

# HAPPILY EVER AFTER: FOSTERING THE ROLE OF THE TRANSACTIONAL LAWYER AS STORYTELLER

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## I. INTRODUCTION

Transactional documents do more than allocate the risk of loss or select the governing law. Transactional documents, whether employment contracts or lease agreements, encapsulate the wishes, hopes, and fears of the transacting parties. The documents share a series of events, identify the key actors in those events, and anticipate particular outcomes or future events. In other words, the transactional documents are narratives. The transactional lawyer is thus more than a transactional intermediary. The transactional lawyer is the narrative agent or storyteller.

The “narrative” is often associated with the following words: story, tale, fiction, and entertainment. These associations may appear to

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have little in common with transactional documents. Yet, these associations do not reflect a full understanding of narrative. Dismissing the applicability of narrative to transactional documents also does not reflect a full understanding of the purpose of transactional documents and the role of the transactional lawyer.

To begin, this essay will define narrative and explain why transactional documents should be considered to be narratives. This essay will then explore the role of the transactional lawyer as a narrative agent and share five practical strategies to foster the role of the transactional lawyer as storyteller.

## II. NARRATIVE DEFINED

A typical definition of “narrative” is a story that involves characters undertaking actions that cause a series of events. But the term narrative is broader than an entertaining, fictional tale. The term references a variety of texts—both literary and nonliterary. Some posit that the human brain automatically processes events as narratives. Life is both then lived and remembered in a series of constructed narratives. Whether narrative is in fact an innate process of the brain, narrative is certainly a predominant method employed to disseminate information. Narrative, for instance, is used in commercial and Instagram stories to share information. As explored in the disciplines of literature, composition, rhetoric, cognitive psychology, neuroscience, and the law, narrative refers to a series of techniques. These techniques are used to convey text, whether oral or written, in an accessible and meaningful manner. Narrative can thus be used to facilitate the composition of various texts. For those reasons, narrative has been of interest to disciplines beyond literary studies.

## III. NARRATIVE AND TRANSACTIONAL DOCUMENTS

Lawyers seek to create accessible, meaningful texts. The use of narrative techniques has been widely explored in the creation of legal texts. Much of that exploration has been limited to the creation of litigation-based documents. Scholars, commentators, and practitioners have noted the already extensive use of narrative in such documents. Suggestions on expanding the use of narrative techniques in such documents have also been explored. In this context, the litigator is the storyteller. The trial lawyer constructs an affidavit in support of a petition and spins a tale in front of a jury in a closing argument. The appellate lawyer crafts a theory of the case in the statement of facts that then shapes the arguments that become key points in oral argument. These narratives focus on persuading

the decision maker. These are not the only opportunities narrative provides to lawyers.

Initial reluctance to equating narrative to transactional documents may be because the purpose and audience of transactional documents are different from that of litigation-based documents. As noted above, narrative focuses on characters, actions, and events. Although not so limited, narrative often engages the audience with hooks and images. Litigation-based documents may seem to be reflective of this understanding of narrative. Transactional documents may be more readily considered as examples of expository text.

Expository text focuses on educating the reader and delivering information in a concise, highly structured manner. That structure includes the use of a table of contents, headings, bolded phrases, and diagrams. Examples of expository text include encyclopedias, instruction manuals, recipes, and driving directions. A rigid distinction between narrative text and expository text is not appropriate—text often contains characteristics of both narrative and expository texts. Indeed, transactional documents have characteristics of both types of texts.

Transactional documents seek to inform, educate, and guide the transacting parties. Transactional documents inform the transacting parties about their rights and obligations. The documents educate the primary and secondary audiences about the goals of the parties. The documents aim to guide the future actions of the parties. Transactional documents are highly structured into sections with cross-references abounding. Nonetheless, this information is conveyed through a series of events by clauses and provisions. The transacting parties become characters in those events pursuing or refraining from particular actions related to those events. These events are relayed by a narrative agent—the transactional lawyer. The narrative agent should relay that information in an accessible and meaningful manner. That's narrative.

#### IV. TRANSACTIONAL LAWYER AS STORYTELLER

If transactional documents are narratives, that means a narrative agent must be identified. The narrative agent is the transactional lawyer. The narrative agent, or storyteller, brings to mind the image of a person telling tales around a campfire. Famous storytellers include Aesop, the Brothers Grimm, and Scheherazade. Equating a transactional lawyer to Aesop, the Brothers Grimm, and Scheherazade may appear to be ill-fitting comparisons. Transactional lawyers do not create fables or fairy tales.

