edward, and he abstains from drinking her blood.\textsuperscript{139} The notion is likely a metaphor for their sexual abstinence.\textsuperscript{140} In the end, they triumph over another vampire who pursues Bella, and they attend

\begin{flushleft}
\textsuperscript{134} See Id.
\textsuperscript{135} The author of this article wrote this example. \textit{See Gardner, The Art of Fiction} 111-112 (suggesting similar examples).
\textsuperscript{136} See Stephenie Myer, \textit{Twilight} (Little, Brown and Company 2005).
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} See Id.
\end{flushleft}
Ultimately, I believe the reader is supposed to invest in the theme: for the virtuous and abstinent, true love overcomes all.

To adopt this theme, the reader must step into Bella’s struggles. Before falling in love with Edward, whom she met on the first day of school, Bella is adjusting to life at her new school. The reader is probably supposed to cheer for underdog Bella and feel excited for her. But I do not feel that adjustment in passages like the one below:

It was easier because I knew what to expect of my day. Mike came to sit by me in English, and walked me to my next class, with Chess Club Eric glaring at him all the while; that was flattering. People didn’t look at me quite as much as they had yesterday. I sat with a big group at lunch that included Mike, Eric, Jessica, and several other people whose names and faces I now remembered. I began to feel like I was treading water, instead of drowning in it.

Reading the passage above, I do not feel flattered or have a sense of treading water. While the explanations in the passage make logical sense, I do not care about the protagonist. The vague summary of the experience creates distance and likely produces this lack of caring. This lack of caring is problematic because Bella is a heroine rather than an unreliable narrator. The reader is supposed to identify with Bella and the idea that salvation and romance are her reward for her goodness, innocence, and abstinence.

In contrast, the reader is more able to identify with a protagonist and digest the theme when the reader is inside the protagonist experiencing each moment unfolding with no careless

\[\text{Id.}\]
\[\text{See Id.}\]
\[\text{Id. at 29.}\]
\[\text{Id.}\]
\[\text{See generally Id.}\]
\[\text{See generally Id.}\]
\[\text{Compare Id. with Gardner, supra n.29 at 111-124.}\]
\[\text{Supra n. 147.}\]
\[\text{See Myer, supra n.135.}\]
shifts. This intimate point of view is well-handled in the Printz Award winner, *A Step From Heaven*. In the novel, the reader follows Young Ju from her journey from Korea as a toddler to her seventeen year adjustment to life in Los Angeles. Her parents believe that Los Angeles is the answer to all of their problems. However, her father’s alcoholism, her mother’s enabling, and her parents’ fatalistic beliefs are the cause of their problems. Fortunately, Young Ju learns new habits and a new philosophy. I believe the theme is: it’s not a place that changes us; it’s the lessons that we learn there. Readers can better accept this theme if they feel Young Ju struggle to embody the theme for herself.

This struggle and embodiment is vividly handled in the intimate passage below, which occurs just after Young Ju’s father has dragged her mother out of the room:

“Nine one one.”

I’m shaking so badly I have to hold the receiver with both hands. The sound of the lady’s voice on the other end asking “How may I help you?’ almost makes me hang up. What am I doing? Do I really believe the police can help? That they care about me? They would not help people like us. I start to breathe too quickly and my vision blurs. For [sic] second I forget I am still holding the phone against my ear.

“Hello” the voice on the other end asks.

Do it, I tell myself. Speak. Save her. I can’t. I start to cry.

“What? Hello?”

What am I doing? I look at the phone in my hand and let it drop to the ground. I hug my knees and rock, back and forth, back and forth. Halmoni’s voice returns, Only God can. Only God can.

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150 See Gardner, supra n. 29 at 111-124.
152 See Id.
153 See Id.
154 See Id.
155 See Id.
156 See Id.
157 See Id.
The sound of breaking and Uhmma’s deep wail haunt the room. I pound my fist into my thigh and bite my lower lip. But I am not a child anymore. I do not have time to wait for God. There is only me. Stop it. Stop it. This is enough.

I pick up the phone and raise it to my ear. “Please,” I whisper and take a gulp of air. “Send help.”

Tell me what is going on, miss.”

“My father is killing my mother.”

In the above passage, readers are inside Young Ju as each moment of her experience unfolds. Readers experience her physical sensations, shaking, breathing too quickly, and rocking back and forth. They experience each millisecond of her thoughts in an internal monologue, “What am I doing? Do I really believe the police can help? That they care about me? They would not help people like us.” They see through Young Ju’s blurry vision. Thus readers are inside Young Ju as she embodies the lesson that she has learned in the new place; Young Ju stands up for herself and her mother.

B. Application of the Fiction Techniques to the Appellate Brief

While the immediacy created by the first person, present tense structure above may be difficult to achieve in an appellate brief, the appellate brief writer can still use some of the techniques from above to achieve some closeness. The lawyer can choose the viewpoint party, typically the client. The lawyer may initially have a wide shot of that client. But at some point, the lawyer can use good record facts to place the reader inside the client or some other person who represents the client’s point of view. For instance, in Michigan v. Bryant, the government has petitioned the United States Supreme Court for review of an appellate court holding that a

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158 See Id. at 138-139.
159 See Id.
160 See Id.
161 See Id.
162 See Id.
163 See Id.
dying declaration admitted in the trial court violates the Confrontation Clause.\textsuperscript{164} The brief for amicus curiae places the reader at the scene of that dying declaration in the following passage:

On April 29, 2001, Detroit police responded to a report of a shooting and found a car idling in the parking lot of a filling station; the car’s operator, Anthony Covington, lay on the ground next to the still-open driver's side door, bleeding profusely from a gunshot wound to his torso. (J.A. 7, 11). In response to the police inquiry “what happened?” (J.A. 19), Covington, in obvious and severe distress, told police that his neighbor “Rick,” later identified as the Respondent, Richard Bryant, shot him through the back door of Bryant's house a few blocks away. (J.A. 12-13). Covington told police that the shooting had transpired within the last half hour. (J.A. 39). Covington had managed to drive away from the scene of the shooting and had made it as far as the gas station. (J.A. 23). After making these statements to the police on the scene, Covington was taken to a nearby hospital by ambulance. He died from his wounds a few hours later. (Pet. App. at 10a).\textsuperscript{165}

This statement of facts begins with a wide shot of the parking lot.\textsuperscript{166} But police move closer to Covington, and readers see details of his last moments.\textsuperscript{167} As a reader, the initial wide shot of the scene orients me; it provides me with a sense of where the statement is set in space and time.\textsuperscript{168} Zooming in on Covington through the police officers’ viewpoint creates tension for me.\textsuperscript{169} I feel empathy for Covington and for those who are aiding him, and I want them to succeed.\textsuperscript{170} I find myself thinking that it is only fair to allow the dying declaration in to evidence.\textsuperscript{171}

