THE POWER OF A GOOD STORY: HOW NARRATIVE TECHNIQUES CAN MAKE TRANSACTIONAL DOCUMENTS MORE PERSUASIVE*

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INTRODUCTION

Transactional documents are complex, multi-faceted documents reviewed by various audiences at multiple points in time. They are more than descriptive legal devices that dictate the exchange of widgets for cash. While the core of many transactional documents will be the acquisition, creation, or exchange of property or services, transactional documents do more than memorialize that understanding. At first glance, transactional documents may seem simply like expository texts that aim to create the private law between the transacting parties and educate the audience by delivering a sequence of instructions, but transactional documents do much more. They tell the stories of the parties and their transaction, and they can be used to persuade their varied audiences to respond in certain ways. They aim to encourage performance by the transacting parties and are often used by third-party decision makers to render judgment against one or both of the transacting parties. Transactional drafters must thus recognize the complex nature of transactional documents to draft documents that achieve the documents' goals.

The authors' previous articles address why transactional documents should be viewed as narratives and why narrative-based drafting techniques should be used by transactional drafters to craft more effective documents.[1] The authors have argued that transactional documents have characteristics of both expository texts and narrative texts.[2] As expository texts, transactional documents provide information. As narrative texts, transactional documents tell the stories of the relationship between the parties, whether it be an employment agreement, trust document, or purchase and sale agreement for a business. The documents present that information as a series of linked events where the transacting parties become characters participating in a narrative arc. The effectiveness of the transactional document can be enhanced with the drafter's use of narrative-based techniques, such as the development of character, establishment of setting, and articulation of themes.[3]

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[1] Susan M. Chesler & Karen J. Sneddon, *Happily Ever After: Fostering the Role of Transactional Lawyer as Storyteller*, 20 TRANSACTIONS 491 (2019) [hereinafter Chesler & Sneddon, *Happily Ever After*]; Susan M. Chesler & Karen J. Sneddon, *Telling Tales: Transactional Lawyer as Storyteller*, 15 LEGAL COMMC'N & RHETORIC 119 (2018) [hereinafter Chesler & Sneddon, *Telling Tales*]; Susan M. Chesler & Karen J. Sneddon, *Tales from a Form Book: Stock Stories and Transactional Documents*, 78 MONT. L. REV. 237 (2017) [hereinafter Chesler & Sneddon, *Tales from a Form Book*].

[2] Susan M. Chesler & Karen J. Sneddon, *From Clause A to Clause Z: Narrative Transportation and the Transactional Reader*, 71 S.C. L. REV. 247, 248–49 (2019) [hereinafter Chesler & Sneddon, *Narrative Transportation*]; *see also* Lisa L. Dahm, *Practical Tips for Drafting Contracts and Avoiding Ethical Issues*, 46 TEX. J. BUS. L. 89, 90 (2014) (identifying the three genres of writing related to transactional drafting as (1) creative writing, (2) expository writing, and (3) legal drafting).

[3] Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques and Drafting*, 68 OKLA. L. REV. 263, 263–64 (2016) [hereinafter Chesler & Sneddon, *Once Upon a Transaction*].

This Article takes the authors' position a step further. This Article posits that the dual goals of the transactional drafter in crafting transactional documents relate directly to the persuasive nature of transactional documents. The drafter's dual goals are (1) to facilitate performance by the transacting parties as intended and (2) to encourage third-party decision makers like judges to interpret the document as intended. These goals relate to the persuasive potential of transactional documents to change beliefs and behaviors. Persuasion occurs in a variety of contexts and generally refers to actions or communications meant to influence another's behavior or point of view. As defined by Black's Law Dictionary, persuasion is "the act of influencing the mind by arguments or reasons offered, or by anything that moves the mind or passions, or inclines the will to a determination."[4] While modified behavior is considered the "gold standard" in terms of the ideal end result of persuasion, persuasion can also result in changed attitudes, norms, beliefs, or ideas.[5] At times, persuasion aims not to alter the audience's behavior or beliefs, but rather to reinforce their likely behavior or already held convictions to make the audience less susceptible to subsequent change.[6] This Article will examine how persuasion, and legal persuasion more specifically, impacts the spectrum of audiences. For purposes of this Article, the term "audience" includes readers and listeners of a text, whether oral or written.[7] As the authors will posit in this Article, transactional documents are examples of persuasive legal writing texts, and the potential persuasiveness of transactional documents should be cultivated by drafters to achieve the drafter's dual goals.

Part I of this Article addresses in greater detail the dual goals of transactional drafters, as expressed above. Transactional documents aim to persuade both the transactional parties and third-party decision makers to react and respond to the text in a favorable manner. Conceptualizing transactional documents as persuasive documents strengthens the rationale for incorporating narrative techniques in transactional documents. Part II explores the power of narrative to persuade in both non-legal contexts and legal contexts. Part III of this Article presents illustrative examples of how incorporating narrative techniques can increase the persuasiveness of transactional documents. This Article will demonstrate that, like a good story, a transactional document can be a powerful persuasive tool.

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[4] *Persuasion*, BLACK'S LAW DICTIONARY (2d ed. 1910).

[5] Nancy Rhodes & David R. Ewoldsen, *Outcomes of Persuasion: Behavioral, Cognitive, and Social*, *in* THE SAGE HANDBOOK OF PERSUASION: DEVELOPMENT IN THEORY AND PRACTICE 53 *passim* (James Price Dillard & Lijang Shen eds., 2d ed. 2013).

[6] Gerald R. Miller, *On Being Persuaded: Some Basic Distinctions*, *in* THE SAGE HANDBOOK OF PERSUASION: DEVELOPMENT IN THEORY AND PRACTICE, *supra* note 5, at 70, 76.

[7] *E.g.*, PATRICK O'NEILL, FICTIONS OF DISCOURSE: READING NARRATIVE THEORY 14 (1994) ("[A]ll stories are told to be received by some addressee.").

I. TRANSACTIONAL DOCUMENTS CONCEPTUALIZED AS PERSUASIVE DOCUMENTS

Transactional documents are created for a variety of purposes in a variety of contexts.[8] Transactional documents may be, at least in part, created to serve as a required written memorialization of a transaction.[9] But the term "transactional document" refers to a wide range of legal documents. The contract is the legal instrument most commonly described as a transactional document.[10] A contract may be a purchase and sale agreement, an employment agreement, a licensing agreement, a charitable gift agreement, or a premarital agreement.[11] As varied as contracts may be, a contract is not the only type of transactional document. Articles of incorporation, by-laws, memoranda of understanding, trust agreements, and wills are also transactional documents. These documents all establish the private law that will govern the parties and their legal relationships.[12]

This Article's focus is on lawyers' creation of transactional documents to memorialize an agreed-upon bargain between two or more transacting parties. To that end, this Article will center on two types of agreements: contracts and trust agreements. These drafted documents are intended to be referenced by the transacting parties to guide their future performance. The lawyers and the transacting parties understand that other audiences, including third-party decision makers, may also reference the document to interpret the meaning of the provisions and to evaluate the parties' obligations.[13] The authors acknowledge that transactional documents are complex, varied documents.[14] They may be one sentence or eighty pages. They may be unilateral declarations, bilateral agreements,

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[8] *See* D. Gordon Smith, *The "Branding Effect" of Contracts*, 12 HARV. NEGOT. L. REV. 189, 189–91 (2007) (considering why people create contracts).

[9] For an examination about forms and formalities, see generally Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337, 339–40 (2017); Jennifer Camero, *Zombieland: Seeking Refuge from the Statute of Frauds in Contracts for the Sale of Services or Goods*, 82 UMKC L. REV. 1, 1 (2013).

[10] 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. L. INST. 1981).

[11] *See* Sidney W. DeLong, *What Is a Contract?*, 67 S.C. L. REV. 99, 99–106 (2015).

[12] For an examination of private law, see Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1873–74 (2011); Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2181–82 (2011); Nathan B. Oman, *Promise and Private Law*, 45 SUFFOLK U. L. REV. 935 *passim* (2012); Reid Kress Weisbord, *The Advisory Function of Law*, 90 TUL. L. REV. 129, 133 (2015).

[13] The narrative of the transaction is a different, but related, issue. *See, e.g.*, Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 CLINICAL L. REV. 489, 502 (2013) ("This story can be told through the creation and administration of: wills, trusts, nonprobate instruments, guardianships, health care directives, and powers of attorney.").

[14] For purposes of this Article, the analysis of the transactional document is separated from the analysis of the broader transaction, which may include a series of interactions between the parties related to fact-gathering and negotiations.

or multi-lateral accords.[15] The transacting parties may also have differing goals and varying levels of sophistication.[16] Regardless of the type of transactional document and the identity of the transacting parties, however, all transactional drafters have similar goals.

A. The Dual Goals of the Transactional Drafter

The transactional drafter[17] has dual goals.[18] The first goal is to have the transacting parties perform in accordance with the terms of the transactional document without the need for third-party intervention. The second goal is that if third-party intervention is at some point needed to determine the obligations, responsibilities, or liabilities of the transacting parties, the transactional document will be interpreted by the third-party decision maker as the drafter intended.[19] While the drafter may rely upon forms, previously drafted documents, and precedent, the creation of a transactional document is not a mere cut-and-paste exercise.[20] The transactional drafter will shape and alter the text based upon the needs and expectations of the multiple audiences who may be engaging with the document at different points in time and for different purposes.[21] The lawyer who drafts a transactional document serves as an advocate for their client by inserting, shaping, altering, and removing provisions in the document.[22] This Section will explore in greater detail the dual goals of the transactional drafter.

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[15] *See generally* 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:17 (4th ed. Supp. 2021) ("Differences between unilateral contracts and bilateral contracts lie both in the operative acts of the parties and in the legal relations created.").

[16] For a discussion of the roles of the business lawyer, see generally Praveen Kosuri, *Beyond Gilson: The Art of Business Lawyering*, 19 LEWIS & CLARK L. REV. 463 (2015).

[17] The transactional drafter may be a lawyer or a non-lawyer. *See* Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429 (2016). In addition to using computer software programs, a non-lawyer may be replicating form documents without legal assistance. *See generally* Bridget J. Crawford, *Blockchain Wills*, 95 IND. L.J. 735 (2020); Sarah Templin, *Blocked-Chain: The Application of the Unauthorized Practice of Law to Smart Contracts*, 32 GEO. J. LEGAL ETHICS 957 (2019) (examining how use of a smart contract may constitute the practice of law).

[18] These goals focus on post-execution of the transactional document. A pre-execution goal is to have the document properly executed.

[19] *See generally* SUSAN L. BRODY ET AL., LEGAL DRAFTING 6 (1994).

[20] For an exploration of the many roles that the transactional lawyer may take during the negotiating, drafting, and implementing of the transactional document, see Lori D. Johnson, *Redefining Roles and Duties of the Transactional Lawyer: A Narrative Approach*, 91 ST. JOHN'S L. REV. 845, 847 (2017); *see also* Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486 (2007).

[21] *See* BRODY ET AL., *supra* note 19, at 6.

[22] *See generally* TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007); James P. Nehf, *Writing Contracts in the Client's Interest*, 51 S.C. L. REV. 153 (1999).

1. *Facilitate Performance by the Transacting Parties as Intended*

A primary goal of the transactional drafter is to encourage the transacting parties to perform their duties in accordance with the terms of the document. As explained in one drafting textbook, "A drafted document is not an end unto itself; it is merely a means to an end."[23] In other words, the document should promote the agreed upon and anticipated performance by the transacting parties.[24] The term "transacting parties" refers to the individuals who are legally bound by the terms of the transaction and the transactional document.[25] These individuals, or individuals properly acting on behalf of entities, are often the persons who were involved in negotiating and creating the transactional document. Sometimes these individuals negotiated and drafted the document themselves, but often they used a lawyer to act on their behalf. These transacting parties typically are non-lawyers, but often have significant business experience or personal experience relevant to the transaction and to the anticipated performance of the obligations and responsibilities called for by the transactional document.[26] They likely read drafts of the document as well as the final document that was ultimately executed. Upon the proper execution of the document, the transacting parties became legally bound by the document's terms and conditions.

