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ARTICLE

Telling Tales

The Transactional Lawyer as Storyteller[*]

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I. Introduction

Transactional lawyers are storytellers, although they may not think of themselves as such. They work with provisions and clauses to build transactional documents that encapsulate the wishes, hopes, and fears of the transacting parties to promote, guide, and control the relationship of those parties. Narratology, the theory of narrative, can provide a resource to transactional lawyers that facilitates the construction of a wide range of transactional documents, which can themselves be considered narratives.

The form documents that transactional lawyers use as starting points in the drafting process are already rife with narrative characteristics; they are embedded with characters and plots, and they tell the stories of the particular types of transactions.[1] By way of illustration, a typical form employment agreement may represent the unequal bargaining power between the powerful employer and the weaker employee—in other words, it tells the widely recognized biblical story of David and Goliath.[2] The provisions and clauses often contained in this form contract embody the predicament of the underdog who needs to overcome great obstacles to secure a victory that is against all odds. This may be seen, for example, in a form termination clause permitting the employer to fire the employee

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1 *See generally* Susan M. Chesler & Karen J. Sneddon, *Tales from a Form Book: Stock Stories and Transactional Documents*, 78 MONT. L. REV. 237 (2017).

2 *Id.* at 252.

at its discretion, for any reason or no reason at all. Or in an arbitration clause requiring that the employee's claims against her employer be decided by arbitration, while the employer makes no reciprocal promise.[3]

Similarly, a typical form premarital agreement may incorporate the characters and plots of fairytales, such as the story of Cinderella. One party is cast as the damsel in distress and the other party cast as prince charming. The form agreement is thus presented as a mere formality on the road to "happily ever after." Such forms may include inadequate protections for property distributions upon dissolution by failing to include provisions that are dependent upon the length of the marriage at the time of dissolution, either by death or divorce. After all, death and divorce are not part of the "happily ever after" of fairy tales. At times, the narratives contained in the form agreements used by the transactional lawyer correspond well with the narrative of the particular transaction, but that is not always the case. The transactional drafter as storyteller can often improve the effectiveness of the document by incorporating additional, or different, narrative characteristics and techniques.

Telling tales is the work of the transactional lawyer. The aim of this article is both to educate transactional lawyers as to the role of the storyteller and to share how best to use storytelling in a manner that facilitates transactional drafting. This article first defines narrative and narratology, and then explains the role of the transactional lawyer as one of storyteller. To promote the work of drafters, the article then shares five practical strategies that drafters can use to leverage the components and characteristics of narrative to craft more-effective transactional documents.

II. Narratology and Transactional Documents

A. Transactional Documents as Narratives

Building a better transactional document resembles the task of Sisyphus. As punishment, Sisyphus was doomed to perform a task of perpetual futility. He was forced to propel an immense boulder to the top of a mountain, only to watch as the boulder rolled to the bottom. His task would thus begin again. When a transactional lawyer revises and reworks one clause or provision in a transactional document, often another clause

3 *Id.* at 253.

4 While litigators seldom question the amount of time spent drafting briefs primarily from scratch, transactional lawyers often express reluctance to devote time redrafting and revising existing form agreements because this redrafting and revision may be perceived as inefficient. However, failure to do so may often result in a transactional document that is not sufficiently tailored to the parties and their particular transaction. For an exploration of efficiency and drafting, see Robert Anderson & Jeffrey Manns, *Engineering Greater Efficiency in Mergers and Acquisitions*, 72 BUS. LAW. 657, 661–63 (2017) (summarizing the role of technology and precedent in the transactional drafting process).

or provision is revealed to need revision and the process begins yet again. At times drafting may seem like a task of futility with little guidance to facilitate the drafting process. That sense of frustration may be alleviated by drawing on narratology for guidance. Narratology provides a new lens to critically examine transactional documents. While at first glance it may seem that incorporating narrative techniques in transactional drafting may lead to increased inefficiency,[4] there is significant value to both recognizing the existence of narrative in form documents and in applying narrative techniques to highlight the stories inherent within transactions.

A typical definition of narrative is "a story, whether told in prose or verse, involving events, characters, and what the characters say and do."[5] Narratology is the theory of narrative.[6] Famed narratologist Mieke Bal defines narratology as a theory that facilitates the understanding, analysis, and evaluation of narratives.[7] Narratology thus "studies perspectives of telling: who sees and who tells, the explicit or implicit relation of the teller to what is told, the varying temporal modalities between the told and its telling."[8]

Narratives are by no means limited to fictional texts. A broader definition of narrative is a series of events shared by a narrative agent.[9] Even such a broader definition initially seems incompatible with transactional documents. Much scholarship addressing the application of narrative and legal writing often focuses on litigation-based documents.[10] This approach conceptualizes the litigator as the storyteller spinning a tale in front of a jury or crafting a tale in an appellate brief in order to better persuade the intended audience.[11] But the definition of narrative also encapsulates transactional documents. After all, a transactional document is a series of events described in clauses and provisions by a narrative agent.

5 M.H. ABRAMS & GEOFFREY GALT HARPHAM, A GLOSSARY OF LITERARY TERMS 233 (11th ed. 2015). For an examination of the consequences of using "narrative," "story," and "storytelling" in the law, see Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 LEGAL COMM. & RHETORIC: JALWD 81, 82–86, 93–94 (2012) (arguing that "narrative," "story," and "storytelling" are ambiguous and overused and suggesting the appropriate term is "narrativity").

6 *See generally* MIEKE BAL, NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE (3d ed. 2009).

7 *Id.* at 3.

8 Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?,* 18 YALE J. L. & HUMAN. 1, 2 (2006).

9 *E.g.*, ROBERT SCHOLES, JAMES PHELAN & ROBERT KELLOGG, THE NATURE OF NARRATIVE 4 (40th anniversary ed. 2006) (articulating the core characteristics of narrative as "the presence of a story and a story-teller").