In contrast to the fairly consistent mid-level distance in the example above, some briefs seem to shift distance without reason.\textsuperscript{172} For instance, in \textit{Tyler v. Tennessee}, Kelly Cook and

\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} See generally Id.
\textsuperscript{169} See generally Id.
\textsuperscript{170} See generally Id.
\textsuperscript{171} See generally Id.
\textsuperscript{172} Cf. Gardner, \textit{supra} n.29 at 111-114.
Wayne Tyler sued the state for wrongful death of their child, Demi. The statement of the case begins:

The events that led to his death began on November 4, 2004, when he and his parents were living at Robin Adams' apartment. Ms. Cook and Mr. Tyler went to the store and left Demi with Ms. Adams at her apartment. Unbeknownst to Ms. Cook or Mr. Tyler and after they left, Michael Flannary, a Case Manager 1 (“CM1”) with the DCS, came to Ms. Adams’ apartment to check on Demi. He told Ms. Adams that Demi was fine at her apartment. Mr. Flannary then demanded Ms. Cook and Mr. Tyler contact him by 4:30 p.m. that day. Shortly after Mr. Flannary left, he instructed Ms. Hamilton, who had no children of her own, to take custody of Demi. Under his direction, Ms. Hamilton went to Ms. Adams’ apartment and stated that Mr. Flannary had told her to take Demi. Believing she had no choice because of Ms. Hamilton's apparent authority on behalf of Defendant, Ms. Adams allowed Ms. Hamilton to remove Demi. Defendant selected Ms. Hamilton as a placement for Demi.

Only after Ms. Cook and Mr. Tyler returned from the store did they learn that Mr. Flannary had placed Demi in Ms. Hamilton's custody. Immediately, Claimants began attempting to contact Mr. Flannary. They scheduled a meeting that afternoon with him. At the meeting, Mr. Flannary stated that Claimants needed to find adequate housing and that he was initiating the Safety Plan placing Demi with Ms. Hamilton. Claimants had never left Demi alone with Ms. Hamilton for any period of time.

In the above passage, the reader begins not in the plaintiffs’ point of view, but in a semi-omniscient point of view that begins closest to their child Demi’s viewpoint with the words “the events that led to his death. . .” It seems that the reader may be about to follow Tyler and Cook with the words “Ms. Cook and Mr. Tyler went to the store. . . .” But it turns out that the reader is a fly on the wall watching them leave. After that the focus shifts to Ms. Adams and then Mr. Flannary. After bouncing around to several different individuals, readers eventually return to Cook and Tyler at the end.

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174 Id.
175 See Id.
176 See Id.
177 See Id.
178 See Id.
179 See Id.
If instead the writer had wanted to convey the shock that Tyler and Cook felt upon returning home to find their child missing, the writer could have stayed with Tyler and Cook in the beginning like so:

Ms. Cook’s and Mr. Tyler’s son Demi was alive and in his parents’ care on November 4, 2004. At that time, Cook and Tyler were living with their son at Robin Adams’ apartment. Ms. Cook and Mr. Tyler went to the store and left Demi with Ms. Adams at her apartment.

After Ms. Cook and Mr. Tyler returned from the store, their son was gone. They learned that Michael Flannary, a Case Manager 1 (“CM1”) with the DCS, had placed Demi in a Ms. Hamilton’s custody. Immediately, Cook and Tyler began attempting to contact Mr. Flannary. . .

In this version, the writer can mention later that Cook and Tyler learned of Flannary’s visit and provide the details that they learned at the later meeting. Thus the readers stay with Cook and Tyler through the events. If a person were to step into Cook and Tyler’s shoes, these two people left for the store. And when they came home, their child was gone. By ordering these events on Cook and Flannary’s timeline, the writer might better convey the shock of their experience for the reader.

V. Chronology Arranged from the Character or Client’s Point of View

Chronology is one of the keys to bringing to life the intimate point of view illustrated in the better examples above. Large-scale, fiction-style chronology can be fairly easily adapted in Appellate Briefs.

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180 See generally Id.
181 See generally Id.
182 See generally Id.
183 See generally Id.
184 See generally Id.
185 See generally Id.
A. Fiction Chronology from the Viewpoint Character’s Lens

In fiction, if the story belongs to that character, then the writer may include pre-conflict events that shaped the character’s view of the conflict. The chronology of events begins at the point that the story began for that character. This process establishes greater empathy for the protagonist. For instance, in the movie Mystic River, the theme is likely that in an extremely patriarchal subculture, the most violent and powerful prevail. The story begins with three friends, Jimmy, Dave, and Sean playing on a curbside. Two older men pull up in a car. One of them berates the boys for writing in the cement. The man discovers that the softer child, Dave, lives further away. The man tells Dave that he’s taking him home to see his mother. He bangs on the roof of the car and says, “Get the fuck inside!” Dave gets in the car. A scene later, Dave is locked in a basement. He begs, “Please no more. Please no more.” At this point in the story, viewers identify with Dave rather than the kidnappers.

Later, Dave escapes, grows to adulthood, and becomes the primary suspect in the murder of Jimmy’s daughter, Katie. Although some clues tie Dave to the crime, viewers still

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187 See Id.; see also Christopher Vogler, The Writer’s Journey 81-98, 212-213 (Michael Wiese Productions 1998)(discussing how both the plot and the protagonist’s arc begin in what he labels “the ordinary world”).
188 See Id.
189 See generally Id.
191 Id.
192 Id.
193 Id.
194 Id.
195 Id.
196 Id.
197 Id.
198 Id.
199 Id.
200 See Id. In class discussions in Appellate Advocacy at Golden Gate University School of Law in the Fall 2008, Spring 2009, Fall 2009, Spring 2010, and Summer 2010, where the author has used this movie as an in-class exercise, students unanimously agreed that they empathized with Dave and not the kidnappers.
201 Mystic River, supra n.191.
empathize with Dave and hope that someone else committed the crime.\textsuperscript{202} Viewers likely react differently to Dave than they do to the kidnappers in part because the story began in Dave’s life before any trauma.\textsuperscript{203} Then he became an innocent victim before he was ever a suspected murderer.\textsuperscript{204} In contrast, viewers know nothing about the kidnappers other than that they kidnapped a little boy and kept him in a basement.\textsuperscript{205}

To truly get inside a character’s skin, a reader will not merely know the character when the story begins; the reader will experience events not necessarily as they are, but as the character experiences them at that moment.\textsuperscript{206} For instance, in \textit{A Step from Heaven}, Korean toddler Young Ju has just arrived in America, and with her family she goes to “Gomo’s” house and meets a man who says to call him “Uhing Kel Thim.”\textsuperscript{207} To Young and to the reader, this person with this odd title or name may seem awfully foreign.\textsuperscript{208} As Young Ju grows and learns English, she visits Gomo’s house again and sees the man who she calls “Uncle Tim.”\textsuperscript{209} The reader realizes that “Uhing Kel Thim” is “Uncle Tim,” and he is actually her uncle, the husband of her Gomo, her aunt.\textsuperscript{210} The reader has experienced a taste of what it is actually like to be a toddler immigrating to a foreign country where people speak a foreign language.\textsuperscript{211}

\textsuperscript{202} See \textit{Id.}. In the same discussions referenced \textit{supra} n. 199, students unanimously agreed that they still empathized with Dave and did not want him to be the murderer. However, in each semester, some students suspected that he might be the murderer because his kidnapping might have warped him psychologically.

