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# REDEFINING ROLES AND DUTIES OF THE TRANSACTIONAL LAWYER: A NARRATIVE APPROACH

LORI D. JOHNSON<sup>†</sup>

## INTRODUCTION

*“Mr. Lewis and I are going to build ships together, great big ships.”<sup>1</sup>*

Put yourself in the shoes of an in-house transactional lawyer at a major, privately-held technology company. We will call the company “MicroChips.” This lawyer, we will call him “Michael,” greatly enjoys working at MicroChips, in part because of the company’s successful, entrepreneurial, and innovative corporate culture. According to Michael, this culture is shaped by a leader who values the “story of the enterprise” the company builds. This understanding of the story pervades even the lawyers’ interactions with transacting parties and opposing counsel seeking to contract with MicroChips.<sup>2</sup>

Parties looking to enter into large transactions with MicroChips on a variety of matters are, as a matter of course, walked through the company’s main headquarters and work

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<sup>1</sup> PRETTY WOMAN (Touchstone Pictures, Silver Screen Partners IV 1990). In the film, Lewis Edwards, played by Richard Gere, is a ruthless corporate raider who buys stock in and then liquidates companies. Edwards had targeted James Morse’s family-owned shipbuilding company for liquidation until a relationship with Vivian Ward, played by Julia Roberts, helps him find his humanity. Edwards instead suggests that he and Morse work together to keep the company in business, rather than selling off the pieces.

<sup>2</sup> Interview with Anonymous, In-house Corporate Attorney, in Las Vegas, Nev. (June 27, 2017).

areas. During the “walk-through,” Michael or another corporate officer shares the story of MicroChips’ enterprise. Building the story of MicroChips’ background, ethos, and goals, according to Michael, shapes the way in which the parties move forward in their transaction. This approach creates a common basis upon which Michael and the legal team can draw as they negotiate and draft documents to complete complex and sophisticated deals with transacting parties and their counsel.

The walk-through of the workspace helps to frame any transaction in terms of MicroChips’ goals, and according to Michael, this approach “shapes the deal, and [opposing counsel] read[s] the contract differently.” Michael senses that the more he and his team can “bring [the transacting party and their counsel] into the [MicroChips] story,” the easier it becomes to understand and recognize the concerns both sides bring to the table. Ultimately, this helps frame the entire deal process in terms of a joint, yet MicroChips-friendly, story from the very outset. As such, Michael and his team can shape the deal in an effective, client-focused way.<sup>3</sup>

Unfortunately, few transactional practitioners appreciate the role of a transactional lawyer as the storyteller of the client’s business. In-house counsel fare better in this respect, as they maintain close, internal relationships with their clients. Often, in-house counsel possess a business background, which may also make them more amenable to the concept of a “corporate story.” However, very few outside counsel take the opportunity to engage their clients on this level. Further, scholarship provides little guidance to the sophisticated transactional practitioner on how to shape her relationship with her client, and how to “add[] value to the deal”<sup>4</sup> from her clients’ perspectives.

Traditional scholarship examining the roles and duties of transactional lawyers is based on an outdated conceptualization of the transactional lawyer’s function in modern practice. Today’s transactional lawyers undertake myriad roles for their clients, beyond the traditional trope of “mere scrivener,”<sup>5</sup> or even

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<sup>3</sup> *Id.*

<sup>4</sup> TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO § 30.2, at 456 (2d ed. 2014).

<sup>5</sup> *Id.*

the more evolved midcentury ideal of “advisor and counselor.”<sup>6</sup> Specifically, today’s sophisticated transactional lawyers are tasked with structuring, drafting, conceptualizing, negotiating, and executing the complex, risky, and often cutting-edge transactions their clients bring to the table.

On the other side of that table often sits another team of sophisticated transactional lawyers.<sup>7</sup> Although the ultimate goal is a meeting of the minds, these opposing counsel are armed for battle over every nuance, every word, every representation, every deliverable, and every obligation their client is poised to undertake or agree to. Therefore, the role of the transactional lawyer can become considerably more adversarial than commonly understood, particularly in sophisticated transactions. The work of preparing and negotiating documents places transactional lawyers in the role of client advocate, in addition to the gatekeeper, monitor, drafter, and counselor roles they typically fill.