Transactional lawyers do not have the freedom to create facts or disregard material facts that are inconvenient for a conceived narrative. Yet, the comparison is surprisingly apt.

All narrative agents must work within constraints. Those constraints include genre constraints. Audience expectations and needs shape the nature of the narrative to be told. A poet, for example, selects the particular form and decides which conventions to incorporate into the poem. Likewise, the transactional lawyer selects the appropriate form to present the narrative. Appropriate form selection is an important transactional skill that requires the drafter to sift through form books and form files. Transactional lawyers do more than identify one form. Indeed, transactional lawyers do not mechanically assemble any document from solely existing provisions. Transactional lawyers create appropriate text through innovation, just as all storytellers innovate. Storytelling involves recognizing standard conventions and pushing the boundaries, where appropriate.

Narrative agents undertake an active role in shaping the narrative. Transactional lawyers take an active role, not only creating the documents, but shaping the entire transaction. While the transacting parties may have a particular transaction in mind, the transactional lawyer does not merely take dictation. The role of the transactional lawyer is to proactively construct the transactional documents to fit the particular transaction. The transactional lawyer also anticipates issues that have yet to be identified, recognized, or acknowledged by the transacting parties. The transactional lawyer works to understand the history of the parties and the nature of the transaction.

Narrative agents create cohesive narratives. The transactional documents produced must be consistent and cohesive. Creating a cohesive narrative requires more than consistent use of terms of art. The transactional lawyer weaves together strands of phrasing, clauses, headings, and provisions to produce a coherent text. That text is built around the elements of narrative—characters, actions, and events. The created documents will promote, guide, and control the relationship of the transacting parties. The transaction, and the related transactional documents, begins with “once upon a time” and aims to end at “happily ever after.” Equating a transactional lawyer to a storyteller reflects the responsibility the drafting lawyer assumes to tell the tale of the transaction.

## V. FIVE PRACTICAL STRATEGIES

This essay shares five practical strategies that transactional lawyers can use to present transactional documents as narrative. The strategies will be of interest to professors who could incorporate these strategies into classroom exercises. The strategies will also be of interest to practitioners who can use these strategies when drafting a variety of transactional documents.

### A. *Use Actual Names in the Documents*

*“What’s in a name? That which we call a rose  
By any other word would smell as sweet”*

*- William Shakespeare<sup>1</sup>*

The first strategy is to use the actual names of the transacting parties in the documents. In transactional documents, the parties are often Assignor and Assignee; Buyer and Seller; Employer and Employee; Lessor and Lessee; Trustee and Beneficiary; Donor and Donee; Wife and Husband. The transacting parties are often presented in documents with reference to their roles as transacting parties. These terms accurately describe the role that the particular party will play in the transaction, but these terms do not necessarily make a meaningful connection to the transacting parties. Despite the accuracy of these terms, the use of terms can alienate the parties from their own transaction because the individuality of names is replaced with a legal term of art.

Legal terms used in most form documents, such as Assignor and Assignee, represent more than convention and convenience—the legal terms reflect substantive meanings that embody certain rights and obligations. Using such legal terms can also minimize the need for the drafter to edit certain portions of the documents. But the terms can also act as barriers for identification by the transacting parties themselves. For instance, the actual parties do not see themselves as the one-dimensional terms of Assignor or Assignee. Individuals are multi-faceted, and they identify with their names, the names of their employer, and the names of their family members. Using the names of the parties thus allows for the parties to identify with the rights and obligations, not of a generic Assignor and Assignee, but an individual party.

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<sup>1</sup> WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act. 2, sc. 1, ll. 85–86.

By approaching the transactional document as embodying a narrative, using the actual names of the parties allows those parties to become the characters in the story of their own transaction. This also instills ownership in the parties of their rights and obligations. The document becomes more than a mere generic form; it becomes personal to the transacting parties.

Consider the following language from a form document:

Assignor assigns to Assignee all of Assignor's right, title, and interest under the Purchase Agreement, including without limitation, all right, title, and interest in any down payment or earnest money.

As written, the provision accurately reflects the roles of the parties. Nevertheless, the use of the legal terms does not encourage the transacting parties to take ownership of their roles. The parties should feel a connection to the documents that embody their current obligations and future responsibilities. But the parties may not identify themselves by these accurate, yet faceless, legal terms.

The form provision may be revised as follows:

Gavin Revel assigns to Bridget Simms all of Gavin Revel's right, title, and interest under the Purchase Agreement, including without limitation, all right, title, and interest in any down payment or earnest money.

