

Humanizing Transactional Documents: Why and How Transactional Drafters Should Use Narrative Techniques

Susan M. Chesler* and Karen J. Sneddon**

- I. Introduction
- II. Dual Goals of the Transactional Drafter
- III. Audience Engagement
 - A. Narrative Transportation
 - B. The Application of Narrative Transportation to Transactional Documents
- IV. Audience Persuasion
 - A. Narrative as a Form of Persuasion
 - B. The Application of Narrative Persuasion to Transactional Documents
- V. Conclusion

I. Introduction

The core of many transactional documents will be the acquisition, creation, or exchange of property or services. Yet, transactional documents are not only descriptive legal devices that dictate the exchange of widgets for cash. They are multifaceted documents that have the ability to do more than memorialize a transaction and create the private laws between the parties. As narrative texts, transactional documents tell the stories of the parties' relationship, whether it be an employment agreement, trust document, or purchase and sale agreement. Transactional documents present necessary and relevant information as a series of linked events where the transacting parties become characters participating in a narrative arc. The effectiveness of the transactional document can be enhanced with the drafter's use of narrative-based techniques.

The use of narrative techniques is not limited to the creation of novels, fairy tales, or advertisements. A broad definition of the term "narrative" is a story that involves characters undertaking actions in a series of structured events.¹ Such a definition includes fictional stories, instruction manuals, and transactional documents. Narrative-based

* Clinical Professor of Law, Sandra Day O'Connor College of Law, Arizona State University.

** Interim Dean and Professor of Law, Mercer University School of Law.

¹ Susan M. Chesler & Karen J. Sneddon, *The Power of a Good Story: How Narrative Techniques Can Make Transactional Documents More Persuasive*, 22 NEV. L.J. (forthcoming 2021) (manuscript at 17) (on file with authors) [hereinafter Chesler & Sneddon, *Power of a Good Story*].

drafting techniques include a wide range of methods that incorporate a narrative into the document, such as the development of characters, establishment of setting, and articulation of themes.²

The transactional drafter's use of narrative-based drafting techniques results in documents that better achieve the drafter's dual goals: (1) to facilitate performance by the transacting parties as intended and (2) to encourage third-party decision makers like judges and juries to interpret the document as intended when necessary. These dual goals of the transactional drafter relate directly to the need to engage the varied audience of transactional documents and to persuade those audiences. By using narrative-based drafting techniques that better engage and persuade audiences, drafters can craft more effective transactional documents.

Furthermore, the use of narrative techniques in transactional drafting achieves another, less obvious purpose: it humanizes the transactional document in the eyes of both the parties and third-party decision makers. As a result, the transacting parties and any third-party decision makers who engage with the document are more likely to view the parties and their transaction in a favorable, more appealing light.

This article addresses not only the reasons why transactional documents should be considered both narrative texts and persuasive documents, but also presents concrete examples of how drafters can use narrative-based drafting techniques to craft more effective documents. These transactional documents will not only better achieve the drafter's dual goals, but they will humanize the documents and give voice to the transacting parties and their transactions.

II. Dual Goals of the Transactional Drafter

The transactional drafter has dual goals for a properly executed transactional document. The first goal is to have the transacting parties perform in accordance with the terms of the transactional document, without the need for third-party intervention.³ The second goal is that if third-party intervention is at some point needed to determine the obligations, responsibilities, or liabilities of the transacting parties, the

² See generally Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques and Drafting*, 68 OKLA. L. REV. 263 (2016) (discussing narrative techniques applicable to drafting transactional documents).

³ Chesler & Sneddon, *Power of a Good Story*, *supra* note 1, at 6.

transactional document will be interpreted by the third-party decision maker as the drafter intended.⁴

The first goal, which may be described as the primary goal, is to encourage the transacting parties to perform their duties in accordance with the terms of the document.⁵ The term “transacting parties” may broadly refer to any party that is directly involved with the execution or performance of the document’s terms.⁶ More specifically, transacting parties may refer to those individuals, or individuals properly acting on behalf of entities, who negotiate and create the document.⁷ Transacting parties may also encompass parties who may be more accurately described as performing parties. Performing parties are individuals who were not involved in the creation of the document but will nevertheless perform in accordance with the transactional document’s terms.⁸ These individuals may have had limited ability or even no ability to influence the creation of the transactional document. For instance, the president of a corporation may have acted as the negotiator and signatory of a transaction, but the party who needs to commence performance in accordance with the document’s terms may be a member of the corporation’s marketing department. Furthermore, transacting parties may include parties more specifically described as ancillary parties.⁹ These are parties that were not directly involved in the creation of the document and did not participate in its execution, but who may need to perform in some role or manner specified by the terms of the transactional document.¹⁰ For example, ancillary parties may be financial institutions or regulatory agencies whose action or approval of an action will be required by the document’s terms.