10 *E.g.,* Todd A. Berger, *A Trial Attorney's Dilemma: How Storytelling as a Trial Strategy Can Impact a Criminal Defendant's Successful Appellate Review*, 4 DREXEL L. REV. 297 (2012); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING 3 (2009); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127 (2008); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001).

11 For a bibliography of legal storytelling, see J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247 (2015).

Despite this resemblance, some may point out that transactional documents have a different function. Transactional documents are to inform, not to entertain or even persuade. Transactional documents may be classified as expositive texts with the sole intention of delivering information. Nonetheless, transactional documents do convey a narrative. Whether employment contract or trust agreement, the documents are more than mere delivery of information. The purposes of transactional documents include the building of relationships, the safeguarding of property, and the securing of legacies. These purposes are furthered by presenting the narratives inherent within each transaction.

Narrative is a prevalent method of communication.[12] Communications from Facebook Stories to persuasive legal writing incorporate the characteristics of narrative to improve communication. And transactional documents should not be segregated from these other forms of communication—as they, too, can benefit from the inclusion of narrative.

B. The Transactional Lawyer as Storyteller

The transactional lawyer, like all lawyers, is a storyteller.[13] Equating lawyers to storytellers may seem at first to be an inaccurate analogy. After all, transactional lawyers and litigators do not spin yarns in front of crackling fires. Nonetheless, all lawyers are storytellers. The role of the transactional lawyer, for instance, is to construct a cohesive narrative that represents a particular series of events that informs the future actions of the parties, whether through contract, trust, or will. The transactional lawyer weaves together strands of phrasing and clauses to produce a coherent text that is built around characters, locations, and events.[14] While the roles of transactional lawyers and litigators may differ given the nature of their representation, all lawyers draft documents to advance the goals of their clients. Thus, the lawyers become the narrators of their clients' stories.

As with all storytellers, the transactional lawyer begins to construct a story by recognizing the conventions of the genre. For transactional drafting, that begins with the acknowledgment of the applicable forms.[15]

12 *See, e.g.*, JEROME BRUNER, ACTS OF MEANING 45 (1990) (identifying the human "predisposition to organize experience into a narrative form").

13 *E.g.*, Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239 (2012); Maureen B. Collins, *Lawyer as Storyteller*, 88 ILL. B.J. 289 (May 2000).

14 The word "text" is related to "textile." MARIO KLAVER, AN INTRODUCTION TO LITERARY STUDIES 1 (3d ed. 2013) (writing that "just as single threads form a fabric, so words and sentences form a meaningful and coherent text"). For an exploration of the role of the transactional lawyer, see generally Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486 (2007).

15 One author describes the drafting process as follows:

Forms are valuable resources to drafting attorneys, transacting parties, courts, and other third parties.[16] As one author wrote, "The repetitive nature of much of legal drafting makes the use of form documents economically efficient."[17] In practice, "[a]lmost all drafting done today begins with a precedent."[18] The term "precedent" as used here refers to executed documents that were used in actual transactions and are either made publicly available on a variety of legal-research databases, or are only privately available to lawyers within the same firm or company. These are sometimes referred to as model agreements, instead of form agreements. Lawyers begin with precedents for two reasons. "First, it is efficient. Precedents save time and money. Rather than reinventing the wheel for each new deal, a lawyer gets a head start. Second, if the precedent is a good one, using it will reduce errors and improve a contract's quality."[19] The use of forms as a starting point can save lawyers time and money, and make them more efficient in the drafting process.[20] Ultimately, that greater efficiency will financially benefit clients.[21]

Form documents also provide a series of prompts and reminders, encouraging the parties to the transaction and the drafters to insert key information that otherwise may be neglected, omitted, or forgotten.[22] It thus follows that form use provides a lawyer with useful information that can assist him in being more competent in the drafting process.[23] In fact, clients often believe that a drafter's use of forms is beneficial to them not

> The process of legal drafting typically begins with an associate dragging examples out of the firm's form file and changing the names, dates, and description of the transaction. (Drafting is perhaps the only form of writing in which plagiarism is considered a positive.) Particular provisions are then modified to suit the singularities of the business deal. When the deal is done, the new document is added to the form file, ready for the next associate.

HOWARD DARMSTADTER, HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING xi (2d ed. 2008). For a brief history of form books, see M.H. Hoeflich, *Law Blanks & Form Books: A Chapter in the Early History of Document Production*, 11 GREEN BAG 2d 189, 191–92 (2008).

16 *E.g.*, WILLIAM K. SJOSTROM JR., AN INTRODUCTION TO CONTRACT DRAFTING 44 (2d ed. 2013) (identifying the first step in the drafting process as "locat[ing] a form or sample contract (often called a precedent) to use as the starting point for your contract"); TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 335 (2007) ("Think of a precedent as a template that you tailor for each transaction.").

17 Hoeflich, *supra* note 15, at 191.

18 STARK, *supra* note 16, at 335.

19 *Id.*

20 Kirsten K. Davis, *Legal Forms as Rhetorical Transaction: Competency in the Context of Information and Efficiency*, 79 UMKC L. REV. 667, 669 (2011)*; see also* Claire A. Hill, *Why Contracts Are Written in "Legalese,"* 77 CHI.-KENT L. REV. 59, 70 (2001).

21 According to one author, using form documents "enables the product to be produced by lower-paid, less-senior and less-experienced lawyers." Hill, *supra* note 20, at 63.

22 *See generally* Erik F. Gerding, *Contract as Pattern Language*, 88 WASH. L. REV. 1323 (2013). *See also* Chesler & Sneddon, *Tales from a Form Book*, *supra* note 1, at 244–45 (exploring the value and limitations of form documents and the stock stories inherent within them, which includes using form documents as checklists).

23 Davis, *supra* note 20, at 669.

only because of financial savings, but also because standardization of documents will yield fewer lawyer mistakes.[24] Over time, as the form evolves, many mistakes get corrected.[25] The forms become curated model documents. The use of forms can thereby promote confidence in the document created. The existence of standardized terms within form documents conveys the value of provisions that have been used in countless transactions.[26] And those provisions have presumably been interpreted by courts on numerous occasions.[27] This also alleviates a level of uncertainty for the parties to the transaction. Thus as the forms themselves become more credible, so too can the story of the related transactions become more credible.