Simply replacing "Assignor" with Gavin Revel and "Assignee" with Bridget Simms allows the transacting parties to see themselves in the document and in their specific transaction. There is power in the personal rather than the generic. It facilitates not only the parties' understanding of their rights and obligations, but may encourage performance under the agreement. This straightforward substitution can easily be completed with the aid of a word processing program and careful proofreading. But this discrete change may have a big impact on the ability of the transacting parties to identify with the personal story of their transaction, and consequently with the documents themselves.

B. *Customize the Order of Provisions*

*“A story has no beginning or end: arbitrarily one chooses that moment of experience from which to look back or from which to look ahead.”*

*- Graham Greene<sup>2</sup>*

The next strategy a drafter can use to tailor the form document to the parties’ particular transaction is to customize the order of provisions. While every story has a beginning, a middle, and an end, the events that are chosen for each part are often selected by the storyteller. Narratives are constructed, at least in part, in the order of events relayed. Consider the power of a compelling hook and the thrill of a cliffhanger. When a story is told out of chronological order, it alters the way in which the viewer understands the story; certain aspects of the overall story are either highlighted or downplayed based on where in the story they appear.

The nature of the events and the order in which those events are described reflect the goals of the storyteller. In other words, the storyteller’s selection of events and characterization of those events as the beginning, the middle, or the end, shapes the narrative. Transactional lawyers should therefore consider the order of provisions in their transactional documents. Altering the order of provisions from the order of provisions in a form document may promote the creation of a narrative that better reflects the understanding and intent of the transacting parties.

Sometimes, conventions inform the sequence and order of clauses in form transactional documents. These conventions may have substantive consequences, such as placing pre-residuary gifts before a residuary gift in a Last Will and Testament. Other conventions, such as leading with the identification of the Testator’s family, reflect common usage. The overall organizational structure of contracts also reflects common usage and has substantive consequences. For example, placing the recitals or background section in the beginning of the contract ensures that the reader is familiar with the understanding and intent of the parties to the transaction. This knowledge, especially when the reader is a court, may have a significant impact on how the document’s terms are interpreted. Similarly, placement of the definitions up-front also is based on convention but has a substantive impact on the reader’s understanding of the subsequent terms.

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<sup>2</sup> GRAHAM GREENE, *THE END OF THE AFFAIR* 7 (1962).

In the case of the transactional document, the organizational approach also projects the narrative. The beginning of the narrative establishes a base or starting point. The purpose or goal of the narrative is either explicitly stated or is subtly foreshadowed. The middle presents a conflict and describes tension. The end presents resolutions and shares takeaways. The manner in which those events are ordered will alter the narrative.

Consider how altering the structure of a Will may convey the individual's story. For a Testator with young children, the narrative is not necessarily a celebration of the wealth accumulations of a lifetime but a narrative emphasizing the importance of caregiving. The Will's introduction can thus be followed by the nomination provisions for the minor children's guardians. The provision can be followed by the property management device for the children, such as the creation of custodianship accounts or testamentary trusts. The substantive integrity of the Will is preserved by the inclusion of all of the provisions necessary for the transmission of wealth. But by front-loading the Will with provisions relating to the minor children, the narrative emphasizes the caregiving as its central theme.

In contrast, a Will that begins with a series of specific gifts to various charitable organizations conveys a different narrative. The narrative centers instead on benevolence. This attention to the ordering of provisions facilitates the initial creation of the document and the ultimate implementation of the document. In the case of a Will, the document may be created fifty years—or more—before implementation. By aligning the order of the provisions with the narrative of the individual making the Will, the interpretation and implementation are better guided by the Testator's intent.

The same is true for the ordering of obligations in a contract. The transactional drafter must make conscious choices about how to organize the clauses and provisions. One obvious choice is to arrange the terms in chronological order, in terms of how the life of the transaction will proceed. Another option is to organize the terms by their relative importance to the transaction, placing the terms that the parties view as most significant in the beginning of the document. Finally, the drafter may opt to keep the terms in their "traditional" sequence, meaning the way in which they are most commonly ordered in form documents. The principal advantage of the traditional sequence is familiarity, yet the rearranging of the document may yield a different understanding of the transaction.



For example, if the Employer's attorney is drafting an employment agreement, she may choose to place a non-compete restrictive covenant near the beginning of the operative terms because that particular term is of utmost importance to her client. The terms could thus be ordered as follows:

1. Employment term
2. Methods of termination by parties
3. Employee's duties upon termination:
  1. Non-competition clause
  2. Non-solicitation clause
  3. Confidentiality clause
4. Employer's duties upon termination
5. Employee's job duties during employment term
6. Employer's duties during employment term
  1. Salary
  2. Benefits

Yet, if the terms were organized in a chronological order, that term, which only comes into effect upon termination of the employment relationship between the parties, will likely be placed toward the end of the operative term section. It will be preceded by the terms outlining the parties' performance during the employment relationship, such as job duties, salary, and benefits. The arrangement of the terms thus impacts the "story" told in the employment contract. The order of the provisions reflects the hierarchy of importance of the terms to the client.

