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WRITING THE STATEMENT OF THE CASE: THE "BEAR" NECESSITIES

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The statement of the case may well be the foundation of any brief. If the judge can read what happened and feel one's client has been wronged, she is much more likely to view the client's legal arguments sympathetically. Thus, we are taught to write persuasively in the statement of the case: "to kick the judge in the stomach with the force of our story."

Unfortunately, for many it remains a mystery how one writes a persuasive statement of the case. Law schools are much quicker to supply a list of "don'ts" than one of "dos": Don't lie; don't omit facts; don't "mischaracterize"; don't be obvious; don't get caught. Legal ethics aside, one might wonder what is left. It is, in fact, easy to listen to a lecture on writing a statement of the case and to leave feeling that such a creature cannot be written.

And yet, hope springs eternal. When writing a statement of the case, an attorney has three effective and subtle tools of persuasion at his disposal: theme, perspective, and organization. A fourth tool, characterization, is also available; however, unless used in a craftsmanlike fashion, characterization will lose more in credibility than it will gain in persuasion.

This Article will look first at two versions of a conflict between two parties. In each of these versions, a different party is viewed sympathetically although both versions rely on the same core facts. The

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Article will then examine how each tool was used to create the differing views of that conflict.

The first tool examined will be theme. Theme is the idea upon which the story focuses. Theme directs all other aspects of the statement of the case. In particular, it determines which facts are relevant to the statement of the case and whether facts strengthen or weaken the case. The first version selects as its theme the violation of a family home while the second takes the same situation and uses as its theme the plight of a child lost in the woods.

The Article will next turn to perspective. When an attorney chooses a perspective, he chooses a character through whom the reader can experience the story which the attorney has written to communicate his theme. Perspective is an effective tool because we are more likely to believe someone was right in what she did if we understand why she did it, and we are more likely to understand why she did it if we can experience the situation as she experienced it. To allow the reader to most effectively experience the theme of the violation of a family home, the first version is told from the perspective of the family. Meanwhile, in the second version, the story of the lost child is experienced through the child.

The Article will then turn to organization. Whether it is general organization or organization at the sentence or paragraph level, if an attorney groups good facts together and displays them early, he can create presumptions in the reader's mind which will be hard for opposing counsel to overcome. Furthermore, by surrounding a bad fact with good facts, the attorney can provide the reader with the ammunition she needs to rationalize away any doubts that the bad facts may invite. Both versions of the story rely heavily on this tool as well.

Finally, the Article will look at nonfacts and characterization. Nonfacts are facts many attorneys miss. They are things that should have happened but did not. The Article will suggest that in many cases, what did not happen is at least as important as what did. Characterization is defined as the heavy-handed approach to word-choice that has given us sentences like, "The ruthless killer blasted the helpless, bloodied victim with more of the same cold, hard, steel bullets." The Article will point out that characterization in its more blatant form will turn off a judge and then will suggest ways an attorney can protect his client from the more subtle forms of characterization.

The Article takes the conflict between two parties, which generates the two versions of the statement of the case presented here, from

the story "Goldilocks and the Three Bears." The value of this particular children's story, which has been entertaining lawyers and law students in this context for five years now, is that it forces the author to play fair: There are no confusing facts here to distract the reader, nor could facts be changed to make the tools appear to work better. By using a simple, well-known story, the Article can prove that the persuasive tools that it explains can work in any setting. Let's face it; if the tools can get "Goldilocks and the Three Bears" into a Law Review, they must be persuasive.

VERSION I

Momma Baer and Poppa Baer live in a small two story cottage at 29 Storybook Lane. They have a young son named Baby who lives there as well.

On July 4, 1983, the Baer family sat down to dinner. Momma, Poppa, and Baby all found that their dinner was too warm to eat so the family decided to take a walk in the forest around their home until the food had cooled down a little.

While the Baer family was out, Ms. Goldilocks arrived at the door. Ms. Goldilocks had been wandering in the neighborhood near the Baers' home for some time. She immediately tried the door, found it unlocked, and entered the Baers' home. Once inside, Ms. Goldilocks ate Baby Baer's dinner, broke his junior rocking chair, and then passed out in Baby Baer's bed.

When the Baers returned home, they found the front door open. The three Baers proceeded cautiously to the kitchen. There, they found that someone had eaten all of Baby Baer's dinner. Furthermore, Momma and Poppa Baer's dinners had been tampered with.