As a consequence, form agreements are a great starting point for the drafter to shape the narrative of the transaction. The form agreement selected must be a deliberate choice. A recent empirical study of public merger agreements concluded that drafting attorneys tend "to use precedents that they are more familiar with or that relate to the particular client they are dealing with, rather than those that may be more readily adapted to the transaction at hand."[28] Confidence in particular forms can increase efficiency. Yet, overreliance on particular forms can also act as a limitation. All standard form agreements are not created equal, and they do not all contain the same terms, language, structure, or narrative techniques. The drafter should, therefore, evaluate a variety of form documents to select the most appropriate base form document to use.[29] Different forms may contain many of the same legal and business concepts, but the forms do not necessarily treat the concepts in the same way, or treat the parties to the transaction in the same way. Understanding the form document is the most basic role of the transactional lawyer[30] and informs the selection of the appropriate form as a starting point for the drafting process.[31] The form is the base for the narrative.

. . . .

24 *Id.* at 672.

25 Hill, *supra* note 20, at 70 (reviewing "network effects" of having multiple attorneys consider, interpret, and use standard contract provisions).

26 *See generally id.*

27 *See id.* at 70–71.

28 Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57, 61 (2017).

29 DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 101 (1982) (remarking that forms provide "the illusion of security").

30 In describing the basic role of the drafting attorney, one commentator observed that "[y]ou must understand the documents no matter how opaque [or dense] they are. That's your job." DARMSTADTER, *supra* note 15, at 229.

31 *See, e.g.*, Scott Burnham, *Transactional Skills Training: Contract Drafting—Beyond the Basics*, 2009 TRANSACTIONS: TENN. J. BUS. L. 253, 265–67 (2009).

Since form documents are generalized documents that cover a broad range of situations, they are very similar to the widespread recognition of patterns of stock stories. A stock story is a story that is readily identifiable by the audience; the story need not be told in detail for the audience to understand the story, whether that means the identification of the characters, the plot, the situations, or the outcomes.[32] Shorthand references and allusions will be understood by the audience. As one author pointed out, stock stories function "as a template for a wide variety of similar stories to follow."[33] In a similar manner, form documents are templates that are also narrative short cuts. When interpreting the provisions in the transactional document, the parties to the transaction, third parties, and the court can—and will—rely upon the shorthand references. The narrative short cuts not only facilitate the interpretation, but also reduce the time and cost needed to develop the documents in the first place.[34] The parties to the transaction and the drafter can rely upon the form document to structure the parameters of the transaction and supply some of the details. The recognition of the stock stories within the transactional forms is particularly beneficial because many transactions do in fact follow the narrative, or pattern, of the stock story. Part of the power of stock stories is that the pattern does in fact fit so many narratives. For example, the employee and employer in a contractual relationship often have very unequal bargaining power, like the recognizable stock story of David and Goliath. Likewise, the "rags-to-riches" plot underscores a number of private foundation documents, such as articles of incorporation and bylaws.[35] Even though stock stories may fit a variety of narratives, stock stories will not be an accurate reflection of all narratives. Too much reliance upon the stock story will compress the actual events into a flat, one-dimensional narrative.

When selecting which forms to consult as the starting point in the drafting process, the transactional lawyer must first pay attention to who drafted each form agreement. It may not be important to determine the specific identity of the drafter, but it is important to know whose interests that original drafter was representing. Consider whether it was a lawyer

32 Chesler & Sneddon, *supra* note 1, at 238–39.

33 Jennifer Sheppard, *What if the Big Bad Wolf in All Those Fairytales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories that are Harmful to Your Client's Case*, 34 HASTINGS COMM. & ENT. L.J. 187, 192 (2012).

34 *E.g.*, DARMSTADTER, *supra* note 15, at 213 ("It's comforting to pontificate that every document should be poured over by highly trained lawyers bent on absolute perfection. The truth, however, is that clients often prefer Quick, Cheap, and No Surprises.").

35 For further analysis of stock stories and transactional documents, see generally Chesler & Sneddon, *supra* note 1.

36 Burnham, *supra* note 31, at 263.

who represented one of the parties in a specific transaction, such as whether the lawyer was representing the seller or the buyer in the creation of the Purchase and Sale Agreement. Understanding which party the lawyer was representing will help identify provisions that are "pro-seller" or "pro-buyer," such as a one-sided arbitration provision that favors the seller. Other considerations include whether a lawyer is employed by a publisher of a form book or by the legal-research company making the form available to its subscribers, or whether a group of lawyers drafted a standardized form for general use or use by only one category of users. The possibilities are numerous and varied. The form's drafter most certainly had an impact on the decision of which terms to include or omit, and the drafting choices made by him may benefit one party over another. And it may have affected the form drafter's use of embedded narrative techniques, whether intentional or not.

Accordingly, in addition to selecting a form base document based on the objective content of the form (such as the inclusion or omission of certain substantive terms, and its organizational structure), the drafter should consider the narrative techniques embedded within such form documents. A form employment agreement may contain broad restrictive covenants intended to protect a vulnerable employer from the nefarious actions of a former employee. However, for the particular transaction, the employer may be a well-established company with a global brand that would not suffer the loss of goodwill by any actions of an ex-employee. A form premarital agreement may assume that the parties have differing net worth and require protection of the assets of just one party from the claims by the other party in the event the marriage is dissolved upon death. One such clause is the complete waiver by one of the parties of the elective share, homestead protection, or probate allowance. In fact, the parties may have similar net worth and thus require a reciprocal waiver. Failure to account for the similarity of assets may produce ill-fitting provisions. The drafter should review the form to ensure that the embedded characters and series of events, which could be described as the plot, reflect the actual parties and events of the transaction.

