

Mercer University School of Law

## Mercer Law School Digital Commons

---

Faculty Publications

Faculty

---

2016

### Once Upon a Transaction: Narrative Techniques and Drafting

Karen J. Sneddon

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/fac\\_pubs](https://digitalcommons.law.mercer.edu/fac_pubs)



Part of the [Legal Writing and Research Commons](#)

---

# ONCE UPON A TRANSACTION: NARRATIVE TECHNIQUES AND DRAFTING\*

SUSAN M. CHESLER\*\* & KAREN J. SNEDDON\*\*\*

## *Table of Contents*

I. Introduction.....	263
II. Narrative and Legal Writing.....	264
III. Applicability of Narrative Techniques to Transactional Drafting.....	265
IV. Featured Techniques and Examples.....	269
A. Stock Stories .....	269
B. Plot and Narrative Movement .....	276
C. Character .....	280
D. Point of View .....	284
E. Setting and Narrative Time .....	287
F. Themes and Motifs .....	290
V. Conclusion.....	295

## *I. Introduction*

A granddaughter joins the family business as a partner. An entrepreneur licenses his newest product. Two parties decide to settle a dispute. A charitable idea materializes as a private foundation. A parent's belief in the power of education is perpetuated by a trust agreement. Each of these events forms a narrative. A transaction is more than the scratch of pens across signature pages or the click of keys to email an executed document. A transaction is itself a story. These stories, made with provisions and clauses, result in the formation of contracts, agreements, and wills. Conceptualizing transactions as narratives benefits the negotiation, drafting, implementation, interpretation, and, ultimately, enforceability of the transactional document.

---

\* Portions of this article were presented on July 2, 2014, at the 2014 Biennial Conference of the Legal Writing Institute held in Philadelphia, Pennsylvania. Thanks to the presentation attendees for their reactions, thoughts, and comments.

\*\* Clinical Professor of Law, Sandra Day O'Connor School of Law, Arizona State University. I would like to thank the Sandra Day O'Connor College of Law, Arizona State University, for its generous support of this article.

\*\*\* Professor of Law, Mercer Law School. This project was supported in part by a Mercer Law School summer research stipend, for which I am grateful.

This article showcases the use of narrative techniques applicable to the drafting of transactional documents. Tethered to the fundamental principles of good drafting, the article will highlight the use of stock stories, plot and narrative movement, character, point of view, narrative setting, themes, and motifs across a spectrum of transactional documents.

## II. Narrative and Legal Writing

Narrative draws from the disciplines of literature, composition, rhetoric, cognitive psychology, and neuroscience.<sup>1</sup> While some may equate narrative with fiction, the term *narrative* is broader and references a variety of texts—both literary and nonliterary.<sup>2</sup> In general, *narrative* refers to a series of events relayed by a narrative agent.<sup>3</sup> At least a few scholars, including Jerome Bruner, posit that narrative is an innate process of the human brain.<sup>4</sup> From this perspective, life is lived in a series of narratives constructed about ourselves and our environment. Whether or not narrative is an innate process of the brain, narrative is certainly a predominant method employed to distill and disseminate information. Even a cursory review of popular culture and media reveals extensive use and reliance on the power of

---

1. Narratology is defined as “the theory of narratives, narrative texts, images, spectacles, events; cultural artifacts that ‘tell a story.’” MIEKE BAL, *NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE* 3 (2d ed. 1997).

2. *E.g.*, ROBERT SCHOLES, JAMES PHELAN & ROBERT KELLOGG, *THE NATURE OF NARRATIVE* 9 (40th anniversary ed., rev. and expanded 2006) (noting that the novel is one example of the narrative tradition that “can be traced back five thousand years”).

3. SCHOLES ET AL., *supra* note 2, at 4 (identifying the two core characteristics of narrative as “the presence of a story and a story-teller”); Jerome Bruner, *The Narrative Construction of Reality*, 18 *CRITICAL INQUIRY* 1, 6 (1991) (“A narrative is an account of events occurring over time.”). *But see* Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 *LEGAL COMM. & RHETORIC: JALWD* 81 (2012) (exploring the use of the terms narrative, story, and storytelling).

4. *See* JEROME BRUNER, *ACTS OF MEANING* 45 (1990) (identifying the human “predisposition to organize experience into narrative form”); Marshall Grossman, *The Subject of Narrative and the Rhetoric of the Self*, 18 *PAPERS ON LANG. & LITERATURE* 398, 398 (1982) (“The construction of narrative is an essential activity of the human mind.”); *see also* Lea B. Vaughn, *Feeling at Home: Law, Cognitive Science, and Narrative*, 43 *MCGEORGE L. REV.* 999 (2012); Lorie M. Graham & Stephen M. McJohn, *Cognition, Law, Stories*, 10 *MINN. J.L. SCI. & TECH.* 255 (2009); Louis J. Goldberg, *Expanding the Narrative: The Grand Compulsion of a Storytelling Species*, 6 *J. CONTEMP. LEGAL ISSUES* 281 (1995); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411 (1989).

narrative.<sup>5</sup> Narrative techniques facilitate the composition and production of an accessible, and often memorable, text. For those reasons, narrative has been of interest to a variety of disciplines, including law.<sup>6</sup>

### *III. Applicability of Narrative Techniques to Transactional Drafting*

As James Boyd White wrote,

[T]he law always begins in story: usually in the story the client tells, whether he or she comes in off the street for the first time or adds in a phone call another piece of information to a narrative with which the lawyer has been long, perhaps too long, familiar. It ends in story too, with a decision by a court or jury, or an agreement between the parties, about what happened and what it means.<sup>7</sup>

Over the last twenty years, the applicability of narrative to the law<sup>8</sup> has been explored by adapting narrative techniques to the development, composition, and production of a variety of litigation-based documents, both at the trial level<sup>9</sup> and the appellate level.<sup>10</sup> These documents include

---

5. See generally ARTHUR ASA BERGER, *NARRATIVES IN POPULAR CULTURE, MEDIA, AND EVERYDAY LIFE* 1-4, 14-16 (1997); see also BAL, *supra* note 1, at 220 (noting that “omnipresence of narrative in culture”).

6. E.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2002); DAVID RAY PAPKE, *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* (David Ray Papke ed., 1991) (reviewed by Jane B. Baron, *The Many Promises of Storytelling*, 23 RUTGERS L.J. 79 (1991)); Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997); Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology*, 18 YALE J.L. & HUMAN. 1 (2006); Peter Brooks, *Narrativity of the Law*, 14 LAW & LITERATURE 1 (2002); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay in Legal Narrative*, 45 STAN. L. REV. 807 (1993) Nancy Levit, *Reshaping the Narrative Debate*, 34 U. SEATTLE L. REV. 751 (2011).

7. JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 168 (1985); see also JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (abr. ed. 1985).

8. See generally J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247 (2015).

9. E.g., Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281 (2013).

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); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127 (2008).

pleadings, briefs, and victim impact statements.<sup>11</sup> In contrast, the applicability of narrative techniques to transactional drafting has yet to be fully explored.<sup>12</sup>

Reluctance to use narrative techniques when drafting transactional documents may be a result of a number of factors. First, many drafters unduly constrain the purpose of both narrative techniques and transactional documents—often viewing the two as inapposite to each other. For instance, narrative techniques are often erroneously considered to apply only to the telling of “fictional” events.<sup>13</sup> Similarly, transactional documents may be automatically classified as expository texts (that is, texts designed to inform) rather than narrative texts (designed to relay a story).<sup>14</sup> However,

---

11. See, e.g., Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 J. LEGAL WRITING INST. 3 (2009); 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).

12. The current scholarship acknowledges the potential applicability but does not yet fully explore the potential and problems. See, e.g., Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ASS'N LEGAL WRITING DIRECTORS 37, 57 (2010) (describing her efforts to infuse narrative into a variety of courses, including an estate planning course so that “students [are] moved from seeing their jobs in drafting these forms as simply checking boxes and filling in blanks, to constructing stories that accurately reflected their client’s goals . . . .”); Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537 (2007).

13. See Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1, 35 (1998). Limits exist to the use of narrative techniques in the law. For an examination of ethics and narrative in the legal context, see generally Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER & SOC. POL'Y & L. 117 (2002); David S. Caudill, *The Year of Truman Capote: Legal Ethics and In Cold Blood*, 86 OR. L. REV. 295 (2007); David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 797 (1998); Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS'N LEGAL WRITING DIRECTORS 63 (2010); Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000); Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ASS'N LEGAL WRITING DIRECTORS 229 (2010); Mia-Carré B. Long, Comment, *Of Mice and Men, Fairy Tales, and Legends: A Reactionary Ethical Proposal to Storytelling and the Briseño Factors*, 26 GEO. J. LEGAL ETHICS 859 (2013).

14. For an examination of expository and narrative texts, see generally Ruth A. Berman & Bracha Nir-sagiv, *Comparing Narrative and Expository Text Construction Across Adolescence: A Developmental Paradox*, 43 DISCOURSE PROCESS 79 (2007); see also Lenora Ledwon, *Storytelling and Contracts: (Casebook Review Essay)*, 13 YALE J.L. & FEMINISM 117 (2001) (reviewing AMY HILSMAN KASTELY, DEBORAH WAIRE POST & SHARON KANG HOM, *CONTRACTING LAW* (2d ed. 2000)) (observing that “[t]here is a general ‘flattening out’ of story and humanity in casebooks” as though the concept of story is incompatible with the study of the law).

a document's classification as either expository or narrative does not foreclose its use for narrative techniques.<sup>15</sup> Indeed, a hasty categorization of transactional documents as expository texts obscures the value that narrative techniques can offer to the process of relaying important information.<sup>16</sup> Additionally, a classification of a text as either expository or narrative assumes those categories are mutually exclusive, which they need not be. A transactional document may indeed contain both expository and narrative text, further highlighting the impact of narrative techniques.