When the family then entered their living room, they found their furniture in disarray. Momma and Poppa Baer's chairs had obviously been tousled, and Baby's had been broken completely.

Unsure if the intruder was still in their home, the family proceeded upstairs. Momma and Poppa Baer checked their own beds and again found indications that a stranger had been in their home. Meanwhile, Baby went to his own bed.

In his bed, Baby found Ms. Goldilocks. She was still asleep. All the noise that the family had made upon their return home had failed to wake her. When Baby saw the stranger in his bed, he began to cry. "Here she is! Here she is!"

Goldilocks bolted up at the sound of the cub's crying. Although Baby's parents responded immediately to his calls, Goldilocks was able to dart to the door and escape.

VERSION II

Goldilocks is a young girl with long blonde curly hair. On the Fourth of July, she went walking and got lost in the woods. Goldilocks tried to find her way home but couldn't. Finally, however, Goldilocks did come upon a house. Although the girl did not know it at the time, this was the house of the Three Bears.

When Goldilocks went to the door of the house, she found it open so she went inside. Once inside, she looked around but couldn't find anyone at home.

Goldilocks entered the kitchen of the house and found three bowls of porridge which had been left out. Seeing the porridge there, Goldilocks began to realize how hungry she had gotten trying to find her way home through the forest. The girl tasted one of the bowls of porridge. She didn't like it. Sitting out like that, the porridge had grown too cold to eat. Still she tried another bowl. Although that bowl was not too cold, it was very hot. Goldilocks couldn't eat that bowl either. Finally she tried the third bowl. She was surprised to find that that bowl was just right, and even ate all the porridge in the third bowl because she was so hungry.

Still no one was home so Goldilocks went into the living room to sit down. There the girl found three chairs. She walked over to one of the chairs and sat down. That chair was very hard and uncomfortable. She decided to try another chair. The second chair was also very uncomfortable—it was too soft. Finally she tried the third chair, and this chair seemed to be fairly comfortable, but while she was sitting in it, the chair broke.

And still no one was home so Goldilocks decided to go upstairs. Once upstairs, Goldilocks found three beds. Seeing the beds, the girl began to feel very tired. She had been lost in the woods for some time. She went over to one of the beds and lay down. That bed was too soft though. Then she went to the second bed. Goldilocks lay down on that bed, but that bed was so hard that it was like lying on the ground that she had been walking on for so long. Finally she went to the third bed. Goldilocks was relieved to find that that bed was just right. Lying down in that bed, Goldilocks drifted off to sleep.

Suddenly Goldilocks was startled from her sleep. She opened her eyes to find the son of the bear family staring down at her. He was

crying out, "Here she is! Here she is!" Goldilocks turned her head just in time to see the two older bears running toward her. The girl panicked. She bolted from the bed and dashed down the steps. Goldilocks rushed out the door back into the woods, and then, once again, Goldilocks found herself lost.

A. *THEME*

The theme of a story is the idea upon which the story focuses. Most simply, it is the answer to the question, "So what's the story about?" For the statement of the case, then, the theme is simply what the case is about. As a case presents two parties in conflict, it also presents at least two ideas in conflict. An attorney must identify the idea upon which his case will turn and make that the theme of his statement of the case. Turning to our stories, one might ask whether they present a case about a suburban home that gets violated or a case about a girl who gets lost in the woods. The answer depends on whose attorney one talks to and, consequently, on which statement of the case one reads.

The selection of a theme affects every other aspect of the statement of the case. Perspective, organization, and fact selection must all work to communicate the theme. Although perspective and organization will be discussed in later sections, the relationship of fact selection and theme is most appropriately covered here.

Although fact selection depends on theme, theme does not excuse the omission of legally relevant, though unpleasant, facts. When the judge asks you, "Counsel, why does your brief fail to mention that your client yelled, 'I intend to batter you, sucker,' just before he clubbed the plaintiff?", she will not be amused if you respond, "Your honor, it just didn't fit with my theme." Your theme must account for these legally relevant facts just as the themes of both stories here allow for the discussion of Goldilocks wandering the neighborhood, entering the home, eating the porridge, breaking the chair, sleeping in the bed, and leaving the house.