The order of provisions in form transactional documents may have started somewhat arbitrarily. And the repeating of particular sequences in form documents over time may have solidified some of those orders. This repetition can be comforting to individual drafters and arguably promote efficiency. Yet, barring substantive restrictions, comfort and efficiency should not be used to override the individual concerns of the transacting parties. The order of provisions should reflect deliberate choices by the drafter to convey the narrative as appropriate to the transacting parties.

C. *Incorporate Expressive Language as Appropriate*

*“It’s embarrassingly plain how inadequate language is.”*

*- Anthony Doerr<sup>3</sup>*

The third practical strategy to foster the role of the transactional lawyer as storyteller is to incorporate expressive language as appropriate. Language is a series of symbols used to convey ideas. Language can be imprecise. Language can be ambiguous. Transactional lawyers understand both the power and problems of language. They use this understanding when drafting documents.

Expressive language can be a powerful addition to transactional documents. The term “expressive language” refers to a variety of explanations and enhanced descriptions that are not required to make the document legally operative. Expressive language is “extra” language. The explanations are not required to enforce the obligations. The enhanced descriptions are more than what is legally required. Classifying expressive language as “fluff” and dismissing expressive language as “low-value,” overlooks the narrative possibilities afforded by expressive language. Used appropriately in selected instances, expressive language can serve a powerful narrative purpose. Transactional documents are more than the vessels that facilitate the acquisition of Greenacre or the selling of widgets. Transactional documents are motivated by personal goals and are crafted for particular purposes. Expressive language may be used to convey those motivations, goals, and purposes by including the person and the personal in the documents. Transactional documents are, after all, intended to be used by the parties to guide future behavior.

The premarital agreement provides an opportunity to consider the role of expressive language. Premarital agreements promote consideration of the nature of the parties’ relationship and inform the continued development of that relationship. Premarital agreements begin with a statement that the agreement is created between the two named parties. Recitals may follow to state the purpose of the agreement. The following are standard recitals in a prenuptial agreement:

A. A marriage is contemplated between the parties.

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<sup>3</sup> ANTHONY DOERR, *ALL THE LIGHT WE CANNOT SEE* 503 (2014) (The 2015 Pulitzer Prize Winner in Fiction).

- B. The parties have fully considered the object of their pecuniary condition and situation, their prospects and desires, and mutual rights and obligations.<sup>4</sup>

The standard recitals are accurate but bland. The recitals do not explain why the two particular individuals are creating the particular premarital agreement in the particular circumstances. The following recitals, while still being standard, do more to explain the reason behind the agreement's creation.

[E]ach party acknowledges and stipulates that the purpose of this Agreement is not to promote or procure a divorce or dissolution of marriage, but to provide for marital tranquility by agreeing on the property and support rights of each other at the commencement of the marriage. The parties have determined that the marriage between them shall have a better chance of success if the rights and claims that accrue to each of them as a result of their marriage are determined and finalized by this Agreement.<sup>5</sup>

The recitals acknowledge the intent of the Agreement “is not to promote or procure divorce,” but the recital is still generic.

Expressive language could be used in that instance to connect the particular document to the particular circumstances. The recitals could expand upon the reasons why the parties are creating the agreement at this particular time. For instance, the parties may both previously have been married and will be combining households. The parties may want to clarify how property acquired during the previous marriages is to be disposed of upon the property owner's death. Similarly, the parties may have particular assets that require customized treatment or special management. For example, one party may have an ownership interest in a family business. How that business interest is to be managed during the marriage could be the reason for the creation of the premarital agreement. The generic recitation, “the parties desire to clarify their property rights in the event of

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<sup>4</sup>5 AMERICAN JURISPRUDENCE LEGAL FORMS 2D § 61:19 (2018).

<sup>5</sup>20 FRANK L. MCGUANE, JR. & KATHLEEN A. HOGAN, *Drafting the Agreement Not to Encourage Dissolution*, in COLO. PRAC., FAMILY LAW & PRACTICE § 39:7 *Drafting the Agreement—Not to Encourage Dissolution* (2d ed. 2012) (omitting “WHEREAS”).

dissolution of the marriage or death of the parties,” does not reflect the specific reason the parties decided to create the premarital agreement.