To achieve this primary goal, the terms of the transactional document should promote prompt and thorough performance by the transacting parties.¹¹ To demonstrate, the notice provision of a real estate purchase and sale agreement should encourage prompt and complete communication between all of the parties as they seek to satisfy the contingencies, or conditions precedent to closing, during the executory contract period. In the context of a real estate transaction, the buyer will

⁴ *Id.*

⁵ *Id.* at 7.

⁶ See generally Mark C. Suchman, *The Contract as Social Artifact*, 37 L. & SOC’Y REV. 91 (2003) (describing how transacting parties form contracts to meet their needs).

⁷ Chesler & Sneddon, *Power of a Good Story*, *supra* note 1, at 7.

⁸ *Id.*

⁹ See *id.* at 8.

¹⁰ *Id.*

¹¹ See Susan M. Chesler & Karen J. Sneddon, *Clause A to Clause Z: Narrative Transportation and the Transactional Reader*, 71 S.C. L. REV. 247, 277 (2019) [hereinafter Chesler & Sneddon, *Clause A to Clause Z*].

obtain a title report and survey that may reveal the existence of encumbrances, encroachments, or other potential title defects. The buyer should promptly communicate such concerns by sharing their objection to the status of title with the seller. The seller then has the opportunity to remedy the defect by effectuating a cure. The seller's attempts to cure should then be timely communicated to the buyer. The exchange of communications promotes the parties' efforts to close on the date scheduled. If the notice provision is vague as to the time and manner of communications, the parties may be unable to timely share concerns which would ultimately result in the failure to close the transaction.

The second goal of the transactional drafter, to write the document with a third-party decision maker in mind, acknowledges that while the need for third-party intervention may be minimized by effective drafting, the possibility that such intervention could occur should inform the drafting process.¹² Although the transactional drafter's aim is to minimize the likelihood of third-party intervention, the second goal is to draft the document in such a way that, if necessary, a third-party decision maker will interpret the document as the drafter intended.¹³

These decision makers will interpret the terms of the transactional document in hindsight to evaluate whether the transacting parties or the performing parties, as the case may be, properly performed in accordance with the document's terms.¹⁴ The decision maker is seeking to resolve a dispute between the parties because the parties themselves have been unable to do so. To best aid the future decision maker, the transactional drafter will attempt to minimize the risk that the document's provisions would be misinterpreted or that an interpretation could result in

¹² See Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 U. KAN. L. REV. 251, 257 (1992) ("Part of the storytelling involved in drafting a contract, for example, looks ahead to the possibility that breach of the contract may result in litigation to enforce its terms.").

¹³ See MARGARET TEMPLE-SMITH & DEBORAH CUPPLES, *LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS* 96 (West 2013) (asserting that "another goal is to draft so as to ensure that if a dispute arises, the client's interests are protected to the fullest extent possible") (emphasis in original). A third-party decision maker may be a judge, a court clerk, a jury member, arbitrator, or mediator. See e.g., Donald E. Vinson, *How to Persuade Jurors*, 71 A.B.A. J. 72 (1985); Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. ARB. & MEDIATION 219 (2013). See generally SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 31:1 (4th ed. 2021).

¹⁴ See Randall H. Warner, *All Mixed up About Contracts: When is Contract Interpretation a Legal Question and When is it a Fact Question?*, 5 VA. L. & BUS. REV. 81, 101–03 (2020).

consequences unanticipated by the drafter.¹⁵ For example, the notice provision in the purchase and sale agreement referenced above should set forth the specific method required for communication between the parties. A third-party decision maker can then evaluate whether that provision was complied with by a voicemail, text message, or social media message. This later analysis should be consistent with the parties' intent at the time the contract was executed.

While the drafter may use forms, previously drafted documents, and legal precedent, the creation of a transactional document goes beyond a cut-and-paste of provisions.¹⁶ The transactional drafter will shape and alter the text based upon the needs and expectations of the audiences who may be engaging with the document at different points in time and for different purposes.¹⁷ The transactional drafter thus seeks to promote audience engagement and advocate for the client by persuading the document's varied audiences.¹⁸

The use of narrative-based drafting techniques supports both audience engagement and audience persuasion.¹⁹ The transactional drafter seeks to support the ability of the transacting parties to process, recall, and act in accordance with the document's terms.²⁰ The transactional drafter also seeks to influence the audiences' beliefs, attitudes, and actions so that the transacting parties act in accordance with the document's terms and that the third-party decision makers interpret the terms as the drafter intended.²¹

III. Audience Engagement

The dual goals of the transactional drafter are furthered by using narrative-based drafting techniques because the drafter must engage the audience to achieve these goals. When the audience is engaged, the audience reads the document, recalls the terms, and then acts in accordance with the terms.