Furthermore, drafters may fear that using narrative techniques will increase the quantity of information in the transactional document and introduce inaccurate or conflicting information,<sup>17</sup> thus creating ambiguity, promoting litigation, or increasing transaction costs. To compound the problem, many erroneously consider transactional documents to be static, thus supporting the reluctance to alter or shy away from the use of commonly-accepted forms.<sup>18</sup> Again, however, these concerns should not trump the value that narrative techniques offer.<sup>19</sup> While the use of forms are certainly a component of drafting, so too are creativity, invention, and

---

15. The differences between expository and narrative texts may be exaggerated. For an examination of the overlapping characteristics of categories of texts, see William Grabe, *Narrative and Expository Macro Genres*, in *GENRE IN THE CLASSROOM: MULTIPLE PERSPECTIVES* 249-67 (Ann M. Johns ed., 2002). See also Michael B.W. Wolfe & Joshua M. Woodwyk, *Processing and Memory of Information Presented in Narrative or Expository Texts*, 80 *BRIT. J. OF EDUC. PSYCHOL.* 341, 357 (2010) (acknowledging that readers may be influenced by the presentation of information using a particular genre).

16. James Seaton, *Essay: Literature and Business: Hostility and Dullness*, 2009 *MICH. ST. L. REV.* 885 (examining transactions in the words of Willa Cather and Edith Wharton and positing that literary portrayals of business and transactions is relevant to attorneys).

17. See, e.g., Sarah Kulkofsky, Qi Wang & Stephen J. Ceci, *Do Better Stories Make Better Memories? Narrative Quality and Memory Accuracy in Preschool Children*, 22 *J. APPLIED COGNITIVE PSYCHOL.* 21 (2008) (using open-ended and closed-ended questions to elicit memories and assess the quantity versus accuracy trade-off of narratives).

18. E.g., HOWARD DARMSTADTER, *HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING* xi (2d ed. 2008) (acknowledging the reluctance of lawyers "to dispense with standard phraseology no matter how obscure"). For an examination of the pull of commonly accepted form language, see Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 *L. & SOC. INQUIRY* 72 (2013) (interviewing lawyers from Frankfurt, London, Paris, and New York, who specialize in sovereign debt and the meaning and use of the term *pari passu* clause).

19. See Rivka Grundstein-Amado, *Narrative Inquiry: A Method for Eliciting Advance Health Care Directives*, 8 *HUMANE MED.* 31 (1992) (acknowledging that the use of narrative will take more time but noting that the benefit is "responsible evaluation and self-critical reflection").

innovation.<sup>20</sup> The creative use of narrative techniques allows for the continued development, refinement, and improvement of documents and allows attorneys to better tailor those documents to individual transactions.

Once these misconceptions are removed, drafters can see yet another benefit narrative techniques offer: opportunities and strategies to engage clients. Narrative techniques further the attorney-client relationship by promoting a closer examination of individual client goals and designing documents to further those goals.<sup>21</sup> It should be remembered that not only the drafting but also the negotiation, implementation, interpretation, and enforceability of a transactional document may benefit from conceptualizing transactions as narratives. After all, at the heart of all transactions is a client's story.<sup>22</sup> Deliberate use of narrative techniques in the drafting of transactional documents acknowledges the presence of this story and leverages its presence to further the intent of the parties.

---

20. See, e.g., John F. Coyle & Joseph M. Green, *Contractual Innovation in Venture Capital*, 66 HASTINGS L.J. 133 (2014) (interviewing lawyers about the evolution of venture finance contracts); 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) (exploring contract innovation and the ways in which courts may both promote and hinder contract innovation). For examples of cultivating contract innovation in the classroom, see William E. Foster & Emily Grant, *Memorializing the Meal: An Analogical Exercise for Transactional Drafting*, 36 U. HAW. L. REV. 403, 404 (2014) (describing approaches that encourage student drafters to “think[] creatively about drafting legal documents.”); Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS’N LEGAL WRITING DIRECTORS 118 (2008) (identifying drafting as a core competency of transactional lawyers).

21. E.g., Foster & Grant, *supra* note 20, at 408 (positing that encouraging creative approaches to drafting means that “students will be better prepared to view a client’s needs as individualized rather than something that can be adequately addressed by rote fill-in-the-blank drafting.”); see also SUE PAYNE, BASIC CONTRACT DRAFTING ASSIGNMENTS: A NARRATIVE APPROACH, at xxii (Vicki Been et al. eds., 2011) (encouraging drafting students to consider “[w]hat is happening in this client’s story?”).

22. For example, Professor Daniel Barnett wrote,  
All transactions involve a story that includes the different parties; what their roles are in the transaction; the obligations and rights of those parties; and the consequences if certain actions are taken or not. Using the narrative as an organizing principle is often the simplest way to structure an agreement.  
DANIEL L. BARNETT, PUTTING SKILLS INTO PRACTICE: LEGAL PROBLEM SOLVING AND WRITING FOR NEW LAWYERS 107-08 (Vicki Been et al. eds., 2014).

#### IV. Featured Techniques and Examples

This article showcases the following six narrative techniques: (1) stock stories, (2) plot and narrative movement, (3) character, (4) point of view, (5) narrative setting, and (6) themes and motifs. Each technique will be defined, and its potential use in drafting transactional documents will be illustrated through examples of various transactional documents that incorporate these techniques.

##### A. Stock Stories

*Stock stories*<sup>23</sup> are prototypes that serve as core patterns, or models, for individual stories.<sup>24</sup> These stories are influenced, developed, and retained by cultural, historical, and personal experiences.<sup>25</sup> The characters in these

---

23. Stephen Paskey, *The Law Is Made of Stories*, 11 LEGAL COMM. & RHETORIC: JALWD 51, 69-78 (2014) (defining a stock story as “a conventional story type, a story stripped of all but essential details”). For examples of stock stories in the law, see Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Sally Frank, *Eve Was Right to Eat the “Apple”*: The Importance of Narrative in the Art of Lawyering, 8 YALE J.L. & FEMINISM 79 (1996); Carolyn Grose, *Of Victims, Villains and Fairy Godmothers: Regnant Tales of Predatory Lending*, 2 NE. U. L.J. 71 (2010); Joan MacLeod Heminway, *Martha Stewart and the Forbidden Fruit: A New Story of Eve*, 2009 MICH. ST. L. REV. 1017; Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847; Diana Lopez Jones, *Stock Stories, Cultural Norms, and the Shape of Justice for Native Americans Involved in Interparental Child Custody Disputes in State Court Proceedings*, 5 PHOENIX L. REV. 457 (2012); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990); Erin Sheley, Comment, *The “Constable’s Blunder” and Other Stories: Narrative Representation of the Police and the Criminal in the Development of the Fourth Amendment Exclusionary Rule*, 2010 MICH. ST. L. REV. 121.

24. AMSTERDAM & BRUNER, *supra* note 6, at 45-47, 117-18, 121-22; Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984); *see also* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259 (2009); Christine Metteer Lorillard, *Stories that Make the Law Free: Literature as a Bridge Between the Law and the Culture in Which It Must Exist*, 12 TEX. WESLEYAN L. REV. 251 (2005); Jennifer Sheppard, *What if the Big Bad Wolf in All Those Fairy Tales 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 (2012).

25. Rollo May, *Values, Myths, and Symbols*, 132 AM. J. PSYCHIATRY 703 (1975); *see also* BERGER, *supra* note 5, at 95-96 (describing a fairy tale as “an ur-narrative—the basic story from which other kinds of stories draw sustenance”); BRUNO BETTELHEIM, *THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES* 25 (1976) (discussing



narratives become archetypes,<sup>26</sup> and ultimately stereotypes, with character traits readily identified by the audience.<sup>27</sup> For instance, characters wearing black hats are easily identified as villains or antagonists.<sup>28</sup> But such automatic identification may also prevent the audience from engaging with the narrative, especially when the antagonist is not wearing a black hat. These narrative shortcuts<sup>29</sup> influence audience perceptions of and engagement with the narrative.<sup>30</sup>

In the context of transactional drafting, stock stories may discourage the use of certain types of documents because of a client's preconceived notion about the stories projected by those documents. Moreover, attorneys choosing to employ these types of documents may be shortchanging their usefulness by failing to customize them to reflect the clients' specific goals. An example of this effect can be seen in whether and how clients use premarital and marital agreements.<sup>31</sup>

---

how the distinction between myth, folktale, and fairy tale may be blurred over time and re-telling of the stories).

26. See generally Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor and Authority*, 77 TENN. L. REV. 883 (2010); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767 (2006).

27. E.g., JACK MYERS & MICHAEL SIMMS, THE LONGMAN DICTIONARY OF POETIC TERMS 289 (Longman ed., 1989) [hereinafter LONGMAN DICTIONARY OF POETIC TERMS] (defining a "stock character" as "a conventional character or STEREOTYPE whose traits have been established by many authors and whose recognition by the audience relies on STOCK RESPONSE").

28. *Id.* at 289 (listing examples of stock characters, including "the villain, the ne'er-do-well, the fair lady in distress, the rich fop, the wicked stepmother, the braggart soldier . . . , the hermit, the taciturn father, and the hard-bitten yeoman").