The theme, however, does affect the selection of other facts in two ways. First, the choice of theme determines what additional facts are relevant. The first story is about the violation of a home, and, therefore, the reader will want to know about the home: where it was, "29 Storybook Lane," and what it was like, "a small two story cottage." With such a theme, the reader will not be as concerned about the intruder: intruders are intruders, and we already know enough about them to know we do not like them. Meanwhile, the second story is

about a person lost in the woods. Now the reader will want to know more about the person, "a young girl with long blonde curly hair" who "tried to find her way back home but couldn't" and the reader will be less interested in what sort of house the person stumbled onto.

Second, the choice of theme determines which facts help and, therefore, need to be emphasized and which facts hurt. No fact is "good" or "bad" outside the context of a theme. Often facts which at first glance appear bad for a case can help that case if placed in the proper theme. For example, at first glance it might appear that the case of Goldilocks will be hurt because she tried all the bowls of porridge, sat in all the chairs, and lay down in all the beds. These facts seem to indicate that she was more disruptive. Yet, in the second story, these same three facts are emphasized and developed to show how unfortunate and frustrating Goldilocks' plight really was.

Finding the best theme is no easy task. To do so, one must first understand the facts and also the motivating factors behind them. The attorney should talk to laymen about the facts and see how their sympathies are shaped. Often their unpolluted minds are more sensitive to how reasonable people really operate. As the theme begins to take shape, the attorney should begin to search for a character in the event through whom the reader can experience that event. That search will bring us to the next section, on "perspective."

B. *PERSPECTIVE*

There is an old saying that before one condemns a person, she should "walk a mile in his shoes." That is the idea behind perspective: a theme is easier to accept if the reader can share the experiences with the person in the statement of the case who lived the theme. Thus, the attorney should write the statement of the case from the perspective of that person. In the first story, we creep step by step through the Baers' home side by side with the Baers, and, consequently, we understand their fear and relate to their moral outrage. In the second story, we are at Goldilocks' side, and we see her flailing from meal to meal, chair to chair, and bed to bed, and consequently, we can understand her emptiness and frustration. Thus in each story, the perspective facilitates the expression of the theme.

An attorney should not feel that the person who pays for her services is the only person from whose perspective the story can be told. Sometimes a key witness or subordinate worker may be a better choice. Furthermore, one may choose to write different segments of a

statement of the case from different people's perspectives. For example, a district attorney might begin the statement of the case in a probable cause for arrest case from the perspective of the victim-witness at the scene of the crime then shift to that of the officer at the site of arrest.

In the third paragraph of the first story, we find a more radical example of shifting perspectives: the Baers' story is told in that paragraph from Goldilocks' perspective. This choice of perspectives works because we are following Goldilocks through a series of unexplained intrusions in the Baers' home and, therefore, gain a negative view of her. Thus, just as perspective can be used to make the reader like a person, it can also be used to make her dislike someone else.¹ We should not, however, overemphasize the value of using perspective to generate animosity; although animosity toward an opposing side may aid an attorney in his ultimate goal, that ultimate goal remains showing that his client wins rather than someone else loses. Therefore, the predominant perspective of the piece should be one that allows for identification with the attorney's side. Furthermore, the first perspective of the piece should be one the attorney wants the reader to view positively. The reader will expect to identify with the first character to whom she is introduced, and, therefore, if an attorney initially introduces the reader to a "negative character," he may be inviting the reader to form an identification which the attorney will subsequently have to overcome. To avoid this, the Baers' story takes its momentary lapse to Goldilocks only after the Baers have had two paragraphs to establish their perspective.

Once the attorney has settled on a theme and a perspective, she must begin the most tedious but perhaps the most rewarding part of the task, organizing the facts. As the next section points out, although theme and perspective will suggest a pattern for organization, that pattern is only the beginning of a methodical trial and error editing process.

C. ORGANIZATION

A friend of mine once hit me with the startling revelation that judges were not born under rocks, that if a judge can feel herself being pushed, she's apt to push back rather than go docilely along. When a

1. At the risk of taking a lesson from one of the law's harsher critics, the best example of using perspective both to create good feelings and to create bad may be *A Christmas Carol*, by Charles Dickens.

statement of the case sounds biased, a judge will feel pushed, and when a judge feels pushed, she will probably stop reading.

The statement of the case, then, is not a place to argue for your theme or even state it explicitly; the argument section of a brief is called the argument section for a reason.² Rather, the statement of the case is a place where one leads the judge right to the edge of the cliff which represents the theme and then allows the judge to jump off herself rather than the attorney trying to shove her over.