A. Narrative Transportation

¹⁵ Susan M. Chesler & Karen J. Sneddon, *Happily Ever After: Fostering the Role of the Transactional Lawyer as Storyteller*, 20 TRANSACTIONS: TENN. J. BUS. L. 491, 504 (2018).

¹⁶ Susan M. Chesler & Karen J. Sneddon, *Telling Tales- The Transactional Lawyer as Storyteller*, 15 LEGAL COMM'N & RHETORIC: JALWD 119, 142 (2018).

¹⁷ *See id.*

¹⁸ *See id.* at 121.

¹⁹ *See id.* at 121–22.

²⁰ *See* Chesler & Sneddon, *Clause A to Clause Z*, *supra* note 11, at 255.

²¹ *See id.*

The transactional drafter can promote audience engagement by using narrative-based drafting techniques to facilitate narrative transportation. Narrative transportation is the ability of the narrative to engage the audience with the narrative world.²² More formally, narrative transportation is defined as the “phenomenological experience of [the audience] being transported to a narrative world.”²³ This transportation engages the audience to hold the audience’s attention, facilitates audience comprehension, promotes audience retention of information, influences the audience’s attitudes and beliefs, and informs future actions by the audience.²⁴ The ability of the narrative to transport the audience will depend upon the following: (1) the audience’s participation in the narrative; (2) the evocation of emotional responses, particularly the emotion of empathy; and (3) the attributes of the text to create a well-crafted, coherent narrative.

Narrative transportation encourages the audience to participate in the narrative by prompting audience responses; such responses are described as participatory responses.²⁵ The following are three common participatory responses: (a) side participation, (b) problem-solving, and (c) replotting.²⁶ “Side participation” casts the audience in the role of a witness or commentator.²⁷ Although not assuming a character role within the narrative, side participation allows the audience to follow the journey of the characters.²⁸ The audience cheers the protagonist’s victories and bemoans the protagonist’s set-backs. “Problem-solving” responses refer to situations when the audience is given the role of fact gatherer to predict resolutions.²⁹ The audience gathers information and evidence to anticipate the characters’ next actions or predict the probable resolution of the narrative’s conflicts. The audience seeks to determine the accuracy of those predictions. “Replotting” is a participatory response that occurs

²² See *id.* at 254.

²³ Melanie C. Green & Timothy C. Brock, *In the Mind’s Eye: Transportation-Imagery Model of Narrative Persuasion*, in *NARRATIVE IMPACT: SOCIAL AND COGNITIVE FOUNDATIONS* 317 (ed., 2002).

²⁴ See Chesler & Sneddon, *Clause A to Clause Z*, *supra* note 11, at 250–51.

²⁵ James W. Polichak & Richard J. Gerrig, “Get Up and Win!”: *Participatory Responses to Narrative*, in *NARRATIVE IMPACT: SOCIAL AND COGNITIVE FOUNDATIONS* 78 (ed., 2002).

²⁶ *Id.* at 73, 78.

²⁷ *Id.* at 74–75.

²⁸ See *id.* at 75.

²⁹ *Id.* at 78.

after the narrative has concluded.³⁰ It is a retrospective reflection by the audience on what could have or should have happened.³¹ Replotting may occur as soon as the audience concludes the narrative or at some potential point in the distant future.³² When participatory responses are provoked by narrative transportation, the audience feels compelled to follow the narrative to see what the audience, in the performative role, must do next.³³

“Emotional responses will facilitate ‘immersion in the text’ and can reduce critical [reaction to] the narrative.”³⁴ The emotional responses vary and are most commonly “activated by the [audience’s] identification with characters in the narrative.”³⁵ “This identification primarily promotes the creation of sympathy and empathy.”³⁶ The range of emotional responses experienced and the depth of those emotional responses will affect audience engagement. “While experiencing the emotional responses, the [audience] will enjoy meeting the characters, appreciate the setting of the narrative, and value the events of the narrative.”³⁷ A favorable experience leads to a favorable recollection of the narrative.³⁸

The attributes of the text can enhance narrative transportation.³⁹ A wide range of text features, from word choice to narrative structure, may be used to cultivate transportation. For example, the grouping of information and the sequencing of information can influence how the audience will respond to the text. “Point of view refers to the perspective from which the [audience] will experience the narrative’s events, characters, and emotions.”⁴⁰ These experiences draw the audience into the narrative world. This immersion causes narrative transportation.

³⁰ *Id.* (describing replotting as “retrospective”).