In the drafting classroom, students can consider the role of expressive language in a manner that promotes student engagement with drafting. Student drafters shift their focus from approaching the drafting of a transactional document as the completion of a fill-in-the-blank form into the affirmative act of construction. To establish the foundation for expressive language, students can consider what questions must be asked to gather the relevant information from the client.

The students begin with the following provision from a Will: “I give my 14 karat diamond earrings to my daughter Lauren Richards, if she survives me.” As a starting point, the provision includes a description of the property (“my 14 karat diamond earrings”), an identification of the Beneficiary (“my daughter Lauren Richards”), and a recitation of conditions (“if she survives me.”). For purposes of this exercise, students are told to assume that the descriptions do not include any mistakes or create any ambiguities. In other words, the Testator (i.e., the Will-maker or property owner) owns only one set of earrings that would match this description. The Testator has only one daughter named Lauren Richards.

Students are asked to formulate questions to pose to the client to enhance the description of the property. Those questions include the following:

Where did the diamond earrings come from?

Is there a family story related to the diamond earrings?

When are the diamond earrings generally worn?

What do the diamond earrings represent to you?

Why was Lauren as the Beneficiary of these earrings?

Does Lauren have a particular connection with these earrings?

The responses to the questions allow students to expand the provisions, focusing on the property description. The student drafter may create the following revised provision:

I give my 14 karat diamond earrings that I received as an anniversary gift from her father to my daughter Lauren Richards, who wore the earrings on her wedding, if she survives me.

The enhanced description conveys additional meaning to the Beneficiary. The Will reflects a lifetime of accumulations. The pairing of property and Beneficiary is meaningful to the Testator and to the Beneficiary. The inclusion of appropriate expressive language honors that aspect of the Will. The Will becomes a more meaningful document to the Testator and to the Beneficiary by directly referencing the financial and non-financial value of possessions and relationships.

Expressive language is not limited to transactional documents that may intuitively be understood to be personal, such as intimate contracts or Wills. All transactional documents are personal to the transacting parties. A purchase and sale agreement is a personal document. One party is selling a beloved home; another party is setting down roots. An employment contract outlines obligations and responsibilities that have a daily impact on the Employee. Ignoring the personal inherent in transactional documents devalues the relevance of transactional documents to the transacting parties after the execution of the documents.

Expressive language can create problems. Transactional lawyers recognize that not all transactional documents will benefit from inclusion of expressive language in all circumstances. The expressive language may conflict with the document's legally operative language. The expressive language may insert mistakes or inject ambiguity into the document. For instance, untrue statements included in the recitals section of a contract may create interpretation issues. Mistakes included in the Will may raise an issue of a Testator's lack of capacity. Transactional documents are not the place to include off-the-cuff statements or vent old grievances. Expressive language must be used appropriately by the transactional lawyer. Used appropriately, expressive language can provide the opportunity to project the narrative of the transacting parties.

D. *Plan for Alternative Outcomes*

*“By failing to prepare, you are preparing to fail.”*

*- Benjamin Franklin<sup>6</sup>*

The fourth strategy is to plan for alternative outcomes. The life of a transaction follows certain paths; these paths can be conceptualized as narrative plotlines. And each transactional document should be drafted to plan for a variety of potential, or alternative, outcomes—just like stories. The terms of a contract, for example, set forth the sequence of events that will take place during the contract term and provide for different contingencies, or alternative plotlines, that may occur during the contract term. Contract terms thus enable the parties to understand how to perform their duties in accordance with the anticipated plot.

But contract terms may also protect one party if the other party to the contract breaches its obligations, representing a foreseeable alternative plotline. A shift in the narrative movement may be presented in the body of the contract to acknowledge and guide the various foreseeable paths. For example, terms may set forth a sequence of events that lead to disputes between the parties. Additional terms may then be added to provide for what is to happen when those disputes arise, such as choice of law and forum provisions. By anticipating the various potential splits in the plot of the contract, the drafter can better create contract terms to deal effectively with each contingency.

In contract drafting, failing to consider an unanticipated ending may produce an agreement that fails to include, for example, a *force majeure* clause. During the term of a contract, one or both parties may be unable to continue to perform its duties; but, without the inclusion of a *force majeure* clause, the parties must seek the intervention of the court to apply the default common law rules.