As such, transactional lawyers have begun to explore new modes of performing as advocates. One such mode is rooted in the strategic construction of documents presented to and exchanged with opposing counsel. Considering how best to frame a client’s position, while making sure a document is palatable enough to avoid threatening the often delicate balance between the contracting parties, requires considerable writing skill and nuance. Thus, a small handful of scholars have begun to propose that transactional lawyers employ methods of storytelling or narrative in their practice.<sup>8</sup> This suggestion comes despite

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<sup>6</sup> Louis M. Brown & Harold A. Brown, *What Counsels the Counselor? The Code of Professional Responsibility’s Ethical Considerations—A Preventive Law Analysis*, 10 VAL. U. L. REV. 453, 453–54 (1976).

<sup>7</sup> Gregory M. Duhl, *Conscious Ambiguity: Slaying Cerberus in the Interpretation of Contractual Inconsistencies*, 71 U. PITT. L. REV. 71, 112 (2009).

<sup>8</sup> Susan M. Chesler & Karen J. Sneddon, *Tales from a Form Book: Stock Stories and Transactional Documents*, 78 MONT. L. REV. 237, 237 (2017) [hereinafter Chesler & Sneddon, *Stock Stories*]; Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques and Drafting*, 68 OKLA. L. REV. 263, 268 (2016) [hereinafter Chesler & Sneddon, *Narrative Techniques*]; Terrill Pollman, *Whereas and Once Upon a Time: A Narrative Analysis of Contract Recitals* (Mar. 5, 2018) (unpublished article) (on file with the author). See, e.g., SUE PAYNE, *BASIC CONTRACT DRAFTING ASSIGNMENTS: A NARRATIVE APPROACH* (2011); JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* 4–8 (2002). Bruner’s seminal work, while not specifically referencing transactional practice, endeavors to “hoist up” the discussion of narrative, by using it to give shape to reality and everyday experiences. He is thus one of the first scholars to include the transactional concepts

earlier suggestions that narrative plays only a “marginal” role in corporate law.<sup>9</sup> These scholars, and this Article, posit that lawyers can successfully wield this innate human desire for stories at the stage of contract formation to enhance transactional outcomes.

Narrative<sup>10</sup> is a time-tested tactic employed by litigators in written and oral advocacy.<sup>11</sup> Yet, the underpinning theories of narrative can, and should, apply to deal negotiation and drafting tactics employed by transactional lawyers.<sup>12</sup> This Article argues that a narrative approach to transactional lawyering can enhance a transactional lawyer’s understanding of her client’s goals, provide a more complete view of a transaction, and improve outcomes for all contracting parties.

One of the many definitions of the term “narrative” describes it as a human method of abstraction or generalization—a less scientific, but by no means inferior, method of understanding concepts as basic as “time, process, and change.”<sup>13</sup> As transactional drafters grapple with changing client demands, mark-ups of documents delivered by opposing counsel, rushed deadlines, and unforeseen deal developments, they can rely upon narrative theory to more successfully grapple with and adapt to these varying demands.

While the ultimate goal of a transaction is a meeting of the minds between the parties, sophisticated transactional lawyers must pursue this goal while prioritizing the advancement of their

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of “broken contracts” and “good faith effort” in dealings as issues situated and existing in “a narrative world.”

<sup>9</sup> Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537, 540 (2007).

<sup>10</sup> Note that the terms “storytelling” and “narrative” are often used interchangeably in the relevant literature, and there has been some debate regarding the evolution of the Applied Legal Storytelling movement toward a focus on technical theories of narrative. The term “narrative” will be used throughout this Article, and discussion of the evolution toward narrative will be explained and discussed. For a discussion of the shift in the Applied Legal Storytelling movement toward exploration of narrative and narrativity, see generally Linda H. Edwards, *Speaking of Stories and Law*, 13 LEGAL COMM. & RHETORIC 157, 159–60 (2016) [hereinafter Edwards, *Stories*]; Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 LEGAL COMM. & RHETORIC 81, 81 (2012); Stephen Paskey, *The Law Is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM. & RHETORIC 51, 55 (2014).

<sup>11</sup> See Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239, 241 (2012).

<sup>12</sup> See Chesler & Sneddon, *Narrative Techniques*, *supra* note 8, at 263.

<sup>13</sup> DAVID HERMAN, BASIC ELEMENTS OF NARRATIVE 2 (2009).

client's interests. In so doing, the transactional lawyer must walk a tightrope between advocating for the good of the client and risking the success of the deal by failing to accede to the goals of the various contracting parties. This Article posits that narrative theory can assist the transactional lawyer in walking this tightrope effectively and ethically.

