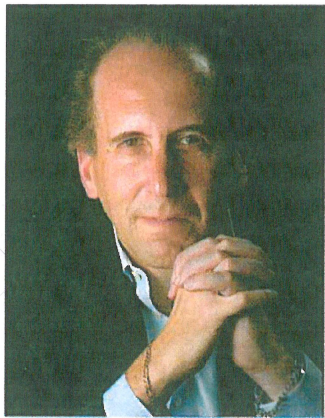


As lawyers, we're constrained by facts. A client comes to us with a problem—a deal to put together, a lawsuit to commence or defend—and the first thing we must do is learn the facts. From then on, all the advice we give and the actions we take are dictated by the immutable facts of the case.

FREE TO FUDGE THE FACTS

by Ken Isaacson



For those of us who are litigators, this is often confounding. We have a meritorious case and a deserving client. If only the facts weren't so...so factual. You know what I'm talking about. Why'd the client have to write that particular email? Why'd he have to say that in front of all those witnesses? It's such a great case, and we're still in the right, but the client went and did something stupid. And now, as Desi used to tell Lucy all the time: "You've got a lot of 'splaining to do." If only the facts were just a little malleable, we could avoid a bit of unnecessary tap dancing.

As a lawyer, I write for a living. And I suppose there are cynics who'd even say that lawyers write fiction for a living. We've all heard the complaint that litigation isn't about finding the truth, it's about finding whose version of the truth will prevail. While there may be something to that view, I can honestly say I've never fabricated facts, or intentionally hidden them, to gain the upper hand in a legal matter. But what if we weren't bound to the reality that the facts impose upon us? What if, in the middle of your big case, when you realize that the facts aren't playing out just as you'd hoped they would, you could go back and change things, un-write the ill-advised email, or un-say the indiscreet remark? You could make things come out just the way you want them to be.

That's the great thing about writing legal thrillers. I get to make stuff up. And if I don't like how it turns out, I get to go back and change it. I'm free to explore "what ifs" and "how abouts" to my heart's content. I can be perpetrator, victim, witness, prosecutor, defense counsel, judge and jury. In short, I get to make up my own facts, and there's nothing unethical about it!

My first legal thriller, *Silent Counsel*, was published in Sept. 2007. The idea for it came to me upon reading a true account of a hit-and-run incident along a highway in Florida some time ago. In that case, the driver hired an attorney and charged him with the task of negotiating a plea agreement with the authorities while at the same time keeping his (the client's) name secret under a claim of privilege. A court battle ensued, testing the bounds of the time-honored doctrine of attorney-client confidentiality: Could the simple name of a client be "privileged information"?

That case resolved itself before the novel legal question was answered by the courts—the driver ultimately came forward on his own. But the magazine article got me thinking. What if the court were to hold that a lawyer attempting to negotiate a plea agreement for a hit-and-run driver didn't have to reveal his client's identity? The prosecutor, no doubt, would refuse to bargain. But what if the mother of the small victim found out that the lawyer knew who had killed her child but maintained his silence, relying on the privilege? How far would the mother go to find out who killed her child? And how dedicated to the principle of attorney-client confidentiality would the attorney be when the going got tough?

With these questions in mind, I set out to write *Silent Counsel*, the story of attorney Scott Heller and mother Stacy Altman. After Stacy's six-year-old son is run down in front of their house, with no witnesses to the tragic accident, she learns that the driver has hired Scott to negotiate a plea arrangement with the prosecutor. But he's instructed Scott to keep his name secret until a satisfactory agreement is in place. The prosecutor refuses to make a deal, and the court rebuffs Stacy's

efforts to force Scott to tell her—or even the authorities—who his client is, holding that it is privileged information. Since the court won't do anything to help Stacy track down her son's killer, she takes matters into her own hands, and is determined to make Scott talk—at any cost... When Stacy's stalking of Scott's young daughter escalates into a kidnapping, Scott makes the only reasonable choice a parent can—cooperate and give up the client. That's when Scott discovers that doing the right thing isn't as easy as he thought, and now the mother isn't the only one looking for the child's killer.