³¹ *See id.* at 78–79.

³² Chesler & Sneddon, *Clause A to Clause Z*, *supra* note 11, at 259; *see also id.* at 259 n.68 (noting that replotting the audience revisits the narrative, which is frequently done with fictional narratives through the creation of “fan fiction”).

³³ *Id.* at 259.

³⁴ *Id.* at 260.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 261.

³⁸ *Id.*

³⁹ *See id.* at 262.

⁴⁰ *Id.*

B. The Application of Narrative Transportation to Transactional Documents

Initially, one may not associate narrative transportation with the experience of reading a transactional document.⁴¹ Yet, narrative transportation offers the transactional drafter the opportunity to further their dual goals. Narrative transportation can (1) influence how the audiences of transactional documents process the provisions within the transactional document, (2) facilitate the audience’s recall of the provisions in transactional documents, and (3) influence the behaviors and attitudes of the audiences.⁴² To better understand how narrative transportation can accomplish these goals, consider two versions of a recitals section from a personal services contract.⁴³

Figure 1

| Version 1 | Version 2 |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><u>AGREEMENT FOR WEB DESIGN & DEVELOPMENT</u></p> <p>This Agreement for Web Design & Development has been entered into by and between Idea Marketing Group (hereinafter referred to as “Purchaser”) and Weberous Web Design (hereinafter referred to as “Provider”) (hereinafter collectively referred to as “Parties”) as of June 1, 2021.</p> <p>Recitals</p> <p>WHEREAS, Purchaser desires to enter into this Agreement for Provider to develop a website for the _____ domain www.marketingforhomebusinesses.com.</p> <p>WHEREAS, under this Agreement, Purchaser authorizes Provider to access Purchaser’s web</p> | <p><u>AGREEMENT FOR WEB DESIGN & DEVELOPMENT</u></p> <p>This Agreement for Web Design & Development has been entered into by Idea Marketing Group (IMG) and Weberous Web Design (Weberous) (collectively the Parties) as of June 1, 2021.</p> <p>Background</p> <p>A. IMG is a marketing company headquartered in Las Vegas, Nevada that primarily focuses on providing internet marketing services for home businesses located in Nevada. IMG was founded in 2017 by its current President, Mary Walsh, and has recently doubled the size of its workforce.</p> <p>B. Weberous is a Nevada-based web design and development company providing services since</p> |

⁴¹ *Id.* at 274.

⁴² *Id.*

⁴³ For complete versions of these two example contracts, *see id.* at 282, 286–87.

host server to upload and download files as needed from the Purchaser directory for the purposes of creating a website. The Purchaser authorizes use of Purchaser’s logo and all brand identification in the creation of the website.

WHEREAS, Provider desires to design and develop a website for Purchaser under the term contained herein.

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained, the parties hereby agree as follows:

2011. It includes a group of top-rated website designers, digital marketers, and mobile app developers.

C. Both parties intend to enter into this Agreement for Weberous to design and develop a website for the domain

www.marketingforhomebusinesses.com for use by IMG and its clients.

D. In order to create this website pursuant to this Agreement, IMG authorizes Weberous to access IMG’s web host server to upload and download files as needed from the IMG directory, and authorizes Weberous to use IMG’s logo and all brand identification in the creation of the website.

E. IMG understands that the amount of time necessary for Weberous to create the website cannot be determined with absolute certainty and therefore the parties agree that IMG will pay Weberous on an hourly basis. Weberous in good faith has estimated the cost to be approximately \$5,000, but the parties understand that the final cost may be greater or lower than this estimate.

F. In order to save both time and money, the parties agree that in the event of a dispute between them relating to this Agreement, that dispute will be resolved through arbitration and not in a court of law. The Parties agree as follows:

Version 1 uses conventional drafting strategies, while Version 2 uses narrative-based drafting strategies. At first read, the notable difference is the length. The length of Version 2 should not be interpreted as adding superfluous or extraneous material. Likewise, the length variation does not mean that Version 1 includes ambiguous, contradictory, or incomplete information. Version 2 leverages the value of narrative-based drafting techniques to further the dual goals of the transactional

drafter. Specifically, Version 2 promotes audience engagement with the following: (1) scene setting, (2) party descriptions, (3) empathy cultivation, (4) sequencing of terms, and (5) enhanced text attributes.

Narratives are typically set in particular places and times.⁴⁴ A transactional drafter does not need to begin with “once upon a time” or “in a galaxy far, far away” to set the scene. Notice the difference between the description of the text of “recitals” compared to “background.” This scene setting can draw the audience into the narrative.