29. Morant, *supra* note 13, at 26-27 (referencing use of stereotypes and other narrative short cuts in the bargaining process).

30. For example, one scholar posits that viewing nurses in relation to stock story characters, such as "ministering angel" or "doctor's handmaiden" undermines the status of nurses and fails to provide a legal framework under which a nurse's professional opinion is accorded weight. Mary Chiarella, *Silence in Court: The Devaluation of the Stories of Nurses in the Narratives of Health Law*, 7 NURSING INQUIRY 191, 192-93, 198 (2000).

31. See generally 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); Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 149 (1996); Clare Robinson, *Pre-Nuptial Agreements—The End of Romance or an Invaluable Weapon in the Wealth Protection Armoury?*, 13 TR. & TR. 207 (2007); Margaret Ryznar & Anna Stephien-Sporek, *To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27 (2009); Judith Younger, *Perspectives on Antenuptial Agreements*, 40 RUTGERS L. REV. 1059 (1988).

As defined by the Uniform Premarital and Marital Agreement Act, a premarital, or prenuptial, agreement is “an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event.”<sup>32</sup> Dating from medieval times, premarital agreements were originally conceived to detail the financial and non-financial responsibilities in the “economic alliances between families that were created by marriage.”<sup>33</sup>

Although of historic vintage, the modern use of the prenuptial agreement was initially met with resistance from the judiciary and the legislature.<sup>34</sup> American courts were reluctant to enforce terms of prenuptial agreements because the agreements were seen as encouraging divorce and the preparation of which “suggested the contemplation of divorce at the very outset of marriage.”<sup>35</sup> Even today, the preparation of a prenuptial agreement is often interpreted as an acknowledgment by the couple that the marriage is likely to end in divorce.<sup>36</sup>

The stock story of the prenuptial agreement is that a miser, wishing to retain all of his or her wealth, suggests a prenuptial agreement in anticipation of the marriage ending in divorce. Because they are reluctant to view themselves as misers, individuals may not suggest the creation of a prenuptial agreement. In addition, clients may presume that use of prenuptial agreements is limited to high-net-worth individuals, specifically

---

32. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 2(5) (UNIF. LAW COMM’N 2012). For an analysis of the act, see Amberlynn Curry, *The Uniform Premarital Agreement Act and Its Variations Throughout the States*, 23 J. AM. ACAD. MATRIM. LAW. 355 (2010); J. Thomas Oldman, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL’Y 83 (2011).

33. See Guggenheimer, *supra* note 31, at 147.

34. J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIM. LAW. 1, 33-34 (2008); see also Robert E. Rains, *A Prenup for Prince William and Kate? England Inches Toward Twentieth Century Law of Antenuptial Agreements: How Shall It Enter the Twenty-First?*, 23 FLA. J. INT’L L. 447, 454 (2011) (exploring the history of prenuptial agreements in America).

35. DiFonzo & Stern, *supra* note 34, at 33.

36. See, e.g., Sam Marguiles, *The Psychology of Prenuptial Agreements*, 31 J. PSYCHIATRY & L. 415, 423 (2003) (“The perceived need for the prenuptial agreement suggests that the couple will have problems with issues of family interference, trust, sharing, power or intimacy.”); see also Florence Kaslow, *Enter the Prenuptial: A Preclude to Marriage or Remarriage*, 9 BEHAV. SCI. & L. 375, 380 (1991).

to protect them from the stock characters of Gigolos and Jezebels.<sup>37</sup> In terms of stock stories, the stereotypes of the miser, trickster, and the femme fatale may be further obscuring the value of prenuptial agreements to a broad spectrum of clients. Understanding the susceptibility of audiences to stock-story references, whether conscious or unconscious, enables the drafter to take deliberate steps to reframe a document's purpose and the nature of its provisions so as to supplant the stock story with a fully developed narrative applicable to the individual client.<sup>38</sup>

Rather than acknowledging the inevitability of divorce, prenuptial agreements should promote an assessment of the marriage. Prenuptial agreements can foster the formation and continuation of marriages by tackling one of the last remaining taboo topics of our society: money.<sup>39</sup> In our culture, money is often addressed in hushed tones or avoided entirely. For instance, discussion of salaries among co-workers is avoided if not actively forbidden.<sup>40</sup> Likewise, families avoid talking about money.<sup>41</sup> Yet, disagreements about finances are one of the top reasons that couples seek counseling and one of the top reasons that couples divorce.<sup>42</sup> For that

---

37. See, e.g., Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIM. LAW. 413, 413 (2008) (beginning the article with reference to Kanye West's song "Gold Digger").

38. See, e.g., Jerome H. Poliacoff, *What Does Love Have to Do with It?*, 33 FAM. ADVOC. 12, 13 (2011) (summarizing study that demonstrates that "most people do not see themselves as needing, or benefiting from, prenuptial agreements"); Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 734 (2009) (noting that the cost for over-optimism is "the failure to adequately self-insure against future negative events"). For a consideration of how the myth of "death with dignity" interferes with individual's understanding and consideration of advance directives, see Rebecca Dresser, *Shiavo and Contemporary Myths About Dying*, 61 U. MIAMI L. REV. 821, 821, 845 (2007); Steven I. Friedland, *The Health Care Proxy and the Narrative of Death*, 10 J.L. & HEALTH 95, 100-01, 106-08, 144 (1995-1996).

39. Joan D. Atwood, *Couples and Money: The Last Taboo*, 40 AM. J. FAM. THERAPY 1, 1 (2012).

40. E.g., Deena Shanker, *Salary Talk with Co-Workers: Is It Ever a Good Idea?*, CNN (Apr. 2, 2013), <http://management.fortune.cnn.com/2013/04/02/salary-conversations-coworkers>. But see Sean Blanda, *Breaking Workplace Taboos: A Conversation About Salary Transparency*, 99U, <http://99u.com/articles/15527/the-age-of-salary-transparency>.

41. Atwood, *supra* note 39, at 11 ("In many couple relationships, money is more taboo than sex.").

42. *Id.* at 11-12; see also Alan J. Hawkins, Brian J. Willoughby & William J. Doherty, *Reasons for Divorce and Openness to Marital Reconciliation*, 53 J. DIVORCE & REMARRIAGE 453, 453, 455, 458-61 (2012) (identifying "growing apart," "not able to talk together," and money issues as often cited reasons in the study).

reason, disagreements about financial goals and misunderstandings about the economic responsibilities of the couple should be identified before marriage. While all marriages eventually terminate, either upon divorce or death, a document that clarifies the financial aspects of the relationship could promote the formation of lasting marriages.<sup>43</sup>

As mentioned above, a stock story preconception may be supplanted with a specific story by reframing the document's purpose. The following is a standard recital in a prenuptial agreement that does not reframe the narrative:

- A. Marriage is intended soon between the parties.
- B. Each party desires, before entering into the marriage, to know just what the rights of property are to be in each other's estate.<sup>44</sup>

These recitals are accurate but fail to present a narrative that is beneficial to the parties. Instead, the recital plays into the stock story of a trickster or miser by focusing attention on the fact that, before entering the marriage, the parties want to know “what the rights of property are to be”—as though creating the marital relationship is contingent on receiving or renouncing particular property rights.

The recitals may instead consciously reframe the narrative by acknowledging the beneficial aspect of the agreement, as in the following:

Each party acknowledges and stipulates the purpose of this Agreement is not to promote or procure a divorce or dissolution of marriage, but to provide for marital tranquility by agreeing on the property and support rights of each other at the commencement of the marriage. The parties have determined that the marriage between them shall have a better chance of success if the rights and claims that accrue to each of them as a result of their marriage are determined and finalized by this Agreement.<sup>45</sup>

---

43. Atwood, *supra* note 39, at 2, 11-12; see also Alison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 894-96 (1997).

44. 5 AM. JUR. LEGAL FORMS 2D *Prenuptial Property Agreement—Barring All Rights in Property of Other Spouse—Reserving Property of Both for Themselves—Subject to Certain Payments to Wife* § 61.19 (2004).

45. 20 FRANK L. MCGUANE, JR. & KATHLEEN A. HOGAN, *Drafting the Agreement Not to Encourage Dissolution*, in COLO. PRAC., FAMILY LAW & PRACTICE § 39:7 *Drafting the*

Direct acknowledgment that the intent of the Agreement “is not to promote or procure divorce” but to promote “marital tranquility” reframes the narrative and replaces the stock story.

A form’s prefatory material can also evidence the intent of a drafter. Consider the narrative formed by a title such as “Drafting the Agreement—Not to Encourage Dissolution.”<sup>46</sup> Similarly, the example below attempts to refocus the goal of the prenuptial agreement.

HUSBAND and WIFE intend to be life-long partners. HUSBAND and WIFE will devote their best efforts to the creation of a successful marriage.

HUSBAND and WIFE intend this Agreement to enhance their marriage, by freeing them from concerns and disputes regarding their post-marriage financial obligations to one another. Both parties believe that disagreement regarding financial matters can gravely impair a marriage. The parties believe that the potential for future discord regarding financial matters can be reduced or eliminated if, before they marry, they agree on the terms of their financial obligations to one another. The parties also believe the Agreement will give them peace of mind, by fixing their rights and duties concerning separate property and support obligations should, despite their best efforts, the marriage end in divorce or other dissolution. The parties expressly agree that this Agreement is not made in contemplation of, or to encourage or facilitate, a separation or divorce.<sup>47</sup>

---

*Agreement—Not to Encourage Dissolution* (2d ed. 2012) (omitting “whereas” from the form language). The authors also suggest another variation of the recital:

WHEREAS, the parties, to promote marital tranquility, desire to fix, limit, and determine by this Agreement the interest, rights, and claims that may accrue to each of them in the property and estate of the other by reason of their marriage or in the event of marital difficulties herein referred to, and to accept the provisions of this Agreement in lieu and in full discharge, settlement, and satisfaction, of any and all interests, rights, and claims that otherwise each might or could have under the law, in and to the property and estate of the other, both before and after the other’s death.