A standard *force majeure* clause provides as follows:

Neither party will be responsible for any failure to fulfill its obligations due to causes beyond its reasonable control,

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<sup>6</sup> This quote is often attributed to Benjamin Franklin. See, e.g., Matt Mayberry, *By Failing to Prepare, You Are Indeed Preparing to Fail*, ENTREPRENEUR (Apr. 22, 2016), <https://www.entrepreneur.com/article/274494>. Verification of authorship of many of Franklin’s purported quotes has not been established. See generally Baylor Univ., *Misquotes and Memes: Did Ben Franklin Really Say That?*, SCIENCEDAILY (July 1, 2015), <https://www.sciencedaily.com/releases/2015/07/150701152634.htm>.

including but not limited to acts of God, fires, floods, riots, wars, or terrorist attacks.

In the drafting classroom, students can be asked to tailor this form *force majeure* clause to fit the particular transaction better. For example, if it was in an employment contract, what illustrative examples might be included beyond those identified above? The students may identify strikes and labor disputes. Alternatively, what if it was in a contract for the sale of goods imported from a foreign country? Here, the students may respond with events such as embargoes, civil wars in origin country, the creation of rules or regulations by government authorities, or materials shortages.

In planning for alternative outcomes, from the perspective of a storyteller, the drafter must think through the life of the contract under various fact patterns. First, the drafter must hypothesize performance. What will happen, moment by moment, if the parties comply with all of the terms in a timely manner? The drafter must consider whether the contract contains all of the necessary “rules” and details to assist the parties in knowing how to perform their duties. Most form contracts do not adequately set forth the steps necessary for the parties to understand what needs to be done to carry out their contractual obligations. This includes sufficient information as to who is obligated to perform, what is the specific obligation, how is it to be performed, and by when and where must the obligation be performed.

Second, the drafter must hypothesize non-performance and default by addressing what happens if one or both parties fail to perform all or part of the contract. In other words, the drafter must prepare for the contract to fail to reach its intended outcome. The consequences of failure to perform must be stated in the agreement and closely linked to the performance required. These issues should be addressed at the drafting stage rather than waiting for the parties to have a dispute. For example, the contract should protect the parties by stating remedies for potential breaches of each obligation.

Finally, the drafter should consider the worst-case scenario by assuming that the parties will become hostile towards each other, seeking to undermine the other party at every opportunity. Will the contract provide sufficient guidance to govern the relationship? Will it provide sufficient guidance to a court interpreting the contract or imposing remedies if necessary? The drafter must consider this alternate outcome

and draft the contract so as to best benefit his client even in the unfortunate event of court intervention.

Guiding the transacting parties and anticipating future court intervention is a facet of all transactional documents and, thus, the responsibility of the transactional drafter. Using the concept of plot to anticipate future events produces a more complete transactional document.

Similar to the contractual relationship, a trust agreement may be structured with reference to a plot to anticipate changes in the relationship of the transacting parties. For example, an individual who is creating the trust relationship may wish to create a trust to be used for the education of his or her descendants. The provisions in the trust agreement should consider the most likely use of the trust property, i.e., education. But that likely use is not the only use. An alternate situation in which the descendants have no need for educational support, but require other support, should be included in the terms of the Trust. Moreover, the possibility of the Settlor leaving no descendants should also be included in the trust instrument to represent a further divergence in the plot. In this sense, the plot becomes similar to a “choose your own adventure” novel where the drafter anticipates multiple divergences that should nevertheless still reference the party’s intent.

The conscious recognition of a plot helps “shape” and provides “direction” to the narrative. Envisioning the structure of events as plotting a narrative enables the drafter to better effectuate the parties’ intent and address any foreseeable contingencies.

*E. Alter the Stock Story When Necessary*

*“Ronald,’ said Elizabeth, ‘your clothes are really pretty and your hair is very neat. You look like a real prince, but you are a bum.’*

*They didn’t get married after all.”*

*- Robert Munsch<sup>7</sup>*

The last practical strategy is to alter the stock story when necessary. One of the benefits of using a form document as a starting point may be the embedded inclusion of a stock story. Stock stories are conventional stories that rely upon stock characters, stock situations, stock plots, and stock outcomes to evoke a stock response. They are generic stories

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<sup>7</sup> ROBERT MUNSCHE, *THE PAPER BAG PRINCESS*, 29 (Annick Press 2016) (1945).



conveyed in broad brushstrokes that are readily understood by audiences. Once a stock story has been triggered in the mind of the audience, that individual's perception of the events and circumstances will be based, at least in part, on the stock situations embedded in that story and the perceived inevitable stock outcome. Stock stories thus serve as patterns and models for the crafting of individual stories.

Yet, a concern with all stock stories is the compression of the narrative in a manner that distorts or misrepresents the individual story. The stock story is a generic narrative that, by definition, may not represent the uniqueness of the individual parties, the particular sequence of events, or the likely outcome.