\textsuperscript{203} See \textit{Id.}

\textsuperscript{204} See \textit{Id.}

\textsuperscript{205} See \textit{Id.}

\textsuperscript{206} Cf. Le Guin, \textit{supra} n.37, at 84(discussing how narrator Huck Finn misinterprets what he sees).

\textsuperscript{207} See \textit{An Na, supra} n.150, at 24.

\textsuperscript{208} See \textit{Id.}

\textsuperscript{209} \textit{Id.} at 36.

\textsuperscript{210} See \textit{Id.}

\textsuperscript{211} See \textit{Id.}
B. Viewpoint Party’s Chronology in Appellate Briefs

In writing an appellate statement of facts, the writer can similarly place readers in the client’s point of view by beginning the statement of facts where the story began for the client and relating that story as the character experiences it.\footnote{See Foley and Robbins, supra n.3, at 475-480.} The Supreme Court’s opinion and the Petitioner’s brief in \textit{Brown v. Illinois} provide a great contrast between effective and ineffective use of this point of view chronology.\footnote{See \textit{Brown v. Illinois}, 422 U.S. 590 (1975).} In that case, the Court held that Miranda warnings did not purge the taint of a “flagrantly” illegal arrest.\footnote{See \textit{Id.} at 604-605.} The Court effectively used chronology to place readers in Brown’s point of view in the passage below:

As petitioner Richard Brown was climbing the last of the stairs leading to the rear entrance of his Chicago apartment in the early evening of May 13, 1968, he happened to glance at the window near the door. He saw, pointed at him through the window, a revolver held by a stranger who was inside the apartment. The man said: ‘Don't move, you are under arrest.’ App. 42. Another man, also with a gun, came up behind Brown and repeated the statement that he was under arrest. It was about 7:45 p.m. The two men turned out to be Detectives William Nolan and William Lenz of the Chicago police force. It is not clear from the record exactly when they advised Brown of their identity, but it is not disputed that they broke into his apartment, searched it, and then arrested Brown, all without probable cause and without any warrant, when he arrived. They later testified that they made the arrest for the purpose of questioning Brown as part of their investigation of the murder of a man named Roger Corpus.\footnote{Id.}

If the Court had begun in the detectives’ point of view, the paragraph above could begin with the murder and the evidence that led the officers to Brown’s house. Instead, the murder is not mentioned until the end. Moreover, Brown does not experience having “a detective” point a gun at him, rather a “stranger” points a gun at him.\footnote{\textit{Brown}, 422 U.S. at 592.} A “man” says “ ‘Don’t move. . . .”\footnote{\textit{Id.}} It is only later that he realizes that these men are police detectives, and it is only later that the reader learns
this information as well.\textsuperscript{218} Thus the reader experiences events just as Brown did.\textsuperscript{219} As I walked in Brown’s shoes, the search and seizure made me feel violated.\textsuperscript{220} Not surprisingly, the Supreme Court reversed the judgment against Brown and remanded his case.\textsuperscript{221}

However, in this particular instance, the Petitioner’s appellate brief made less use of point of view chronology than the Court’s opinion. Rather than starting with Brown, the Petitioner’s Brief starts with the officers:

Officer Nolan testified that on May 13, acting pursuant to official police department orders, he and Officer Lenz proceeded to petitioner's apartment (R. 433), arriving between 4:30 and 5:00 p.m. (R. 434) The pair met a third detective at the apartment, Officer Wasmund, who remained outside, at street level, as the two entered the building. (R. 401)

Officer Nolan, a detective for five and one-half years (R. 431), and Officer Lenz, a member of the police force for fourteen years and a detective for twelve years (R. 3, 4), broke into petitioner's apartment upon finding no one home. Possessing neither a search or arrest warrant (R. 103) nor probable cause for arrest (Illinois Supreme Court Opinion, p.2), the two detectives searched the apartment (R. 21, 412) and laid in wait, concealed, for petitioner's return for three hours. (Opinion, p. , R.434) When Petitioner arrived at approximately 7:45 p.m. (R. 4, 57) and began entering his apartment, Nolan and Lenz jumped out at him with drawn guns. (R. 19, 102, 103, 462) Petitioner, a Black man did not know at this time that his two white assailants in street clothes were police officers. (R. 128) Officer Lenz told petitioner that he was under arrest. (R. 20, 71) Petitioner denied being Richard Brown. (R. 21, 72, 103)

The two arresting officers then handcuffed petitioner's hands behind his back (R. 104, 463), pushed him against a wall (R. 462), and searched his person. (R. 462)\textsuperscript{222} This passage does tell a story, and Brown is not wholly un-empathetic.\textsuperscript{223} However, the readers do not experience events in the same chronology as Brown, and thus the passage presents his case in a less compelling fashion than the Court’s opinion does.\textsuperscript{224}

\textsuperscript{218} Id.
\textsuperscript{219} See Id.
\textsuperscript{220} See generally Id.
\textsuperscript{221} Id.
\textsuperscript{222} Br. for Petr. at 4, Brown v. Illinois, 422 U.S. 590 (1975).
If we were to wind back the clock and step in Brown’s shoes the day he was arrested and report that in chronological order from Brown’s point of view, that report would not look like the above passage. When Brown came home to his apartment, he did not know yet know anything about Officers Nolan and Lenz meeting Officer Wasmund at the apartment. He did not know how much experience they had. He only knew that he came home to find a gun in his face. The information about the officers is information that he discovered later, likely at the hearing. To place the readers in Brown’s shoes, the writer could have started with Brown coming home to a gun in his face. After telling that story, the writer could follow Brown to the hearing and relay that the officers testified to their years of service and explained that they met outside the apartment to break in and arrest Brown.

VII. Detailed Chronological Play-By-Plays

To fully flesh chronologies like those above, both the fiction writer and the lawyer may include the details in a chronological play-by-play as well. By immersing the reader in the details, the writer goes beyond simply reporting events in the order that the character experienced them and delves into the relevant milliseconds of those events. These details can include action, sensation, and emotion.