Specifically, this Article proceeds to show that the use of narrative techniques, specifically those proposed by Walter Fisher, can assist transactional lawyers: (1) in understanding their clients' goals more fully; (2) in more effectively advancing their clients' goals through persuasion; and (3) in creating complete, holistic documents to govern the proposed deal. As such, the appropriate use of narrative techniques and understanding of narrative theory can enhance the skills of transactional lawyers, and improve client outcomes.

This Article proceeds in three Parts. Part I briefly introduces narrative theory and provides background on the current paucity of scholarship regarding its use in the areas of transactional and corporate law. Part I continues by describing how sophisticated transactional lawyers behave as advocates in large-scale transactions, and how this advocacy role relates to the growing importance of narrative in transactional practice.

Part II discusses narrative theory in more depth, specifically Walter Fisher's theory of narrative rationality and its application to litigation and appellate practice. Part III proposes methods of how, within the deal-making construct, a transactional lawyer can wield narrative techniques to improve persuasion, document accuracy, and client outcomes. Part III also discusses potential risks associated with the adoption of narrative techniques by transactional attorneys and debates surrounding the ethics of using narrative as a persuasive tool. This Article resolves that the benefits of employing narrative theory in transactional legal practice outweigh any potential risks associated with its use. Finally, the Conclusion summarizes potential best practices for effectively incorporating narrative theory into the boardroom, and not just the courtroom.

## I. NARRATIVE'S RISE AND MARGINAL ROLE IN TRANSACTIONAL PRACTICE

*"[T]here is no genre, including even technical discourse, that is not an episode in the story of life . . . ."*<sup>14</sup>

The evolution of thought concerning the applicability of narrative to various modes of legal practice should be expanded to include transactional lawyering, despite earlier discussions of narrative's inapplicability to the field. As such, this Part discusses the rise of the modern legal narrative movement, and continues by discussing the marginal role that scholars have attributed to narrative theory in corporate and transactional law to date. Finally, this Part addresses how modern, sophisticated transactional attorneys advocate for clients through the deal-making process. This Part frames the discussion of how narrative can enhance advocacy in transactional practice.

### A. *Overview of the Legal Narrative Movement*

Narrative theory has become a widely-utilized tool in various areas of legal writing and thought. An understanding of currently prevailing modes of narrative theory in the broader legal context is required to provide potential examples of how these techniques can be translated into the transactional context. What narrative means in the law and how it can be wielded has generated significant scholarship over the past nearly thirty years.<sup>15</sup> This Part describes the current landscape of legal narrative before examining its usefulness to the modern transactional drafter.

The basic thesis of narrative theory is that we, as humans, carry a primal yearning and ability to engage in storytelling as a way of creating meaning.<sup>16</sup> As such, "stories and images we acquire from our culture and experience provide mental blueprints that, for better or for worse, help us sort through and

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<sup>14</sup> WALTER R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION 85 (1987).

<sup>15</sup> See generally Van Patten, *supra* note 11 (summarizing the evolution of the scholarship).

<sup>16</sup> See *id.* at 239.

understand new things.”<sup>17</sup> This understanding has been harnessed in a practical manner in the litigation context through the recognition that “lawyers persuade by telling stories.”<sup>18</sup>

In a 1987 book discussing the applicability of narrative to human communication, Walter Fisher noted the theory’s application to the law by stating that “[n]o matter how strictly a case is argued . . . it will always be a story, an interpretation of some aspect of the world that is historically and culturally grounded and shaped by human personality.”<sup>19</sup> Foundational to the application of narrative theory to the law is the recognition that “storytelling lies at the heart of what lawyers do.”<sup>20</sup>

After Fisher and other authors began the dialogue about legal narrative in the mid-to-late 1980s,<sup>21</sup> the concept emerged in full force in the legal academy, mostly as a theory of storytelling to assist in framing particularly sensitive types of legal problems.<sup>22</sup> Specifically, scholars such as Derrick Bell and Richard J. Delgado recognized the power of narrative in discussing issues of race, and narrative theory became central to the development of the critical race theory movement<sup>23</sup> and the resulting critical legal theory movement.

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<sup>17</sup> Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 276 (2011).