In addition to form selection, transactional drafters must recognize that form documents are helpful only to a certain point. For each drafted document, modification is required because the facts and circumstances in each transaction are quite varied.[36] Revising transactional documents raises risks that deletion of a critical provision will occur or that uncertainty will be injected with new provisions. "[R]evising and clarifying legal

37 Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 SCRIBES J. LEGAL WRITING 109, 109–10 (2000).

documents always involves some judgment and some risk. But the risk is worth it, and writers should not be dissuaded. Otherwise, the legal profession will never start to level the mountain of bad forms and models that we have created."[37] In other words, transactional lawyers must overcome fear of new provisions or risk perpetuating poor, ill-fitting forms.

Storytelling involves relying upon standard conventions and pushing the boundaries. This innovation is also part of the drafting process. Innovation can be an underrated aspect of transactional drafting.[38] Drafters, like storytellers, must recognize the limits of the forms and the constraints of conventions. Drafting attorneys should not be afraid to modify the language of form agreements or to draft a provision from scratch to fit the needs of the particular transaction or goals of the transacting parties. In other words, modification to forms can be used to ensure the transacting parties' stories are reflected in the document that binds them. As two commentators recently cautioned in a bar-journal article, "sometimes too much reliance is placed upon a prior draft from a previous deal, which can lead to an updated contract that omits material information."[39] Just as aspects of narratives are crafted to resonate with audiences, provisions included in transactional documents need to be crafted to speak to the particular audience for the particular purpose. Equating a transactional lawyer to a storyteller reflects the responsibility the drafting lawyer assumes to tell the tale of the transaction.

III. Practical Strategies to Leverage the Benefits of Narrative

Narratology provides a theoretical foundation for drafting. This section aims to present concrete application of narratology to transactional drafting. Specifically, this section shares five practical strategies to promote the work of drafters by using the components and characteristics of narrative. These strategies range from the simple substitution of words to the reimagining of a stock story embedded within a form document. This section addresses the issues raised in the first part of this article.

38 For a general discussion of contract-drafting innovation, see Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170 (2013). For suggestions on how to promote contract drafting innovation, see generally William E. Foster & Emily Grant, *Memorializing the Meal: An Analogical Exercise for Transactional Drafting*, 36 HAW. L. REV. 403, 404 (2014) (presenting classroom approaches to encourage student drafters to "think[] creatively about drafting legal documents").

39 Robert Hernquist & Robert L. Rosenthal, *Drafting Business Contracts: Practical Pointers for Protecting Yourself and Your Clients*, 24 NEV. LAW., Feb. 2016, at 20, 21.

40 WILLIAM SHAKESPEARE, ROMEO AND JULIET Act. II, Sc. 2, Lines 85-87, *in* THE NORTON SHAKESPEARE (2d ed. 2008).

A. Use Actual Names in the Document

> *"What's in a name? That which we call a rose*
> *By any other name would smell as sweet"*
> —William Shakespeare[40]

Assignor and Assignee. Buyer and Seller. Employer and Employee. Leasor and Leasee. 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 alienates the parties from their own transaction. The individuality of names is replaced with a legal term of art.

Legal terms represent more than conventionally used vocabulary—they reflect substantive meanings that embody certain rights and obligations. Additionally, using legal terms minimizes the need to edit certain portions of the documents. But the terms can 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" in the example above. Individuals are multi-faceted. Individuals identify with their names,[41] the names of their employer, and the names of their family members. In short, individuals identify with names they are familiar with. 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. 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 instills ownership in the parties of their rights and obligations. The document becomes more than a mere generic form. The document 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.[42]

41 Indeed, individuals even demonstrate a preference for words with letters in common with their name. *See, e.g.,* Gordon Hodson & James M. Olson, *Testing the Generality of the Name Letter Effect: Name Initials and Everyday Attitudes*, 31 NO. 8 PERSONALITY & SOC. PSYCHOL. BULL. 1099 (Aug. 2005); John T. Jones et. al., *Name Letter Preferences Are Not Merely Mere Exposure: Implicit Egotism as Self-Regulation*, 38 NO. 2 J. EXPERIMENTAL SOC. PSYCHOL. 170 (2002).

42 1A CAL. REAL EST. FORMS § 1:140 (2d ed. 2017).

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 the roles. Transactional documents are more than the mere memorialization of past events. The transactional documents will inform and guide future behavior. To that end, the parties should feel a connection to the documents that embody their current obligations and future responsibilities. 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's power in the personal rather than the generic.[43] It thus facilitates not only the parties' understanding of their rights and obligations, but encourages performance under the agreement. This straightforward substitution can easily be completed with the aid of a word processing program and proofreading. But this discrete change will 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. As storyteller, the drafting lawyer can easily accomplish this goal by using actual names in the documents.

B. Customize the Order of Provisions

> *"A story has no beginning or end: arbitrarily one chooses the moment of experience from which to look back or from which to look ahead."*
> —Graham Greene[44]

While Aristotle observed that everything has a beginning, a middle, and an end,[45] the events that are chosen for each part are often selected by the storyteller. Narratives are constructed, at least in part, on the order of events relayed. The nature of the events to be relayed and the order in

43 For an exploration of the narrative power of names, see Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques in Drafting*, 68 OKLA. L. REV. 263, 280–82 (2016)

44 GRAHAM GREENE, THE END OF THE AFFAIR 3 (1996).

45 Cynthia A. Freeland, *Plot Imitates Action: Aesthetic Evaluation and Moral Realism in Aristotle's Poetics*, *in* ESSAYS ON ARISTOTLE'S POETICS 115 (Amelie Oksenberg Rorty ed., 1992) (applying one of Aristotle's most quoted sections in the *Poetics* to understandings of plot).

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 thus 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.

Conventions inform the sequence and order of texts in any genre, including transactional documents.[46] These conventions may have substantive consequences, such as placing preresiduary 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 reflects common usage, but also 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 the 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.

In the case of the transactional document, the organizational approach also projects the narrative.[47] 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 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,[48] the narrative is not a celebration of the accumulations of a lifetime but 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 Will would

46 *See, e.g.,* Gisela M. Munoz, *Writing Tips for the Transactional Attorney*, 21 No. 3 Prac. Real Est. Law., May 2005, at 33 (describing the order of typical provisions in a contract and sharing drafting tips).