The transactional document is not about nameless, interchangeable parties.⁴⁵ By using the actual names of the parties rather than their transactional role, the audience identifies with the parties. Version 1 uses the generic and dehumanized terms “Purchaser” and “Provider.”⁴⁶ In contrast, Version 2 uses “IMG” and “Weberous.”⁴⁷ The Version 2 audience does not need to consciously attribute “Purchaser” to “IMG” and attribute “Provider” to “Weberous.” Instead, the audience, especially the transacting and performing parties, can readily identify themselves in the characters, one might even say “stars,” of the transaction with the use of names. By increasing the likelihood that the audience will identify with the parties, there is also an increase in the level of empathy for the parties.⁴⁸ But Version 2 goes beyond only using the parties’ names by using additional techniques to cultivate audience empathy. In Version 2, IMG is described as “a marketing company headquartered in Las Vegas, Nevada that primarily focuses on providing internet marketing services for home businesses located in Nevada.”⁴⁹ A brief history of the founding and growth of the company is shared in the following statement: “IMG was founded in 2017 by its current President, Mary Walsh, and has recently doubled the size of its workforce.”⁵⁰ These two sentences allow the audience to see themselves in the shoes of IMG, a company that has been rapidly developing. Similarly, Version 2 describes Weberous as “a Nevada-based web design and development company providing services since 2011.”⁵¹ The company becomes more than a mere business enterprise with

⁴⁴ See *id.* at 254.

⁴⁵ See *id.* at 274–75.

⁴⁶ See *supra* Figure 1.

⁴⁷ *Id.*

⁴⁸ See Victoria A. Shaffer et al., *Encouraging Perspective Taking: Using Narrative Writing to Induce Empathy For Others Engaging in Negative Health Behaviors*, 14 PLOS ONE 1, 3 (2019).

⁴⁹ See *supra* Figure 1.

⁵⁰ *Id.*

⁵¹ *Id.*

the inclusion of the following language: “[Weberous] includes a group of top-rated website designers, digital marketers, and mobile app developers.”⁵² The employees at Weberous put a face to the company. Version 2 is grounded in specificity and helps the audience connect with the transacting parties. This cultivation of empathy may help the audience experience the emotions of respect and understanding.

A critical attribute of any text is organization. The use of clear headings, enumeration, and grouping of like terms in Version 2 allows for easier audience processing of information.⁵³ This could continue throughout the document by deliberate sequencing of information and grouping of like terms. For example, complicated legal terms—such as a confidentiality provision—could be more easily understood by non-legal audiences if the drafter included background information explaining the events giving rise to the need for such a provision. Accordingly, the audience would be more likely to see the completion of the events by taking a participatory role in the narrative. The positive reading experience will have both immediate and lasting consequences. The audience will “buy into” the transaction and performance that is outlined in the document by having a more positive impression of the document and its obligations because the audience has effectively processed the information in the narrative.⁵⁴ In terms of grouping of terms, all provisions related to payment obligations could be placed together. Rather than jumping from one unrelated provision to another, the audience is presented with a series of interconnected provisions. Minimizing audience confusion and frustration cultivates narrative transportation.⁵⁵ The audience is more likely to be immersed in the text rather than disengage from the text.

Narrative-based drafting techniques such as these support and enhance audience engagement, comprehension, and recall. Narrative-based drafting techniques may also influence the formation of beliefs and prompt particular behavior.

IV. Audience Persuasion

In addition to audience engagement, narrative techniques are also often used to persuade audiences in a variety of contexts. Persuasion is defined as “[t]he act of influencing or attempting to influence others by

⁵² *Id.*

⁵³ Kate Moran, *How Chunking Helps Content Processing*, NIELSEN NORMAN GRP. (Mar. 20, 2016), <https://www.nngroup.com/articles/chunking/> (last visited Sept. 29, 2021).

⁵⁴ See Shaffer, *supra* note 48, at 3.

⁵⁵ See Melanie C. Green, *The Role of Transportation in the Persuasiveness of Public Narratives*, 79 J. PERSONALITY & SOC. PSYCH. 701, 701 (2000) (finding that reduced transportation led to reduced story-consistent beliefs and evaluations).

reasoned argument”⁵⁶ Modified or altered behavior is the gold standard in terms of the desired end result of persuasion, yet persuasion can also result in changed attitudes, norms, or ideas, or in reinforcing the audiences’ likely behavior or already-held beliefs.