*Id.* § 41:57.

46. *Id.* § 39:7.

47. 2 FREDERICK K. HOOPS, FREDERICK H. HOOPS III & DANIEL S. HOOPS, *Prenuptial Agreement for Parties that Are Similarly Situate—With No Mandatory Provision for Either Spouse on Death or Divorce*, in FAMILY ESTATE PLANNING GUIDE Appendix 21 (4th ed. 2014) (Intentions Provision).

Beginning the prenuptial agreement with a recital or introductory remark about intentions presents opportunities to reframe the purpose of the prenuptial agreement and override the stock story.

Indeed, a drafter has the opportunity to reframe the narrative at various points in the agreement. For example, the document can conclude with a repeated recital that the agreement is not intended to promote divorce but rather is an effort to promote marital tranquility. Moreover, a drafter can reinforce the narrative by ordering the document such that provisions concerning estate rights (should the marriage terminate upon death) are placed before provisions concerning dissolution rights (should the marriage end in divorce).<sup>48</sup>

Another narrative technique to supplant the stock story uses formatting to engage the client-audience of the prenuptial agreement. Dense text with few divisions may be difficult for clients to absorb, decreasing their initial comprehension of the text and diminishing their continued use of the document. Divisions, descriptive headings, and other formatting can be used as signals to promote comprehension and retention of the agreement.<sup>49</sup> A table of topics can also be used to itemize the topics addressed in the prenuptial agreement. An attorney can further customize an agreement by using proper names,<sup>50</sup> rather than generic, defined terms, so as to reflect the personalization of the story.

Coupled with the use of independent counsel and full and adequate disclosure, client engagement in the negotiating and drafting of a prenuptial agreement can enhance its ultimate enforceability. Deliberately supplanting a stock story with a client's individualized story fosters that kind of engagement.

---

48. MCGUANE & HOGAN, *supra* note 45, § 41:57.

49. Headings increase reader engagement with text and promote reader retention of the text. *See, e.g.*, Kristin Ritchey, Jonathan Schuster & Jaryn Allen, *How the Relationship Between Text and Headings Influences Readers' Memory*, 33 CONTEMP. EDUC. PSYCHOL. 859, 860 (2008) (studying use of typographical signals, such as bolding and underling, and organizational signals, such as headings, overviews, and summaries); *see also* Robert F. Lorch, Jr., *Text-Signaling Devices and Their Effects on Reading and Memory Processes*, 1 EDUC. PSYCHOL. REV. 209, 212 (1989) (exploring the impact of text signals on reading processes, comprehension, and memory).

50. *See, e.g.*, Tim Brennen, *On the Meaning of Personal Names: A View from Cognitive Psychology*, 48 NAMES 139 (2001); A.J. Sanford, K. Moar & S.C. Garrod, *Proper Names as Controllers of Discoursal Focus*, 31 LANG. & SPEECH 43 (1988); Mary Margaret Steedly, *The Importance of Proper Names: Language and "National" Identity in Colonial Karoland*, 23 AM. ETHNOLOGIST 447 (1996).

### B. Plot and Narrative Movement

*Plot* is a core characteristic of all narratives<sup>51</sup> and refers to the sequencing of events in a story.<sup>52</sup> Related to the concept of plot is *narrative movement*, which refers to the story's forward momentum that results in a culmination that the sequence of events anticipates.<sup>53</sup> Plot includes concepts of sequencing, pacing, and emphasis, such that "plot will be phased into a series of episodes of *rising affective intensity*, with the strongest discharge of energy at the end and the other main points spaced out in roughly ascending order through the text."<sup>54</sup> Although the word *plot* is singular, a narrative can certainly have multiple plotlines.<sup>55</sup> Structuring a sequence of events with reference to these plotlines can strengthen the structure of a transactional document.

The ordering of events may initially seem like only a component of fictional narrative where the author has great freedom in the creation and selection of events. Yet plot has a role in the development of all narratives, including the narrative relayed by a transactional document such as a contract. Contracts are in essence the private law between the parties, and contract terms guide how the relationship between the parties will progress over time.<sup>56</sup> The terms 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.<sup>57</sup> 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

---

51. *E.g.*, PETER BROOKS, *READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE* 5 (1992) (observing that "without at least a minimal plot [the narrative] would be incomprehensible") [hereinafter BROOKS, *READING FOR PLOT*].

52. *Id.* at xi; *see also* GERALD PRINCE, *A DICTIONARY OF NARRATOLOGY* 73 (rev. ed. 2003) (defining plot, in part, as a series "of events with an emphasis on causality").

53. "Without plot, events would be mere occurrences, discontinuous and separate moments, rather than episodes in an unfolding story." Francesca Polletta, *Contending Stories: Narrative in Social Movements*, 21 *QUALITATIVE SOC.* 419, 421 (1998).

54. N.J. LOWE, *THE CLASSICAL PLOT AND THE WESTERN NARRATIVE* 71 (2000).

55. *See, e.g.*, KELLEY GRIFFITH, *WRITING ESSAYS ABOUT LITERATURE* 53 (2011).

56. As defined in the Restatement (Second) of Contracts, "[a] contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." *RESTATEMENT (SECOND) OF CONTRACTS* § 1 (AM. LAW INST. 1981).

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).

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.

Presenting terms as components of a plot facilitates the cognitive process that gives meaning to the terms when viewed as parts of a whole.<sup>58</sup> An employment agreement, for example, may be created and drafted with reference to plot.<sup>59</sup> The nature of the employment agreement and the terms of the contract depend upon a variety of factors, including “the level of the employee, in terms of both responsibility and compensation; the importance of the employee to the organization; the type of company information that will be entrusted to the employee and that the employee is expected to develop; and the amount of training the employee will receive.”<sup>60</sup> The employment agreement needs to set forth sufficient detail so that the plot may continue on the anticipated series of events—the parties’ performance of their respective duties during the employment term. This can be represented by terms setting forth job duties, salary increases, and bonuses.<sup>61</sup>

Terms of an employment agreement must also anticipate alternative plotlines. The drafter should include terms dealing with the bases and procedures for contract termination and the occurrence of *force majeure*

---

58. See, e.g., Donald E. Polkinghorne, *Narrative and Self-Concept*, 1 J. NARRATIVE & LIFE STORY 135, 136 (1991).

59. The employment agreement centers on the social relationship that is employment and involves “institutions with internal rights, obligations, and procedures for resolving disagreements.” David L. Weakliem, *The Employment Contract: A Test of the Transaction Cost Theory*, 4 SOC. F. 203, 203 (1989).

60. Galit Kierkut, *The Value of Employment Contracts*, N.J. LAW., Dec. 2012, at 28, 28; see also Frank H. Clarke & Masako N. Darrough, *Optional Employment Contracts in a Principal-Agent Relationship*, 4 J. ECON. BEHAV. & ORG. 69 (1983).

61. See generally Vito A. Gagliardi Jr. & Thomas O. Johnston, *Evaluating Key Clauses and Terms in Today’s Employment Agreements*, in INSIDE THE MINDS: NEGOTIATING AND DRAFTING EMPLOYMENT AGREEMENTS (2012 ed.), 2012 WL 3058620 (“The goal in drafting an employment agreement is to memorialize effectively the value you expect from the employment relationship with language that protects the employer’s interests.”).



events.<sup>62</sup> The employment agreement should also acknowledge the potential shift in plot narrative toward contract dispute<sup>63</sup> by including boilerplate terms relating to forum selection, choice of law, and the provision of notice under the contract.<sup>64</sup>

For example, in describing contract performance, an employment agreement may typically provide as follows: “The Corporation hereby engages and employs Executive as the Chief Executive Officer.” By envisioning the sequence of events in a contract performance as a plot, however, the provision may be revised as follows:

The Corporation shall employ Executive as the Chief Executive Officer. Executive shall perform such duties as are commensurate with such a title, including but not limited to: reporting directly to the Board of Directors; directing, supervising, and having responsibility for all aspects of the operations and general affairs of the Corporation; and serving without additional compensation as an officer or director of any subsidiary of the Corporation upon request of the Board of Directors.

The provision remains accurate but presents greater detail as to the nature of the performance, thus enabling the parties to better understand how to perform their duties under the contract and follow the anticipated sequence of events.

In a similar manner, a provision relating to termination of the contract may provide as follows: “Executive shall have the right to terminate her

---

62. The *force majeure* clause in a contract excuses a party from not performing its contractual obligations due to unforeseen events beyond its reasonable control. If a contract does not include a *force majeure* clause, the default rule generally applied by courts is that “where . . . a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged . . . .” RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981).

63. See, e.g., 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.”).

64. For an examination of the importance of customizing so-called boilerplate provisions, see generally TINA L. STARK, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE (2003) (reviewed by Loftus C. Carson, II, *Book Note*, 40 TEX. J. BUS. L. 231 (2004)); Stephen L. Sepinuck & Tina L. Stark, *The Big Deal About the Fine Print: Negotiating and Drafting Contractual Boilerplate*, 61 CONSUMER FIN. L. Q. REP. 848 (2007).

employment under this Agreement for any reason.” Expanding this reference to a point in the plot could produce the following provision:

Executive may terminate her employment under this Agreement for any reason as long as Executive provides the Board of Directors with 30 days advance notice. If Executive terminates employment under this section, the Corporation has no obligation to provide Executive with any severance payment or other payments under this Agreement.