To succeed in such an endeavor, one must be subtle, and the most subtle of all persuasive devices is organization. No reader will ever notice where one particular fact "happened" to appear, but many well-placed facts begin to act as subliminal images pounding the point across without seeming to be noticed.

In the statement of the case, the attorney must be aware of his organization at three levels: (1) the overall organization of the piece, (2) the organization of each paragraph, and (3) the organization of each sentence. In all of these levels of organization, the attorney invites the reader to prejudge the case and rationalize any subsequent inconsistent facts. To do this, the attorney must get his "good" facts out early. As the reader sees those facts, she will begin to prejudge the case. Her newly-formed prejudices will encourage her to rationalize away the "bad" facts as they come later because these facts are not completely consistent with what she already believes to be true. The attorney can facilitate this process by surrounding the "bad" facts with "good" facts. This amounts to a sort of halo technique. This halo technique prevents the bad facts from overwhelming the reader as she moves through the document, and guarantees the attorney will finish with strong facts.

A concrete example may help to show how preceding and surrounding facts can color an event. Let's imagine we have a friend and an enemy, and each of them spills a beer on us. Because we have seen good facts about our friend before and judged her to be a good person, we will pass the event off as an accident or as out-of-character. Meanwhile, because we have seen bad facts about our enemy before and judged him to be a bad person, we will see the same act as further evidence of his weak character. Now add in the halo technique and imagine that our friend was picking up our tab for the evening while our enemy was trying to pick up our date, and we can see how much preceding and surrounding facts affect our view of an event.

2. That is where an attorney's argument goes.

These effects are further illustrated in the stories. In the first story, the overall organization presents all of Goldilocks' major disruptions early and then changes perspectives to allow for a more expansive discussion of the damage. By the third paragraph and eighth sentence of that story, one knows that Goldilocks entered the home, ate Baby Baer's dinner, broke his chair, and fell asleep in his bed. Meanwhile by the third paragraph of the second story, Goldilocks has barely finished dinner although she has already eaten up seventeen sentences. The organization of the first story invites the reader to judge Goldilocks' actions before he meets her while the organization of the second develops the girl before the actions. Thus, both stories set the foundations early for the prejudices that they need to rely on later.

The two different organizations used here suggest an additional point for attorneys writing a statement of the case: A statement of the case does not have to be organized chronologically, and if it is, it may "begin" at many points in time and then flashback to previous times. An attorney should seek the organizational structure that most clearly and persuasively presents his story. Often that structure will move chronologically, but sometimes it may be more effective to de-emphasize events and describe something like an organization, activity, or procedure weaving the events into the description. When chronological organization is chosen, beginnings and tempos still must be set, and once the tempos are set, they may vary during the story. Here the two stories start at slightly different times and move through Goldilocks' travels in the house at much different tempos. Furthermore, while the first story moves very quickly while with Goldilocks, its tempo slows considerably while with the Baers. That variation in tempo reinforces in the reader's mind the primary choice of perspective in that story.

The organization of the paragraphs in the second story highlights the halo technique. In the third paragraph, for example, the reader does not just learn that Goldilocks ate the porridge; he also learns that the porridge had been left out and is reminded that Goldilocks was lost and hungry. Similarly, in the fifth paragraph, the reader does not just learn that Goldilocks slept in Baby's bed. He learns also that Goldilocks was thinking about being tired and lost and about how far she had walked and how hard the ground had been. These facts cushion what Goldilocks does to the bears' property. This cushioning is particularly effective since again at the paragraph level the good facts come first.

To use organization at the sentence level persuasively, one must understand sentence structure and how people read sentences. To understand that, we must return to fifth grade English class and review what none of us could bear to learn then.

A sentence is a complete thought communicated by a subject, verb, and usually an object. There are two types of sentences: long ones and short ones. Although the two types may contain a great difference in the number of words, each type still communicates only one complete thought; the longer one just has more going on to distract and confuse the reader. Thus, it does not take a linguist to understand that if an attorney wants a judge to focus on a fact, that fact should appear in its own short sentence, while if the attorney wants to de-emphasize a fact, that fact should share a long sentence with a lot of other facts.

The use of good facts in short sentences is demonstrated in the first story. In paragraph four, Goldilocks' greatest kitchen crime is covered in one short sentence of twelve words:

There, they found that someone had eaten all of Baby Baer's dinner.