223 See Id.
224 See Id.
225 See Brown, 422 U.S. at 592.
226 See Id.
227 See Id.
228 See generally Id.
229 See generally Id.
230 See generally Id.
231 Cf. Gardner, supra n. 29, at 24-25 (discussing how a tale writer convinces a reader by documenting the story moment by moment); see also Francine Prose, Reading Like a Writer 193-207 (Harper Perennial 2006)(discussing how details create a convincing story); but cf. Stephen King, On Writing 173-180 (Pocket Books 2000)(encouraging inclusion of some details while cautioning against including irrelevant details).
232 See supra n.230; see also Ann Hood, Creating Character Emotions 10 (Story Press 1998)(discussing how labeling an emotion does not reproduce the emotion).
A. Fiction Techniques

In fiction, the writer can keep revisiting and documenting a character’s experience to capture each breath of emotion, sensation, thought, and action and to recreate the character’s experience for the reader to convey a theme. For instance, in the novel Speak, play-by-plays place reader in high school freshman Melinda’s shoes as she struggles to speak out about the rape she experienced just before school began. The theme behind Melinda’s struggle is likely that we stand up for ourselves and others when we speak out about wrongs. Melinda is silent at the beginning of the novel, and readers are unsure what has happened to her. She gives readers bit and pieces of her story, and eventually, they realize that she was raped just before the school began. In the narrative below, author Laurie Halse Anderson provides a moment-by-moment account of Melinda’s struggle to finally scream to free herself from her attacker:

He grabs my wrists. I try to pull them back [sic] and he squeezes so tight it feels like my bones are splintering. He pins me against the closed door. . . . His mouth is on my face. I twist my head. His lips are wet, his teeth knock against my cheekbone. I pull my arms again [sic] and he slams his body against mine. I have no legs. My heart wobbles. His teeth are on my neck. The only sound I can make is a whimper. He fumbles to hold both my wrists in one hand. He wants a free hand. . . .

As a reader, I feel how hard it is for Melinda to speak, and at the same time, I want her to scream and save herself. Thus, this vivid passage internalizes her theme for me.

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234 See Id.
235 See Id.
236 See Id.
237 Id. at 194.
238 See Id.
239 See Id.
In contrast, a summary creates a less vivid experience for the reader and fails to instill the theme so deeply.\textsuperscript{240} For instance, the paragraph above could be reworded less vividly as follows:

Holding me to the wall, he tries to kiss my cheekbone. I struggle to get away but can’t. I whimper as he holds my wrists with one hand.\textsuperscript{241}

Similarly, reporting the action out of chronological order pushes the reader away.\textsuperscript{242} For example:

He held my wrist in one hand. I had tried to get away earlier when he kissed my cheekbone.\textsuperscript{243}

In this rewrite, the reader is not fully there for Melinda’s struggle to speak about how she has been wronged and does not digest the theme as fully.

To reproduce the experience and convey the theme, these chronologies must contain details rather than conclusions.\textsuperscript{244} For instance, the reader vividly recalls physical sensations when the writer describes those sensations in detail rather than merely labeling them with a single word like “pain,” “hot,” or “cold.”\textsuperscript{245} Thus when Liesel steals the book, \textit{The Shoulder Shrug}, from the burn pile in \textit{The Book Thief}, the reader almost feels the heat from the book in the section below:

They began to leave the scene of the crime, and the book was well and truly burning her now. \textit{The Shoulder Shrug} had applied itself to her rib cage. . . .

Smoke was rising out of Liesel’s collar.

A necklace of sweat had formed around her throat.

\ \textsuperscript{240} Cf. Gardner, supra n.29, at 24-25.
\textsuperscript{241} See Anderson, supra n. 232, at 194 (paraphrased).
\textsuperscript{242} Gardner, supra n.29, at 112.
\textsuperscript{243} See Anderson, supra n. 232, at 194 (paraphrased).
\textsuperscript{244} See n. 230 supra.
\textsuperscript{245} See generally Gardner, \textit{The Art of Fiction} 111-124.
Beneath her shirt, a book was eating her up.\textsuperscript{246}

If instead, Marcus Zusak had simply written, “the book was hot,” the reader would not feel the weight of Liesel’s discomfort.\textsuperscript{247} Therefore, the reader would not so deeply feel the theme: that humans are so brutal and beautiful that they haunt even Death himself.\textsuperscript{248}

Similarly, when a feeling is labeled with a single word like “love,” “hate,” or “guilt,” the reader does not experience the feeling.\textsuperscript{249} For instance, in Mystic River the novel, the reader steps outside of Jimmy and his freedom from guilt when Jimmy recalls murdering Dave and Just Ray Harris in the passage below:

The truth was Jimmy never felt much guilt for anything he’d done. Sure, he’d arranged with a buddy to have the Harrises sent five hundred bucks over the last thirteen years, but that wasn’t as much guilt as it was good business sense— as long as they thought Just Ray was alive, they’d never send anyone looking for him.\textsuperscript{250}

This freedom from guilt works here because the novel’s theme is likely that to survive in a patriarchal society men must be cruel and suppress emotion and empathy.\textsuperscript{251} Since Lehane likely intends the book as a critique of the emotional suppression of males in a patriarchal society, Lehane probably intended to distance the reader from Jimmy and his lack of guilt.\textsuperscript{252}

When instead the writer intends to plant suggestions, chronological play-by-plays can be effective.\textsuperscript{253} For instance, I crafted the paragraph below to illustrate how to lead a reader to a conclusion without ever stating the conclusion:

Erica entered the room. Fred shoved the papers in his bag and pushed the bag under his

\textsuperscript{246} Marcus Zusak, supra n.197, at 122.
\textsuperscript{247} See Id.
\textsuperscript{248} See Id. at 122, 540.
\textsuperscript{249} See Hood, supra n.231, at 10 (discussing how labeling an emotion does not reproduce the emotion).
\textsuperscript{250}Dennis Lehane, Mystic River 443 (HarperTorch 2001).
\textsuperscript{251} See Id.
\textsuperscript{252} See Id.
\textsuperscript{253} Cf. Prose, supra n. 46, at 200 (discussing how details can lead to a conclusion about a character; Hood, supra n. 232, at 14 (discussing how details can be used to suggest emotions).
“Hey Fred, I can’t find my notebook. Have you seen it?”

Fred pushed the bag further away. “Nope, maybe you should check downstairs.”

Erica glanced around the room. She stopped and stared at the bag. “Do you think maybe you accidentally put it in your bag?”

No, I just cleaned it out.”

After reading this paragraph, most readers would believe that Fred is hiding something from Erica. In the paragraph below, the chronology is destroyed.

Erica asked about her notebook. Fred said that he had cleaned out his bag and told her to look downstairs. Fred had shoved some papers in his bag and pushed it under his desk when Erica walked in.

The reader likely views this paragraph as insignificant and likely makes no conclusion.