<sup>18</sup> J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 54 (2008) (attributing the basis for this assertion to the work of James Boyd White).

<sup>19</sup> FISHER, *supra* note 14, at 49.

<sup>20</sup> Rideout, *supra* note 18, at 53.

<sup>21</sup> See e.g., FISHER, *supra* note 14, at 5; JAMES BOYD WHITE, Foreword, in HERACLES’ BOW: ESSAYS ON THE RHETORIC AND THE POETICS OF THE LAW ix (1985) [hereinafter HERACLES’ BOW].

<sup>22</sup> Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 485–86 (1994) (“[L]egal scholars have approached storytelling and narrative from the standpoint of theory—critical race theory, critical literary and legal theory, feminist theory, lesbian and gay theory, and ethnographic theory.”) (footnotes omitted). Compare Stephen Paskey, *supra* note 10, at 55–56 (suggesting that the development of narrative theory in the law progressed in three eras: the 1980s focus on outsider stories; the 1990s focus on practical application of storytelling in trial work; and the current move toward applying narrative to pedagogy and practice more broadly), with Edwards, *Stories*, *supra* note 10, at 159–60 (suggesting, instead, that three types of legal narrative scholarship have evolved, each having been applied during all three eras to varying degrees and in varying capacities).

<sup>23</sup> See RICHARD J. DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY, AN INTRODUCTION 36, 39 (3d ed. 2017); Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 899.



Later, in the early- to mid-1990s, the legal narrative movement gained momentum through suggestions that narrative's persuasive value could be wielded more practically to frame and craft various trial and appellate level documents, oral arguments, trial theories, and the like.<sup>24</sup> Specifically, scholars active in the current Applied Legal Storytelling movement have "encourage[d] scholars to use storytelling to enhance their understanding of what skills lawyers practice and how to improve those skills."<sup>25</sup>

Thus, storytelling techniques have become recognized as beneficial, applicable skills for use in the "actual practice of lawyering."<sup>26</sup> Preeminent scholars on the topic, such as Linda Berger, further recognize that "[s]torytelling extends beyond jury trials and fact statements in which the parties and claims may be portrayed as characters in a plot."<sup>27</sup> As such, something deeper than simple use of story is at work in narrative theory. Narrative theory has been proven to implicate issues of neuroscience and cognitive psychology, amplifying its recognition and importance as a persuasive tool.<sup>28</sup>

This recognition has generated an expansion in how legal academics use narrative, extending its application beyond simply including client and outsider stories in legal discourse. Rather, scholars have begun to explore how sophisticated narrative theory impacts a broader set of practical skills and conceptions of ethos.<sup>29</sup> Scholars have argued and proved that narrative theory directly enhances persuasion in a broad set of legal

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<sup>24</sup> See Paskey, *supra* note 10, at 55 (summarizing the vast body of scholarship applying narrative and storytelling techniques to trial practice, particularly).

<sup>25</sup> Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ASS'N LEGAL WRITING DIRECTORS 37, 38 (2010).

<sup>26</sup> Miller, *supra* note 22, at 486.

<sup>27</sup> See Berger, *supra* note 17, at 294.

<sup>28</sup> Paskey, *supra* note 10, at 53.

<sup>29</sup> See, e.g., *id.* at 52–53.

communications<sup>30</sup> including: briefs,<sup>31</sup> fact sections,<sup>32</sup> personal statements,<sup>33</sup> opening<sup>34</sup> and closing arguments,<sup>35</sup> and judicial opinions.<sup>36</sup>

Further, lawyers can apply narrative theory more universally to shape how audiences view legal inquiry itself. Specifically, according to narrative and rhetoric scholar Linda Edwards, narrative theory has three distinct ways of interacting with the law:

(1) [T]he jurisprudential role of narrative as a universal preconstruction, underlying most forms of human thought, including rules of law; (2) the role of narrative in public law talk—what we say and how we reason in briefs and judicial opinions; and (3) the role of narrative in the lawyering task of persuasion.<sup>37</sup>

These methods of narrative interaction with the law have been used across the span of the legal narrative movement, and applied by scholars to subjects as diverse as property law,<sup>38</sup> criminal law,<sup>39</sup> health law,<sup>40</sup> bioethics,<sup>41</sup> immigration,<sup>42</sup> evidence,<sup>43</sup>

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<sup>30</sup> See Grose, *supra* note 25, at 38.