47 *E.g.,* Daniel L. Barnett, Putting Skills into Practice: Legal Problem Solving and Writing for New Lawyers 108 (2014) ("Using the narrative as an organizing principle is often the simplest way to structure an agreement.").

48 Such testator may be referred to as the "Young Family Client." *See generally* Thomas L. Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 Notre Dame L. Rev. 345 (1969).

continue to include other provisions, such as the administrative powers of the personal representative. But by front-loading the Will with provisions relating to the minor children, the narrative emphasizes the caregiving as its central theme. The substantive integrity of the Will is preserved by the inclusion of all of the provisions necessary for the transmission of wealth. But the focus of the document for the testator—the creator of the Will—and the beneficiaries becomes caregiving: not mere wealth transmission. 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 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 Will-making, the ultimate implementation of the document is facilitated. The interpretation and implementation are guided by the testator's intent. The order of the provisions showcases that intent by highlighting the most important aspects of the story from the storyteller's perspective.

The transactional drafter must make conscious choices about how to organize the clauses and provisions of the document. 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 the restrictive covenant near the beginning of the operative terms because that particular term is of utmost importance to her client. Yet if the terms were organized in a chronological order, that term, which comes into effect only upon termination of the employment relationship between the parties, will likely be placed towards 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. As can be seen in this illustration, the arrangement of the terms thus influences the "story" told in the employment contract. The order of the provisions reflects the hierarchy of importance of the terms to the client because on the very first page, the client, as well as any subsequent reader, immediately sees that essential provision.

The order of provisions in a transactional document may have started somewhat arbitrarily. Repeating the same order became convention and then calcified into an immutable order.[49] Repeating particular sequences 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[50]

Customizing a transactional document is not limited to altering the order of provisions or even the wholesale creation of a new provision. Customizations may come from the injection or infusion of expressive language into the document. Expressive language is the general description of a variety of explanations and enhanced descriptions.[51] Expressive language is thus "extra" language because the enhanced descriptions are often in excess of what would be legally required. But far from being superfluous, expressive language serves 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.

The knee-jerk dismissal of expressive language is caused by the uncertainty of "extra" language that is "unnecessary" with "low value." Expressive language is worrisome to drafters because expressive language conjures concerns of ambiguities, inconsistent language, conflicting terms, and

49 Altering the order of provisions may sometimes raise the specter of cut-and-paste mistakes. Deviation from the customary order of provisions may lead a drafter to mistakenly believe a provision has been included when in fact the provision has been deleted. For an examination of the benefit of "incomplete contracts, see Wendy Netter Epstein, *Facilitating Incomplete Contracts*, 65 CASE W. RES. L. REV. 297 (2014). To prevent against unintentional omission, checklists can be, and frequently are, used to ensure that all the appropriate provisions have been included. M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 J. ALWD 79, 79 (2008) ("With a thorough checklist of these requirements and considerations, a drafter need not reinvent the wheel with each contract. Instead, with the use of a checklist, drafters of contracts can ensure that their contracts are complete and effective."); *see also* Jay E. Grenig, *Checklists for Document Assembly*, 18 WIS. PRAC., ELDER LAW § 2:34 (2017 ed.).

50 ANTHONY DOERR, ALL THE LIGHT WE CANNOT SEE 503 (2014) (winner of 2015 Pulitzer Prize for Fiction).

51 *See generally* Karen J. Sneddon, *Not Your Mother's Will: Gender, Language and Wills*, 98 MARQ. L. REV. 1535 (2015); Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379 (2011).

even libel. The worry surrounding use of emotional, rather than legal, language may prevent some drafters from engaging with expressive language. For instance, untrue statements included in the recitals section of a contract may create interpretation issues.[52] Mistakes included in the Will may raise an issue of a testator's lack of capacity.[53] However, completely dismissing the value of expressive language based on such fears is an overreaction that has the potential to undermine some of the value of the transactional document.

Transactional documents are intended to be used by the parties to guide behavior. Consider, for example, a premarital agreement. Premarital agreements have historically been viewed as suspect.[54] The recitals in a premarital agreement may share the reasons why the parties are creating the agreement.[55] This may be beyond the stock recitation that "the parties desire to clarify their property rights in the event of dissolution of the marriage." For instance, the parties may have a particular asset that requires customized treatment or special management. The generic recitation may be "the parties desire to clarify their property rights in the event of dissolution of the marriage." The generic recitation may then be customized to "Jaime and Dana desire to clarify their property rights as relates to Family Co., Inc. in the event of dissolution of the marriage." The personalization replaces the generic. The narrative thus becomes one of the two particular individuals or characters, and not two faceless parties.[56] Including the reason for the creation of the premarital agreement may

52 RESTATEMENT (SECOND) OF CONTRACTS § 218 cmt. b (1981) ("A recital of fact in an integrated agreement is evidence of the fact, and its weight depends on the circumstances. Contrary facts may be proved. The result may be that the integrated agreement is not binding, or that it has a different effect from the effect if the recital had been true. In the absence of estoppel, the true facts have the same operation as if stated in the writing.").

53 Although concern about mistakes is a legitimate concern, expressive language is by no means the only source of potential mistakes. *See, e.g.,* Robert D. Lang, *Auto-Correct: Changing Sua Ponte to Sea Sponge; A Mixed Blessing for Attorneys*, 32 SYRACUSE J. SCI. & TECH. L. REP. 1, 1–2 (2015–2016) (highlighting the "hidden danger of auto-correct" with "the creation of entirely new words and new phrases, none of which were intended by the drafter"). In the context of estate planning documents, part of the concern is that mistakes in language may provoke a will contest or require a construction proceeding. A case frequently presented in casebooks for this concern is *Lipper v. Weslow*, 369 S.W.2d 698 (Tex. Civ. App. 1963). The language at issue in *Lipper* is a statement of reasons, which is not the type of expressive language referred to in this article. Yet, mistakes are often included in descriptions of property when individual testators share misdescriptions with the drafting attorney. Family lore and actual facts are often shown to be incompatible on PBS's *Antiques Roadshow*.