B. Application of these Techniques to Appellate Briefs

The chronological play-by-plays that create significance can be used in persuasive legal writing.254 For instance, attorneys for amici curiae employed similar techniques in their brief in Michigan v. Bryant mentioned earlier in the section on wide-shots.255 In that case, the Court is considering whether admission of a dying declaration violates the defendant’s Sixth Amendment confrontation rights.256 The play-by-plays below place the reader in the officers’ point of view during that dying declaration:

On April 29, 2001, Detroit police responded to a report of a shooting and found a car idling in the parking lot of a filling station; the car’s operator, Anthony Covington, lay on the ground next to the still-open driver's side door, bleeding profusely from a gunshot wound to his torso. (J.A. 7, 11). In response to the police inquiry “what happened?” (J.A. 254) Cf. Mary Beth Beazley, A Practical Guide to Appellate Advocacy 146-147 (Aspen Publishers 2006)(discussing how details can be used to suggest legal conclusions); Shapo, supra n. 36, at 414-415 (encouraging chronological narratives and inclusion of details).


256 See Id.
19. Covington, in obvious and severe distress, told police that his neighbor “Rick,” later identified as the Respondent, Richard Bryant, shot him through the back door of Bryant’s house a few blocks away. (J.A. 12-13). Covington told police that the shooting had transpired within the last half hour. (J.A. 39). Covington had managed to drive away from the scene of the shooting and had made it as far as the gas station. (J.A. 23). After making these statements to the police on the scene, Covington was taken to a nearby hospital by ambulance. He died from his wounds a few hours later. (Pet. App. at 10a). The details of the chronology unfold as the officers experienced them. The first thing officers see is the idling car. Then they spot the victim lying next to the open door. He’s not simply a gunshot victim. He’s “bleeding profusely” from his torso. As a reader, I feel their anguish and want to help Covington achieve justice.

This brief also plants a couple of suggestions for the reader by using detailed chronological play-by-plays. First, Anthony Covington went to great lengths to report the crime. Second, before police arrived, Covington opened the door to get out of the car and fell to the ground. Third, Covington’s death was imminent. These suggestions tend to make the reader want the court to allow dying declarations to be used as evidence.

If instead the writer had omitted the details, the brief writer would have failed to re-create the emergency for the reader and plant these suggestions. For instance:

Police went to a gas station to respond to a shooting report. The gun-shot victim, who later died, told police that his neighbor, the defendant, shot him, and that he traveled to the gas station to contact police.
Similarly destroying the chronological play-by-plays reduces vividness and fails to plant such strong suggestions. For example:

On April 29, 2001, a few hours before dying from gunshot wounds to his torso, Anthony Covington told the police that Richard Byrant, known to him as “Rick” shot him in the last half hour. Covington was on the ground near the car when he spoke to police. Richard Bryant, Covington’s neighbor, had shot him earlier at the house. When the police found Covington, he was bleeding profusely. Covington drove to a gas station to report the shooting, and he was in distress at the time he made the statement to the police. His car was idling. The door was open. The police started the inquiry by asking him what happened.

In the above example, the reader has to work to reach the conclusions suggested earlier and may never reach those conclusions.

IX. Tools Used to Construct Vivid Viewpoint

Both fiction writers and lawyers can draw from a set of tools to recreate a moment-by-moment account. In fiction, vivid chronological play-by-plays are composed of a set of tools that recreate the experience for the reader. These tools can include improper grammar, illogical sentences, active voice and action verbs, adverb elimination, seamless internal monologue tags, seamless dialogue tags, metaphors, and character specific word choice. For the lawyer unfamiliar with these terms, a monologue tag is a set of words that labels a character’s thoughts, such as “she thought, ‘I hope this explanation is clear.’” Similarly, dialogue tags label a character’s speech. For instance, “I said, ‘I am defining these ideas for the reader.’” Stephen King touts the use of some of these tools in On Writing. He explains that his book is a guide to telepathy, complains that passive voice is circuitous, criticizes adverb use, advocates for simple dialogue tags, explains that sentence fragments can create clear images, and discusses how

\[269 \text{Cf. King, supra n.230, at 103-107, 122-128, 133, 178; Prose, supra n.46, at 16-17, 28 (praising Flannery O’Connor’s lack of adverb use and discussing how a character’s misuse of a word puts the reader in the character’s point of view).}
\[270 \text{Id.} \]
metaphors create a more vivid experience. However, fiction writers can rely more heavily on some of these tools, such as incomplete sentences and metaphors, than lawyers can.

1. Improper Grammar, Illogical Sentences, and Metaphors

   In fiction, the writer may telegraph the viewpoint character’s perception with improper grammar, illogical sentences, and metaphors. These techniques are limited in legal writing, but can be used when quoting witness testimony.

   a. Fiction Techniques

   Because a character’s thoughts may occur as metaphors or may break the rules of grammar and logic, the skilled fiction writer may write as the character thinks, perceives, and speaks. The writer uses words and sentence construction with the point of view character in mind. For instance, in Reading Like a Writer Francine Prose explains that sentences may be illogical if the viewpoint character would think or speak in such an illogical way. Prose illustrates that in Dead James Joyce writes that Lily, the care-taker’s daughter is literally run off her feet. Prose explains that readers know that Lily cannot have “literally” run off her feet. Rather the word choice places readers in Lily’s point of view because Lily herself would speak in such a way. Prose writes “The mistake . . . prepares us for the ways in which the story will play with viewpoint, with notions of truth and untruth, and with the ways that class and background affect how we use the language.”

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271 Id.
272 See Prose, supra n. 46, at 28.
273 Id.
274 Id.
275 Id.
276 Id.
277 Id.
Similarly keeping the character in mind, fiction writers may also write in incomplete sentences and use metaphors.\footnote{See King, supra n.230, at 178-179, 185, (mentioning that sometimes writers use fragments and discussing how metaphors create a more vivid experience).} These incomplete sentences can mimic the narrator’s thoughts as most people do not think in complete sentences. Rather images and thoughts appear in a stream of fragments.\footnote{See supra n.277.} Sometimes our brain also connects those fragments to our other experiences.\footnote{See supra n. 277.} Those connections to other experiences are metaphors.\footnote{See supra n. 277.} For example, when Death describes Liesel in the Book Thief, he uses metaphors and incomplete sentences in the paragraph below:

Upon her arrival, you could still see the bite marks of snow on her hands and the frosty blood on her fingers. Everything about her was undernourished. Wirelike shins. Coat hanger arms. She did not produce it easily, but when it came, she had a starving smile.\footnote{Zusak, supra n. 197, at 31.}

Again, these fragments and metaphors give the reader a clear picture of Liesel, and it is a beautiful, brutal, and haunting picture.\footnote{See Id.}

\textbf{b. Application of Techniques to Legal Writing}

Although application of these metaphors, illogical sentences, and improper grammar techniques to legal writing is limited, in some instances the lawyer can still use these tools to establish point of view.