Depending on the transaction and the transactional document, the transacting parties can also be the performing parties, but this is not always the case. The performing parties are those individuals who need to perform in accordance with the transactional document's terms. These individuals may have had no ability to influence the creation of the transactional document. For instance, the president of the corporation may have acted as the negotiator and signatory of the transaction, but the party who needs to perform in accordance with the document's terms may be a member of the corporation's marketing or human resources department. Likewise, supportive or ancillary parties are non-transacting parties, even though these parties may need to perform in some role or manner as specified by the terms of the transactional document. For example, regulatory agencies or financial institutions may serve as ancillary parties who must approve of aspects of the performance or provide financial resources for the transacting parties to complete performance. The anticipated performance of the obligations is what initially drew the transacting parties together.[27] Thus, proper performance

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[23] GEORGE W. KUNEY & DONNA C. LOOPER, LEGAL DRAFTING: PROCESS, TECHNIQUES, AND EXERCISES 115 (3d ed. 2017).

[24] Chesler & Sneddon, *Narrative Transportation*, *supra* note 2, at 270–71.

[25] *See, e.g.*, Mark C. Suchman, *The Contract as Social Artifact*, 37 L. & SOC'Y REV. 91, 91–92 (2003).

[26] *See* Matt Keating, *On the Cult of Precision Underpinning Legalese: A Reflection on the Goals of Legal Drafting*, 18 SCRIBES J. LEGAL WRITING 92, 118 (2018–2019) ("Even sophisticated commercial readers are (unless formally schooled in the law) lay readers.").

[27] *See, e.g.*, David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1823 (1991) ("Enforcement of promises fosters the autonomy of transacting parties by enabling them to bind themselves to cooperate with others.").

of the agreed-upon terms is what the parties anticipated when the transactional document was executed.

As part of proper performance, the transacting parties are also seeking to minimize the need for third-party intervention and interpretation.[28] To facilitate proper performance, some of the document's terms may be intentionally broad or even intentionally vague.[29] For example, the transacting parties may be required to use "best efforts" or "reasonable efforts" in the performance of an obligation.[30] The meaning of these terms will be dependent upon the circumstances, but the goal is that the parties will seek to comply with these terms using efforts appropriate for the transaction.[31] For example, if a purchase and sale agreement requires a buyer to use "reasonable efforts" to arrange for "appropriate financing," the buyer should explore multiple loan options at multiple financial institutions while recognizing the impact of current market conditions.[32] Similarly, the parties may seek to minimize the need to declare a breach of their agreement even if there have been delays in performance. Alternatively, the transacting parties, between themselves, may seek to informally extend deadlines or otherwise modify the initial terms of the document in order to promote performance.[33] Regardless of whether the parties ultimately seek to modify the initial terms or not, their primary expectation at the time of drafting and execution of the document is that the document's terms will be performed as intended. Therefore, the drafter's goal is to draft the document in a way that will most likely achieve that intention of performance, without the need for outside intervention from a third-party decision maker.

2. *Encourage Third-Party Decision Makers to Interpret the Document as Intended*

Although the transactional drafter is aiming to minimize the need for third-party intervention, the drafter must anticipate the potential for third-party intervention when drafting the document.[34] As a result, the drafter's second goal is to

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[28] Scott J. Burnham, *Transactional Skills Training: Contract Drafting—Beyond the Basics*, 2009 TRANSACTIONS 253, 269 (2009) ("As a planning device, the goal is to prevent the enforcement of contract rights through litigation.").

[29] *See, e.g.*, Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 852 (2010).

[30] *See generally* Kenneth A. Adams, *Understanding "Best Efforts" and Its Variants (Including Drafting Recommendations)*, 50 PRAC. LAW. 11, 13 (2004).

[31] Josh Lerner & Robert P. Merges, *The Control of Technology Alliances: An Empirical Analysis of the Biotechnology Industry*, 46 J. INDUS. ECON. 125, 132 (1998) (arguing that descriptions of the "level of effort" required may be impossible).

[32] *E.g.*, 2 GEORGIA JURISPRUDENCE § 14.20 (John Glenn ed., 2022).

[33] George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279, 290 (2009).

[34] *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

ensure that should third-party intervention be required, a third-party decision maker will interpret the document as the drafter intended.[35] Third-party decision makers will be interpreting the provisions, terms, and words of the transactional document in hindsight.[36] Their understanding of the document will likely have limited effect on the future performance of obligations as outlined in the document.[37] Instead, the third-party decision makers will evaluate whether the transacting parties or the performing parties, as the case may be, properly understood and performed in accordance with the terms of the document.[38] The third-party decision maker is thus looking backward to what has happened in the past rather than looking forward to what may happen in the future. The decision maker is seeking to resolve the dispute between the parties because the parties themselves have been unable to do so.

Consequently, when the drafter is creating the transactional document, the drafter is aiming to facilitate a third-party resolution that would, if needed, both protect and advance the client's interests. The drafter may rely upon language that has an accepted meaning by the courts.[39] For instance, the drafter may include stock phrasing or boilerplate provisions that have become standardized in a particular industry or geographic area. But the drafter will likely do more than rely upon form provisions. The drafter should tailor the document's provisions and terms to customize the language in a manner that better reflects the client's intent while continuing to be legally valid.[40] For example, the document may define key terms in a manner that represents the client's intent as to the meaning

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example, looks ahead to the possibility that breach of the contract may result in litigation to enforce its terms.").

[35] *See* MARGARET TEMPLE-SMITH & DEBORAH CUPPLES, LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS, 96 (7th ed. 2012) ("[A]nother goal is to draft so as to ensure that *if* a dispute arises, the client's interests are protected to the fullest extent possible.").

[36] *See, e.g.*, Shahar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L.J. 519, 523 (2017) (arguing that hermeneutic theories will result in "a more precise taxonomy of contractual interpretation than the conventional debate between textualists and contextualists allows, enriching the interpreter's range of analytic and conceptual possibilities").

[37] *See* Juliet P. Kostritsky, *Interpretative Risk and Contract Interpretation: A Suggested Approach for Maximizing Value*, 2 ELON L. REV. 109, 109 (2011); Ronald J. Gilson et al., *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170, 174 (2013).

[38] *See* Randall H. Warner, *All Mixed up About Contract: When Is Contract Interpretation a Legal Question and When Is It a Fact Question?*, 5 VA. L. & BUS. REV. 81, 106 (2010).

[39] Claire A. Hill, *Why Contracts Are Written in "Legalese*,*"* 77 CHI.-KENT L. REV. 59, 59 (2001) (characterizing drafting with forms as allowing "access [to] the accumulated wisdom of many"); *see also* Aditi Bagchi, *Risk-Averse Contract Interpretation*, 82 L. & CONTEMP. PROBS. 1, 1–2 (2019) (exploring interpretation of boilerplate).

[40] *See, e.g.*, Matthew Jennejohn, *The Architecture of Contract Innovation*, 59 B.C. L. REV. 71 (2018).

of the term because that meaning may differ from the standard dictionary definition.[41] Similarly, the document may limit the damages available for a breach by the client. That limitation is intended to be respected by the transacting parties and, if one of the parties instituted litigation, followed by a court.[42]

The third-party decision makers may be judges or other court personnel generally tasked with deciding whether a transacting party has breached the terms of the document.[43] Third-party decision makers may also consist of jury members reading the document's terms to determine questions of liability.[44] They may be arbitrators or mediators.[45] The transactional drafter aims to minimize the risk that the document's provisions may be misinterpreted by the third-party decision maker or that the interpretation by the third-party decision maker results in unanticipated consequences.[46] Accordingly, the ultimate resolution of the dispute by the third-party decision maker is influenced by the provisions the drafter selected, inserted, and modified. The resolution is thus influenced, and hopefully anticipated, by the transactional drafter.[47]

B. The Overarching Goal of Persuasion

As discussed above, a transactional document is multi-faceted. One of the overlooked attributes of a transactional document is its persuasiveness.[48] Overlooking or neglecting a particular document's attributes can lead to the creation of a document that fails to meet its goals.[49] The provisions in the transactional document seek to influence the future actions, behaviors, and attitudes of the parties. The overarching goal of a transactional document should thus be considered persuasion.

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[41] *See* M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 J. ASS'N LEGAL WRITING DIRS. 79, 94 (2008).

[42] Henry F. Luepke III, *How to Draft and Enforce a Liquidated Damages Clause*, 61 J. MO. BAR 324, 324 (2005).

[43] *See generally* 11 WILLISTON & LORD, *supra* note 15, § 31:1.

[44] *See, e.g.*, Donald E. Vinson, *How to Persuade Jurors*, 71 A.B.A. J. 72, 72 (1985).

[45] *E.g.*, Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. ARB. & MEDIATION 219 (2013).

[46] *See generally, e.g.*, Kostritsky, *supra* note 37; Lawrence A. Cunningham, *Contract Interpretation 2.0: Not Winner-Take-All but Best-Tool-for-the-Job*, 85 GEO. WASH. L. REV. 1625 (2017).

[47] *E.g.*, Thomas Gibbs & Timothy Hoban, *A Proactive Approach to Avoiding Disputes*, 61 DISP. RESOL. J. 24, 24–25 (2006).

[48] *E.g.*, BRODY ET AL., *supra* note 19, at 9 ("Good legal drafting requires the skills of objectivity and advocacy.").

[49] *See, e.g.*, Bret Rappaport, *A Lawyer's Hidden Persuader: Genre Bias and How It Shapes Legal Texts by Constraining Writers' Choices and Influencing Readers' Perceptions*, 22 J.L. & POL'Y 197, 240–62 (2013); *see also* Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 296–97 (2005) (arguing that status-driven dichotomies in contract law, such as merchant versus non-merchant, fail to accurately reflect the goals of contract law, at least as related to small businesses).

Persuasion in the context of legal communication is legal persuasion.[50] Legal persuasion draws from a variety of disciplines, including, but not limited to, rhetoric,[51] science,[52] logic,[53] and narrative.[54] Legal persuasion is not merely the exchange of competing viewpoints or beliefs. Legal persuasion seeks to cause the audience to undertake an action, experience a change in attitude or belief, or retain an attitude or belief that will have legal significance.

Legal persuasion is most associated with the lawyer's role as advocate. The Preamble to the Model Rules of Professional Conduct states, "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[55] Litigation-based communications, such as summary judgment motions or oral arguments, may be considered typical examples of legal persuasion. These communications are designed to convince a third-party decision maker to find in favor of the lawyer's client.[56] The documents leverage tools to persuade,

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[50] *See generally* LINDA L. BERGER & KATHRYN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE (2018). For a review of this book, see generally Lori D. Johnson & Sarah Morath, *Book Review: Legal Persuasion: A Rhetorical Approach to the Science Linda L. Berger and Kathryn M. Stanchi*, 22 J. LEGAL WRITING INST. 254 (2018). *See generally* Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL'Y 195 (1993). ("Persuasive argument" is another phrase that refers to persuasion in the legal context.)

[51] *See generally* Scott Fraley, *A Primer on Essential Classical Rhetoric for Practicing Attorneys*, 14 LEGAL COMMC'N & RHETORIC: JALWD 99 (2017); Krista C. McCormack, *Ethos, Pathos, and Logos: The Benefits of Aristotelian Rhetoric in the Courtroom*, 7 WASH. U. JURIS. REV. 131 (2014); Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS'N LEGAL WRITING DIRS. 129 (2006); Michael Frost, *Ethos, Pathos, & Legal Audience*, 99 DICK. L. REV. 85 (1994).