<sup>31</sup> See Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127, 167 (2008).

<sup>32</sup> See, e.g., Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How To Use Fiction Writing Techniques To Write Persuasive Fact Sections*, 32 RUTGERS L.J. 459, 465 (2001).

<sup>33</sup> See, e.g., Stacy Caplow, *Putting the "I" in Wr\*t\*ng: Drafting an A/Effective Personal Statement To Tell a Winning Refugee Story*, 14 LEGAL WRITING 249, 260–61 (2008).

<sup>34</sup> See, e.g., Jim M. Perdue, *The Principles of Storytelling*, in 3 LITIGATING TORT CASES § 37:11 (2017).

<sup>35</sup> See, e.g., 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, 231–33 (2002).

<sup>36</sup> See, e.g., Jeffrey L. Harrison & Sarah E. Wilson, *Advocacy in Literature: Storytelling, Judicial Opinions, and The Rainmaker*, 26 U. MEM. L. REV. 1285, 1285–86 (1996).

<sup>37</sup> Edwards, *Stories*, *supra* note 10, at 159.

<sup>38</sup> See Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 51 (1990).

<sup>39</sup> See generally Michael N. Burt, *The Importance of Storytelling at All Stages of a Capital Case*, 77 UMKC L. REV. 877 (2009).

<sup>40</sup> See Stacey A. Tovino, *Incorporating Literature into a Health Law Curriculum*, 9 MICH. ST. U. J. MED. & L. 213, 233–35 (2005).

<sup>41</sup> See generally Dena S. Davis, *Developments, Tell Me a Story: Using Short Fiction in Teaching Law and Bioethics*, 47 J. LEGAL EDUC. 240 (1997).

<sup>42</sup> See generally Gloria Valencia-Weber & Antoinette Sedillo Lopez, *Stories in Mexico and the United States About the Border: The Rhetoric and the Realities*, 5 INTERCULTURAL HUM. RTS. L. REV. 241 (2010).

civil rights,<sup>44</sup> trusts and estates,<sup>45</sup> legal writing,<sup>46</sup> and oral advocacy.<sup>47</sup> However, corporate law has been specifically recognized as one area where narrative can play only a marginal role due to its lack of relatable human stories.<sup>48</sup> Nonetheless, if legal scholars and practitioners more fully engaged in and embraced the creative, rather than simply the interpretive roles of narrative, they could apply narrative to craft clearer and more persuasive transactional documents.

Recent scholarship on the technical use of narrative tools in transactional drafting has correctly recognized this opportunity.<sup>49</sup> This Article, by focusing on narrative theory's relationship to human thought, and its role in legal persuasion, will suggest a broader, more holistic application of narrative to transactional practice. Recognizing the misplaced limitations previously placed on narrative in corporate law, and exploring the role of the transactional lawyer as advocate, will demonstrate how narrative can apply to enhance persuasion and outcomes in transactional documents.

### B. *The "Marginal Role" of Narrative in Corporate Law*

Scholarship concerning the application of narrative theory to transactional lawyering remains limited despite over thirty years of recognition of the benefit of narrative in the persuasive litigation and appellate contexts.<sup>50</sup> This lack of recognition persists despite the father of modern legal narrative theory, James Boyd White, recognizing that an "agreement between . . . parties" can constitute a narrative as early as 1985.<sup>51</sup>

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<sup>43</sup> See Beryl Blaustone, *Teaching Evidence: Storytelling in the Classroom*, 41 AM. U. L. REV. 453, 454 (1992).

<sup>44</sup> See Linda H. Edwards, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, 2015 MICH. ST. L. REV. 1327, 1329–30.

<sup>45</sup> See Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J.L. & HUMAN. 265, 266–67 (2016); Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355, 360 (2013).

<sup>46</sup> See Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place To Stand*, 16 LEGAL WRITING 3, 3 (2010).

<sup>47</sup> See, e.g., Jennifer Kruse Hanrahan, *Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools*, 2003 BYU EDUC. & L.J. 299, 299.

<sup>48</sup> Kuykendall, *supra* note 9, at 540.

<sup>49</sup> See Chesler & Sneddon, *Narrative Techniques*, *supra* note 8, at 264.

<sup>50</sup> See Rideout, *supra* note 18, at 53.

<sup>51</sup> JAMES BOYD WHITE, *Telling Stories in the Law and in Ordinary Life: The Oresteia and "Noon Wine,"* in HERACLES' BOW *supra* note 21 at 168.