The recognition and identification of stock stories produce an instant, strong, and automatic response. "Cheering the hero" and "booing the villain" are examples of stock responses. The strong response to a stock story means that triggering an alternate response may be difficult. Because of the immediate recognition of stock stories by the audience, the audience may also use the stock story to fill in gaps in the narrative. The audience may also project an intent of the parties that is not representative of the actual intent.

Thus, it may often be necessary for the transactional drafter to supplement the stock story or alter the stock story found in a form agreement, which requires deliberate drafting choices. The drafter must pay careful attention to whether the stock story embedded within the form actually corresponds with the parties' intent.

This recognition of stock stories in form documents must be accompanied by the understanding that, at times, the stock story may need to be deliberately altered or even omitted. The transactional drafter as storyteller may need to create a counter story. To do so, the drafter must use the structure, format, and language of the transactional document to sidestep the stock story embedded within the form agreement. The drafter may use a variety of techniques to supplement the stock story, to supplant the stock story, or to counter the stock story. The customization of the story then accurately reflects the uniqueness of the particular parties and their particular transactions.

Even the title of the form document can suggest a generic stock story and thus present an inaccurate representation of the parties' actual intent. For example, consider the narrative formed by the title "Prenuptial Agreement" in a standard form agreement. The generic title conjures up

the stock story of the need for a prenuptial agreement to deal with the inevitable, and unavoidable, demise of a marriage through a dissolution proceedings or divorce. By including a subtitle of “Not to Encourage Dissolution,” the drafter may expand upon the intent of the parties. Altering the title presents an opportunity to reframe the purpose of the agreement and override that stock story.

The transactional drafter can also use “recitals” or a background section to tailor the form to the parties’ specific transaction. These recitals represent an ideal opportunity to draw from narratology. They can be used to illustrate the points of view of the transacting parties. Despite presenting an ideal opportunity to draw from narrative, recitals in form documents are generic or often nonexistent. Yet, the drafter as storyteller can effectively use recitals to consciously reframe the narrative by acknowledging the parties’ true intent behind the agreement, thus replacing the stock story.

The information in the recitals may be useful to explain the parties’ contractual relationship, any past history, and the parties’ intentions that may present an alteration of the generic stock story provided by the form language. Recognizing the transactional lawyer’s role as storyteller can be particularly valuable in encouraging the tailoring of the recitals to the specific story of the transaction.

Additionally, the use of definitions enables the drafter to tailor the meaning of certain terms used in the contract to the subject of the transaction. Definitions can be drafted to customize the meaning of words or phrases used; in other words, they can be used to supplement or alter the stock story. For example, consider the definition of the terms “Child,” “Children,” and “Issue” in a form Will. Those words are generally defined to mean the blood descendants or adopted children of an individual. While that standard definition may correspond with the intent of a number of people who create a Will, the standard definition may not reflect the individual family relationships created by some Testators. In other words, the standard definition may not match who the individual would consider to be his or her children. The definition could then be modified to not only consider technological changes to reproduction, such as posthumously conceived children, but also to include individuals who are not legally considered children, such as stepchildren.

Finally, in order to ensure that the transactional document reflects the story that represents the actual parties and their situation instead of a

mismatched stock story, the drafter may need to modify the operative terms of the form and possibly delete some of the form's clauses.

As an illustration, consider the image below:



This is an image of an underdog: a smaller, weaker, naive opponent armed only with a sling and a pebble faces a larger, stronger, experienced adversary wearing armor and a spear. Yet, a pebble is hurled that then falls the mighty warrior, and the head of the warrior is cut off.

This is, of course, the story of David and Goliath<sup>8</sup>. Just those three words—David and Goliath—are all you need to fill in the details of the story—the weaker, inexperienced individual triumphing against all odds against a strong, experienced adversarial in an inventive, and perhaps, unusual way.

But as Malcolm Gladwell teaches us in his TED Talk<sup>9</sup>, that actually is not the real story of David and Goliath. In fact, the actual story is one in which the person who is supposed to triumph does in fact triumph. Goliath suffered from a medical condition that made his movements slow and cumbersome. As a person of unusual size, he would have been easy to spot by opponents. David, in contrast, was agile, wily, and very experienced with projectile weapons. So why is it that we believe we know what happens when we hear the words “David and Goliath” when we do not actually know the story? It is because we use stock stories to fill out the story.

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<sup>8</sup> See generally 1 Samuel 17.