A. Narrative as a Form of Persuasion

Narrative is a powerful tool used to persuade audiences. The ability of a narrative to persuade is well established across a variety of disciplines.⁵⁷ Narrative persuasion can be described as the means by which communications containing narrative may activate those persuasive responses discussed above, namely modified or reinforced behavior and beliefs.⁵⁸ Both fictional and nonfictional narratives have been shown to persuade audiences.⁵⁹

The degree to which narrative persuades audiences varies. Scholars across many fields have explained that several factors contribute to the persuasiveness of narrative.⁶⁰ These factors include the audience’s identification with the characters in the narrative, the perception that the narrative is realistic, and the absorption or transportation into the narrative.⁶¹ When the audience members empathize with the characters, the narrative message is more likely to resonate with them. Conversely, if they view the narrative as unrealistic there is a lesser chance of persuasion. Research has shown that a person’s increased absorption into a narrative and belief that the narrative is realistic results in reduced counterarguing.⁶² Counterarguing is the generation of direct rebuttals to the intended message.⁶³ This reduction in counterarguing may lead to altered attitudes

⁵⁶ *Persuasion*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁵⁷ Helena Bilandzic & Rick Busselle, *Narrative Persuasion*, in THE SAGE HANDBOOK OF PERSUASION: DEVELOPMENT IN THEORY AND PRACTICE 200, 200 (James Price Dillard & Lijang Shen ed., 2012).

⁵⁸ *Id.* at 201–02.

⁵⁹ *See id.* at 211.

⁶⁰ *See, e.g.*, Anne Hamby et al., *Reflecting on the Journey: Mechanisms in Narrative Persuasion*, 27 J. CONSUMER PSYCH. 11,14 (2017); Hans Hoeken et al., *Story Perspective and Character Similarity as Drivers of Identification and Narrative Persuasion*, 42 HUMAN COMM’N. RSCH. 292, 294 (2016).

⁶¹ Hoeken, *supra* note 60, at 294.

⁶² Hamby, *supra* note 60, at 14.

⁶³ Jeff Niederdeppe et al., *Beyond Counterarguing: Simple Elaboration, Complex Integration, and Counterelaboration in Response to Variations in Narrative Focus and Sidedness*, 62 J. COMM’N 758, 758 (2012).

and behaviors because the person is less likely to have negative reactions to or contradict the implications of the narrative message. Once absorbed into the narrative, the audience member may cast aside real-world facts that could otherwise have been used to contradict the narrative. They may also lack the motivation to interrupt the narrative to counterargue because that may make their experience with the narrative less enjoyable. In other words, when a person is transported by the narrative, it leads to a reduction in counterarguing, which in turn leads to a greater likelihood of being persuaded by the narrative message.

Narrative has been proven to persuade audiences in a variety of nonlegal contexts. One arena where narratives have been shown to positively influence beliefs and behaviors is in public health.⁶⁴ In one study, the participants were given one of two messages: one containing only statistical evidence about the risk of infection with the hepatitis B virus and another containing a narrative first-person account of an individual infected with the virus.⁶⁵ Research showed the people who received the narrative message were both more likely to perceive a personal health risk to themselves and also to get a vaccine against hepatitis B.⁶⁶ Thus, the use of narrative altered both the participants' beliefs and behavior.

Narrative has also been shown to improve the likelihood of people following safety measures.⁶⁷ In one study, participants were tasked with assembling a children's swing.⁶⁸ Those participants who reviewed assembly instructions containing narrative-based safety messages with brief stories about individuals who had been injured were more likely to improve their own safety behavior than those who received instructions without any narrative messages.⁶⁹

In the legal arena, narrative has been studied as a form of legal persuasion since the time of Aristotle.⁷⁰ Such study has, however, almost exclusively focused on the use of narrative in the litigation context. It is not difficult to see the why litigators would be viewed as storytellers:

⁶⁴ See, e.g., John B. F. de Wit et al., *What Works Best: Objective Statistics or a Personal Testimony? An Assessment of the Persuasive Effects of Different Types of Message Evidence on Risk Perception*, 27 HEALTH PSYCH. 110, 110 (2008).

⁶⁵ *Id.* at 112.

⁶⁶ *Id.* at 113.

⁶⁷ See, e.g., Mitch Ricketts et al., *Using Stories to Battle Unintentional Injuries: Narratives in Safety and Health Communication*, 70 SOC. SCI. & MED. 1441, 1447 (2010) (“[S]afety messages were more effective when they contained brief stories about people who were injured in the past.”).

⁶⁸ *Id.* at 1443.

⁶⁹ *Id.* at 1447.

⁷⁰ See Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEGAL COMM’N & RHETORIC: JALWD 229, 231–32 (2012).

litigators use narrative to portray their clients in a favorable light to persuade judges and juries to rule in their favor.⁷¹ This can be done in opening and closing arguments, the statement of facts section of a motion brief, or a theory of the case imbedded in an appellate brief. However, narrative can—and should—be used as a tool for legal persuasion beyond the litigation context. Transactional drafters should also employ narrative techniques to draft more persuasive documents that best achieve their dual goals.

