

The Dating Game

Imagine that you're a judge reading a brief in chambers. You're trying to get a handle on the facts when you come to this passage:

On January 2, 2003, Mary Jones rented a car from XYZ Rentals, Inc. She kept the car from January 2, 2003, through January 4, 2003. On January 4, 2003, she drove the car into a retail store that she owned, causing extensive property damage. On January 5, 2003, Ms. Jones reported the accident to her property insurer. On January 6, 2003, she reported it to her no-fault insurer. On February 5, 2003, the property insurer paid the claim. On May 21, 2003, the property insurer sued the no-fault insurer to recover the amount it paid on the claim.

Did you get all those dates? Did you jot them down or at least make a mental note of them? You probably expended considerable mental energy trying to keep them straight. Would it bother you to learn that the case actually involves no time-sensitive legal issue and that none of the dates has any bearing on the decision the court must make?

The judges who have authored articles on effective brief-writing tell lawyers to resist this “each fact gets its date” approach. There are alternatives that are easier on your reader.

The Problem With Dates

There's nothing wrong with including dates in a brief—if they're relevant and helpful to

the reader. By all means, include relevant dates if you are writing a brief about the statute of limitations, a presuit notice requirement, compliance with discovery deadlines, or another time-sensitive legal issue. But consider a different approach if time is not essential to your subject. Here's why.

To begin with, dates are typically irrelevant, as noted by Eleventh Circuit Judge Joel Dubina: “A brief should be pared down by reciting essential facts only. Unless a date is material and relevant to an issue in the case, omit it. Most of the time, I suggest, you will find [that] dates are irrelevant.”¹

Dates are also a distraction. When you include unnecessary dates, you give your reader the false impression that there's a time-sensitive issue lurking in the case. Naturally, this will put your reader on the lookout for that phantom point while reading the brief. As longtime Fifth Circuit Judge Jacques Wiener Jr. observed, meaningless dates divert the reader's attention from the lawyer's intended message:

When we judges see a date or a series of dates, or time of day, or day of the week, . . . most of us assume that such information presages something of importance and we start looking for it. But if such detailed information is purely surplus fact and unnecessary minutiae, you do nothing by including it other than to divert our attention or anticipation from what we really should be looking for. In essence, you will have created your own red herring.²

When lawyers commingle unnecessary dates with important facts, the reader cannot focus on the important facts as easily. Not-

ing the prevalence of “unnecessary dates” in briefs, one experienced practitioner commented that “including unnecessary facts will result in a greater possibility that your strongest points will be overlooked.”³

Unnecessary dates are also a distraction in a more practical sense: they create needless clutter, disrupting the flow of your prose and making it harder for judges to read your briefs with ease.⁴

And what may start as a mere distraction can grow into an annoyance. When a group of California appellate judges were surveyed about the use of the factual record in briefs, “they strongly agree[d] that they are annoyed by immaterial information, such as dates of events and filings that do not matter.”⁵

Chronology Without Dates

Chronology has been called “the essential organizer” and “the basis of all narrative.”⁶ The easiest way to tell a story is chronologically, and readers process factual information best when it's presented that way.⁷ So how does a writer establish the chronology of events without using dates?

The trick is to focus on the temporal relationship between important events by using words and phrases that quickly capture that relationship for the reader.⁸ Use simple words indicating time, such as *then*, *after*, *before*, *following*, or *later*. Avoid inflated alternatives like *subsequent to*, *prior to*, and *at that point in time*.

Instead of reciting raw dates, you can refer to units of time, such as hours, days, months, or years. Just a few time words or

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references will establish chronology. Consider our original example, only this time without any dates:

*Mary Jones rented a car from XYZ Rentals, Inc. A few days later, she drove the car into a retail store that she owned, causing extensive property damage. Ms. Jones reported the accident to her no-fault and property insurers. After paying the claim, the property insurer sued the no-fault insurer to recover the amount it had paid.*⁹

Did you miss the dates? Of course not. You understood what happened—and when—just fine. And there were no dates to distract you.

In reading the example, you may have noticed one spot where the writer calculated the passage of time between events (“a few days later”) rather than using a raw date and forcing the reader to do the math. This is a simple technique that pays big dividends for you and your reader. As one commentator put it, “Even if the sequence of events is important, dates alone are nearly impossible for most readers to follow.”¹⁰

When you are writing about a time-sensitive legal issue and you need to include specific dates, consider calculating the relevant time frames for your reader and stating them explicitly. For example:

- “On October 23, 2004, two weeks before the close of discovery, defense counsel sent a letter seeking dates for the plaintiff’s deposition. Almost two weeks later, on November 4, 2004, the plaintiff’s attorney responded with two available dates.”
- “The plaintiff learned that she had a possible malpractice claim on March 21, 2001, which triggered the six-month discovery period. She served her notice of intent to sue less than five months later, on August 4, 2001.”
- “The court ordered the defendant to produce the documents by February 13, 2004. Nevertheless, the defendant remained uncooperative, producing the disputed records more than two weeks beyond the court’s deadline, on March 3, 2004.”

The last example shows how doing the math for the reader not only makes the timing of events more obvious, but also gives you an opportunity for advocacy—to drive

home a point in a way that you couldn’t with raw dates alone.

It takes a sizable investment of mental energy for readers to keep a bunch of dates straight. Include them only if it’s absolutely necessary. Even then, use techniques that help the reader immediately grasp important time frames without making calculations from raw dates. Do the math for your reader, and give your writing added clarity and persuasive punch.

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FOOTNOTES

1. Joel F. Dubina, *Effective Appellate Advocacy*, 20 Litig 3, 4 (1994).
2. Jacques L. Wiener Jr., *Ruminations from the Bench: Brief Writing and Oral Advocacy in the Fifth Circuit*, 70 Tul L R 187, 192 (1995).
3. Betsy E. Gallagher, *Ten Signs That You Need an Appellate Lawyer*, Fla B J, May 2004, at 67.
4. See Raymond T. Elliget Jr. and John M. Scheb, *Stating the Case and Facts: Foundation of the Appellate Brief*, 32 Stetson L R 415, 416 (2003).
5. Charles A. Bird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J App Prac & Process 141 (2002).
6. Bryan A. Garner, *Modern American Usage* 145, 146 (2003).
7. Id. at 145; see also Brian L. Porto, *The Art of Appellate Brief Writing*, 29 Vt B J 30, 33 (2003).
8. See Andrew M. Low, *Chronology*, Colo Law, March 2002, at 32.
9. My “before and after” examples are based on the facts in *State Farm Fire & Cas, Co v Old Republic Ins Co*, 466 Mich 142; 644 NW2d 715 (2002). There were no time-sensitive legal issues in that case, and the court avoided using dates in its concise recitation of the facts.
10. Low, supra n 8 at 32.