Unnecessary details are not cluttering the provision, but the consequences of the contemplated event are introduced, producing a more complete and cohesive narrative.

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. 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.<sup>65</sup> Instead, the agreement could clarify as follows:

Neither party will be responsible for any failure to fulfill its obligations due to causes beyond its reasonable control, including but not limited to: acts of God; acts or omissions of any government or military authority, including any order determining the operations of Corporation are not permitted under the laws of the jurisdictions in which it operates; death or disability of the Executive; and bankruptcy or insolvency of Corporation. In the event this clause becomes effective, the party whose performance is not excused may either suspend the contract for up to 30 days or terminate the contract.

---

65. For the “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.), 2014 WL 4785369. The procedure for termination is identified as a key provision in an employment contract.

In a similar manner, a trust agreement may be structured with reference to plot.<sup>66</sup> For example, an individual may wish to create a trust to be used for the education of his or her descendants.<sup>67</sup> The trust provisions should consider the most likely use of the trust property (education), an alternate situation in which the descendants have no need for educational support but require other support, and the possibility of the settlor leaving no descendants.<sup>68</sup>

The conscious recognition of plot helps “shape” and provides “direction” to the narrative.<sup>69</sup> 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.

### C. Character

Character, sometimes considered the most important aspect of a narrative,<sup>70</sup> consists of the people, entities, and ideas that participate in the narrative. In legal storytelling, the emphasis is on characters as a means to a particular plot outcome.<sup>71</sup> These characters and their motivations drive the plot forward through their actions and inactions.

In the context of a contract, the contracting parties are the characters. Conceptualizing the parties as characters can result in contracts that better encapsulate the parties’ understandings. For instance, lawyers can draft contracts that better effectuate the parties’ intent by providing descriptive information about the parties in the Recitals or Background section of the

---

66. 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).

67. 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).

68. 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).

69. BROOKS, READING FOR PLOT, *supra* note 51, at xi.

70. See, e.g., JOHN GARDNER, JOHN GARDNER’S COLLECTION ON WRITING: ON BECOMING A NOVELIST, ON WRITERS & WRITING, AND ON MORAL FICTION (2013).

71. E.g., Joseph M. Williams & Gregory G. Colomb, *Telling Clear Stories: A Principle of Revision that Demands a Good Character*, 5 PERSP.: TEACHING LEGAL RES. & WRITING 14 (1996).

contract. This descriptive information may include specific references to the identity of the parties and may also address the intent or motive of the parties, transforming two-dimensional references to the parties into three-dimensional, human characters.

Inclusion of the parties' intent or motivation may facilitate the execution of the contract between the parties and, even more importantly, may later assist a court if called upon to interpret the contract in the event of a dispute. The use of character as an aid to contract interpretation is twofold:

1. If a court is required to interpret potentially ambiguous language in a contract, its primary goal is to effectuate the parties' intent. The inclusion of descriptive information about the parties and their intent within the contract itself is both more effective and more likely to achieve that goal.
2. If a court is asked to enforce contract terms that it often views suspiciously, such as a jury-waiver clause or a covenant not to compete, a description of the parties' intent may go a long way in helping the court decide whether these particular parties are entitled to have such a term enforced under the circumstances of their particular transaction.

For example, the following form provision (as may appear in a collective bargaining agreement) provides a description of the parties' intent:

It is the intent of the parties to secure and sustain maximum productivity per employee. In return to employer for the rates provided in this agreement and consistent with the principle of a fair day's work for a fair day's pay, union emphasizes its agreement with the objectives of achieving the highest level of employee performance and efficiency, and agrees that union, its agents, and its members will not take, authorize, or condone any action that interferes with the attainment of such objective.<sup>72</sup>

Inclusion of this description may make it more likely that the parties will be willing to finalize the transaction and also serves to assist a court in defining the contractual obligations of the parties to the contract in a way that best encapsulates the parties' intent.

In the context of a settlement agreement, recitals may be used to showcase the concept of characters. Specifically, recitals can be used to

---

72. 3A SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS: FORMS § 55F:10 (4th ed. 2014).

describe the parties and their relationship, such as the nature of their dispute and their disclaimer of liability or fault.<sup>73</sup> As the parties are generally introduced in the recitals, the actual party names can also be used, rather than generic characterizations like “buyer” and “seller,” to reinforce the individualized, personalized nature of the transactional document. In addition, the recitals can set forth the parties’ specific concerns under the contract, such as a preference towards the creation of an accord and satisfaction rather than a substituted contract.<sup>74</sup> Including this information about intent will give dimension to what otherwise might simply be empty words on a page.

Furthermore, character can be used to boost the chances a court will enforce a contract term that it would otherwise view suspiciously.<sup>75</sup> The following is an example of such a term—a standard jury-waiver provision:

Due to high cost and time involved in commercial litigation before a jury, the parties waive all right to a jury trial on all issues in any action or proceeding relating to this lease agreement, the transaction contemplated by this lease agreement, or any documents executed in connection with the contemplated transaction.<sup>76</sup>

Although this provision covers the basic requirements, the bland provision may not ultimately be enforced.<sup>77</sup> Courts are typically reluctant to enforce terms where a party waives its fundamental legal rights, such as the right to

---

73. See LONGMAN DICTIONARY OF POETIC TERMS, *supra* note 27, at 238.

74. In a substituted contract, the releasing party discharges the other party’s obligation and the original contract; thus if there is a breach, the releasing party’s only recourse is to bring an action under the substituted contract. In contrast, under an accord and satisfaction, only performance of the obligations under the accord discharges the original contract. In the event of a breach, the releasing party may choose to bring an action under the accord or based on the initial obligations under the original contract. See SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 73:36 (4th ed. 2003).

75. See, e.g., A. Darby Dickerson, *Contractual Jury Waiver Provisions: A Striking Idea*, 39 FED. B. NEWS & J. 206 (1992); Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 484-522 (2013).

76. Frederick H. Miller, *U.C.C. §§ 2A-508, 2A-503: Jury Waiver Clause*, 12A WEST’S LEGAL FORMS, COMMERCIAL TRANSACTIONS § 23:22, Westlaw (database updated September 2014).

77. See Jean Hellwege, *Coming to a Contract Near You: The Predispute Jury Waiver*, TRIAL, Dec. 2004, at 14, 14 (noting that jury waiver provisions are “gaining favor among businesses”); Jarod S. Gonzalez, *A Tale of Two Waivers: Waiver of the Jury Waiver Defense Under the Federal Rules of Civil Procedure*, 87 NEB. L. REV. 675, 678-83 (2009) (describing jury waivers in contracts as a “twenty-first century trend”).

a trial by jury, unless the provision reflects that the parties intentionally and knowingly gave up their rights to a jury trial.<sup>78</sup> Customizing the provision by using the narrative technique of character can strengthen the enforceability of the provision.<sup>79</sup> For example, the revised provision in a commercial lease may read as follows:

**Waiver of Jury Trial by Theresa Taylor and Logan Lucas.**

Theresa Taylor makes a voluntary, intentional, and knowing waiver of a right to a trial by jury. Theresa Taylor acknowledges that neither Logan Lucas nor any agent acting on Logan Lucas's behalf has induced her waiver. Theresa Taylor has had the opportunity to consult with independent legal counsel about this provision. Theresa Taylor understands the costs and time involved in litigation. As a consequence, upon advice and reflection, Theresa Taylor confirms her intent to waive her right to a jury trial and has placed her initials in the space indicated below this provision to acknowledge her intent.

This provision projects a personalized contemplation of the significance of the provision and reinforces the intentional and knowing waiver by the tenant.

Viewing parties to the transaction as characters with individual traits and specific intentions allows the drafter to more fully develop pertinent aspects of the document. This may ultimately be critical in the execution, interpretation, and implementation of the document.

---

78. *E.g.*, Wayne Klomp, Note, *Harmonizing the Law in Waiver of Fundamental Rights: Jury Waiver Provisions in Contracts*, 6 NEV. L.J. 545, 549-54 (2005-2006); *see also* David F. Johnson, *The Enforcement of Contractual Jury Waiver Clauses in Texas*, 62 BAYLOR L. REV. 649, 661-62 (2010) (citing freedom of contract as a policy consideration for enforcing jury waiver provisions).

79. *See generally* Amanda R. Szuch, *Comment: Reconsidering Contractual Waivers of the Right to a Jury Trial in Federal Court*, 79 U. CIN. L. REV. 435, 438-40 (2010) (exploring the different standards used to evaluate jury waiver provisions in federal law and state law); Brian D. Weber, Note, *Contractual Waivers of a Right to Jury Trial—Another Option*, 53 CLEV. ST. L. REV. 717, 722-26 (2005) (referencing the factors of bargaining power, sophistication, negotiation, and conspicuousness as factors relevant to intentional and knowing waiver).