With respect to metaphors in legal writing, those metaphors must seek to duplicate rather than embellish. Otherwise, they can appear melodramatic and distracting.\footnote{Cf. Moore v. Liggins, 685 N.E.2d 57, 65-66 (Ind. App. 1997).} At their worst, overly stretched metaphors can be insulting and sanctionable.\footnote{Cf. Id.} For instance, in Moore v.
Liggins, a father appealed a child support order and his appellate attorney wrote: “One has only to click the TV or pick up any magazine to see colorful, bold headlines proclaiming ‘Woman wants Dead-Beat Dad Toasted over Open Flames, Broiled, Folded, Spindled and Mutilated!’”286 The attorney then compared child support order enforcement to “the Nazis' extermination of millions of ‘Jews, Hungarians, gypsies, homosexuals, and socialists in Germany. . . .”287 The court found that this over-stretched analogy was insulting and inflammatory and stated that the “brief reflects a lack of professional responsibility on the part of counsel and does little to serve the interest of the client.”288 The attorney failed to advance the client’s thematic point of view, and the court upheld the judgment of the court below.289

Although tortured metaphors can be cliché, corny, or humorous, an appropriate metaphor can paint a more vivid picture. For instance, in Hazzard v. Southern Dredging, a dredge owner sought a portion of the proceeds that the insurance company paid to compensate for the dredge’s destruction in the hurricane.290 Hazzard’s attorney places the readers in Hazzard’s shoes for the scene of the destruction with this witness quote:

The hurricane caused numerous boats and vessels around Charleston to be displaced and sunk. Dent testified, “Oh, it was like a pick up sticks. Everything was all jumbled up.” Hazzard's dredge was one of the items sunk in Southern Dredging's channel. The dredge was a total loss. 291

The use of the metaphor “pick up sticks” paints a picture for the reader.292 When I read this metaphor, I see destroyed wood jumbled in a pile just like the game of pick-up sticks.293 If

286 Id.
287 Id.
288 Id.
289 Id.
290 Hazzard v. Southern Dredging, 17 F.3d 1434, 1 (4th Cir. 1994).
292 See Id.
instead Dent had simply testified, “wood was piled up and jumbled around everywhere,” I would not have such a vivid picture.\textsuperscript{294} Thus the quoted metaphor works well for me, and I lean more towards wanting Hazzard to recover money.

Although within reason the lawyer can include metaphors in a brief, improper grammar poses a greater problem. The lawyer’s own appellate brief must comport with the rules of grammar. However, the lawyer can still quote witnesses’ colorful language to recreate vividness. For instance, in \textit{In the Interest of R.D.G.} Child Protective Services sought to terminate a mother’s parental rights to her son.\textsuperscript{295} To place the court in the case worker’s point of view regarding the mother, the state’s brief quotes the mother’s testimony: “[Barnstone] testified, ‘Pow! Pow! Pow! I haul off and knock him out the other side of the door.’”\textsuperscript{296} This quote paints a more vivid picture of the mother than could any statement that she is mentally unwell, uneducated, or violent.\textsuperscript{297}

Moreover, while an attorney’s own writing to the court must be grammatically proper, witnesses’ notes and records need not always be so.\textsuperscript{298} For instance, I imagine that an ideal child abuse investigator’s report may read somewhat like the example I crafted below:

I was in the field investigating in twenty degree weather when I received a priority 1 report of abuse and neglect. When I arrived at the house, a child sat on the front porch. Stooped over. Long, ratty hair. I looked closer. A girl. She wasn’t wearing any shoes and had on only a tank top and torn underwear. I stepped out the car. Cold. It stung. I

\textsuperscript{293} \textit{See Id.} (paraphrased)  
\textsuperscript{294} \textit{See Id.}  
\textsuperscript{296} \textit{Id.} The mother’s name has been changed here due to the confidentiality concerns in these cases.  
\textsuperscript{297} \textit{See Id.}  
\textsuperscript{298} \textit{See Id.}
shook. Why wasn’t the child shaking? She just sat there with her droopy eyes and droopy face. Tired perhaps. Hypothermia? 911. I called 911. 299

If such a report were part of the record, instead of stating, “The child was dressed inappropriately for the weather,” the appellate attorney for child protective services could quote the passage above and thus telegraph the harm.

However, such quoted material must be a part of the record, and thus these techniques have limitations. 300 In fact, I had to craft my own example above to achieve the effect I wanted, and such crafting is inappropriate and unethical in an appellate brief. In the real world, the average witness, client representative, or collateral 301 may not have the recall skills or communication abilities to produce the kind of detailed report above. Moreover, while borrowing fiction-techniques is useful, the lawyer must ensure that the report itself is not fictional. 302

Limitations and dangers of fictionalizing notwithstanding, if lawyers study these techniques, their appellate briefs can establish greater closeness. 304 The “inappropriately dressed child” is at least more likely to become “a sleepy-looking child wearing only underwear outside in twenty degree weather.”

2. Adverb-Free Action Verbs in Active Voice

While lawyers are limited in their use of metaphors, improper grammar, and illogical construction, both fiction writers and legal writers can use action verbs in active voice to capture

299 This description is a fictional report that I wrote. Care must be taken to ensure accuracy in an actual report.
300 See generally Duong, supra n. 7 (recognizing the role of story-telling in law but also drawing boundaries).
301 “Collateral” is a term that investigators use for witnesses who have information but will not called at trial.
302 See generally Id.
303 See generally Id.
304 See generally Chestek, supra n. 59.
the individual moments of an experience.\textsuperscript{305}

\textbf{a. Fiction Techniques}

In fiction, these verbs can work well to place the reader in the protagonist’s shoes for each moment of the action.\textsuperscript{306} They work particularly well to convey danger. For instance, in my novel \textit{Disobedient}, the protagonist Cori loves her parents despite the fact that her step-father sexually abuses her, and her mother, an emotional abuser, enables him.\textsuperscript{307} The novel’s theme is that love does not require obedience.\textsuperscript{308} For readers to best feel that theme’s full weight, they must step inside Cori’s shoes and experience her fear and discomfort. Thus, to place readers in Cori’s shoes I used action verbs and active voice in the passage below, which occurs just after Cori has tried to tell her mother about her step-father’s abuse:

\begin{quote}
Mom grabbed a glass from the soapy water, squirted some Dawn in it, and filled it with water. She grabbed Cori’s hair and yanked her head back. She shoved the glass up to her mouth.

“Drink it.” Mom shoved the glass further. Some of the water ran down Cori’s chin. The rest flooded the back of her throat. She choked.
\end{quote}

I use this example with my students. When they read it, their response is “call CPS.” This response is consistent with the theme; even though Cori loves her parents she must disobey them and tell on her father.

In contrast, pairing the verb with an adverb creates a less vivid experience that can fail to immerse the reader in the protagonist’s point of view.\textsuperscript{310} The adverb is a couple of extra beats

\textsuperscript{305} See King, supra n.230, at 122-124(discussing how passive voice is circuitous).
\textsuperscript{306} Cf. Id.
\textsuperscript{308} Id.
\textsuperscript{309} Id.
\textsuperscript{310} See Le Guin, n.37, at 61-62; \textit{see also} King, n. 230 at 124-126 (criticizing adverb use in general).
after the verb, and thus the thoughts do not feel like “real-time” to the reader.\textsuperscript{311} For instance, in the novel Eragon, Eragon has just learned that his brother is moving, and his reaction to the move is expressed in the adverbs below:

\begin{quote}
he sat down \textit{roughly}. . . \textit{Impulsively}, he broke a dead branch with his foot. . .