Meanwhile the second story requires a twenty-six word sentence just to indicate Goldilocks ate Baby's porridge:

She was surprised to find that that bowl was just right, and even ate all the porridge in that bowl because she was so hungry.

While the short sentence points the reader at the empty bowl, the second paints a broader picture which makes the bowl but one of many things to retain. If the bowl is to be forgotten, it is more likely to escape the reader of the second story.

The length of the sentence is not the only thing in the longer sentence that de-emphasizes Goldilocks' eating. The location of that fact also de-emphasizes it. A reader's attention is highest at the beginning and ending of a long sentence and lowest in the middle. Thus, Goldilocks' eating the porridge needs to be in the middle of that sentence rather than at either end if the attorney wants the reader to weigh it less heavily.

Not all good facts can go in short sentences. A reader can only have so much fun with Dick and Jane:

See Dick. Dick sees Jane. Dick sees Jane's purse. Dick steals Jane's purse. See Dick run.

Bombarded with a series of short sentences, the reader becomes desensitized to them or bored with them. Conversely, the most effective short sentences are those that fall between longer ones.

Meanwhile, not all bad facts must go in long sentences. These facts may also be de-emphasized by putting them in phrases or subordinate clauses. Like sentences, clauses must have a subject and a verb. Main clauses, in fact, can stand by themselves as complete sentences. Subordinate clauses, however, must always be associated with a main clause in a sentence. For example, the first sentence of the fifth paragraph of the first story reads:

When the family then entered their living room, they found their furniture in disarray.

The main clause is “they found their furniture in disarray,” because that clause could stand alone as a sentence. The subordinate clause is “[w]hen the family then entered their living room,” since that clause must relate to a main clause because of the “when.”

Main clauses are supposed to convey the main idea of the sentence, and subordinate clauses are supposed to convey subordinate ideas. If our fifth grade teachers could not get us to write that way, they did, at least, succeed in getting us to read that way. Thus, if an attorney wants the judge to focus less attention on a fact, he should put the fact in a subordinate clause. Facts to be emphasized should go in a main clause. In our example, the status of the furniture was the idea to be emphasized so that went into the main clause while the room in which the Baers found the furniture was less important and merited only a subordinate clause.

Phrases merit even less attention than do subordinate clauses, and, therefore, they are even better places to de-emphasize facts. Phrases do not have a subject and a verb. They are usually introduced by a preposition or a verb form, infinitive (to lie) or participial (lying). The second story seeks to emphasize how tired Goldilocks was while de-emphasizing where she chose to sleep. Thus, the first fact goes in a main clause while the second goes in a phrase. The last sentence of the fifth paragraph, therefore, reads:

Lying down in that bed, Goldilocks drifted off to sleep.

A final element in the organization of the sentence is the voice of the verb. In active voice, we have an actor, reflected in the subject, an action, reflected in the verb, and an agent, reflected in the object. For example:

<i>Subject/actor</i>	<i>Verb/action</i>	<i>Object/agent</i>
Goldilocks	broke	the chair.

In passive voice, the agent becomes the subject, a form of “be” becomes the verb, the old verb/action takes its participial form, and

the actor, if it remains at all, becomes the object of the preposition "by." Thus:

<i>Subject/agent</i>	<i>Verb/be</i>	<i>Participial/action</i>	<i>By Object/actor</i>
The chair	was	broken	by/Goldilocks (optional).

The current vogue is to pass off passive voice as "weak" while active voice is "strong," whatever that means. More to the point, passive voice is clumsy and wordy, but because it makes the actor an optional fact in a sentence, it is useful when an attorney wants to de-emphasize the actor. For example, in the second story, the attorney would want to downplay Goldilocks' role so he would write, "the chair was broken," rather than "Goldilocks broke the chair."

The problem with de-emphasizing the actor through passive voice is that the technique is too obvious. Any good attorney should begin his study of any legal document by circling every passive verb in it and finding out all the actors missing from those verbs. Thus, when an attorney faces a good judge or opposing counsel, passive voice ceases to be a subtle device. However, almost all passive verbs have active verbs that carry similar meanings. Therefore, the subtle attorney should replace the passive verb with a similar active one. In our example, we can communicate the idea that "the chair was broken" by saying "the chair broke."

If "the chair broke" is placed in its proper context in the last sentence in the fourth paragraph of the second story, one finds a good review of the concepts related to sentence organization:

Finally she tried the third chair, and this chair seemed to be fairly comfortable, but while she was sitting in it, the chair broke.