[52] *E.g.*, Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain's Negativity Bias and Persuasion*, 15 NEV. L.J. 605, 606–08 (2015); Kathryn Stanchi, *What Cognitive Dissonance Tells Us About Tone in Persuasion*, 22 J.L. & POL'Y 93, 95 (2013); Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 305–07 (2010); Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 382–83 (2008); Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. STATE L. REV. 411, 412–13 (2006).

[53] *E.g.*, Barbara A. Kalinowski, *Logic Ab Initio: A Functional Approach to Improve Law Students' Critical Thinking Skills*, 22 J. LEGAL WRITING INST. 109, 111 (2018); Stephen M. Rice, *Leveraging Logical Form in Legal Argument: The Inherent Ambiguity in Logical Disjunction and Its Implication in Legal Argument*, 40 OKLA. CITY U. L. REV. 551, 551 (2015); Stephen M. Rice, *Indiscernible Logic: Using the Logical Fallacies of the Illicit Major Term and the Illicit Minor Term as Litigation Tools*, 47 WILLAMETTE L. REV. 101, 101 (2010); Mary Massaron Ross, *A Basis for Legal Reasoning: Logic on Appeal*, 3 J. ASS'N LEGAL WRITING DIRS. 179, 179 (2006).

[54] *See generally* J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53 (2008).

[55] MODEL RULES OF PRO. CONDUCT, Preamble [2] (AM. BAR. ASS'N 1983).

[56] *See generally* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008); ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES (2d ed. 2014).

including identifying relevant content, framing the content persuasively, and using persuasive phrasing.[57] Legal authorities, factual evidence, statistics, and custom will be used to support the assertions and arguments.[58] In terms of phrasing, lawyers generally avoid extreme statements and vague assertions. The presented text will be logically sequenced and flow from one concept to the next. These tools are used by the drafter to engage the audience so that presented information compels a subsequent reaction by the audience. The reaction may occur because the presented information inhibits counterarguing by the audience.[59] Counterarguing can be defined as the generation of direct rebuttals to the intended message. In other words, if the audience is less likely to refute or "argue" against the intended message, the audience is more likely to be persuaded. The audience will have "bought into" the presented information. Another reaction may not be a change in behavior, but rather a confirmation of the audience's preexisting belief to reinforce the audience's likely reaction.

Acknowledging the audience's expectations, needs, and sophistication informs the development of all persuasive documents.[60] While litigation-based documents might be considered the typical examples of legal persuasion, a broader range of legal communications are created to motivate or encourage someone to take or refrain from taking an action. After all, advocacy is not limited to litigation proceedings or litigation-based documents.[61] Transactional lawyers are also advocates. As shared in one drafting textbook, "[i]n contract drafting, being the advocate means setting out a planned transaction in words that will protect the client's interests and implement the client's intentions."[62] Professor Lori Johnson summarized, "When viewing a contract as a document that exists to persuade parties to act in favorable ways and gives rise to favorable interpretations, it becomes clear that drafting terms in a contract on behalf of a client

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[57] *E.g.*, Julie A. Oseid, *"Liven Their Lives Up Just a Little Bit": Good Pacing Persuades Judges*, 24 J. LEGAL WRITING INST. 239, 241–43 (2020); Cathren Page, *Stranger than Fiction: How Lawyers Can Accurately and Realistically Tell a True Story by Using Fiction Writers' Techniques that Make Fiction Seem More Realistic than Reality*, 78 LA. L. REV. 907, 908–09 (2018); Brian K. Keller, *Whittling: Drafting Concise and Effective Appellate Briefs*, 14 J. APP. PRAC. & PROCESS 285, 286 (2013); Susan B. Haire & Laura P. Moyer, *Advocacy Through Briefs in the U.S. Courts of Appeals*, 32 S. ILL. U. L.J. 593, 595 (2008); David Lewis, *Common Knowledge About Appellate Briefs: True or False?*, 6 J. APP. PRAC. & PROCESS 331, 335–41 (2004).

[58] *See generally* WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 13 (2002) (stating that legal arguments are based upon "text, intent, precedent, tradition, or policy analysis" (emphasis omitted)).

[59] Helena Bilandzic & Rick Busselle, *Narrative Persuasion*, *in* THE SAGE HANDBOOK OF PERSUASION: DEVELOPMENT IN THEORY AND PRACTICE, *supra* note 5, at 200, 205.

[60] *See, e.g.*, David Lewis, *What's the Difference? Comparing the Advocacy Preferences of State and Federal Appellate Judges*, 7 J. APP. PRAC. & PROCESS 335 (2005).

[61] *See* Lori D. Johnson, *The Ethics of Non-Traditional Contract Drafting*, 84 U. CIN. L. REV. 595, 605–06 (2016) (examining the "zealous advocate" language in the Model Rule's Preamble in the context of transactional drafting).

[62] TEMPLE-SMITH & CUPPLES, *supra* note 35, at 1.

constitutes a form of advocacy."[63] Accordingly, a broader understanding of legal persuasion is needed.

Legal persuasion refers to any form of legal communication that is created to prompt an audience, who may be a transacting party, litigant, or third-party decision maker, to take or refrain from taking a certain action. That action may be because of an attitude, belief, or norm that has been previously accepted by the audience or newly adopted by the audience. For legal persuasion, the decision maker may be a court, another lawyer, a client, or a transacting party.[64] Transactional documents, such as contracts, and other legal documents, such as legal letters, that seek to provoke an audience action are thus also examples of legal persuasion, in addition to the typical litigator's briefs and motions.[65]

As Professor Kathryn Stanchi wrote about the lawyer's role, "Whether you are a litigator, transactional lawyer, or trial lawyer, part of your job is to persuade people to make decisions, or do things, that they may not have chosen to do but for your intervention."[66] Accordingly, the transactional drafter is seeking to influence behavior or beliefs held by the transacting parties or third-party decision makers. The transactional document does more than record an objective recitation of the parties' understanding. The document seeks to encourage the parties to perform their duties as intended and as drafted, without the need to resort to third-party resolution,[67] and to ensure the court will interpret the document in accordance with the parties' intentions if necessary.[68] In essence, these goals are to persuade the transacting parties and third-party decision makers to act or refrain from acting in a certain way, i.e., to persuade them.

Drafting techniques can enhance persuasion. These persuasion techniques will have both an immediate and lasting impact that directly relates to the drafter's dual goals. Although the drafter is focused on creating the document, the drafter also must recognize that the document does not represent the final and exclusive interactions between the transacting parties. As one scholar wrote, "Even in a single sale of goods the parties must often collaborate on delivery, installation, operation, and maintenance after the closing."[69] The document re-

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[63] Johnson, *supra* note 61, at 606. *But see* Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone*, 38 FLA. STATE U. L. REV. 251, 253, 258 (2011).

[64] Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2442 (1989) (stating that lawyers seek to persuade judges, law partners, clients, and legislators).

[65] *E.g.*, Carrie Sperling, *Priming Legal Negotiations Through Written Demands*, 60 CATH. U. L. REV. 107, 110 (2010).

[66] Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ASS'N LEGAL WRITING DIRS. 75, 75 (2009). *But see* Schaefer, *supra* note 63, at 253, 258 (cautioning that zealous advocacy may not be compatible with the business client's goals or best interests).

[67] *See, e.g.*, Charny, *supra* note 27, at 1823 ("Enforcement of promises fosters the autonomy of transacting parties by enabling them to bind themselves to cooperate with others.").

[68] *See generally* Gilson et al., *supra* note 37.

[69] Dent, *supra* note 33, at 289–90.

quires continued and most often future action by the performing parties. The parties' attitudes and beliefs will affect their future actions. Therefore, transactional drafters should use all of the tools at their disposal to craft documents that effectively achieve their goals of persuasion.[70] As another commentator observed, "[O]ur ability to persuade may be our most important yet least understood skill."[71] The following Part assesses the power of narratives to persuade.

II. THE POWER OF NARRATIVES TO PERSUADE

Narrative is a powerful tool to persuade audiences.[72] Narratives are ever present[73] and are an inherent way for people to understand human experience.[74] They help facilitate connections with the audience[75] and are often used to educate the audience.[76] Narratives can also be used to increase comprehension and retention of information.[77] Whether advertisement or fairy tale, narratives have the ability to both inform and influence feelings, behaviors, and actions.[78] "[N]arrative persuasion can be defined as any influence on beliefs, attitudes, or action

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[70] *See generally* Eric A. Zaks, *Contract Review: Cognitive Bias, Moral Hazard, and Situational Pressure*, 9 OHIO STATE ENTREPRENEURIAL BUS. L.J. 379 (2015) (describing various techniques, such as the anchoring effect, that may influence the behavior of the transacting parties).

[71] Peter D. Baird, *Persuasion 101*, 27 LITIGATION 25, 25 (2001).

[72] *See, e.g.*, LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD 271–86 (2012).

[73] *E.g.*, Louis J. Goldberg, *Expanding the Narrative: The Grand Compulsion of a Storytelling Species*, 6 J. CONTEMP. LEGAL ISSUES 281, 282 (1995) ("We get our stories from movies, radio, TV, plays, books, magazines, and newspapers . . . . Gossip at work, at play, at parties, is a never-ending stream of storytelling.").

[74] *See, e.g.*, Michael D. Slater, *Entertainment Education and the Persuasive Impact of Narrative*, *in* NARRATIVE IMPACT: SOCIAL AND COGNITIVE FOUNDATIONS 157, 158 (Melanie C. Green et al. eds., 2002) (examining the historical and current power of narratives, including the impact of television and radio).

[75] *See, e.g.*, Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 581 (2018) ("Narrative is powerful because it is natural, inviting, and shared."); Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 257–58 (2009).

[76] *E.g.*, J.R. Curtis, *Improving Osteoporosis Care Through Multimodal Interventions: Insights from the University of Alabama at Birmingham Center for Education and Research on Therapeutics*, 22 OSTEOPOROSIS INT'L S445, S448–49 (2011) (asserting that narratives facilitate patient engagement in the health care system).

[77] *See* Sarah Kulkofsky et al., *Do Better Stories Make Better Memories? Narrative Quality and Memory Accuracy in Preschool Children*, 22 APPLIED COGNITIVE PSYCH. 21, 31 (2008).

[78] *See, e.g.*, John B.F. de Wit et al., *What Works Best: Objective Statistics or a Personal Testimonial? An Assessment of the Persuasive Effects of Different Types of Message Evidence on Risk Perception*, 27 HEALTH PSYCH. 110, 112–13 (2008) (concluding that, in a study of 118 men at risk for infection with Hepatitis B, perceptions of personal risk and intentions to obtain a vaccine were higher among men given the narrative evidence); Ari Jokinen et al., *Strategic Planning Harnessing Urban Policy Mobilities: The Gradual Development of Local Sustainability Fix*, 20 J. ENV'T POL'Y & PLAN. 551, 552–53, 561 (2018) (demonstrating how narratives can be used by urban policy makers to appeal to stakeholders and decision-makers).

brought about by a narrative message through processes associated with narrative comprehension or engagement."[79] Narrative's ability to influence future behaviors and actions has been established through a multitude of studies across various fields.[80] This Part will first discuss how narrative persuades, and then address how narratives have been used in both non-legal and legal contexts to persuade audiences.

A. How Narrative Persuades

Many automatically associate the term "narrative" with a story that includes all of the elements of fiction.[81] A typical definition of "narrative" is a story that involves characters undertaking actions that cause a series of events.[82] Narrative is most often thought of in terms of the story of a fictional character told by a third-party narrator or storyteller.[83] Yet a narrative may be the famous one sentence from E. M. Forster: "The King died and then the Queen died."[84] A narrative may even be a series of images.[85]

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[79] Bilandzic & Busselle, *supra* note 59, at 201–02.