When I first sat down to begin writing *Silent Counsel*, I didn't have a clue how to proceed. I decided to approach the task as I did a legal case, and I remembered an instructor in one of my continuing legal education classes advising of the importance of developing a theme for your case. "A case without a theme is just a bunch of testimony," I'd been told. "A car crash doesn't happen in a vacuum—it's a tragedy that involves real people and real consequences." Cloaking your case with a theme gives jurors a reason to stay interested and alert: "This case is not just about young Will being injured when the buckling mechanism on his infant seat came loose. It's about the kind of corporate greed that places the cost of recalling a defective product and the benefit of saving a child's life on opposite ends of a scale—and tips that scale against the child." Now, with that theme in the jury's mind, otherwise dry testimony about how this strap connects to that latch may be, if not interesting, at least a little more bearable. There's a reason to care.

In the context of a legal case, we start—necessarily—with the facts as they're presented to us. We search for a theme that relates well to those facts and exerts the right amount of emotional pull to grab hold of the jury. Writing

fiction, though, allows the reverse.

When I started, the page was quite literally blank. There were no facts, only an idea: What if the attorney representing a hit-and-run driver didn't have to reveal his client's name because the court held it was privileged information? With that intriguing premise in mind, I began constructing facts: I decided that the victim of the driver had to be a child, because readers (my jury) would care more about this arcane legal issue if the attorney-client privilege was being used to shield someone responsible for a youngster's death. I knew that the lawyer in my story would face a difficult ethical dilemma—needing to protect the confidences of a client while feeling that the "right" thing to do would be to help the grieving mother.

Because I had never faced such a challenge, I decided my lawyer should (like me) be unaccustomed to criminal practice and protecting the rights of the guilty. I made him a corporate litigator handling a "quick referral" for a friend—just a matter of making a few phone calls to the prosecutor to see if a deal could be made. This way, in the process of writing, I could experience the doubts and misgivings of my protagonist as he did, for the first time. And, I decided that my lawyer should have a young child of his own, so the conflict he felt between duty and right would strike close to home.

From this germ of an idea, and these few basic facts, emerged competing themes: *Silent Counsel* would be about a lawyer's struggle with his personal beliefs when confronted with the fundamental need for secrecy between client and attorney. It also would be about a mother's frustration and rage at a system that places more value on a legal technicality than bringing the killer of a six-year-old boy to justice.

I knew little more about *Silent Counsel* than this when I began writing. I've since heard the writing process com-

pared to driving from New Jersey to California in the dark, being able to see only as far as your headlights illuminate. You know where you are, you know where you ultimately want to be, and you have a vague idea of how you're going to get there. But all you know for sure right now is the ground you'll be covering within the range of



your headlights—and something just outside your view may change your plans. You discover that the bridge you planned to take across the river is washed out, and instead of going directly from Point A to Point B, you find yourself driving miles along the river until you come upon the next way across. You planned on driving west, but unforeseen weather conditions force you to take the southern route instead. This is how writing was for me: I'd start a chapter knowing generally where I was heading, with some specific short-range ideas of what route to

take, and find out quickly that the characters had something else in mind. I'd watch, almost a spectator, as dialog unfolded, and I'd discover things about my characters and the story that I hadn't known before.

That's when it becomes really useful to be able to control the facts. Remember, I lamented a lawyer's inability to un-write the ill-advised email, or un-say the indiscreet remark? In the middle of writing fiction, when the story takes an unexpected left turn, and the sun-shiny day mentioned a few chapters ago no longer suits your purpose, you can simply go back and create a thunderstorm. Believe it or not, it actually takes some getting used to. I remember the first time during the writing process when an action one of my characters was about to take just wasn't consistent with the facts up to that point. I was stumped. How could he possibly do that in view of what had come before? Then it dawned on me—what I had already written was not etched in granite. I could go back and rewrite history. A little thought and a couple of keystrokes, and a new path opened for my character. That was heady stuff.

As lawyers, we all have the tools necessary to write fiction. We're an imaginative and creative bunch, we can organize facts and concepts, and we know how to convey our ideas in compelling fashion, in writing. And, our day-to-day activities are fertile grounds for material. Don't like the ruling the judge just made in the middle of your trial? Just sit back and enjoy conjuring up the fate that might befall him if he were a character in the book you're writing. ☞

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