<sup>9</sup> Malcolm Gladwell, Presentation at TEDSalon NY2013: The unheard story of David and Goliath (Sept. 30, 2013), [https://www.ted.com/talks/malcolm\\_gladwell\\_the\\_unheard\\_story\\_of\\_david\\_and\\_goliath](https://www.ted.com/talks/malcolm_gladwell_the_unheard_story_of_david_and_goliath).

One might think it quite the stretch to apply the concept of stock stories to transactional documents. But consider this provision from a form employment contract:

Employer shall continue to employ Employee for such time as Employer is in need of, or desirous of, the services of Employee. It is agreed between Employer and Employee that the duration of employment is unspecified and solely rests in the discretion of the Employer.

That clause certainly appears to reflect the David and Goliath story where David is the Employee who is the weaker party compared to the mighty Employer, the Goliath in the story. Another example from a standard form employment agreement is the arbitration clause that requires the Employee to agree to arbitration for claims or disputes against the Employer, but often does not require the Employer to agree to the same. This form provision also represents the stock story of David and Goliath—of the powerless Employee pitted against the overbearing and powerful Employer.

But at times, this stock story does not represent the actual relationship between the parties. Consider, for example, an executive employment agreement where the Employer is just one of many companies vying for the same highly-valued potential executive. Or consider the Employer is a start-up venture, where the Employee is taking on potentially high risks by leaving her employment with a stable company for this new opportunity. In both scenarios, the traditional view of Employee and Employer as David and Goliath is not applicable—and the transactional drafter must alter the stock story of the form agreement by modifying clauses to make them more reciprocal, as in the case of the standard one-sided arbitration clause.

There are other form contract provisions in employment agreements that embed a wholly different stock story. For example, an Employee Incentive Stock Options clause may provide:

The proper execution of the duties and responsibilities of the executives and employees of Corporation is a vital factor in the continued growth and success of Corporation. Toward this end, it is necessary to attract and retain effective and capable individuals to assume positions that contribute materially to the successful operation of the Corporation and to provide incentive

compensation opportunities that are competitive with other similar businesses. It will benefit Corporation, therefore, to bind the interests of these persons more closely to its own interests by offering them an attractive opportunity to acquire a proprietary interest in Corporation...

This form clause reflects a situation where the Employer and Employee are likely on a more equal footing, unlike the stock story of David and Goliath. Additionally, it contains a possible alternate stock story of the Quest of the Dragon Slayer, based on the myth of Sigurd from Nordic legend.<sup>10</sup> According to the legend, Sigurd accepted the quest of seeking the return of gold that had once belonged to his father from Fafnir, who had been cursed and turned into a dragon. Sigurd's quest was based on loyalty to his deceased father and was ultimately successful, earning him the name of "Dragon Slayer" as well as the reward of the gift of prophecy. This "reward" stock outcome is contained in a variety of employee stock option form documents. The following form clause contains an even more pronounced reward stock story since the benefit to the Employee increases with continued faithful service:

As of the Effective Date, Executive has been granted 20,000 restricted shares of common stock of the Company (the "Restricted Shares"). One-fourth of the Restricted Shares shall vest on, and be delivered to the Executive promptly following, each of the first four anniversaries of the Effective Date, provided the Executive has remained continuously employed by the Company until the applicable date. . . .

In the drafting classroom, when discussing with students how to best select and choose among hundreds, if not thousands, of form agreements found online, in addition to considerations such as who drafted the particular form, students can also be introduced to the idea of viewing the form agreement through a narrative lens. Selecting forms can also be about selecting the best or most appropriate stock story for the transaction.

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<sup>10</sup> See generally *Sigurd*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Sigurd> (last modified Sept 21, 2018).

Because a stock story is by definition a generic story type, it may in fact reflect the actual story of a transaction. But often the stock story of the form will not be the story of the particular transaction. In the context of transactional documents, the “happily ever after” theme of most stock stories may not correspond to parties’ transaction. “Happily ever after” may be the starting point to drafting the transactional document, but the drafter must also have the confidence to alter stock stories when necessary.

## VI. CONCLUSION

This essay presents an understanding of narrative that is compatible with transactional documents. Whether an employment agreement or a trust agreement, transactional documents are more than mere devices to mechanically deliver information. The transactional documents are the product of relationships and interactions between the transacting parties. Transactional lawyers undertake an active role in creating documents that reflect the hopes, wishes, and fears of the transacting parties. From the selection of a form document to the customization of clauses, transactional lawyers use provisions to craft the narrative. In other words, transactional lawyers can, and should, use the power of narrative to share their clients’ stories in an accessible, meaningful manner.