[80] *See generally* MIEKE BAL, NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE (3d ed. 2009); JEROME BRUNER, ACTS OF MEANING 45 (1990). But it must also be noted that the effect of narrative persuasion is often dependent upon the characteristics and beliefs of the audience. *See* Julia Braverman, *Testimonials Versus Informational Persuasive Messages: The Moderating Effect of Delivery Mode and Personal Involvement*, 35 COMMC'N RSCH. 666, 682 (2008) (finding that narrative testimonials were more effective when an individual had a low involvement in the issue being presented); Jeff Niederdeppe et al., *Attributions of Responsibility for Obesity: Narrative Communication Reduces Reactive Counterarguing Among Liberals*, 37 HUM. COMMC'N RSCH. 295, 312 (2011) (concluding that narrative communication's influence depended, in part, on political affiliation).

[81] The confusion may be amplified by the variety of terms used. *See generally* Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 LEGAL COMMC'N & RHETORIC: JALWD 81, 82–83, 86 (2012) (arguing that the ambiguous and overused terms of "narrative," "story," and "storytelling" can creation confusion).

[82] *See* BAL, *supra* note 80, at 3.

[83] *E.g.*, ROBERT SCHOLES ET AL., THE NATURE OF NARRATIVE 4 (40th anniversary ed. 2006) (identifying the two core characteristics of narrative as "the presence of a story and a storyteller").

[84] E.M. FORSTER, ASPECTS OF THE NOVEL 86 (1927).

[85] *See* GREG BATTYE, PHOTOGRAPHY, NARRATIVE, TIME: IMAGING OUR FORENSIC IMAGINATION 39 (2014) ("Even if no concrete examples exist of any series of pictures which actually move quite as far . . . in the direction of imitating verbal language, we can see that the potential complexity in relationships between separate pictures makes the construction of narrative very much easier."); *see also* Elena Martinique, *Reading the Narrative Photography*, WIDEWALLS (Oct. 30, 2016), https://www.widewalls.ch/magazine/narrative-photography [https://perma.cc/8BDU-G3TC] (describing the narrative qualities in iconic photographs); *10 Examples of Powerful Visual Storytelling in Photos*, URTH MAG., https://urth.co/magazine/visual-storytelling-examples [https://perma.cc/QB6H-3RF8] (displaying the photos from the Independent Photographer's "visual storytelling" photo contest); Michael D. Murray, *Mise en Scène and the Decisive Moment of Visual Legal Rhetoric*, 68 U. KAN. L. REV. 241 (2019) (exploring how visual legal rhetoric can be used effectively).

Narrative can generally be described as being comprised of two components: "the *what* of the story told and the *how* of its presentation."[86] Selecting the "what" and determining the "how" references attributes that make narratives powerful and potentially persuasive. Narrative persuasion is the means by which communication containing narrative may activate certain responses in the audience, such as those discussed above.[87]

The degree to which narrative connects with or persuades the audience will vary.[88] Scholars across many fields have explained that several factors contribute to the persuasiveness of narratives upon the audience.[89] These factors include the audience's identification with the characters, the perception that the narrative is realistic, and the absorption or transportation into the narrative.[90] When the audience members empathize with or perceive a similarity between themselves and the characters in a narrative message, that message is more likely to resonate with them. To the contrary, if they perceive that the narrative does not realistically portray the world, then the chances of being persuaded by that narrative are lessened.

It has been argued that a person's increased absorption into a narrative and belief that the narrative is realistic results in reduced counterarguing, which in turn may lead to changed attitudes and behaviors that are the cornerstone of persuasion.[91] An audience member who has been transported into the world of the narrative is less likely to have negative reactions to or contradict implications of the narrative message.[92] This may be based on the fact that individuals who are transported by narrative cast aside real-world facts that they may have otherwise used to contradict the narrative. Such individuals may also lack the motivation to interrupt that narrative in order to counterargue because that may make their personal experience of engaging with the narrative less enjoyable.[93] This reduction in counterarguing makes the audience members more susceptible to being persuaded by the narrator's message.

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[86] PATRICK O'NEILL, FICTIONS OF DISCOURSE: READING NARRATIVE THEORY 13 (1994).

[87] Bilandzic & Busselle, *supra* note 59, at 201–02.

[88] *See, e.g.*, Cathren Page, *Astonishingly Excellent Success or Sad! Loser! Failure: Why President Trump's Legal Narratives "Win" with Some Audiences and "Lose" with Others*, 18 CONN. PUB. INT. L.J. 53, 57 (2018) (explaining why President Trump's narrative techniques succeed with his base but lose with some courts, using the travel ban as an example).

[89] *E.g.*, Anne Hamby et al., *Reflecting on the Journey: Mechanisms in Narrative Persuasion*, 27 J. CONSUMER PSYCH. 11, 11–12 (2017); Hans Hoeken et al., *Story Perspective and Character Similarity as Drivers of Identification and Narrative Persuasion*, 42 HUM. COMMC'N RSCH. 292, 292–93 (2016).

[90] *See generally* Niederdeppe et al., *supra* note 80.

[91] Melanie C. Green et al., *The Power of Fiction: Determinant and Boundaries*, *in* THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION 161, 168 (L.J. Shrum ed., 2004); *see also* Niederdeppe et al., *supra* note 80, at 300.

[92] Green et al., *supra* note 91, at 168.

[93] *Id.*

From the narrator's perspective, there are three primary attributes of narrative that can be used to increase the power of the narrative to persuade the audience: narrative coherence, narrative correspondence, and narrative fidelity.[94] Coherence refers to the degree to which the narrative "makes sense" to the audience.[95] It involves both internal and external coherence.[96] Internal coherence occurs when the parts of the narrative fit together and are consistent with each other.[97] External coherence, on the other hand, refers to how the narrative is aligned with other stories that already exist in the audience's "stock of social knowledge."[98] Coherence makes the narrative seem more credible to the audience, thus impacting its ability to persuade.[99]

Narrative correspondence refers to audience's perceptions about the plausibility of the narrative.[100] Some scholars refer to this as "external factual plausibility," meaning the extent to which the audience believes that the story could have happened the way it was presented.[101] The more a narrative fits with what the audience understands could actually occur in real life, the greater the likelihood to persuade.[102]

Lastly, narrative fidelity refers to the narrative's similarity to what the audience knows about the real world.[103] Fidelity differs from correspondence in that

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[94] *See* Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEGAL COMMC'N & RHETORIC: JALWD 229, 251–52 (2012) (exploring the concepts of narrative coherence, narrative correspondence, and narrative fidelity); Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMANS. 1, 30–31 (2014) (exploring the terms narrative coherence and narrative fidelity); Melissa H. Weresh, *Wait, What? Harnessing the Power of Distraction or Redirection in Persuasion*, 15 LEGAL COMMC'N & RHETORIC: JALWD 81, 89–91 (2018) [hereinafter Weresh, *Wait, What?*].

[95] *See* J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 LEGAL COMMC'N & RHETORIC: JALWD 67, 71–78 (2013) (defining the two components of narrative coherence: external consistency and internal consistency); *see also* Jan M. Van Dunné, *Narrative Coherence and Its Function in Judicial Decision Making and Legislation*, 44 AM. J. COMPAR. L. 463, 465 (1996).

[96] Ralph, *supra* note 94, at 28.

[97] Rideout, *supra* note 95, at 71.

[98] *Id.*

[99] *Id.* at 77.

[100] *Id.* at 71. Correspondence is related to verisimilitude, defined as the "believability or sense of reality" in a story. Page, *supra* note 57, at 912 (examining verisimilitude).

[101] Ralph, *supra* note 94, at 29–30.

[102] *Id.* at 29.

[103] *Id.* at 29–30; 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 COMMC'NS & ENT. L.J. 187, 200 (2012).

fidelity refers back to the audience's personal experiences, not just their understanding of what could theoretically happen.[104] Fidelity is centered on the audience's evaluation of the narrative based on whether it is consistent with their personal expectations and experiences.[105]

To make the narrative more persuasive to the audience, the narrator can manipulate coherence, correspondence, and fidelity with characterization, setting development, sequencing of events, and stylistic choices.[106] The narrative's structural elements—namely setting, plot, and character—must be plausible for it to be persuasive to the audience. A thematic framework can be used to both tie together the various parts of the narrative and align that narrative with a known stock story, thus increasing the narrative's coherence.[107] Plot development can be used for internal coherence while references, either explicitly or by inference, to a stock story can increase external coherence.[108] By sequencing the series of events that make up the narrative with an easily perceptible theme, or stock story, the audience is more likely to believe the narrative "makes sense" to them. To the contrary, when the audience encounters inconsistencies and contradictions within the elements of the narrative, the flow is disrupted and may result in counterarguing by the audience, which in turn reduces the persuasive impact.[109]

As discussed in more detail in the Sections below, narratives are often an effective tool to influence an audience's beliefs and actions in both non-legal and legal contexts.[110]

B. *Narrative as a Form of Persuasion in Non-Legal Contexts*

The use of narrative as a means of persuasion has long been the subject of examination by scholars in a number of disciplines, with significant development about the persuasive power of narrative since 2000. According to Professors Green and Brock, "The power of narratives to change belief has never been doubted and has always been feared."[111] The ability of narratives to influence

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[104] Ralph, *supra* note 94, at 30.

[105] Weresh, *Wait, What?*, *supra* note 94, at 89–90.

[106] "A text is perceived to be coherent to the reader when the ideas hang together in a meaningful and organized manner." Arthur C. Graesser et al., *What Do Readers Need to Learn in Order to Process Coherence Relations in Narrative and Expository Text?*, *in* RETHINKING READING COMPREHENSION 82, 83 (Anne Polselli Sweet & Catherine E. Snow eds., 2003).

[107] Rideout, *supra* note 95, at 74.

[108] *Id.* at 71–72.

[109] Weresh, *Wait, What?*, *supra* note 94, at 93–94.

[110] *See, e.g.*, Bilandzic & Busselle, *supra* note 59 (examining various contexts in which narrative can be used to persuade individuals).

[111] Melanie C. Green & Timothy C. Brock, *The Role of Transportation in the Persuasiveness of Public Narratives*, 79 J. PERSONALITY & SOC. PSYCH. 701, 701 (2000).

behavior and beliefs has been examined in a variety of contexts and across numerous fields of study. Both factual and fictional narratives have been shown to be successful tools of persuasion.[112]

One arena where narratives have been found to positively influence behavior is in public health campaigns, where they are seen as an important tool for motivating health-behavior change.[113] Narrative messages refer to any type of communication containing narratives. For example, one study concluded that communications in the form of narrative, rather than an expository or didactic form intended mainly to inform or educate, could increase the willingness of individuals to schedule cancer screenings.[114] The use of a narrative video made up of excerpts of testimonials of breast cancer survivors was shown to increase recall. The audience members also expressed a greater intention of getting a mammogram as a result of viewing the narrative message.[115] Notably, the study found that women with less personal involvement with breast cancer (those who did not have a close friend or family member who had breast cancer) were the most persuaded by the narrative messages as compared to non-narrative messages.[116]

Another study examined the use of narratives in promoting personal health risk acceptance.[117] The study's participants were given one of two messages: one containing statistical evidence about the risk of infection with the hepatitis B virus (HBV) or one containing a narrative first-person account of an individual who was infected with HBV.[118] The results showed that individuals who received narrative messages supporting the health risk assertion were more likely to perceive a personal risk to themselves than the individuals who received messages containing only statistical evidence.[119] These same individuals also expressed the greatest intention to engage in protective health behavior, such as getting a vaccine against HBV.[120]

Narrative messages are also more likely to result in an improvement in the audience's likelihood of following safety measures.[121] One study examined the impact of narrative stories on individuals' likelihood to follow safety messages

[112] Leslie J. Hinyard & Matthew W. Kreuter, *Using Narrative Communication as a Tool for Health Behavior Change: A Conceptual, Theoretical, and Empirical Overview*, 34 HEALTH EDUC. & BEHAV. 777, 781 (2007) (citing multiple psychology studies).
[113] *Id.* at 777.
[114] Matthew W. Kreuter et al., *Comparing Narrative and Informational Videos to Increase Mammography in Low-Income African American Women*, 81 PATIENT EDUC. & COUNSELING S6, S6 (2010).
[115] *Id.* at S12.
[116] *Id.*
[117] de Wit et al., *supra* note 78, at 110.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *See, e.g.*, Mitch Ricketts et al., *Using Stories to Battle Unintentional Injuries: Narratives in Safety and Health Communication*, 70 SOC. SCI. & MED. 1441, 1447 (2010) ("[S]afety messages were more effective when they contained brief stories about people who were injured in the past.").

contained in assembly instructions for a children's swing.[122] The instructions contained safety messages targeting assembly mistakes that were previously linked to serious injuries in children who played on the swings.[123] Participants in the study were asked to assemble the swing and were provided with one of three different types of safety messages: (1) abstract informational safety messages; (2) narrative-based safety messages containing brief stories about people who were injured in the past; and (3) informational safety messages with concrete, but non-narrative, examples.[124] The study found that the safety messages containing narrative-based messages were more effective and resulted in a 19 percent improvement in safety behavior.[125]

These studies and many others support the persuasive nature of narrative messages to increase the audience's retention of information and to influence their attitudes and behaviors.