Regardless of the type of communication, from the narrator's perspective there are three primary attributes of narrative that can be used to increase the persuasiveness of the narrative: narrative coherence, narrative correspondence, and narrative fidelity.⁷² Narrative coherence refers to the degree to which the narrative makes sense to the audience; it involves both internal and external coherence.⁷³ Internal coherence is when the parts of the narrative are consistent with each other, while external coherence refers to how the narrative fits within the stock knowledge that already exists in the audience's mind.⁷⁴ Narrative correspondence refers to the audiences' perceptions about the plausibility of the narrative.⁷⁵ In other words, could the story have happened that way in real life? Lastly, narrative fidelity refers to the similarity between the narrative and what the audience already knows about the real world; this differs from correspondence because it refers to the audience's personal experiences as opposed to what could theoretically happen.⁷⁶

⁷¹ See also Michael H. Frost, *With Amici Like These: Cicero, Quintilian and Importance of Stylistic Demeanor*, 3 J. ASS'N LEGAL WRITING DIRS. 5, 9 (2006) (“[S]uccessful arguments depend as much on appeals to emotion (*pathos*) and the advocate's credibility (*ethos*) as they do on logic (*logos*). Moreover, both *pathos* and *ethos* help determine an advocate's organizational strategies and exercise a considerable influence on a judge's decisions.”).

⁷² See Melissa H. Weresh, *Wait, What? Harnessing the Power of Distraction or Redirection in Persuasion*, 15 LEGAL COMM'N & RHETORIC: JALWD 81, 89–91 (2018); see also Weresh, *supra* note 70, at 251–52 (exploring the concepts of narrative coherence, narrative correspondence, and narrative fidelity); Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMANS. 1, 27–31 (2014) (exploring the terms narrative coherence and narrative fidelity).

⁷³ Weresh, *supra* note 72, at 90 (“Coherence refers to the consistency and completeness of the story—how accurately it comports with logic and audience expectation.”).

⁷⁴ *Id.* (“[I]nternal consistency [is] how well the parts of the story fit together. . . .”); Weresh, *supra* note 70, at 252 (external coherence or “completeness . . . refers to ‘the extent to which the structure of the story contains all of its expected parts.’”).

⁷⁵ Ralph, *supra* note 72, at 29 (“Narrative correspondence ‘is the feature of narratives that lends them much of their plausibility, that makes them structurally convincing.’”).

⁷⁶ *Id.* at 30.

Narrators can manipulate narrative coherence, correspondence, and fidelity to increase the persuasiveness of the narrative—as illustrated in Section B below.

B. Application of Narrative Persuasion to Transactional Documents

While scholars have focused on legal persuasion primarily in the litigation context,⁷⁷ we posit that narrative can also be used by transactional drafters to persuade their audiences. A critical examination of the dual goals of transactional drafters reveals how they both relate to persuasion. First, by trying to facilitate performance by the transacting parties as intended, drafters are in effect seeking to modify or reinforce those parties’ inclination to behave or act in a certain way.⁷⁸ Second, by trying to encourage third-party decision makers to interpret the transactional document as intended, transactional drafters, just like litigators, are seeking to persuade how their audience to responds.⁷⁹ Therefore, transactional drafters should consider incorporating narrative techniques to increase the persuasive nature of transactional documents and effectuate their dual goals.⁸⁰

To better illustrate how narrative can be used to achieve the drafter’s dual goals, consider the following example: A drafter wants to better encourage the parties to perform their obligations with strict adherence to the deadlines set forth in the contract and also facilitate a third-party decision maker’s interpretation of that document. This example focuses on the use of a “time is of the essence” clause (“TOE clause”) included in a variety of sales and services contracts. This clause is used when a delay in performance can harm one or both of the parties.⁸¹ Without a TOE clause, transacting parties and courts do not typically consider the timing of performance as material.⁸²

| Version 1 | Version 2 |
|--------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|
| <p>Operative Terms: The parties agree that time is of the essence with respect to</p> | <p>Recitals and Background: Ralph’s Savvy Shirts (“RSS”) is a small family-owned business and an online retailer of</p> |

⁷⁷ See Frost, *supra* note 71, at 9.

⁷⁸ Chesler & Sneddon, *Clause A to Clause Z*, *supra* note 11, at 267.

⁷⁹ *Id.*

⁸⁰ Two sections of the transactional document where narrative can best be utilized are the recitals and the document’s operative terms.

⁸¹ See Asif Saleem, *Think Twice Before Using “Time is of the Essence,”* 7 TRANSACTIONAL L. 1, 1 (2017).