As he talked, his voice grew \textit{steadily} louder until he was yelling \textit{pointlessly} into the air. He ranted until his emotions were spent, then \textit{ineffectually} punched the ground.\textsuperscript{312}
\end{quote}

Not only is this scene less than vivid, but readers may wonder whether it is possible to yell into the air pointedly or to effectively punch the ground. For me as a reader, I know that the writer wants me to think that Eragon is upset, but I do not feel it.\textsuperscript{313} I am left grasping at the theme.

The scene could be made more vivid by deleting the adverbs and replacing them with action verbs and action that conveys the roughness of the scene.

\begin{quote}
He plopped down. Something stabbed his buttock. A stick. He shoved it out of the way. . . He broke a dead branch with his foot. . . As he talked, his voice grew louder until he was yelling into the air. He ranted until his emotions were spent, then punched the ground.\textsuperscript{314}
\end{quote}

\section*{b. Fiction Techniques Applied to Appellate Briefs}

These action techniques can often easily be applied to the appellate brief to recreate the client’s experience.\textsuperscript{315} For instance, in \textit{Magwood v. Culver} the government sought to prevent the habeas corpus release of a mentally ill murder convict.\textsuperscript{316} To establish empathy for its position,
the government created empathy for the victim and placed readers as witnesses at the scene of
the crime as it occurred. To do so, the government used action verbs in the passage below:

When Sheriff Grantham arrived for work, Magwood got out of his car and confronted
Sheriff Grantham. Magwood shot the sheriff three times, once each in the head, face, and
chest. He then fled. As Magwood sped away. . .

“[A]rrived,” “confronted,” “shot,” “fled,” and “sped”— these words make me feel as though I
am sitting at the edge of my seat watching an action movie. I am there watching this crime
unfold. But note this distance is moderate. Readers see the crime unfold as though they are
standing in the parking lot, but they cannot step into the shoes of deceased Grantham. Grantham
cannot testify. Therefore, the distance is limited by the trial record.

In contrast, Magwood’s attorney likely wanted to create greater distance between
Magwood and the murder scene. Magwood’s attorney did so through more passive verbs:

Petitioner was released from jail at the end of his sentence. On March 1, 1979, as
petitioner's hallucinations grew more vivid, petitioner approached Sheriff Grantham in
front of the jail. After exchanging greetings and in plain view of the sheriff's deputies,
petitioner shot and killed the sheriff. Petitioner then exchanged fire with a deputy, got
into his car, and drove home. Upon arriving there, petitioner sat unarmed on his front
porch until arresting officers arrived.

“[W]as released,” “exchanging greetings,” and “arriving” all slow the action down. While the
attorney does use some action verbs, the more benign “approached” replaces “confronted” and

317 See Id.
318 Id.
319 See Id.
320 See Id.
321 See Id.
322 See Id.
323 See Beazley, supra n. 6, at 142-148 (explaining that the citations to the record below must be accurate); 5 Am.
Jur. 2d Appellate Review § 503 (2010)(explaining that appeal is limited to the record)
325 Id.
326 See Id.
“drove home” replaces “sped.” Moreover, Magwood “exchanged fire” with the deputy. Magwood did not “shoot at the deputy,” and the deputy did not “shoot back.” However, the writer cleverly chose action verbs to place readers in the moment during Magwood’s passivity. Magwood “sat unarmed on his front porch until arresting officers arrived.” Overall, the evidence is the same, and it is accurate. But reducing the action verbs diminishes the vividness of the violence. Then readers end with a vivid picture of a passive Magwood.

3. Dialogue Tags and Internal Monologue Tags

Unlike these action verbs that place the reader inside the protagonist, in both fiction works and appellate briefs, dialogue tags and internal monologue tags can take the reader outside of the protagonist. Dialogue tags accompany quotations and denote who is speaking. “He said” is a dialogue tag. Internal monologue tags label thoughts. “She thought” is an internal monologue tag. The more awkward and obvious the tag the more distance the tag places between the reader and the character/client. In some instances, the tag reminds the reader that the reader is simply reading a book or a brief.

a. Fiction Techniques

Skilled fiction writers can weave seamless tags into their work. Unfortunately, writers sometimes get overly creative with tags and yank the reader from the vivid dream.

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327 See Id.
328 See Id.
329 See Id.
330 See Id.
331 See Id.
332 See Id.
333 See Id.
334 Cf. King, supra n.230, at 126-128 (criticizing awkward dialogue tags).
For instance, if the tag indicates an unnatural way of speaking, the reader may have trouble believing the dialogue.\(^3\) For example, Bella Swan of \textit{Twilight} is known for saying things like, “Stop looking at him,” I hissed.\(^3\) The reader may wonder whether Bella’s forked tongue snaked out of her mouth as she spoke. In so wondering, the reader is snatched from the dream and becomes aware of the writing.

But even more ordinary tags can create some distance.\(^3\) For instance, Bella’s tags in the example below distance the reader from her:\(^3\)

“So you like him then?” She wasn’t about to give up.

“Yes,” I said curtly.

“I mean do you really like him,” she urged.

“Yes,” I said again blushing.\(^3\)

In this example, the adverb “curtly” takes the reader outside of Bella. Unless we are acting self-consciously or specifically choosing our tone, most people are not so aware of their tone at the moment that they speak. To make readers aware of Bella’s feelings, the writer could have including Bella’s thoughts or physical sensations instead. Similarly, “I said again blushing” does not happen in the moment. If we were truly inside Bella the writer might state something like, “‘Yes.’ ” My face grew hot.”

In contrast, the reader feels closer to Melinda in \textit{Speak} when the writer uses screenplay-like dialogue tags in the passage below:

Me: “I don’t feel well.”

\(^3\) See Id.
\(^3\) See Myer, n. 136, at 42.
\(^3\) See King, \textit{supra} n.230, at 126-128.
\(^3\) See Myer, \textit{supra} n. 136, at 205.
\(^3\) Id.
Mom pats my back.

Mom: “You must be sick. You’re talking.”

Even she can hear how bitchy that sounds. She clears her throat and tries again.

Mom: “I’m sorry. It’s nice to hear your voice. Go back to bed, I’ll bring a tray before I leave. Do you want some ginger ale?”

In this passage, the reader is inside Melinda. Melinda never ventures outside of herself to hear her own voice.

In sharper contrast, in *We Disappear*, Scott Heim eliminates all distance when he simply includes a line of action to indicate which character is speaking in the dialogue below:

My mother sat again. “I thought you quit biting your fingernails.”