C. *Narrative as a Form of Legal Persuasion*

Legal communications also have narrative-based attributes that can be leveraged to increase the goals of those communications: namely, to persuade the audience.[126] The study of persuasion in the legal context has a long history, dating back to Aristotle.[127]

It's not difficult to imagine the trial lawyer spinning a tale in front of a jury in a closing argument. But using narrative in the law as a means of persuasion is much more far-reaching within both the litigation and transactional arenas, as discussed below.

1. *Litigation Arena*

Initially, the intersection between narrative and legal communication focused on the litigation context. That focus informed and continues to inform

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[122] *Id.* at 1443.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 1441.
[126] *E.g.*, J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMMC'N & RHETORIC: JALWD 247, 248 (2015).
[127] BERGER & STANCHI, *supra* note 50, at 3–6; Robert F. Hanley, *Brush Up Your Aristotle*, 3 J. ASS'N LEGAL WRITING DIRS. 145, 146–47 (2006); Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ASS'N LEGAL WRITING DIRS. 37, 37–41 (2010).

scholarship and commentary related to the creation of litigation-based documents.[128] There has also been scholarship on the use of narrative in oral communications in the litigation arena.[129] In both contexts, the litigator is the storyteller, or the narrative agent.[130] Narrative techniques have been used by litigators from the pretrial phase of a case to jury selection, opening and closing statements, prosecution and defense strategies, and appeals.[131] Some uses of narrative may be omnipresent, such as by trial lawyers during opening and closing arguments in front of a jury.[132] Other uses may be less obvious, but still are engrained in a litigator's role. For example, an appellate lawyer may craft a theory of the case in the statement of facts of a brief that then shapes the arguments that become key points in oral argument.[133]

Narratives in the litigation arena are most often used by lawyers to influence third-party decision makers, such as juries and judges, to side with their clients.[134] For example, using a narrative may be an effective way to gain the jury's attention, to improve their retention of the information presented, and to enhance their ability to connect the disparate pieces of information into a "convincing

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[128] *See, e.g.*, Cathren Page, *Not So Very Bad Beginnings: What Fiction Can Teach Lawyers About Beginning a Persuasive Legal Narrative Before a Court*, 86 MISS. L.J. 315 (2017); Amy Bitterman, *In the Beginning: The Art of Crafting Preliminary Statements*, 45 SETON HALL L. REV. 1009, 1009–13, 1018–19 (2015); Ralph, *supra* note 94, at 2–3, 25–27, 33–37; Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 J. LEGAL WRITING INST. 3, 4, 12–15 (2009); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127, 130–32 (2008).

[129] *E.g.*, Beryl Blaustone, *Teaching Evidence: Storytelling in the Classroom*, 41 AM. U. L. REV. 453, 470–82 (1992) (exploring the use of storytelling techniques when examining witnesses and introducing expert testimony).

[130] *See generally* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281 (2013); Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239 (2012); Richard Lempert, Comment, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559 (1991).

[131] *See generally* John C. Reinard, *Persuasion in the Legal Setting*, *in* THE SAGE HANDBOOK OF PERSUASION: DEVELOPMENT IN THEORY AND PRACTICE, *supra* note 5, at 331; Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses on the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1 (2005); Michael N. Burt, *The Importance of Storytelling at All Stages of a Capital Case*, 77 UMKC L. REV. 877 (2009).

[132] *E.g.*, Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. SCH. L. REV. 55, 58 (1992); Philip N. Meyer, *"Desperate for Love III": Rethinking Closing Arguments as Stories*, 50 S.C. L. REV. 715, 716–17 (1999); Philip N. Meyer, *Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in* The Estate of Karen Silkwood v. Kerr-McGee, Inc., 9 CLINICAL L. REV. 229 (2002).

[133] *E.g.*, Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write a Persuasive Fact Section*, 32 RUTGERS L.J. 459, 459–61 (2001); Sheppard, *supra* note 75, at 255–56, 258.

[134] For an exploration of the power of narrative to persuade judges, see Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N LEGAL WRITING DIRS. 1, 2–3 (2010). *See also* Ted Becker, *What We Still Don't Know About What Persuades Judges—and Some Ways We Might Find Out*, 22 J. LEGAL WRITING INST. 41, 41–42 (2018).

whole."[135] When litigators use narrative techniques to persuade judges to rule in their favor, usually through motions, trial briefs, and appeals, the techniques may vary, but the documents are likewise being used to persuade their audience. But narratives can also be used for reasons other than persuasion. They can, for example, also be used to give litigants a greater sense of justice by allowing their side of the story to be told, regardless of whether they win or lose.[136]

Narrative can also be used to inform public debate on important issues revealed in lawsuits.[137] For example, since the early 2000s, lawsuits against pharmaceutical companies that manufactured opioids have garnered much public attention.[138] These suits have alleged, among other things, that the manufacturers failed to adequately warn users about the risks of addiction on drug packaging and in promotional materials.[139] Some lawsuits further alleged that opioid manufacturers deliberately withheld information about their products' dangers, misrepresenting them as safer than alternatives.[140] In addition to compensating victims for harms caused by the use of opioids, such litigation may help alleviate the opioid epidemic by forcing changes to industry practices and by raising public awareness.[141] By publicizing harmful, unethical, and possibly illegal practices of these pharmaceutical companies, more patients may question their doctors about opioid prescriptions. Lawsuits that publicly paint the opioid industry as contributing to the "worst drug crisis in American history" also may give credence to regulatory agencies and legislatures seeking stronger oversight of the pharmaceutical industry.[142]

As with any use of narrative, the use of narrative in litigation will also be more effective if it has the three key attributes of a compelling narrative. Scholars explain that the narratives used by lawyers are more likely to persuade if they are complete and consistent, thus exhibiting internal coherence.[143] If the narrative aligns with a stock story well known to the audience, such as a reference to the stock character of a femme fatale in a prenuptial agreement, then it is also more effective due to its external coherence. The narrative portrayed by the litigator

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[135] JESSICA D. FINDLEY & BRUCE D. SALES, THE SCIENCE OF ATTORNEY ADVOCACY: HOW COURTROOM BEHAVIOR AFFECTS JURY DECISION MAKING 161 (2012).

[136] Anne E. Ralph, *The Story of a Class: Uses of Narrative in Public Interest Class Actions Before Certification*, 95 WASH. L. REV. 259, 275 (2020).

[137] *Id.* at 275.

[138] Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 NEW ENG. J. MED. 2301, 2301–02 (2017).

[139] *Id.*

[140] *Id.*; *see also* Katherine Spiser Rios, Comment, *Combatting the Opioid Epidemic in Texas by Holding Big Pharma Manufacturers Liable*, 50 ST. MARY'S L.J. 1353, 1363–66 (2019).

[141] *E.g.*, Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 389 (2019).

[142] *Supra* note 57 and accompanying text; *see also* Taleed El-Sabawi, *What Motivates Legislators to Act: Problem Definition & the Opioid Epidemic, A Case Study*, 15 IND. HEALTH L. REV. 188, 188 (2018); Taleed El-Sabawi, *Defining the Opioid Epidemic: Congress, Pressure Groups, and Problem Identification*, 48 U. MEM. L. REV. 1357, 1358–64 (2018).

[143] *See, e.g.*, FINDLEY & SALES, *supra* note 135, at 163–64.

must be plausible and realistic, so as to correspond with what the audience believes could occur in real life. Finally, to be most persuasive, that narrative should resonate with the audience's own expectations and experiences.[144]

2. *Transactional Arena*

Narrative has now been recognized to have broader applicability to a wider range of legal documents, specifically, transactional documents.[145] These transactional documents represent a series of events relayed by a narrative agent—the transactional drafter.[146] Just like narrative techniques are used in a variety of settings, legal and non-legal, to persuade audiences, transactional drafters should use narrative techniques to increase their ability to persuade as intended. For example, describing the reason behind a testamentary gift with an enhanced description is an illustration of a narrative technique. It may result in a greater likelihood that the personal representative will follow the specific intentions of the deceased by clearly identifying the property and ensuring an efficient transfer. Other beneficiaries may also be less likely to object to the personal representative's actions when the text of the will uses narrative techniques.

Similarly, a transactional drafter may employ narrative techniques to influence a transacting party to abide by a non-compete provision in an employment contract. The drafter may include within the contract an explanation of the reasons for the non-compete, such as the training provided to the employee or the confidential nature of the information provided to the employee. The employee then understands the benefit to be received and the need for inclusion of the provision.[147] When the employment concludes, the employee remembers the enhanced training that was received in exchange for the commitment to be bound by the terms of the covenant.

The transactional drafter must also recognize the three key attributes of narratives that affect the power to persuade. Narrative coherence may be achieved by ensuring that the terms of the transactional document, and any attachments or related documents, are internally consistent. For example, related terms should be grouped together under clear headings, and the parties should be referred to in all documents by the same designations. To increase its external coherence, an employment contract, for example, may make inferences to an easily recognizable stock story, such as that of David and Goliath.[148] The biblical story of

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[144] *Id.*

[145] *E.g.*, Chesler & Sneddon, *supra* note 3, at 263–64 (demonstrating the implementation of narrative techniques when drafting transactional documents); *see* McKenzie, *supra* note 34, at 257.

[146] *E.g.*, Chesler & Sneddon, *Happily Ever After*, *supra* note 1, at 493–94. *See generally* Maureen B. Collins, *Lawyer as Storyteller*, 88 ILL. BAR J. 289 (2000).

[147] *E.g.*, Matthew T. Bodie, *Taking Employment Contracts Seriously*, 50 SETON HALL L. REV. 1261, 1276–77 (2020).

[148] Chesler & Sneddon, *Tales from a Form Book*, *supra* note 1, at 252.

David and Goliath conveys the predicament of the underdog who needs to overcome great obstacles to secure a victory that is against all odds. It involves the triumph of the young Israelite shepherd, David, armed only with his slingshot and some stones, against the armored nine-foot-nine warrior, Goliath.[149] This David and Goliath stock plot can be embedded within an employment contract in various terms that express the unequal bargaining power between the employer and the employee, such as a one-sided arbitration clause or at-will termination clause. That same narrative should also correspond to what the parties understand occurs in real life. For example, a non-compete provision that restricts only conduct that aligns with an employee's expectation of what is typical in the industry, and possibly even with what she has agreed to in previous employment contracts, is more likely to influence that employee to conform to those expectations.