Here, the bad fact is in a long sentence with many other facts to distract the reader. Goldilocks has been removed from the chair breaking through passive voice followed by verb choice. Her remaining tie to the chair, that she was sitting in it, has been de-emphasized by being placed in a subordinate clause in the middle of the long sentence.

Theme, perspective, and organization are the three most important tools of an attorney writing a statement of the case. For most of us, they are painful and tedious tools of the editing process because few of us can put a jig-saw puzzle together without shuffling around some pieces. Although these three are the most important tools, time must still be given to some special issues of fact identification and presentation before we can conclude.

D. *NONFACTS*

No matter how gifted the writer, she cannot use facts effectively if she does not have them, and one group of facts is particularly likely to escape an attorney's attention. That group consists of the "nonfacts."

Nonfacts are things that could have, or should have, happened but did not. Often they go unnoticed as the two sides become overwhelmed by what did happen. Yet, often the nonfacts say more about the case than do the facts. For example, in a case involving a judicial immunity issue, the facts might indicate that the judge had learned before jury selection that the panel would contain a person who was hearing-impaired. They might also indicate that the judge called the person to the bench, verified that she was deaf and that she would require an interpreter, and then dismissed her. Although that may sound complete, the nonfacts would indicate that neither attorney had challenged the woman and that although the judge planned in advance to raise the issue, he never notified the woman of this, he never suggested she retain counsel to present her side, nor did he invite her to present her side.³ If the woman were to show the judge stepped out of his judicial capacity, the nonfacts, or what the judge failed to do, would be more valuable than the facts; yet, an attorney would discover them not by reading what the record said but only by realizing what it did not say.

In the first story, the third sentence of the seventh paragraph contains a nonfact:

All the noise that the family had made upon their return home had failed to wake her.

Although we do not know how soundly Goldilocks was sleeping, her failure to awaken may help determine whether she "drifted off" as the second story indicates or "passed out" as the first story indicates.⁴

E. *CHARACTERIZATION*

This Section seeks to show why this version:

The ruthless killer then violently pumped five more vicious bullets into the helpless victim already bleeding profusely on the floor;

is not as persuasive as this one:

Mr. Williams was now lying wounded on the floor. The defendant shot him five more times.

3. See *DeLong v. Brumbaugh*, No. 87-369, slip op. (W.D. Pa. Jan. 12, 1989).

4. Note that the first story never indicates how much noise the Baers made, only that all of it failed to awaken Goldilocks. Read words like "all" and "most" with the same caution statistics require.

The reason rests in the way characterization is perceived.

Characterization is the enemy of the good attorney. With the billing meter running, an attorney may ask who has time to look for nonfacts, select a theme and perspective, and then chase words into subordinate clauses; why not just sprinkle in a few adverbs and adjectives and get the same result. The two examples that introduce the section demonstrate that the modifiers do not generate the same result. Characterization modifiers suggest bias on the attorney's part, and that bias distracts the reader. Beyond that, if the attorney has done his job, the modifiers are unnecessary: Well-constructed facts speak for themselves.

Characterization is the least subtle of all the persuasive devices and, therefore, the one the attorney is most likely to have to explain. A judge is much more likely to ask an attorney to explain how he knew Goldilocks had "passed out" rather than "drifted off" than she is to ask an attorney why Goldilocks' presence in Baby Baer's bed merited only a phrase rather than an independent clause. Therefore, an attorney should choose his words for their accuracy rather than their emotional impact because he should realize he may have to defend that choice later.⁵

From the standpoint of a judge or an opposing counsel, the most dangerous type of characterization is the word that appears to mean something different from what it really means. In the second paragraph of the second story, Goldilocks found the door to the house of the Three Bears "open." As it is commonly used, the word "open" can mean either not closed or not locked. Since either meaning would fit into the context, unless someone pursues this ambiguity, the judge runs a fifty per cent chance of falling into its trap. The first story more specifically indicates that the door was "unlocked."

