

Justice Kagan's Storytelling Sets Her Writing Apart

by Hon. Robert J. Jones, J.S.C.¹

Nobody lands on the Supreme Court without top-notch writing skills. But a few names stand out in recent years, including Chief Justice John Roberts, the late Justice Antonin Scalia, and—the subject of this article—Justice Elena Kagan. Like the other two, Justice Kagan writes compelling opinions that capture the reader's interest. She uses several techniques to do this, but one of her most effective is her ability to spin a narrative—storytelling.

Somewhere along the line you've probably been told that your fact section should read like a story. Legal-writing experts have been saying this for decades. And more recently, neuroscience research has confirmed it: Story-driven writing holds the reader's attention and is more memorable.²

But knowing this and putting it into practice are two different things. How do you learn to take the often-dry facts surrounding a legal issue and turn them into a compelling story? One way is to read good examples. So let's start with this one from Justice Kagan. It's the fact section from an opinion about a criminal defendant's insanity claim:

"This case arises from a terrible crime. In early 2009, Karen Kahler filed for divorce from James Kahler and moved out of their home with their two teenage daughters and 9-year-old son. Over the following months, James Kahler became more and more distraught. On Thanksgiving weekend, he drove to the home of Karen's grandmother, where he knew his family was staying. Kahler entered through the back door and saw Karen and his son. He shot Karen twice, while allowing his son to flee the house. He then moved through the residence, shooting Karen's grandmother and each of his daughters in turn. All four of his victims died. Kahler surrendered to the police the next day and was charged with capital murder."³

I converted what Justice Kagan wrote into how you'd likely see it in the typical brief:

"On February 5, 2009, Karen Kahler (hereinafter "Mrs. Kahler") filed a complaint for divorce against her husband, James Kahler ("Defendant") in the Kansas Superior Court, Family Part. Mrs. Kahler then moved out of the marital home, taking with her the couple's three minor children, Robyn (age 15), Kaitlyn (age 13), and Justin (age 9). Between the date of the divorce complaint and the date of the incident in question, Defendant showed signs of psychiatric problems. On November 28, 2009, he drove his motor vehicle

to 129 New Street in Kansas City, where Mrs. Kahler's grandmother resided and where Mrs. Kahler and the children temporarily sheltered. After entering the southwest entrance, he saw Mrs. Kahler and Justin Kahler. Mrs. Kahler was then shot twice with a Smith & Wesson .38 revolver by Defendant. Justin Kahler exited the residence and proceeded to an adjacent property. Defendant then proceeded to locate and shoot Mrs. Kahler's grandmother, Robyn Kahler, and Kaitlyn Kahler, as a result of which each expired. After Defendant surrendered, he was charged with capital murder under Kansas Code section 21-3439."

See the difference? Notice how simply Justice Kagan told the same story. Her version's not riddled with meaningless details that distract from what's important. It omits irrelevant dates, places, and filings. Yet, at the same time, relevant details drive the narrative. She focuses on people and what they did—actions, not abstractions. Also, notice the conversational tone.

Lawyers sometimes treat the fact section as an afterthought—a necessary inconvenience before getting to the heart of the brief, the argument. Not so. A compelling fact section—one that uses storytelling principles—can help you persuade the judge from the get-go. By reading the fact sections in Justice Kagan's opinions, you'll see storytelling at its best. Let's end with another one of her top-flight examples. And if you think storytelling only works in criminal cases, where the facts rival those on *Law & Order: Special Victims Unit*, here's one she wrote in a case involving an otherwise-boring personal-jurisdiction issue:

"Ford is a global auto company. It is incorporated in Delaware and headquartered in Michigan. But its business is everywhere. Ford markets, sells, and services its products across the United States and overseas. In this country alone, the company annually distributes over 2.5 million new cars, trucks, and SUVs to over 3,200 licensed dealerships. Ford also encourages a resale market for its products: Almost all its dealerships buy and sell used Fords, as well as selling new ones. To enhance its brand and increase its sales, Ford engages in wide-ranging promotional activities, including television, print, online, and direct-mail advertisements. No matter where you live, you've seen them: 'Have you driven a Ford lately?' or 'Built Ford Tough.' Ford also ensures that consumers can keep their vehicles running long past the date of sale. The company provides original parts to auto supply stores and repair shops across the country. (Goes another slogan: 'Keep your Ford a Ford.') And Ford's own network of dealers offers an array of maintenance and repair services, thus fostering an ongoing relationship between Ford and its customers.

"Accidents involving two of Ford's vehicles—a 1996 Explorer and a 1994 Crown Victoria—are at the heart of the suits before us. One case comes from Montana. Markkaya Gullett was driving her Explorer near her home in the State when the tread separated from a rear tire. The vehicle spun out, rolled

into a ditch, and came to rest upside down. Gullett died at the scene of the crash.”⁴

¹ Thank you to my law clerk, Elizabeth Gibbons, Esq., for helping with this article.

² Bill Birchard, *Writing for Impact: 8 Secrets from Science That Will Fire Up Your Readers' Brains*, 157-82 (2023).

³ *Kahler v. Kansas*, 140 S. Ct. 1021, 1026–27 (2020).

⁴ *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 355–56 (2021) (internal citation omitted).