Although narrative is not the exclusive technique used to achieve legal persuasion, narrative is a powerful persuasive technique.[150] Part of the applicability and appeal of narrative to legal communication is narrative's power to connect with the audience and to persuade that audience. The audience then retains more information that results in an altered perception, attitude, or belief about the provision. It will also often result in influencing the parties to perform as agreed to under the terms of the document, or in encouraging third-party decision makers to interpret the document as intended by the drafter. In the following Part, the authors provide illustrations of how the use of narrative techniques in transactional documents can increase their ability to persuade.

III. EXAMPLES OF NARRATIVE TECHNIQUES TO ENHANCE THE PERSUASIVE ATTRIBUTES OF TRANSACTIONAL DOCUMENTS

Conceptualizing transactional documents as persuasive documents gives drafters a new perspective on how to approach the drafting process. Drafters are missing the opportunity to promote the dual goals of the transactional documents if they do not consider how to leverage the power of narrative.[151] The following are examples of how narrative-based techniques can be used to increase the persuasive attributes of transactional documents, which in turn facilitates the dual goals of the drafter.

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[149] *Id.*

[150] *See generally, e.g.*, Rideout, *supra* note 54; Shaun B. Spencer, *Dr. King, Bull Connor, and Persuasive Narrative*, 2 J. ASS'N LEGAL WRITING DIRS. 209 (2004).

[151] *E.g.*, SUE PAYNE, BASIC CONTRACT DRAFTING ASSIGNMENTS: A NARRATIVE APPROACH (2011); Chelser & Sneddon, *Happily Ever After*, *supra* note 1, at 493; Collins, *supra* note 146, at 289. While customization of transactional documents often raises the concern about increased transaction costs associated with the creation of documents, such costs may ultimately serve to minimize future costs. *See generally* David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61 (2005) (arguing that lawyers' fees may increase the efficiency of the transaction and avoid inefficient transactions).

A. Recitals and Background

Transactional documents often begin with recitals or a background section (referred to jointly as "recitals" for convenience). The recitals are usually at the beginning of the transactional document, preceding the operative terms.[152] The main purposes of the recitals are to provide background information about the transacting parties and their relationship, and to provide context surrounding their reasons for entering into the transaction.

The use of recitals in contracts dates back to the earliest English use of the written agreement.[153] Recitals are thought to be introduced into contracts because early English common law prohibited the testimony of parties to establish their mutual assent.[154] The recitals have a "peculiar" characteristic in that each one traditionally begins with the word "whereas."[155] The use of formal recitals has continued today in the United States, not only as a matter of tradition, but because of their value in evidencing the intention of the parties. However, in most form or model agreements, the recitals are very limited or omitted entirely. Including recitals tailored to the particular transaction aligns with the transactional drafter's dual goals. Furthermore, a drafter can increase the persuasiveness of the recitals by incorporating narrative-based techniques.

First, recitals can be used to facilitate performance by the transacting parties as intended. A drafter can include comprehensive and personalized descriptions of the parties themselves and their relationship to each other. This may result in the performing parties having a better connection to the document and to the transaction, thus giving them more incentive to perform as promised. The recitals can also include more information regarding the parties' intent behind the transaction and the document's specific terms. If the parties better understand why the agreement was entered into and why certain terms were included, they may also be more likely to perform as expected. Drafting recitals that serve to engage the parties and transport them into the narrative of the transaction can increase the overall persuasiveness of the document.

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[152] Recitals are not considered operative terms and thus do not create legal obligations or liability on the transacting parties. Va. Fuel Corp. v. Lambert Coal Co., 781 S.E.2d 162, 168 n.5 (Va. 2016) ("Recitals in a contract are not binding on the parties."); Captiva Lake Invs. v. Ameristructure, Inc., 436 S.W.3d 619, 625 (Mo. Ct. App. 2014) ("Recitals are not strictly a part of the contract because they do not impose contractual duties on the parties."); *see also Recital*, BLACK'S LAW DICTIONARY (11th ed. 2019) (explaining that recitals are "the reasons for entering into it or the background of the transaction"); 11 WILLISTON & LORD, *supra* note 15, § 33:46.

[153] Note, *The Effect of Recitals in Contracts*, 35 COLUM. L. REV. 565, 565 (1935).

[154] *Id.* at 568 n.12.

[155] *Id.* at 566. Although the inclusion of the word "whereas" carries no legal significance, many transactional drafters continue to use it. In recent years, drafting scholars and professors have attempted to do away with the use of the word and instead draft recitals in plain language. *E.g.*, Mark Cohen, *How to Draft a Bad Contract*, 17 SCRIBES J. LEGAL WRITING 79, 80–81 (2017).

Second, recitals can also be used to help persuade third-party decision makers to interpret the language of the transactional document as intended by the parties.[156] Background information can be used to showcase the intent of the transacting parties and promote an interpretation by third-party decision makers that is consistent with the parties' intent.[157] For example, if contract language is ambiguous, the primary goal of the court as decision maker is to interpret it in the way that best reflects the transacting parties' intentions.[158] To assist the decision maker, the transactional drafter should expressly identify the parties' intent in the recitals. If the document does not evidence that intent, courts will look to extrinsic evidence, often with no relation to the transacting parties themselves.[159] By using narrative-based techniques in the recitals, the drafter can promote greater recall by the decision maker and encourage an interpretation that best aligns with the transacting parties' intent. Drafting recitals that reflect the parties' specific transaction can thus increase the persuasiveness of the document to third-party decision makers.

To best leverage the persuasive potential of the recitals, the drafter should consider the three attributes of narrative that can be used to increase the power of the narrative to persuade the audience. Narrative coherence refers to the degree to which the narrative makes sense to the audience. Thus, not only should the narrative told in the recitals be consistent with the operative language in the body of the agreement, but the narrative must align with stock stories familiar to the audience. Narrative correspondence refers to the plausibility of the narrative incorporated into the recitals and the extent to which it fits with what the audience believes could realistically happen in real life. Finally, narrative fidelity refers to that narrative's similarity with the audience's personal experiences and expectations. The two examples below show how the drafter can use these attributes of narrative to further the dual goals.

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[156] *See, e.g.*, Royce de R. Barondes, *Side Letters, Incorporation by Reference and Construction of Contractual Relationships Memorialized in Multiple Writings*, 64 BAYLOR L. REV. 651, 686 n.173 (2012) (asserting that the recitals "inform future readers of the context" of the transaction).

[157] *E.g.*, Susan M. Chesler, *Drafting Effective Contracts: How to Revise, Edit, and Use Form Agreements*, 19 BUS. L. TODAY 35, 36–37 (2009).

[158] Mobile Acres, Inc. v. Kurata, 508 P.2d 889, 894 (Kan. 1973) ("A cardinal rule in the construction of contracts is to ascertain the intention of the parties and to give effect to that intention."); *see also* WebBank v. Am. Gen. Annuity Serv. Corp., 54 P.3d 1139, 1144–45 (Utah 2002); N.A.P.P. Realty Tr. v. CC Enters., 784 A.2d 1166, 1168–69 (N.H. 2001); Shifrin v. Forest City Enters., 597 N.E.2d 499, 501 (Ohio 1992); GMG Cap. Invs. v. Athenian Venture Partners I, 36 A.3d 776, 780 (Del. 2012).

[159] Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1233 (Del. 1997) ("In construing an ambiguous contractual provision, a court may consider evidence of prior agreements and communications of the parties as well as trade usage or course of dealing."); *see also* Klapp v. United Ins. Grp. Agency, 663 N.W.2d 447, 457 (Mich. 2003) ("[E]xtrinsic evidence is not the best way to determine what the parties intended . . . . However, where . . . it is not possible to determine the parties' intent from the language of their contract, the *next* best way to determine the parties' intent is to use relevant extrinsic evidence.").

The following example from a premarital agreement demonstrates how a transactional drafter can use recitals to better encourage the parties to perform as intended. A premarital agreement is a bilateral agreement between two parties in advance of marriage whereby the parties outline the rights and responsibilities with respect to property before, during, and after the marriage.[160] Below is what might be considered a standard premarital agreement recital.

> In anticipation of the upcoming marriage between the parties, each party desires to clarify the property rights that each may have in the event of the marriage's dissolution.

The premarital agreement can bring to mind a variety of stock stories. One stock story may be the "boy-meets-girl" story that fades into a happily ever after. But other stock stories may be presented in form premarital agreements. Those stories may involve the stock characters of the trickster or femme fatale, neither of which receive a happily ever after. The document may project these competing stock stories in the absence of the drafter's use of a particularized narrative. These competing stock stories can undermine the persuasiveness of the document, as the parties have different reactions to the continued performance anticipated. The generic recital above does not promote the development of one particular narrative about the premarital agreement. In its absence, conflict, confusion, and even nonperformance can arise.[161] The transacting parties may be offended by or even reject these stock narratives, which can lead to a reluctance to perform as intended.

Consider the revised language below:

> In anticipation of the upcoming marriage between the two parties, the parties wish to clarify their interests in property acquired before the marriage and their interests in property acquired during the marriage. This clarification is a reflection of each party's family relationships and the accumulation of significant retirement benefits. This clarification is not in anticipation of a potential dissolution of the marriage. The parties intend to be life-long partners and appreciate the benefit to plan for their shared life.

The revised language[162] makes clear that this particular premarital agreement is about planning for a relationship where the parties are equal partners invested

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[160] UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 2(5) (UNIF. L. 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. LAWS. 355, 355–56 (2010); J. Thomas Oldham, *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, 83–84 (2011).

[161] *See generally* Elizabeth R. Carter, *Rethinking Premarital Agreements: A Collaborative Approach*, 46 N.M. L. REV. 354, 355 (2016) ("Premarital agreements should be encouraged, socially accepted, and relatively easy to enter into.").

[162] The following is an example of a comparable recital from a form book:

> 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

in its success, not about predicting an unsuccessful one that dissolved into bitter recriminations with a party planning for a convenient exit.[163] The language directly supplants the idea that the parties are not committed to the relationship.[164] The language is authentic because it speaks to the parties' specific intentions.

The reference to stock stories in the premarital agreement relates to narrative coherence, narrative correspondence, and narrative fidelity, which all will be undermined in the absence of a clear story.[165] If the provisions are read to conflict with the purpose of the document as in the initial example, narrative coherence can become disjointed. If the provisions do not seem to fit the parties' understanding of what is likely to occur, the narrative correspondence can be dismissed. And if the provisions do not appear to reflect the parties' personal expectations and prior experiences, narrative fidelity can be eroded. Alternatively, the revised recitals situate the transactional document in a particular context and reflect the particular intent of the transacting parties.[166] The recitals establish a foundation or theme that can harmonize later provisions, thus promoting narrative coherence. The collaboration envisioned by the recitals can promote narrative correspondence and narrative fidelity, as the transacting parties connect the document to lived experiences.

Transactional drafters can also use recitals to better achieve their second goal of encouraging third-party decision makers to interpret the agreement as intended by the parties. For example, employment agreements often contain a non-compete clause, especially for professional positions and those in highly competitive industries such as sales and technology development.[167] This clause comes into effect upon termination of the employment relationship and limits the former

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> claims that accrue to each of them as a result of their marriage are determined and finalized by this Agreement.

FRANK L. MCGUANE, JR. & KATHLEEN A. HOGAN, COLORADO FAMILY LAW AND PRACTICE (2d ed. 2012) (omitting "whereas" from the form language).

163 Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 766–67 (2009); Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 894–96 (1997).

164 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.").

165 *See supra* notes 94–105 and accompanying text.