The first story, however, has some interesting word choices of its own. In the fourth paragraph, the Baers discover that Baby's dinner has been eaten and that Momma's and Poppa's have been "tampered" with. Similarly in the fifth paragraph, the Baers find their furniture in disarray: one chair is broken and two have been "tousled." While we

5. It has been suggested that whenever we choose one word over another, we are characterizing and, therefore, characterization is not an evil in and of itself. That much would be conceded. The real issues about characterization, though, are what criteria we use when we choose between words, to what extent does our persuasiveness rest on these choices, and as we make these choices, how much credit do we give our reader.

might expect "tamper" to require some underhanded design,⁶ arguably it is enough just to alter something without invitation,⁷ perhaps by placing a spoon in a porridge bowl. Furthermore, while we might expect "tousled" chairs to be at least moved in a room in "disarray," it is enough that they have been "handled roughly."⁸

Two morals come out of these examples. First, every attorney should own a dictionary and use it humbly and faithfully. Second, if an attorney wants to argue the facts on his own terms, he must pin the other side down to what each of her words means; otherwise, he is allowing the other side to invite the judge to misunderstand the case.

Even when the parties have stipulated to a word or the word has been established by the record, the danger of characterization still exists. The same word can leave different impressions depending on the different contexts in which it is used. For example, in the fourth sentence of the seventh paragraph of the first story, Baby Baer "began to cry. 'Here she is! Here she is!'" Meanwhile in the third sentence of the last paragraph of the second story he "was crying out, 'Here she is! Here she is!'" Although both stories use "cry" to communicate the action, the surrounding words and punctuation give different meanings to the word. Consequently these different meanings color the events in different ways. The fearful "cry" in the first story reinforces a view of the apprehension of the Baers while the "crying out" in the second helps to paint the bears as intimidators.

Just as words can mean something different from what they appear to mean, entire facts can mean something different from what they appear to mean. Not surprisingly, those facts that invite interpretation are just as dangerous a form of characterization as are those words. When a fact has potentially good implications and bad implications, the reader may infer meanings based on the prominence of the fact: since an attorney would not advertise a fact he felt would hurt his case, the more prominent the fact, the more likely that the fact helps the case. Needless to say, that rule of thumb does not always work, and when an attorney does not consider all the implications of a fact, and does not invite the judge to do the same, merely because the fact appears prominently in opposing counsel's brief, that attorney has asked to have his client's pocket picked.

6. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1451 (Unabridged ed. 1966).

7. *See id.* at 890, 1451.

8. *Id.* at 1459.

In the second story, two paragraphs begin by announcing that “no one was home,” and a third ends with that fact. Thus three of the five paragraphs that occur in the Baers’ house prominently indicate that the bears were not at home. Under the circumstances, the reader could easily assume that this fact was important because Goldilocks was waiting for the bears to return home. The story, however, never says that, and the fact could just as easily mean that Goldilocks found that she had more time to tear the place apart.

For the most part, then, characterization is a device to be unraveled defensively rather than used offensively. An attorney can be just as persuasive using the other devices, and by using those, he does not risk his credibility. As an attorney attacks the characterizations of the other side, he should realize some of them may not be obvious. We must remember that the humble attorney who asks is wiser than the haughty attorney who assumes.

E. *THE ETHICS OF PERSUASIVE WRITING*

Attorneys are instructed not to deceive the court. This Article suggests, however, that playing on ignorance, inviting prejudgments, and facilitating rationalizations differ so much from “deceiving” that they are not covered under that instruction. That is a suggestion worth questioning.

One could, of course, say that techniques do not lie; people lie. The rejoinder would then be to say that people lie better with better techniques. This exchange is perhaps no more dispositive here than it is in gun control debates; and yet, there just may be something in acknowledging that the problem is not in the what but in the who.

Persuasive writing can be defined as a means of more clearly presenting the truth just as accurately as it can be defined as a means of clouding the issue. Attorneys must know how to emphasize the most relevant facts and de-emphasize the distractions if they are to help the judge understand what really happened. To the extent that this is what the attorney wants the judge to understand, the techniques presented here do not conflict with a lawyer’s responsibility to the court. It is only when the attorney sets out to abuse the system that the techniques threaten to abuse the rules.

As lawyers, we are sometimes too quick to question the rules and too slow to question ourselves. Perhaps, we feel that so long as the rules are good and we follow them, we need not question ourselves. However, just as the end does not justify the means, the means do not

justify the end. An attorney can no more lie honestly than he can tell the truth dishonestly.

The techniques discussed here are neither honest nor deceptive in their own right. They take their personality from the person who uses them. To the extent that an attorney seeks to be honest and candid, he will tell the truth and one hopes he will do so persuasively. To the extent that he looks for techniques that allow him to be less than candid, he will be deceptive, and he, rather than his words, will be to blame.