#### D. Point of View

Related to character is the concept of point of view.<sup>80</sup> *Point of view* refers to the perspective from which the audience experiences the narrative.<sup>81</sup> The general categories of point of view are omniscient, first person, and third person.<sup>82</sup> Point of view, however, is more than the consistent use of pronouns. Selecting a point of view and its consistent use throughout a narrative is crucial in influencing the audience's perception and memory of the narrative.<sup>83</sup>

The last will and testament<sup>84</sup> presents an opportunity to examine point of view in the context of transactional drafting. From the introduction to the closing, a will begins and ends with first person "I." A will is a legal document that reflects an assessment of accomplishments, an acknowledgment of disappointments, a confrontation of mortality, and a contemplation of legacy. In essence, the will is a first person narrative.<sup>85</sup> The use of self-referencing—that is, I, me, my, and mine—can strengthen the power and resonance of the personal narrative in a will.

Establishing the point of view is more, however, than using the first person pronoun. For example, a standard provision in a will reads, "To my niece Evelyn Marie Stein, if she survives me, my art deco diamond and sapphire brooch." The provision can be modified to include the first person

---

80. See Simon Stern, *The Third-Party Doctrine and the Third Person*, 16 NEW CRIM. L. REV. 364, 372-77 (2013); see also Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2478-85 (1993); Michele G. Falkow, *Pride and Prejudice: Lessons Legal Writers Can Learn from Literature*, 21 TOURO L. REV. 349, 384-90 (2005).

81. Cathren Koehlert-Page, *Come a Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. REV. 399, 404 (2011).

82. See generally JOHN GARDNER, *THE ART OF FICTION: NOTES ON CRAFT FOR YOUNG WRITERS* (1991).

83. John B. Black, *Point of View in Narrative Comprehension, Memory, & Production*, 18 J. VERBAL LEARNING & VERBAL BEHAV. 187, 187 (1979); Fenja V. Ziegler & Daniel K. Acquah, *Stepping into Someone Else's Shoes: Children Create Spatial Mental Models from the Protagonist's Point of View*, 10 EUROPEAN J. DEV. PSYCHOL. 546 (2013).

84. See Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355, 368 (2013); see also Elizabeth Stone, *The Last Will and Testament in Literature: Rupture, Rivalry, and Sometimes Rapprochement from Middlemarch to Lemony Snicket*, 47 FAM. PROCESS 425 (2008).

85. See generally Henrik Skov Nielsen, *The Impersonal Voice in First-Person Narrative Fiction*, 12 NARRATIVE 133 (2004) (examining the use of first person in a variety of novels, including Herman Melville's *Moby Dick* and F. Scott Fitzgerald's *The Great Gatsby*); Malinda Snow, *The Origins of Defoe's First-Person Narrative Technique: An Overlooked Aspect of the Rise of the Novel*, 6 J. NARRATIVE TECH. 175 (1976).

“I.” But the point of view can be developed by expanding the testator’s descriptions about the property to show the significance the testator placed on the property, such as in the following example:

I give to my niece Evelyn Marie Stein, if she survives me, the art deco diamond and sapphire brooch I received as a twentieth wedding anniversary gift.

Point of view may reference the perspective from which the narrator relays the narrative even more directly by sharing the reasoning behind decision.<sup>86</sup> In the context of a will, point of view thus also includes the testator’s directions, wishes, and hopes with regard to the dispositive and administrative terms. These explanations may share the significance behind a piece of tangible personal property, which are not necessary for the identification of the property. The explanation may share the rationale for an unequal distribution of property. This type of language to share point of view is commonly referred to as “expressive language.” Consider the following example:

I give to my son Albert Chin, if he survives me, the pair of 11 inch Tiffany & Co. crystal candlesticks that were regularly used on the Thanksgiving Day table.

This entry now provides the beneficiary with greater insight about the testamentary gift. On the other hand, drafters may be concerned that expanded descriptions inject ambiguity. What, for example, if another pair of candlesticks was used on some of the Thanksgiving Day tables? Drafters may also fear that adding to the description will reveal the testator’s faulty recollection, inviting claims of lack of capacity if, in the brooch hypothetical, the brooch was actually received as a gift on the twenty-fifth wedding anniversary, not the twentieth. These legitimate concerns are not limited to expressive language however; they apply to all testamentary language. All provisions in a will may be potentially ambiguous. For instance, the diamond brooch may turn out to be made of paste stones and the candlesticks may not bear the mark of Tiffany & Co. No drafter would suggest the elimination of all descriptive language. Refusal to consider the value of the enhanced description is a lack of acknowledgment about the importance of point of view.

---

86. See, e.g., LONGMAN DICTIONARY OF POETIC TERMS, *supra* note 27, at 238.



Drafters may also object to the inclusion of non-legal language in a legal document.<sup>87</sup> This objection may be because drafters are worried that testators will include vitriolic insults that will goad beneficiaries to institute legal proceedings or bog down the estate's administration with ambiguity. The testator's point of view may thus cause adverse legal consequences. Nonetheless, expressive language has a role in establishing the testator's point of view, benefitting both the testator and subsequent audiences of the will. A will is, after all, a document of historic origins, written in the present tense, and intended to be implemented in the future. The point of view in the will should reflect not only the history of the document itself but also the history of the individual testator. The use of self-referencing, descriptive headings, sequencing of provisions, and description of property enhances the personal narrative of the will by sharing the testator's point of view.<sup>88</sup>

Sharing the point of view facilitates the drafting and the implementation of the terms of the will, especially when the court is called upon to interpret the will. In addressing the formalities of execution, Professor John H. Langbein wrote, "Standardization of wills is a matter of unusual importance, because unlike contracts or conveyances, wills inevitably contemplate judicial implementation."<sup>89</sup> This reasoning has been applied in the context of drafting to urge the adoption of uniform constructions and language choices and discourage drafting innovation, such as the use of narrative techniques. But innovation does not mean a disregard or ignorance of the canons of construction and the possibility of judicial interpretation. By incorporating point of view, the court is able to draw from the individualized language to better interpret the testator's intent and

---

87. This language is typically referred to as "non-legal language" because the language is not substantively required. The reluctance to include expressive language may also be the interpretation of expressive language as "feminine language" that does not belong in the "masculine language" of legal documents. See Karen J. Sneddon, *Not Your Mother's Will: Gender, Language, and Wills*, 98 MARQ. L. REV. 1535, 1561-68 (2015).

88. In a similar manner, a revocable trust (the pure will substitute) may benefit from enhanced attention to point of view. Trust agreements are typically written in third person. Incorporating first person pronouns to identify the settlor reinforces that the key point of view is that of the settlor. See, e.g., KEVIN D. MILLARD, DRAFTING WILLS, TRUSTS, AND OTHER ESTATE PLANNING DOCUMENTS: A STYLE MANUAL §§ 2.6, 6.3 (2006) (urging drafters to use first person in the pure will substitute: the revocable trusts). For an exploration of Wills and Revocable Trusts, see Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523 (2008).

89. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 494 (1975).

therefore better implement the terms of the will. Innovation, particularly through the use of narrative techniques such as point of view, can produce documents that acknowledge the function of the document.

#### *E. Setting and Narrative Time*

The *setting* is the environment in which a story or event takes place.<sup>90</sup> It can include specific information about time and place or simply be descriptive. Geographical location, historical era, social conditions, weather, immediate surroundings, and time of day can all be aspects of setting.<sup>91</sup>

Relatedly, *narrative time* refers to the temporal sequence of events in a story. It addresses the cultural, historical, and chronological factors surrounding the events of a narrative.<sup>92</sup> In other words, narrative time is the temporal setting, helping to set the stage and context for the plot events and the ideology of both the characters and the author.

The use of setting, both in terms of environment and temporal sequence, can help ground a contract in its particular location and time of performance. Where and when the parties are obligated to perform can have great importance to the overall plot or purpose of the contract. While detailed descriptions of geographical location and historical settings may seem more suited to fictional narratives that evoke a sense of imagery in the mind of the reader, location and historical perspective also enable the contract drafter to better achieve the parties' intent. For example, an employment agreement that sets forth the requirement that an employee travel frequently may avoid future disputes or dissatisfaction with the parties' contractual relationship. Likewise, a *force majeure* clause in a sales agreement may take on greater meaning and perspective if it referenced the military coup or acts of civil disobedience that had recently affected the ability of local companies to manufacture or export goods. The inclusion of a specifically tailored *force majeure* clause represents a type of "flash

---

90. M.H. ABRAMS & GEOFFREY GALT HARPHAM, A GLOSSARY OF LITERARY TERMS 362 (11th ed. 2015).

91. See PHILIP N. MEYER, STORYTELLING FOR LAWYERS 155-57 (2014).

92. See, e.g., BERGER, *supra* note 5, at 4 (remarking that "narratives take place within or over, to be more precise, some kind of time period."); see also Paul Ricoeur, *Narrative Time*, in NARRATIVE DYNAMICS: ESSAYS ON TIME, PLOT, CLOSURE, AND FRAMES 35, 35-45 (Brian Richardson ed., 2002).

forward,” or prolepsis,<sup>93</sup> and is an effective technique for transactional drafters.

In its most obvious expression, the use of setting in a contract addresses which jurisdiction and what body of law will be applicable in determining its enforceability and interpretation in the event of a dispute.<sup>94</sup> Many drafting scholars suggest that forum-selection and choice-of-law provisions are the most important terms in any contract.<sup>95</sup> However, many form contracts include a generic arbitration clause like the following:

All actions, disputes, claims and controversies relating to this Agreement, or the breach, invalidity or termination hereof, will be subject to and resolved by binding arbitration pursuant to the Commercial Arbitration Rules of U.S. Arbitration and Mediation. Any award or order rendered by the arbitrator may be confirmed as a judgment or order in any state or federal court of competent jurisdiction.