166 Dennis I. Belcher & Laura O. Pomeroy, *A Practitioner's Guide for Negotiating, Drafting and Enforcing Premarital Agreements*, 37 REAL PROP. PROB. & TR. J. 1, 27 (2002) (recommending that premarital agreement recitals include facts relating to the validity of the contract's creation and "the situation of the parties at the time of the agreement").

167 *See* Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 500–01 (1990) (finding that employees involved in noncompetition clause lawsuits are "most likely to be involved in a sales-type occupation"); Jason S. Wood, *A Comparison of the Enforceability of Covenants Not to Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH. ¶¶ 16, 23 (2000) (stating that courts increasingly began enforcing noncompetition agreements in the technology industry).

employee's ability to compete with the former employer.[168] In most states, non-compete clauses are only enforceable to the extent necessary to protect the employer against unfair competition.[169] It must be reasonable in its scope, length of time, and geographical restriction in order to be enforced against the employee.[170] Courts are reluctant to enforce overly broad non-compete clauses because the clauses infringe upon an employee's right and ability to work in his or her field of expertise.[171]

In spite of this, most employment agreements containing a non-compete clause contain little, if any, language providing the decision maker with information as to why the clause should be enforced in that instance. Some drafters include only the non-compete clause itself, while others may include generic language stating that the clause meets the jurisdiction's legal requirements.[172] However, such standard language does not provide the decision maker with much guidance. A typical non-compete might read as follows:

> For a period of twelve months following termination, Employee shall not engage in the practice of pediatric dentistry for herself or any other employer within 100 miles of Employer's office.

Instead of providing no guidance, the drafter can include language in the recitals to encourage, or persuade, the decision maker to find the clause enforceable as against the former employee. For example, the recitals can describe the employer's specialized practice in pediatric dentistry. They can include information about how the employer is one of only three pediatric dentistry practices within a 100-mile radius of its location in a rural county. They can also include information as to how the employer plans to train the employee during her employment on its patient retention and billing practices. The recitals may also provide more detailed background information on the employee, such as the fact that she is licensed in both general and pediatric dentistry. In essence, the drafter can use the recitals to better describe the parties, or characters, within the narrative framework of their employment relationship to encourage the decision maker to enforce the non-compete cause as intended.

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[168] *See, e.g.*, Dyar Sales & Mach. Co. v. Bleiler, 175 A. 27, 30 (Vt. 1934).

[169] Mertz v. Pharmacists Mut. Ins. Co., 625 N.W.2d 197, 204 (Neb. 2001) ("[I]n order to determine whether a covenant not to compete is valid, we consider whether the restriction is . . . not greater than is reasonably necessary to protect the employer in some legitimate interest."); *see also* Empiregas, Inc. of Kosciusko v. Bain, 599 So. 2d 971, 975 (Miss. 1992).

[170] Whelan Sec. Co. v. Kennebrew, 379 S.W.3d 835, 841–42 (Mo. 2012) (en banc) ("A non-compete agreement must be narrowly tailored temporally and geographically and must seek to protect legitimate employer interests beyond mere competition by a former employee.").

[171] *See, e.g.*, Whitten v. Malcolm, 541 N.W.2d 45, 48 (Neb. 1995); *see also* Donahoe v. Tatum, 134 So. 2d 442, 445 (Miss. 1961) (stating that the law requires the court "to recognize that there is such a thing as unfair competition by an ex-employee as well as by unreasonable oppression by an employer").

[172] *See generally* WESTLAW, PRACTICAL LAW STANDARD DOCUMENT 7-502-1225, EMPLOYEE NON-COMPETE AGREEMENT (2021).

While doing so, the drafter should consider the three main attributes of narrative to best leverage the persuasive power of the recitals. First, the narrative in the recitals must be consistent with the operative terms in the rest of the employment agreement and make sense to the decision maker. It must align with characters and stories of which the audience is familiar. Second, it must also be plausible and conform to what the audience believes could happen in real life. Finally, it must be similar to the audience's own experiences and expectations. As shown in the example above, the drafter can effectively use narrative-based techniques in the recitals to present the story of the small business owner who needs to protect itself from unfair competition in a specialized field within a small marketplace. The employer who spends its resources training its employee is a sympathetic character in a believable story that will likely resonate with most audience members, either through personal experience or the familiar experiences of others. Additionally, the decision maker is given reasons why this particular employee will not be unreasonably prohibited from gaining employment in her field even if the non-compete is enforced due to her licensure in general dentistry as well as pediatric dentistry. This example illustrates how the drafter can effectively use narrative techniques in the recitals to persuade decision makers to interpret the non-compete clause in its client's favor.

B. Operative Terms

Recitals may seem like the natural place for the drafter to draw upon narrative-based drafting techniques; yet narrative-based drafting techniques should not be exclusively limited to drafting recitals. Operative terms can likewise benefit from the use of narrative-based techniques. Operative terms, in contrast to recitals, refer to the provisions in a transactional document that create legal obligations or liability on the transacting parties.[173] The drafter must ensure that these terms are substantively accurate, legally operative, and reflect the parties' intent. In so doing, the drafters can be most helped or hampered by the language they choose.[174]

Language is a dynamic and yet imperfect medium of communication.[175] Drafters know the importance and challenge of selecting the appropriate phrasing for inclusion in transactional documents. As summarized by one scholar almost fifty years ago:

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173 *See*, *e.g.*, STARK, *supra* note 22, at 39–41.

174 *E.g.*, Volker Triebel, *Pitfalls of English as a Contract Language*, *in* TRANSLATION ISSUES IN LANGUAGE AND LAW 147, 149 (Frances Olsen et al. eds., 2009) ("English as a contract language is difficult to master, even for common law lawyers.").

175 "Each word, each phrase interacts with, changes and is changed by the other words, phrases, and discourses that it encounters, whether in speech or in writing. Words alter and are altered by surrounding words in a sentence as well as shifting meaning over time and context, or historically." Darsie Minor Bowden, The Mythology of Voice 69 (Aug. 1991) (Ph.D. dissertation, University of Southern California) (on file with authors).

> Language often inadequately describes intention because (1) it is inherently imperfect and inadequate to express all phases of thought, (2) it may be unskillfully or improperly used, (3) the human mind is unable to foresee all contingencies, and (4) the meaning of words may be altered or eroded by the passage of time.[176]

Accordingly, drafters are cautious with the selection of provisions, the modification of phrasing, and the rejection of form language.

The authors are not advocating for the inclusion of extraneous information that may create ambiguity or conflict with other provisions, nor are they advocating for the abandonment of time-tested phrasing and the avoidance of commonly accepted legal terms. All drafters should seek to avoid ambiguity as they aim to use substantively accurate and intent-effectuating language. Yet the unwillingness to consider alternate phrasing, alternate sequencing, and enhanced descriptions may undermine the drafter's pursuit of the two goals of transactional documents.

Some of the suggested changes to phrasing, sequencing, and descriptions may be small, but offer a big impact. For example, a small modification to the operative language is to alter the names used within the document. For example, using the actual names of the transacting parties, rather than using generalizations like "Buyer" and "Seller" throughout the document, can be humanizing and increase the sense of ownership that the transacting parties have in the transaction.[177] The parties may still be identified in those roles, whether in the recitals or the definitions, but using the actual names within the document can promote narrative fidelity. The parties better see themselves reflected in the document's phrasing when reading their own names.

The sequencing of the provisions can also have an impact on the effectiveness of the provisions. The decision as to sequencing can also be thought of as enhancing the plot of the narrative. The provisions can build upon and relate to each other to enhance narrative correspondence and narrative coherence. The provision that is most likely to be re-read or consulted, and that carries the most weight to the transacting parties, can be included prominently in the beginning of the document. A provision that is less likely to be re-read or consulted can be included at the end of the document.

The phrasing of the operative terms can also have an effect on the audience. The level of detail provided in the provisions can increase the persuasiveness of the document. In other words, the comprehensiveness of the document and its provisions can affect persuasiveness. In this context, comprehensive provisions refers not to the number of words but rather to the completeness of the provisions.

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[176] Daniel M. Schuyler, *The Art of Interpretation of Wills*, *in* PROBATE IN MIDCENTURY: TRANSITION, TAXATION & TRENDS 101, 102 (R.O. Schwartz ed., 1975).

[177] *See, e.g.*, Tim Brennen, *On the Meaning of Personal Names: A View from Cognitive Psychology*, 48 NAMES 139 (2000); A.J. Sanford et al., *Proper Names as Controllers of Discourse Focus*, 31 LANGUAGE & SPEECH 43 (1988); Mary Margaret Steedly, *The Importance of Proper Names: Language and "National" Identity in Colonial Karoland*, 23 AM. ETHNOLOGIST 447 (1996).

The provisions should anticipate changes of circumstances and address multiple contingencies.[178] By anticipating multiple contingencies, the document directs the behavior and actions of the transacting parties.[179] Thus, the drafter should aim for limited, if any, reliance on the default rules for the transacting parties, or any potential third-party decision makers, to understand the full scope of the document. For example, key terms, such as the term "descendants" in a trust agreement, are generally defined within the document.[180] This definition can be customized to reflect the intent of the parties as to whether adopted descendants and posthumously conceived descendants are to be included as potential beneficiaries of the trust to be eligible for distributions of income, principal, or both. By anticipating future issues or changes of circumstances, the drafter is aiming to minimize the need for the performing parties to seek the intervention of third-party decision makers.[181] The document itself includes all of the information that the parties need to perform as intended, but it also includes sufficient information for a potential third-party decision maker to interpret it per the parties' intent.

The audience is also less likely to engage in counterarguing if the transactional document does not omit key provisions or leave gaps in the provisions. The omission or gaps can decrease the persuasiveness of the document, as the parties may fill in the gaps with information that one party may believe to be appropriate, but the other does not. Neither party may be performing as originally intended; the need for resolution from a third-party decision maker may arise. Filling in any gaps in the transactional document also provides potential third-party decision makers with necessary information for them to persuade them to construe the document as intended.

Similarly, including appropriate, meaningful boilerplate can increase the persuasiveness of the document.[182] Boilerplate can have a negative connotation of text in small font that is mechanically replicated from document to document.

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[178] *See generally* Spencer Williams, *Predictive Contracting*, 2019 COLUM. BUS. L. REV. 621 (2019) (asserting that transactional drafters should use contract data and machine learning to construct more effective contracts).

[179] Seeking to create a comprehensive document can be challenging, both in anticipating a wide range of circumstances and in conveying to the transacting parties the value of including such wide-ranging provisions. As one commentator described, "When transactional attorneys write legal documents, their fundamental job is to communicate intentions and meanings accurately through words. At the same time, however, a document should not be too much longer or more complex than necessary." Joshua Stein, *How to Use Defined Terms to Make Transactional Documents Work Better*, 43 PRAC. LAW. 15, 15 (1997).

[180] Chesler & Sneddon, *Telling Tales*, *supra* note 1, at 140–41.

[181] *See, e.g.*, McKenzie, *supra* note 34, at 257 ("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.").

[182] *See generally* John F. Coyle, *The Butterfly Effect in Boilerplate Contract Interpretation*, 82 L. & CONTEMP. PROBS. i–ii (2019); Gregory Klass, *Boilerplate and Party Intent*, 82 L. & CONTEMP. PROBS. 105 (2019); Joseph Kimble, *Revisiting the Writing Contests (on Boilerplate)*, 96 MICH. BAR J. 38 (2017); 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).

These provisions, however, may ultimately prove vital to the overarching persuasiveness of the document. While little attention may have initially been devoted to the boilerplate by the audience, the boilerplate may contain the precise information needed for appropriate performance by both the transacting parties and third-party decision makers. The more comprehensive the provisions are, the clearer guidance the document may provide and the more persuasive the document may be to both the transacting parties and third-party decision makers.