⁸² See *id.*

| | |
|------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>performance of each of the parties' obligations under this Agreement.</p> | <p>T-shirts related to concerts, sporting events, and other timely cultural events.</p> <p>A significant portion of RSS's sales in the past three months have been for products directly related to the 2020 Olympics.</p> <p>The failure to complete the repair of the T-shirt machinery by Machine Medics (MM) by the date set forth in this contract will likely result in substantial harm to RSS due to its subsequent inability to fulfill pending sales and to enter into future contracts for sale.</p> <p>...</p> <p>Operative Terms:</p> <p>RSS represents that it will not be able to fulfill its outstanding orders in a timely fashion if there is any delay in performance by MM. As a small family-owned business, such loss in profits will be devastating to RSS.</p> <p>If MM fails to complete the repair of the machinery by the date set forth in this contract, MM must reimburse RSS for all consequential damages, including but not limited to lost future profits.</p> |
|------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Figure 2

Version 1 contains a standard TOE clause in the contract's operative terms.⁸³ In Version 2, the drafter added language to the recitals and background section as well as the contract's operative terms.⁸⁴ In Version 2, the drafter used narrative techniques to persuade the document's audiences to treat time as particularly relevant in this transaction. This language does not replace the TOE clause but supports a clearer understanding of what the clause means and why it is so important to RSS in this transaction.

In the recitals and background section, this drafter used expressive language and included relevant details to explain why RSS would be harmed by a delay in performance.⁸⁵ Including sufficient background about the parties themselves, such as the fact that RSS is a small family-

⁸³ See *supra* Figure 2.

⁸⁴ *Id.*

⁸⁵ *Id.*

owned business and an online retailer of T-shirts related to concerts and other timely cultural events, also encourages the audiences to develop empathy for RSS.⁸⁶ The fact that a significant portion of RSS's recent sales were related to the 2020 Olympics allows both MM and any potential third-party decision maker to better understand the need for a TOE clause and timely performance by MM.⁸⁷

In the operative terms, this drafter included a representation in addition to the TOE clause itself.⁸⁸ This term underscores how important the TOE clause is to RSS because it subjects MM to liability if performance is not complete within the specified time. In addition, tailored damages provisions, like the one drafted in Version 2, may be useful in discouraging MM from failing to comply.⁸⁹ The drafter here should also consider the sequencing of the TOE clause, placing it in a prominent position at the start of the operative terms.

Like every narrator, the transactional drafter should always consider the three attributes of narrative to increase persuasiveness.⁹⁰ Here, the additional language in the recitals and operative terms must be consistent with the other contract terms, such as the termination clause and other boilerplate provisions to address narrative coherence. To be most effective, the narrative must appear plausible and realistic to the party whose timely performance is necessary – and here the additional details provide that correspondence. This is also true of a judge or jury tasked with interpreting the TOE. And lastly, the narrative must promote fidelity. The idea portrayed here that a delay in performance may hamper the future sales and reputation of a company, especially one that is small and whose business is based on timed events, should hopefully resonate with the drafter's intended audiences.

This example establishes that by using just a few, rather simple narrative techniques the drafter can create a much more effective document. The five techniques illustrated in Version 2 of Figure 2⁹¹ increased audience engagement and the likelihood of achieving the drafter's dual goals it relates to persuasion.

⁸⁶ See Chesler & Sneddon, *Clause A to Clause Z*, *supra* note 11, at 275.

⁸⁷ *Id.* at 276 (“The reader will ‘buy into’ the transaction and performance that is outlined in the document by having a more positive impression of the document and its obligations because the reader has effectively processed the information in the narrative.”).

⁸⁸ See *supra* Figure 2.

⁸⁹ *Id.*

⁹⁰ See *supra* Part IV, Section A.

⁹¹ (1) Scene setting, (2) party descriptions, (3) empathy cultivation, (4) sequencing of terms, and (5) enhanced text attributes.

The use of narrative techniques may not definitively result in better outcomes for either the transacting parties or third-party decision makers. As in every setting—even in the litigation context—the use of narrative techniques does not guarantee better results for the lawyer. Regardless, the transactional drafter should consider incorporating narrative techniques because it gives him or her a greater likelihood of persuading the document’s audiences to think and act in accordance with the parties’ intent.

V. Conclusion

People are drawn to stories as a way of engaging with and connecting to one another. Transacting parties and third-party decision makers are no different: if drafters can humanize transactional documents by using narrative-based techniques, they can craft documents that better engage and connect with their audience. Humanizing transactional documents supports the dual goals of the transactional drafter to (i) encourage the transacting parties to perform in accordance with the document’s terms and (ii) encourage third-party decision makers to interpret the document’s terms as intended by the parties.