“I tried, but I gave up.”

She took a sip from the smaller glass. “Did she tell you about the football?”

Similarly, the skilled fiction writer will avoid internal monologue tags that jar the reader from the viewpoint character’s perspective. Hugo and Nebula Award winning novelist Ursula K. Le Guin cautions against tags such as “‘Heavens,’ Aunt Jane thought, ‘he’s going to eat that grommet.’ ” Le Guin explains that the quotations over-emphasize the material; in other words, this tag draws attention to the tag and yanks the reader from the story. Similarly she believes that italicizing the thoughts overemphasizes them. She recommends tags such as,

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340 Anderson, *supra* n. 233 at 163.
342 Le Guin, *supra* n. 37 at 103.
343 Id.
344 See Id.
345 Id.
“As soon as she heard Jim shout, Aunt Jane knew that Fred had swallowed the grommet after all.”

However, it’s possible to even more seamlessly indicate thought and omit any words demarcating thought altogether. For instance, in the passage below from *A Step From Heaven*, the writer does not label thought:

Look, Young Ju, Apa says. This is your new brother, Park Joon Ho. Is he not beautiful? Inside there is a wiggly worm with no hair. I touch his head and feel only a little fur. Where is his hair? It will grow later, Apa says. I look back at the worm. Maybe his hair will grow back curly because he was born in Mi Gook.

The reader knows that “Where is his hair?” and “Maybe his hair will grow back curly because he was born in Mi Gook” are Young Ju’s thoughts. There is no interruption that rips the reader from the vivid dream. Thus the reader experiences the theme.

**b. Application of Fiction Techniques to Appellate Briefs**

The appellate attorney can strategically use or eliminate these dialogue tags or internal monologue tags to create or eliminate distance. For instance, in a habeas corpus case involving a mentally ill murder defendant, the state’s initial reply to the petition for United States Supreme Court review creates too much distance with the dialogue and monologue tags below:

Thomas Weeks, a Coffee County Deputy Sheriff, testified he was employed as the county jailer on March 1, 1979, under Coffee County Sheriff Neil Grantham. The witness stated he observed appellant, whom he recognized as a former jail inmate, sitting in a car parked

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346 *Id.*
347 An Na, *supra* n.150, at 37-38.
in Sheriff Grantham's parking space at approximately 6:45 a.m. Shortly before 7:00 a.m., he observed Sheriff Grantham drive up and park his vehicle.\textsuperscript{348}

The dialogue tags “testified” and “stated he observed” and the internal monologue tags “whom he recognized” and “observed” create unnecessary distance from Weeks during Grantham’s murder. Instead of placing readers at the scene of the murder, these words plant an image of Weeks testifying at trial.

Instead the writer should place the reader at the scene of the murder. In a later brief, the state not only placed the reader at the scene but even gave the reader a glimpse inside the defendant’s state of mind:

On the morning of March 1, 1979, Magwood lay in wait for Sheriff Grantham in the Coffee County Jail parking lot. When Sheriff Grantham arrived for work, Magwood got out of his car and confronted Sheriff Grantham. Magwood shot the sheriff three times, once each in the head, face, and chest. He then fled. As Magwood sped away, he exchanged gunfire with Deputy Thomas Weeks, who witnessed the murder.\textsuperscript{349}

Although the example above presumably came from Weeks’s memory and observation, there are no monologue tags so indicating.\textsuperscript{350} That being said, the narrative above doesn’t report the thoughts of Grantham, Magwood, or Weeks, just the events that Weeks witnessed.\textsuperscript{351}

However, when removing monologue tags means that the attorney is speculating about the witnesses’ thought process, the attorney should not delete the tag. In fact, in the same case, Billy Joe Magwood’s paranoid schizophrenic state of mind was potentially a mitigating factor regarding the death penalty.\textsuperscript{352} His attorney chose to use monologue tags to report Magwood’s state of mind as follows:

\textsuperscript{350}\textit{See Id.}
\textsuperscript{351}\textit{See Id.}
\textsuperscript{352}\textit{Magwood v. Patterson}, 30 S.Ct. 2788, 2793 (2010).
Petitioner “was a sound person before his service with the United States Army in Viet Nam,” for which he received a Purple Heart. Pet. App. 105a. After that service, however, he began to develop paranoid schizophrenia and started abusing his pain medication. Id. In 1975, he pleaded nolo contendere to illegally possessing the medication and was sentenced to four years in the Coffee County, Alabama jail. During that confinement, petitioner was unable to obtain medication or treatment for his mental illness, and his condition worsened.

By the end of his jail term, petitioner had developed full-blown schizophrenia. He believed that the Army was sending him orders through surgically implanted communication devices and warning him that Coffee County authorities, including Sheriff Cornelius Grantham, were interfering with his “missions.” Petitioner went so far as to send letters to the Veterans Administration, imploring it to release him from its command by removing the implanted communication devices.

The reader stands back and sees Magwood’s insanity labeled as “mental illness” and “paranoid schizophrenia.” Then the language “he believed” tags Magwood’s thoughts. Yet, although the reader is not inside Magwood’s head experiencing his insanity in the above example, the passage comes fairly close to Magwood’s mind. Thus the brief is appropriate and still establishes some empathy. To speculate as to the internal monologue running through Magwood’s mind would be to fabricate evidence.

In this regard, legal writing differs from fiction. The skilled fiction writer instead might write:


354 See Id.
355 See Id.
356 See Id.
357 See Id.
358 See
Note that none of Magwood’s thoughts are labeled here. Rather it’s understood that these ideas are running through his head. However, absent some recorded rant by Magwood, this passage is pure speculation and thus inappropriate in an appellate brief. With that said, if the trial court were to enter a quote, recording, or testimony of such a rant into evidence, it could appropriately be used at the appellate level and would vividly convey Magwood’s experience to readers.

Although Magwood’s attorneys may want to vividly convey Magwood’s experience, they likely will want to distance readers from the shooting. Thus they could have used some of the distancing techniques that the state used in its reply to the petition for certiorari. So Magwood’s attorneys could have stated that Weeks testified that he observed that he remembered that the shooting happened, but perhaps not all in one sentence as then the techniques become tedious and obvious.

**Conclusion**

As seen above, in some instances, appellate attorneys are already successfully using fiction point of view techniques to establish greater client empathy in appellate briefs. Lawyers can establish this empathy by studying distance, viewpoint character chronology, and vivid play-by-play techniques such as metaphors, action verbs, active voice, and seamless dialogue and monologue tags. However, in so doing, lawyers must remain true to the record and must follow the rules of grammar when they are not quoting. In mastering these techniques, the appellate attorney can tell subjective human truths.

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359 See supra n. 358.
360 See supra n. 358.
361 See Beazley, supra n. 6, at 142-148 (explaining that the citations to the record below must be accurate); 5 Am. Jur. 2d Appellate Review § 503 (2010)(explaining that appeal is limited to the record).