54 *E.g.*, Suzanne D. Albert, *The Perils of Premarital Provisions*, 48 R.I. BUS. J., Mar. 2000, at 5. *But see* Elizabeth R. Carter, *Rethinking Premarital Agreements: A Collaborative Approach*, 46 N.M. L. REV. 354, 355 (2016) (arguing that "[p]remarital agreements should be encouraged, socially accepted, and relatively easy to enter into").

55 Dennis I. Belcher & Laura O. Pomeroy, *A Practitioner's Guide for Negotiating, Drafting, and Enforcing Premarital Agreements*, 37 REAL PROP. PROB. & TR. J. 1, 27 (2002) (recommending that the recitals of a premarital agreement include not only the facts of valid contract creation, but also "the situation of the parties at the time of the agreement").

56 With some transactional documents such as a will, one party's story (the testator's) dominates. In other transactional documents including some premarital agreements and corporate contracts, the story of both parties is told. Which party's lawyer drafts the documents and the relative bargaining power of each may influence which story is the primary story that is told in the document.

guide not only the development of the document, but also the subsequent interpretation of the document.[57] The generic, rote recitations may provide little guidance to the subsequent interpretation. In contrast, the slight customization allows the transactional drafter to more effectively tell the story of the two individual parties and their particular property interests.

Expressive language can also be used to humanize documents.[58] The most obvious example of a personal transactional document is the will. A will is in fact a first-person narrative. As Emily Dickinson wrote, "I willed my Keepsakes—signed away/ what portion of me be/ Assignable . . . ."[59] The will disposes of probate property, both real and personal property, and nominates representatives to oversee the transfer of that property upon the death of its owner. To deny the human aspect to will making is to deny the expressive function of will making.[60]

A transactional document need not be a Last Will and Testament to be a personal document.[61] An employment contract is likewise a personal document. The document outlines obligations and responsibilities. But the document also creates a personal relationship. The choice and terms of employment have a daily impact on the employee. Ignoring the personal is to devalue the importance of employment to an individual.

All transactions are products of human fears, concerns, wishes, and hopes. Expressive language need not inject ambiguity or uncertainty. Expressive language can be used to develop the narrative. The following is a standard bland provision from a Will:

> I give my diamond earrings to my daughter Lauren Richards, if she survives me.

With the addition of expressive language, the provision becomes a narrative that is both meaningful to the testator and the beneficiary.

57 *See, e.g.,* Clare Robinson, *Pre-Nuptial Agreements—The End of Romance or an Invaluable Weapon in the Wealth Protection Armory?*, 13 TR. & TRUSTEES 207 (2007); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998).

58 *E.g.*, Karen J. Sneddon, *Speaker for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 736 (2011) (positing that a will "is not a one-size-fits-all form, or even a one-size-fits-most form, but a unique document for a unique individual"); Daphna Hacker, *Soulless Wills*, 35 LAW & SOC. INQUIRY 957, 958 (2010) (arguing that "the unique, personal, and emotional voices of testators should be allowed to be heard in their wills").

59 Emily Dickinson, *I Heard a Fly Buzz—When I Died, in* THE COMPLETE POEMS OF EMILY DICKINSON 223, 224 (Thomas H. Johnson ed., 1960)*; see also* Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J.L. & HUMAN. 265, 267 (2016) (asserting "that nearly every individual owns at least one possession that the owner, rich or poor, male or female, old or young, sees as reflecting something important about her personality, history, and values").

60 *See generally* Karen J. Sneddon, *Memento Mori: Death and Wills*, 14 WYO. L. REV. 211 (2014); David Horton, *Testation and Speech*, 101 GEO. L.J. 61 (2012).

61 For an examination of the Will as personal narrative, see Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L. J. 355 (2013).

I give my diamond earrings that I received as an anniversary gift from her father to my daughter Lauren Richards, if she survives me.

The transactional document is more than a mere legal instrument. In the example above, the Will is more than a listing of widgets and identification of individuals and entities. The will reflects a lifetime of accumulations and the selection of the appropriate individual or entity to receive particular items of property. The expressive language can honor that aspect of the Will, and become a more valuable document to the testator and to the beneficiaries by directly referencing the financial and nonfinancial value of possessions and relationships.

D. Plan for Alternative Outcomes

"By failing to prepare, you are preparing to fail."
—Benjamin Franklin[62]

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 that time period.[63] Contract terms thus enable the parties to understand how to perform their duties in accordance with the anticipated plot.

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 plotlines. For example, terms may set forth a sequence of events that leads to disputes between the parties. Additional terms may then be added to provide for what is to happen when those disputes arise—such as the circumstances under which a party may terminate the contract and the determination of where disputes may be litigated. By anticipating the various potential splits in the plot of the contract, the drafter can better create contract terms to deal effectively and efficiently with each contingency.

62 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 University, *Misquotes and Memes: Did Ben Franklin Really Say That?*, SCI. DAILY (July 1, 2015), https://www.sciencedaily.com/releases/2015/07/150701152634.htm.

63 Chesler & Sneddon, *supra* note 1, at 252–57. *See generally* D. Gordon Smith, *The "Branding Effect" of Contracts*, 12 HARV. NEGOT. L. REV. 189 (2007) (exploring the types of problems contracts attempt to address).

While the terms of a contract generally address the anticipated plot narrative of contract performance, unanticipated or alternative endings should also be introduced in the contract. Failing to consider an unanticipated ending may produce an agreement that fails to include, for example, a *force majeure* clause.[64] During the term of the employment contract, an employer corporation may be unable to continue its operations; 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.[65]

Therefore, from the perspective of a storyteller, the drafter must think through the life of the contract under various fact patterns.[66] First, 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 and how is it to be performed, and by when and where must the obligation be performed.