Transactional drafters can incorporate narrative techniques in the operative terms to better achieve the first goal of persuading the transacting parties to perform as intended. One example can be gleaned by examining the use of a "time is of the essence" clause (TOE Clause) included in a variety of services and sales contracts. This clause is used when a delay in performance could harm one or both of the parties. For example, time is of the essence when a lender must fulfill a loan contract by funding a loan on time so that the buyer can purchase the property in question or fund the pending business opportunity. Time is of the essence when a commercial buyer is purchasing parts necessary for manufacturing goods for the fulfillment of sales to consumers or contracting for the repair of equipment necessary to manufacture such goods. Time is generally of the essence whenever there are perishable goods at stake or property that is subject to rapid fluctuations in value. Without such a clause, transacting parties and courts alike do not typically consider the timing of performance to constitute a deal-breaker when it comes to contracts. This is why the drafter should include a TOE Clause in contracts where it is important. A typical TOE Clause reads as follows: "The parties agree that time is of the essence with respect to performance of each of the parties' obligations under this Agreement."

To better encourage the transacting parties to perform their obligations with strict adherence to the deadlines set forth in the contract, the drafter can utilize narrative-based techniques in the operative terms. For one, the drafter should consider the sequencing of the contract's terms, placing the TOE Clause in a prominent position at the start of the operative terms, with a clear heading. The drafter should also consider the use of expressive language and inclusion of relevant details to boost the language in the clause itself. The clause can include language explaining why the party would be harmed by a delay in performance. For example, it may state: "A failure to complete the repair of the machinery by Machine Medics (MM) by the date set forth in this contract will likely result in substantial harm to Ralph's Savvy Shirts (RSS) due to its subsequent inability to fulfill pending sales and to enter into future contracts for sale." A separate representation[183] can also be included, such as "RSS represents that it will not be able to fulfill its outstanding orders in a timely fashion with any delay in performance. As a small family-owned business, such loss in profits will be devastating

[183] A representation is a statement of fact made by one party to the contract that becomes part of the operative terms. It may relate to a fact in existence at the time of contracting, or at a later date. If the statement is not factually accurate, the party will be in breach and may be liable for damages. *See, e.g.*, STARK, *supra* note 22.

to RSS." This representation not only alerts MM to the impact of a delay on RSS, but also underscores how important it is to RSS because RSS can be subject to liability if its representation is false.

The drafter should also consider expanding on RSS's background in both the recitals and the operative terms, specifically describing it as an online retailer of T-shirts related to concerts and other cultural events. Another representation can be added to better reflect the narrative by stating that as an online retailer, positive customer reviews have an enormous impact on RSS's sales volume, and the inability to timely meet orders can have a drastic effect on its future sales and profits. In addition, tailored damages provisions can be drafted to set forth the consequences if MM fails to satisfy the TOE Clause. For example, the drafter could create a duty on MM to compensate RSS for its lost profits based on its outstanding orders, as well as estimated lost future profits based on missed opportunities. The more comprehensive the language of the contract, the more likely it is to encourage MM to timely perform its duties. By referring to the fact that a significant majority of the T-shirts sold by RSS in the past three months relate to the upcoming 2021 Olympics Games, MM can better understand both RSS's need for timely performance and the potential consequences to MM for failing to do so. As such, the drafting language serves to both incentivize MM to perform and disincentivize it to breach.

The drafter should always consider the three main attributes of narrative to increase persuasiveness: narrative coherence, narrative correspondence, and narrative fidelity. The inclusion of the additional language surrounding the TOE Clause must be consistent with the other contract terms, such as damages provisions and termination clauses, as well as the recitals. To be most effective, the narrative must appear plausible and realistic to the party whose timely performance is required. Providing specific but helpful details as to how the impacted party will be harmed, such as those described above, helps achieve that. It is a common and expected occurrence that repair delays can negatively impact pending sales and may hamper the reputation of a company for future sales. Including that information, rather than hoping that the parties will think of that stock story on their own, promotes fidelity. By setting forth this narrative in the contract, the meaning is transparent, reinforcing the original intent of the parties. Moreover, most transacting parties would understand the even greater impact such a delay would have on a small online business that primarily deals with products that have an "expiration date," such as in the case of RSS. But rather than rely upon what most parties would understand, the language can clarify that understanding for the audience.

Using narrative-based techniques in the operative terms can also help the drafter to achieve the second goal of persuading third-party decision makers. An example can be drawn from the critical language of discretionary trusts.[184] A

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[184] *See, e.g.*, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 228, Westlaw (database updated June 2021); Alan Newman, *Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code*, 40 REAL PROP., PROB. & TR. J. 567, 568–69 (2005).

trust is a fiduciary relationship with respect to property where the settlor is entrusting legal title with the trustee and bestowing equitable title to the beneficiaries.[185] The trustee is charged with acting in the best interests of the beneficiaries. Consider the following general provision from a trust agreement:

> The Trustee shall have complete and absolute discretion to pay or apply any part of the income and principal to or for the benefit of the trust beneficiaries as the Trustee determines to be appropriate in the Trustee's absolute discretion.

This provision grants the trustee extended discretion to make such distributions as would be appropriate.[186] Such extended discretion is consistent with the purpose of a discretionary trust for the benefit of multiple beneficiaries where the trustee may distribute all, some, or none of the trust property to one, some, or all of the trust beneficiaries.[187] The settlor, who could be considered the initial transacting party, would not want to unduly limit the flexibility that is embedded within such a trust instrument.[188] The trustee needs the flexibility to respond to changes in investments and the beneficiaries' personal situations.

Broad, unqualified discretion, however, may create uncertainty. Given the typically long duration of trusts, trustees are cautious with authorizing distributions. Unforeseen future events may ultimately prove earlier trust distributions to have been unwise.[189] The settlor's original intent was to have resources available for beneficiaries for a wide-ranging number of situations. Thus, restricting the distributions may interfere with the trustee's ability to respond to changes of circumstances. The trustee may be uncertain whether to authorize significant distributions or to moderate the distributions to save property for future circumstances.[190] The trustee and the beneficiaries may need to seek intervention from a third-party decision maker, such as a mediator or a court, to determine what

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[185] RESTATEMENT (THIRD) OF TRS. § 2 (AM. L. INST. 2003) (Definition of Trust).

[186] *See, e.g.*, Amy K. Kanyuk, *Trustee Discretion: The Better Part of Valor or Vulnerability?*, 46 EST. PLAN. 3 (2019).

[187] *See generally* Richard C. Ausness, *Discretionary Trusts: An Update*, 43 ACTEC L.J. 231 (2018).

[188] The settlor's intent should be the guiding principle. For an examination of the settlor's intent, see Jeffrey A. Cooper, *Empty Promises: Settlor's Intent*, *the Uniform Trust Code*, *and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1171–74 (2008); Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC. L.J. 1, 2–3 (2014); Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It*, *Anyway?*, 38 AKRON L. REV. 649, 650–54 (2005); Benjamin D. Patterson, *The Uniform Trust Code Revives the Historical Purposes of Trusts and Reiterates the Importance of the Settlor's Intent*, 43 CREIGHTON L. REV. 905, 905–07 (2010).

[189] *See, e.g.*, Ronald R. Volkmer, *Standard for Finding Abuse of Trustee's Discretion*, 41 EST. PLAN. 42 (2014); *see also* Eric A. Manterfield, *Lurking Liability for Trustees—and Their Counsel Too*, 41 EST. PLAN. 3, 6 (2014) ("Which individual or which corporate fiduciary will actually carry out the terms of the estate plan can have immense implications for the trust and its beneficiaries.").

[190] *See generally* Shyla R. Buckner & Michelle Rosenblatt, *A Rose by Any Other Name: Utilizing and Drafting Powers for Trustees, Trustee Advisors, and Trust Protectors*, 8 EST. PLAN. & CMTY. PROP. L.J. 41 (2015).

distributions may be appropriate under what circumstances.[191] Although such intervention may be sought by either or both the trustee and the beneficiaries, such intervention may produce a resolution that is inconsistent with the intent of the transacting parties. For example, courts may differ as to whether any distributions were appropriate, and the above language provides limited evidence to facilitate the resolution. Such a legal proceeding may therefore be more extensive, time-consuming, and expensive to resolve without clear guidance in the document.

Contrast the previous provision with unqualified authorization of extended discretion with the following provision:

> The Settlor vests the Trustee with extended discretion to invest, manage, and distribute the property in accordance with the purpose of this trust for the benefit of Settlor's descendants and consistent with the Trustee's fiduciary duties. To that end, the Trustee is authorized to pay or apply any part of the income and principal to or for the benefit of the trust beneficiaries as the Trustee determines to be appropriate in the Trustee's complete and absolute discretion. The Settlor hopes, but does not direct, that the Trustee considers making distributions to further each beneficiary's education. The Trustee may, but is not directed to, take into considerations all sources of income available to each of the beneficiaries and to take into considerations all prior distributions made to each of the beneficiaries. Nonetheless, the Trustee is authorized to make unequal distributions to and among the trust beneficiaries. Such distributions may result in the termination of this trust.

When reviewing this provision from the perspective of a third-party decision maker, more specific articulation of the settlor is included. This additional language does not interfere with the broad delegation of discretion but instead provides workable parameters for expectations, actions, and review.[192] The second version is more likely to encourage the trustee to act in accordance with the provisions and provides better guidance to a third-party decision maker about the original intent of the transacting parties. This increased persuasion comes from expanding the operative terms by drawing on the three attributes of narrative. The inclusion of some targeted, focused sentences promotes persuasiveness. The additional language in the provision above is thus consistent with the overall purpose of the trust and consistent with other provisions, such as discretion about investments. This consistency promotes narrative coherence.

The provision also promotes narrative correspondence because this provision showcases the level of trust and authority that the trustee has while also recognizing that the trustees and beneficiaries will form a relationship that relies upon trust. Yet, the expectations that each party has may differ. For instance, the concept of splitting title to property may be previously unknown by the parties. The audience may draw upon personal experiences and perspectives about property ownership and be confused when, as happens in a trust, neither the trustee

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[191] RESTATEMENT (THIRD) OF TRS. § 50 (AM. L. INST. 2003) (Enforcement and Construction of Discretionary Interests).

[192] *See, e.g.*, Volkmer, *supra* note 189, at 42–43.

nor the beneficiaries have complete title and unrestricted access to the property.[193] The audience may reference the stock character of the miser and believe that the focus should be asset preservation, which will result in the trustee denying the beneficiaries' requests for distributions.[194] But this provision shares guiding principles. For instance, a trustee may file a petition requiring early termination of the trust. The language that expressly asserts that the distributions authorized by the trustee may result in the termination of the trust because the trust property was already distributed would guide a court's interpretation as to whether to grant the petition. Even cloaked in standard legal language, the text in the second version reads as authentic, genuine statements that support narrative fidelity.

By using narrative techniques, in both the recitals and operative terms, the drafter can make the transactional document more persuasive to its audience and thus better accomplish the dual goals to facilitate performance by the transacting parties as intended and to encourage third-party decision makers to interpret the document as intended.

CONCLUSION

Transactional documents are complex, multi-faceted documents. They seek to guide, inform, and influence the thoughts, behaviors, and actions of the transacting parties and third-party decision makers. By conceptualizing transactional documents as persuasive documents, transactional drafters can draw upon narrative-based drafting techniques to better achieve the dual goals of transactional documents. A good story is compelling, and a powerful means of persuading its audience to respond as the author intended. Like a good story, a transactional document can be drafted to be a powerful and persuasive document that both facilitates performance by the transacting parties as intended and, if necessary, encourages third-party decision makers to interpret the document as intended.

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[193] *See, e.g.*, Kent D. Schenkel, *Trust Law and the Title-Split: A Beneficial Perspective*, 78 UMKC L. REV. 181 (2009).

[194] For information about the different uses of discretionary trusts, see Jay A. Soled & Mitchell M. Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 WASH. & LEE L. REV. 257 (2015).