A more nuanced use of setting, however, would result in the drafting of a more effective arbitration clause—one that includes reference to issues such as the number and selection process of arbitrators and the timing and location of the proceedings.<sup>96</sup>

Understanding the temporal setting or sequence of events is also vital to contract drafters for several reasons. Specifically, it allows them to differentiate between terms that are in effect throughout the life of the contract (i.e., the definitions), terms that relate solely to a current state of affairs (i.e., representations of fact), and terms that may or will become

---

93. One type of narrative time is *prolepsis*. While *prolepsis* is often presented in literature as a flash forward, it can more broadly be considered the evocation of events that will occur after the present moment. LONGMAN DICTIONARY OF POETIC TERMS, *supra* note 27, at 243.

94. For an examination of forum selection clauses, see David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973 (2008); James C. McNeal, Note, *Civil Procedure and Contract Law—Contractual Forum-Selection Clauses in Erie Cases: More than Substance or Procedure*, 34 U. ARK. LITTLE ROCK L. REV. 439 (2012).

95. See, e.g., SCOTT J. BURNHAM, DRAFTING AND ANALYZING CONTRACTS 334-35 (3d ed. 2003); GEORGE W. KUNEY, THE ELEMENTS OF CONTRACT DRAFTING WITH QUESTIONS AND CLAUSES FOR CONSIDERATION 161-62 (3d ed. 2011); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437 (2011) (exploring the U.S. Supreme Court’s interpretation of the Federal Arbitration Act).

96. See generally Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004).

effective in the future (i.e., the parties' mandatory duties, conditional duties, and warranties or promises as to the state of facts to exist at some time in the future).<sup>97</sup>

A contract for the sale of goods<sup>98</sup> presents an example of how drafters can incorporate concepts of setting and narrative time to benefit the implementation and interpretation of the transaction. One type of provision that setting affects is the definition. Contract definitions are continually speaking, meaning they are effective over the entire course of the contractual relationship—from execution through performance, to breach of contract, termination, and possibly beyond. Therefore, drafters should draft contract definitions in the present tense to ensure that readers comprehend their applicability in all temporal settings, present and future. For example, a typical contract definition should be phrased as follows: “Premises *means* the property located at 1202 West Elm Street.”

A drafter's choice in creating mandatory duties versus conditional duties<sup>99</sup> also references concepts of place and time. A conditional duty is not immediately activated and does not become an obligation of the party, thus subjecting that party to breach and damages, unless and until an event occurs in some future time or place. Likewise, constructive duties of exchange, those terms that establish which party to a contract is obligated to perform first, reference concepts of place and time. For example, a simple contract for the sale of an automobile may state the seller's obligation to deliver the vehicle to the buyer and the buyer's obligation to pay a sum of money but not set forth what happens if the seller does not deliver the vehicle on time. Is the buyer still obligated to pay, forcing her to sue the seller for breach to recoup any monetary damages suffered? One can see the implications of failing to address the timing of the parties' contract duties in even more complicated transactions, such as the sale of goods by a manufacturer to a wholesaler or the sale of a family business to a new owner. By incorporating the concepts of narrative time and recognizing the

---

97. See, e.g., SUSAN L. BRODY ET AL., *LEGAL DRAFTING* 20 (1994) (stating that the anticipation of future contingencies is critical for effective drafting); RICHARD K. NEUMANN, JR., *TRANSACTIONAL LAWYERING SKILLS: CLIENT INTERVIEWING, COUNSELING, AND NEGOTIATION* 2-3 (2013) (acknowledging that transactions have both deal and, potentially dispute, stages, which should inform the drafting process).

98. See generally Louis F. Del Duca, *Evolving Concepts of the Contract for Sale of Goods: Sale of Goods Under the Uniform Commercial Code*, 38 UCC L.J. 119 (2005); Cynthia Hawes, *Sale of Goods Contracts: What's in a Name?*, 17 N.Z. BUS. L.Q. 230 (2011).

99. Conditional duties may reference the time in which the party is legally obligated and identify when the party is subject to breach. See Arthur L. Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 763-65 (1919).

importance of the sequencing of events in a contract, the drafter can ameliorate these concerns and better effectuate the parties' intent.

Anchoring a transactional document to a setting and infusing it with a sense of narrative time helps ground the transaction in a realistic sequence of events. Drafters can use these narrative concepts of environment and temporal setting to better facilitate the execution and implementation of the transaction and to help avoid potential disputes between the parties as to when and how they are obligated to perform under the contract.

#### *F. Themes and Motifs*

A *theme* is the underlying principle or central meaning of a narrative.<sup>100</sup> A *motif* is a recurring phrase, idea, image, or sound that develops or explains a theme.<sup>101</sup> Themes and motifs help convey the ultimate meaning of the text. Using themes and motifs in transactional documents can provide guidance to the parties who must work with the documents.

For example, in transactional drafting, both private foundations and charitable trusts<sup>102</sup> would benefit from deliberate incorporation of themes and motifs. From the name inscribed on a building to a scholarship bearing a name, legacies are often created and perpetuated through charitable<sup>103</sup>

---

100. LONGMAN DICTIONARY OF POETIC TERMS, *supra* note 27, at 308. For an examination of developing themes in legal texts, see Mary Ann Becker, *What Is Your Favorite Book?: Using Narrative to Teach Theme Development in Persuasive Writing*, 46 GONZ. L. REV. 575 (2010-2011); Margaret Moore Jackson, *Confronting "Unwelcomeness" from the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 CARDOZO J.L. & GENDER 61 (2007); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1995); Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC*, 25 T.M. COOLEY L. REV. 267 (2008); Jonathan K. Van Patten, *Themes and Persuasion*, 56 S.D. L. REV. 256 (2011).

101. LONGMAN DICTIONARY OF POETIC TERMS, *supra* note 27, at 198 (defining motif as "a theme, device, event, or character that is developed through nuance and repetition"). For a selection of literary themes and motifs from adolescence to werewolves, see 1 DICTIONARY OF LITERARY THEMES AND MOTIFS (Jean-Charles Seigneuret ed., 1988).

102. Jill Horwitz, *Nonprofits and Narrative: Piers Plowman, Anthony Trollope, and Charities Law*, 2009 MICH. ST. L. REV. 989, 1015 (asserting that both fictional and real narratives help individuals better understand the laws governing nonprofits); *see also* Evelyn Brody, *Charity Governance: What's Trust Law Got to Do with It?*, 80 CHI.-KENT L. REV. 641 (2005).

103. Originally developed by the Romans, charitable trusts flourished under the guiding hand of the ecclesiastical court. *See generally* ROBERT H. BREHNER, *GIVING: CHARITY AND PHILANTHROPY IN HISTORY* 6-8, 30 (1996).

giving.<sup>104</sup> Individual and family giving in America is estimated at more than \$22 billion each year.<sup>105</sup> Donors, whether individuals or families, use charitable gift agreements, private foundations, or charitable trusts as charitable giving mechanisms.<sup>106</sup> Embedding a theme that is developed through motifs may assist in implementing, enforcing, and, as needed, modifying a trust to realize the donor's goals while still providing flexibility to respond to the current circumstances and situation.

Charitable trust agreements must include a declaration of charitable purposes and goals.<sup>107</sup> As provided in the Uniform Trust Code, charitable purposes include "the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other achievements beneficial to the community."<sup>108</sup> Form books typically include the broadest, most generic statements of charitable purposes. The following are examples:

The purposes of this Trust are to devote and apply the property of this instrument vested in the Trustees and the income to be derived exclusively for charitable, religious, scientific, literary, or educational purposes, either directly or by contributions to organizations duly authorized to carry on charitable, religious, scientific, literary, or educational activities.<sup>109</sup>

---

104. *E.g.*, Frank Adloff, *What Encourages Charitable Giving and Philanthropy*, 29 AGEING & SOC'Y (Special Issue No. 8) 1185, 1200 (2009); John J. Havens, Mary A. O'Herlincy, & Paul G. Schervish, *Charitable Giving: How Much, by Whom, to What, and How?*, in THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK 542 (Walter W. Powell & Richard Steinberg eds., 2006); Alan Radley & Marie Kennedy, *Charitable Giving by Individuals: A Study of Attitudes and Practice*, 48 HUM. REL. 685 (1995).

105. Russell N. James III, *Health, Wealth, and Charitable Estate Planning: A Longitudinal Examination of Testamentary Charitable Giving Plans*, 38 NONPROFIT & VOLUNTARY SECTOR Q. 1026, 1027 (2009) (noting that this figure is more than double the amount given by businesses and corporations).

106. *E.g.*, THOMAS J. RAY, JR., CHARITABLE GIFT PLANNING: A PRACTICAL GUIDE FOR THE ESTATE PLANNER (Candace M. Cunningham et al. eds., 2d ed. 2007); *see also* Michelle Coleman-Johnson, *Creating a Family Foundation*, 17 PROB. & PROP. 10 (2003); Matthew F. Jones, *The Other Family Tree: Leaving Your Legacy in a Private Foundation*, 63 ALB. L. REV. 567 (1999).

107. *See generally* UNIF. TRUST CODE § 405 (UNIF. LAW COMM'N 2014); *see also* Mary Kay Lundwal, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341 (1995).

108. UNIF. TRUST CODE § 405(a).

109. 24 MASS. PRACTICE SERIES, ESTATE PLANNING § 27.27(2) (3d ed. 2015).