Second, the drafter must hypothesize nonperformance and default by addressing what happens if one or both parties fail to perform all or part of the contract.[67] 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. 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 become hostile towards each other, seeking to undermine the other party at every opportunity.[68] Will the contract provide sufficient guidance to govern the relationship? Will it provide sufficient guidance to a court interpreting the contract or imposing

64 A *force majeure* clause allows a party to suspend or even terminate a contractual obligation when unexpected circumstances, such as a natural disaster, make performance impossible or impractical. 30 WILLISTON ON CONTRACTS § 77:31 (4th ed. 2016).

65 For an "Anatomy of the Employment Agreement," see Joseph T. Ortiz, *Trends, Developments, and Best Practices Relevant to Drafting Employment Agreements*, *in* INSIDE THE MINDS: NEGOTIATING AND DRAFTING EMPLOYMENT AGREEMENTS (2014 ed.). The procedure for termination is identified as a key provision in an employment contract.

66 Susan M. Chesler, *Effective Contract Drafting: How to Revise, Edit, and Use Form Agreements*, BUS. L. TODAY, Nov./Dec. 2009, at 35 [hereinafter Chesler, *Effective Contract Drafting*].

67 *Id.*

68 *Id.*

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.

Providing guidance to 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 plot to anticipate changes in the relationship of the transacting parties.[69] 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.[70] 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. This change can be seen as a divergence in the anticipated plot. 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.[71] 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 trust creator's intent.

The conscious recognition of plot helps "shape" and provides "direction" to the narrative.[72] Envisioning the structure of events as plotting a narrative enables the drafter to foster the full development of a transactional document that effectuates the parties' intent and better addresses 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[73]

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69 *E.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 650–67 (1995). For an exploration of the development of trusts, see James Barr Ames, *The Origin of Uses and Trusts*, 21 HARV. L. REV. 261 (1908); E.W. Ives, *The Genesis of the Statute of Uses*, 82 ENG. HIST. REV. 673 (1967); Austin W. Scott, *The Trust as an Instrument of Law Reform*, 31 YALE L.J. 457 (1922).

70 For an examination of incentive trusts, see generally Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445 (2006).

71 *See generally* Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91 (2000); Kent D. Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 AKRON L. REV. 63 (2012).

72 PETER BROOKS, READING FOR PLOT: DESIGN AND INTENTION IN NARRATIVE xi (1992).

As discussed above, one of the benefits of using a form document as a starting point may be the embedded inclusion of a stock story. Yet a concern with all stock stories is the compression of the narrative in a manner that distorts or misrepresents the individual story.[74] The stock story is a generic narrative which, by definition, may not represent the uniqueness of the individual parties, the particular sequence of events, or the likely outcome. The stock story necessarily relies upon generic stock characters, stock situations, stock plots, and stock outcomes.

The recognition and identification of stock stories produces an instant, strong, and automatic response.[75] "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.[76] 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. Accordingly, "the outcome suggested by the stock story will seem to be the natural result of the events that preceded it."[77] The audience may also project an intent of the parties to the transaction that is not representative of the actual intent.

Thus, it may often be necessary for the drafter to supplement the stock story or alter the stock story, which requires deliberate drafting choices. When relating stock stories to transactional form documents, the compression may unintentionally direct the drafting of the transactional document such that the drafter fails to fully customize the document for the individual parties and instead relies upon standard provisions.[78] The drafter must pay careful attention to whether the stock story embedded within the form actually corresponds with the parties' intent.

73 ROBERT MUNSCH, THE PAPER BAG PRINCESS 23 (1980). This children's book switches the gender roles typically assigned in fairytales so that the Princess Elizabeth must save the Prince Ronald from the dragon. Upon doing so, Prince Ronald comments on the physical state of the disheveled Princess Elizabeth. She makes the remark above and calls off the wedding. *See id.*

74 Chesler & Sneddon, *Tales from a Form Book*, *supra* note 1, at 238.

75 *See* Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 5–7 (1984).

76 J.A. CUDDON, A DICTIONARY OF LITERARY TERMS AND LITERARY THEORY 865 (4th ed. 1998).

77 Sheppard, *supra* note 33, at 193.

78 For an exploration of the need to develop documents to reflect individuals, see Avi Z. Kestenbaum & Amy F. Altman, *Have We Got It All Wrong?: Rethinking the Fabric of Estate Planning*, 155 NO. 2 TR. & EST. 29 (Feb. 2016); Thomas L. Stover, *Will the Tax Tail Still Wag the Estate Planning Dog?*, 41 EST. PLAN. 3 (2014); James H. Siegel, *The Importance of Analyzing Family Dynamics to Provide Clients with Appropriate Trust and Estate Plans,* ASPATORE, 2012 WL 4964459 (2012); Avi Z. Kestenbaum, Jeffrey A. Galant & K. Eli Akhaven, *The State of Estate Planning*, 150 NO. 3 TR. & EST. 35, 39 (Mar. 2011) ("Instead of concentrating on particular estate planning techniques and forcing their clients into these same techniques over and over again, estate planners will now be compelled to focus on each individual and unique client."); Lori D. Johnson*, Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*, 65 SYRACUSE L. REV. 451 (2015).

From the perspectives of the transactional drafter and the parties to these agreements, this recognition of stock stories 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 alternatively need to create a counterstory. To create such a counterstory, the drafter must use the structure, format, and language of the transactional document to sidestep the stock story embedded within the form agreement to "reveal a new or different reality."[79] 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 transactional form document can further the generic stock story and thus present an inaccurate representation of the parties' actual intent. For example, consider the narrative formed by title. The title "Prenuptial Agreement" is an accurate title to a standard form agreement. This title may be reproduced as the actual title for the document. But compare that to a customized title, such as "Drafting the [Premarital] Agreement—Not to Encourage Dissolution."[80] 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 dissolution proceedings. Including a subtitle of "Not to Encourage Dissolution" or even "Not Anticipating Dissolution Proceedings," expands upon the intent of the parties. In a similar manner, the title of a trust agreement may be tailored to reflect the goal of the Settlor, the person who creates the trust. Instead of the generic "Trust Agreement dated X," the title could be "the Klein Family Trust." By including "family" and the name of the Settlor's family, the trust agreement is more than a computer-generated form. The trust is an embodiment of the Settlor's wish to care for his or her family. Alternatively, the names of the beneficiaries could be included. The trust may be titled the "Beth Klein Trust," to emphasize the importance of providing resources of the individual rather than the accumulation of assets. 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.[81] The recitals

79 Sheppard, *supra* note 33, at 195.

80 Frank L. McGuane Jr. & Kathleen A. Hogan, *Drafting the Agreement Not to Encourage Dissolution, in* COLO. PRAC., FAMILY LAW & PRACTICE § 39:7 (2d ed. 2012).

81 *See supra* notes 46–47 and accompanying text addressing order of provisions and the role of background or preliminary information.

contained in a form agreement, especially if it is a precedent agreement, may play into the stock story of the form agreement. These recitals represent an ideal opportunity to draw from narratology.[82] The recitals can illustrate the points of view of the transacting parties. Despite presenting an ideal opportunity to draw from narrative, recitals often provide little to no background. This is, in part, because the recitals in form documents are generic or often nonexistent. Yet the drafter as storyteller may effectively use recitals to consciously reframe the narrative by acknowledging the parties' true intent behind the agreement, thus replacing the stock story. Recitals can effectively be used to present the parties' specific intentions and to provide relevant and individualized background information.[83] 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 meanings of certain terms used in the contract to the subject transaction.[84] Generally, if the word or phrase as used in the contract is intended to vary in any way from the standard dictionary definition of that word or phrase, or if the word or phrase does not have a standard dictionary definition, it should be defined within the contract. Definitions can also 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.

> As used in this instrument, the term "child" or "issue" means the blood descendants of any individual; provided, however, that an adopted child and such child's issue, whether natural or adopted, shall be considered as issue of an individual. A child born out of wedlock shall *[not]* be included in the term issue.[85]

The standard definition will correspond with the intent of a number of people who create a will. But the standard definition may not reflect the

82 Chesler & Sneddon, *Once Upon a Transaction*, *supra* note 43, at 273–74.

83 Chesler, *Effective Contract Drafting*, *supra* note 66, at 35.

84 *Id.*

85 Mary F. Radford, 2 Redfearn: Wills and Administration in Georgia § 17:40, 238 (7th ed. 2008).

86 *See generally* Susan N. Gary, *Definitions of Children and Descendants: Construing and Drafting Wills and Trust Documents*, 5 Est. Plan. & Community Prop. L.J. 283 (2013).

individual family relationships created by some testators.[86] 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,[87] but also to include individuals who are not legally considered children. For instance, a stepchild may be defined for purposes of a Will as a "child." The particular child could be identified by name to limit the definition to one particular individual. This would include the stepchild in all class designations and reflect the fact that the particular testator treated all children, whether stepchild, adopted child, or biological child, the same.

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. In the example of the form employment agreement, the standard arbitration clause requires the employee to agree to arbitration for claims or disputes against the employer, but does not require the employer to agree to the same.[88] This form provision represents the widely recognized stock story of David and Goliath—of the powerless employee pitted against the overbearing and powerful employer. At times, this 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 as 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. Alternatively, other form clauses may need to be omitted altogether, such as the "right to invention" term under which the employer obtains exclusive ownership of the employee's ideas or inventions, sometimes regardless of whether such inventions are outside the scope of the employer's business.[89]

87 *See, e.g.*, Cassandra M. Ramey, Note, *Inheritance Rights of Posthumously Conceived Children: A Plan for Nevada*, 17 NEV. L.J. 773 (2017); Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y 347 (2011).

88 24A WEST'S LEGAL FORMS, EMPLOYMENT § 2.52 (2003).

89 *See* Chesler & Sneddon, *supra* note 1, at 253–54.

A stock story is by definition a generic story type. Thus, the stock story may reflect the actual story of a transaction. But often the stock story will not. For instance, not every story involving the formation of a marriage is premised on the fairytale of a damsel in distress being rescued upon marriage to prince charming. Marriage may represent a partnership formed by parties with similar assets and sophistication. In the context of transactional documents, the "happily ever after" may not correspond to the stock story. Indeed, the "happily ever after" may be the starting point to drafting the transactional document. The drafter must have the confidence to alter stock stories when necessary.

IV. Conclusion

Transactional lawyers share attributes with Aesop, the Brothers Grimm, and Scheherazade. All are storytellers. Telling tales is the work of transactional lawyers. Drafting is far more than the cutting and pasting of standardized provisions from one form document to another form document. Transactional lawyers recognize that drafting is the creation of a document that projects the narrative of the transacting parties. Whether employment agreement or trust agreement, transactional documents are more than mere devices to mechanically deliver information. The transactional document is a product of relationships and interactions between the transacting parties. Transactions address the hopes, wishes, and fears of the parties to inform behaviors—long after the documents are signed.

From the selection of a form document to the customization of clauses, transactional lawyers use provisions to craft the narrative. Form agreements are a great starting point for the drafter to shape the narrative of the transaction. But the forms must be altered for the particular transaction. Narratology can provide the inspiration and techniques to enhance the power of transactional documents. The five practical strategies outlined in this article offer guidance on how to harness the power of narrative. Replacing generic legal terms with the actual names of the parties allows those parties to become the characters in the story of their own transaction. Making deliberate choices about the ordering of the provisions of the document can better convey the narrative as appropriate to the parties. And expressive language may be used to convey the motivations, goals, and purposes of the transacting parties. The power of narrative can also be enhanced by drafting transactional documents to plan for a variety of potential outcomes, just like the alternate plotlines of stories. Finally, the transactional drafter may use a variety of techniques to alter or replace the generic stock story of the form document to reflect the

unique story of the particular parties. In other words, transactional lawyers can, and should, use the power of narrative to more effectively tell their clients' stories. After all, transactional lawyers are storytellers.