This Trust is created exclusively for charitable, religious, literary and educational purposes, including for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code.<sup>110</sup>

Drafters can, and should, tailor the focus to reflect the donor's intent by using themes and motifs.<sup>111</sup> The settlor's interests, family traditions, and wishes influence charitable giving and should be reflected in the statement of charitable purpose.<sup>112</sup> For example, the charitable purpose of the Bill and Melinda Gates Foundation, one of the wealthiest private foundations,<sup>113</sup> provides that the trustees are,

Guided by the belief that every life has equal value, the Bill & Melinda Gates Foundation works to help all people lead healthy, productive lives. In developing countries, it focuses on improving people's health and giving them the chance to lift themselves out of hunger and extreme poverty. In the United States, it seeks to ensure that all people—especially those with

---

110. THE LAW OF TRUSTS AND TRUSTEES § 1231 (3d ed. 2009).

111. Drafters need to ensure that the statement of purpose does represent a legitimate charitable purpose to preserve favorable tax treatment. *See, e.g.*, STEPHANIE ZELLER, *Testamentary Gifts—In Charitable Trust*, in 8C NICHOLS CYCLOPEDIA OF LEGAL FORMS § 217:564 (2006); *see also* John J. Martin, *A Primer on Deduction, Valuation, and Substantiation of Charitable Contributions*, 5 EST. PLAN. & COMMUNITY PROP. L.J. 371 (2013).

112. *See* Adloff, *supra* note 104, at 1193; Domen Bajde, *Mapping the Imaginary of Charitable Giving*, 15 CONSUMPTION MARKETS & CULTURE 358, 359 (2012); René Bekkers & Pamala Wiepking, *A Literature Review of Empirical Studies of Philanthropy: Eight Mechanisms that Drive Charitable Giving*, 40 NONPROFIT & VOLUNTARY SECTOR Q. 924 (2011); Carole B. Burgoyne, Brian Young & Catherine M. Walker, *Deciding to Give to Charity: A Focus Group Study in the Context of the Household Economy*, 15 J. COMMUNITY & APPLIED SOC. PSYCHOL. 383, 395 (2005); CBD Burt & K Strongman, *Use of Images in Charity Advertising: Improving Donations and Compliance Rates*, 8 INT'L J. ORGANISATIONAL BEHAV. 571 (2005); Katie McDonald & Wendy Scaife, *Print Media Portrayals of Giving: Exploring National 'Cultures of Philanthropy'*, 16 INT'L J. NONPROFIT & VOLUNTARY SECTOR MARKETING 311, 313 (2011).

113. *Top Funders*, FOUND. CTR., <http://foundationcenter.org/findfunders/topfunders/top100assets.html> (last visited Sept. 24, 2015). For an examination of private foundations, *see generally* JOEL L. FLEISHMAN, *THE FOUNDATION: A GREAT AMERICAN SECRET; HOW PRIVATE WEALTH IS CHANGING THE WORLD* (2009).

the fewest resources—have access to the opportunities they need to succeed in school and life.<sup>114</sup>

This language is repeated in all of the documents relating to the trust to present a unified vision of the trust's focus and work.

A statement of purpose customized to the settlor aids the intended implementation and interpretation of the terms of a charitable trust because the interpretation of its terms must be made consistent with the settlor's intent.<sup>115</sup> As one commentary noted, "History suggests that trustees and foundation leaders operating with a free hand tend to perform less effectively than those constrained by some donor choices."<sup>116</sup>

The potential duration of trusts requires the drafter to also incorporate possible future contingencies and situations. For instance, because the Rule Against Perpetuities does not apply to charitable trusts, charitable trusts have potentially unlimited duration.<sup>117</sup> Therefore, the need to reassess the trust's ability to achieve the settlor's goals may occur decades after the settlor's death.<sup>118</sup> Resources may expand exponentially or shrink considerably. In these situations, modifications of trust terms may make administration more efficient and effective, and trustees may need to consider alternative goals.

Investment strategies may also be reexamined. Consider the recent commitment of the Rockefeller Brothers Fund, descendants of the Standard

---

114. *Foundation Fact Sheet*, BILL & MELINDA GATES FOUND., <http://www.gatesfoundation.org/Who-We-Are/General-Information/Foundation-Factsheet> (last visited Sept. 24, 2015).

115. See, e.g., IND. CODE ANN. § 30-4-1-3(West 2015).

116. FLEISHMAN, *supra* note 113, at 294 (illustrating this point with a consideration of the Rockefeller Foundation and the Ford Foundation).

117. Robert J. Lynn, *Perpetuities: The Duration of Charitable Trusts and Foundations*, 13 UCLA L. REV. 1074, 1075 (1966). For an exploration of the issues of one of the wealthiest and long-standing charitable trusts, see SAMUEL P. KING & RANDALL W. ROTH, *BROKEN TRUST: GREED, MISMANAGEMENT & POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST* (2006). For another in-depth examination of an almost four hundred-year-old charitable trust, see Ronald Chester, *The Life and Death of the Ipswich Grammar School Trust: Is Enduring Dead Hand Control Possible?*, 39 ACTEC L.J. 49 (2013) (examining a charitable trust established in 1652 and terminated in 2012).

118. See Chris Abbinante, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665, 682 (1997). The cy pres doctrine may be used when the settlor's purpose becomes impossible or illegal. See generally Eric G. Pearson, *Reforming the Reform of the Cy Pres Doctrine: A Proposal to Protect Testator Intent*, 90 MARQ. L. REV. 127 (2006).



Oil magnate, to “divest from investments in fossil fuels.”<sup>119</sup> This divestment is consistent with the mission statement of the fund to “advance[] social change that contributes to a more just, substantial, and peaceful world”<sup>120</sup>— even if at first glance this decision seems to be inconsistent with the connection to Standard Oil.<sup>121</sup> A statement of purpose that has been customized to reflect the donor’s intent facilitated this reassessment.<sup>122</sup>

Once the trust’s theme is established, the drafter can embed and repeat key phrases from its statement of purpose throughout the governing documents. This also holds true for governing documents beyond a trust agreement. In addition, key phrases can be repeated in related, ancillary documents such as annual reports, letters of wishes, and letters to donors. Even the attachments to the Form 990-PF, the required tax return for private foundations, may reference the theme.<sup>123</sup> These repeated words and phrases become reoccurring motifs that guide interpretation and implementation of the trust to fulfill the donor’s vision for his or her charitable giving.

Ethical wills, also called legacy letters,<sup>124</sup> likewise allow for the embedding of themes and the repeating of key motifs. Phrases that are included in the will may be repeated in the ethical will to buttress the intent of the documents as a whole.

---

119. Vauhini Vara, *The Rockefeller Brothers Fund Gives Up on Oil*, NEW YORKER (Sept. 23, 2014), <http://www.newyorker.com/business/currency/rockefellers-give-oil>.

120. *Mission Statement*, ROCKEFELLER BROTHERS FUND, <http://www.rbf.org/content/about-fund> (last visited Sept. 24, 2015).

121. Kevin Smead, *Forsaking Their Legacy?: Rockefeller Brothers Fund Shifts Toward Renewable Energy*, ENERGY DIGITAL (Sept. 25, 2014), <http://www.energydigital.com/renewables/3598/Forsaking-Their-Legacy:-Rockefeller-Brothers-Fund-Shifts-Toward-Renewable-Energy>.

122. See Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHI.-KENT L. REV. 977 (2010); see also FLEISHMAN, *supra* note 113, at 304 (urging donors to “[s]pecifically describe your motivating intentions, list the objectives to be served, and explicitly proscribe all other objectives”).

123. *Form 990: Return of Organization Exempt from Income Tax*, IRS (2014), <http://www.irs.gov/pub/irs-pdf/f9990.pdf>; see also Grace Allison, *The New Form 990 for Tax-Exempt Organizations: Revolution in Process*, EST. PLAN., Mar. 2010, at 14, 16.

124. Cindy E. Faulkner, *Happily Ever After: An Ethical Will May Be a Step on That Journey*, 12 T.M. COOLEY J. PRAC. & CLINICAL L. 451 (2010); Judith A. Frank, *The Human Legacy: Using Ethical Wills to Enhance Estate Planning*, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 65, 71 (2003); Zoe M. Hicks, *Is Your (Ethical) Will in Order?*, 33 ACTEC L.J. 154 (2008); see also James Eli Adams, *Troubled Legacies: Narrative and Inheritance*, 50 VICTORIAN STUD. 709 (2008) (book review); William B. Dillingham, *Structure and Theme in The House of Seven Gables*, 14 NINETEENTH-CENTURY FICTION 59 (1959).

A person or entity executes transactional documents, especially those surrounding charitable gifts, to further particular goals and intentions. These intentions bind subsequent interpretation and implementation of these documents. Establishing a theme within the governing documents can memorialize those intentions to guide subsequent trustees and the courts. Once a theme is established, repeatedly embedding motifs from the theme can contribute to its resonance.

#### *V. Conclusion*

Narrative techniques and transactional drafting may initially seem incompatible. Rather than injecting uncertainty or bloating a document with unnecessary information, narrative techniques can spur innovation while remaining grounded within the principles of good drafting. This article has aimed to showcase how narrative techniques can be used to develop, produce, and create transactional documents that meet and further the client's immediate and future goals.

More than mere words on the page, transactional documents encapsulate concerns, hopes, fears, and wishes. In short, they are stories. A small business wants to hire a new Vice President of Operations. A company wishes to sell its eco-friendly products to consumers. An individual wants to pass on a treasured family heirloom. Because each of these events form a narrative memorialized in transactional documents, effective drafting of these documents will draw upon narrative techniques to facilitate conceptualization, construction, and ultimately implementation of the transaction.