Further, Jerome Bruner recognized that “broken contracts” create a type of stock narrative as early as 2002.<sup>52</sup> These hints at a possibility of narrative playing a role in transactional lawyering have gone largely unheard.

Most recent scholarship on the intersection of narrative with transactional, or more broadly, corporate law, has found little to no link between the two fields. Eminent scholars of contract drafting have also suggested that “drafters should be cautious about using words associated primarily with expository, narrative, or persuasive prose[.]”<sup>53</sup> These limitations persist despite scholars recognizing, as early as 1990, that storytelling can play a helpful role in the transactional-based areas of property law<sup>54</sup> and estate planning.<sup>55</sup>

Before delving deeper into narrative theory and exploring its practical application to transactional practice, it is important to understand how Applied Legal Storytelling<sup>56</sup> and related legal rhetorical movements have, up to present, been inadequately integrated with transactional and corporate practice. Specifically, studying the evolution of thought concerning the application of narrative techniques to transactional practice shows how these techniques can be applied more broadly to the skills and behaviors of transactional and corporate practitioners.

In suggesting that narrative takes a marginal role in broader corporate law, Mae Kuykendall argued that “corporate law is an area of the law that filters out narrative as a source of knowledge, a criterion of relevance, or a standard of justification.”<sup>57</sup> Those who had attempted in the past to apply

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<sup>52</sup> BRUNER, *supra* note 8, at 8 (“Indeed, we refer to events and things and people by expressions that situate them not just in an indifferent world but in a narrative one: ‘heroes’ to whom we give medals for ‘valor,’ ‘broken contracts’ where one party has failed to show ‘good-faith effort,’ and the like.”).

<sup>53</sup> KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING § 1.57, at 8 (4th ed. 2013).

<sup>54</sup> See Rose, *supra* note 38, at 39.

<sup>55</sup> See sources cited *supra* note 45.

<sup>56</sup> The Applied Legal Storytelling movement arose in organized fashion at a 2007 conference of the same name. The movement holds conferences and symposia intended to “examine the use of stories—and of storytelling or narrative elements—in law practice, in law school pedagogy, and within the law generally.” J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC 247, 248 (2015). The lone directly transactional article listed in this 2015 bibliography of scholarship on narrative in the law dealt with estate planning. For the full citation of that article, see Sneddon, *supra* note 45.

<sup>57</sup> Kuykendall, *supra* note 9, at 540.

narrative techniques to corporate law, from judges to academics to popular writers, she noted, had mostly failed.<sup>58</sup> Kuykendall suggested that corporate law, as a body “is not readily reducible to human stories,” and that even drafting lawyers have “no narrative purpose” when drafting deal documents.<sup>59</sup>

Kuykendall remained focused on the traditional use of narrative as a sense of “voice”<sup>60</sup> in determining that corporate law does not lend itself to reduction to a story that is human and relatable. She limited narrative to its use in subjects such as feminism and critical race theory, where it related “outsider” or unheard stories.<sup>61</sup>

What Kuykendall missed was the potential application of more evolved legal narrative theories, which have begun to move away from searching for voices and narratives within preexisting documents, toward a more creative and formative approach. Kuykendall diligently searched for applicable narratives within corporate documents from the top down, looking at the body of corporate law as a preexisting whole. Instead, she might have considered ways to imbue corporate and transactional documents with narrative properties during the initial drafting phase—that is, from the ground up.

In response to Kuykendall, authors have since attempted to imbue corporate law with narratives, or counter-narratives, based on theories of equity,<sup>62</sup> morality,<sup>63</sup> and corporate personhood,<sup>64</sup> among others. Yet, these views miss the fact that the documents creating corporate dealings—contracts themselves—constitute written work that can be substantively infused with narrative from the outset of the handshake deal between two parties, before drafting begins.

Further, these scholars have failed to acknowledge that taking a more ground-up approach can enhance the parties' relationships, the lawyers' effectiveness, the overall persuasion of

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<sup>58</sup> *Id.* at 538.

<sup>59</sup> *Id.* 541, 560.

<sup>60</sup> *Id.* at 547.

<sup>61</sup> *Id.*

<sup>62</sup> See Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 849.

<sup>63</sup> See Thomas W. Joo, *Narrative, Myth, and Morality in Corporate Legal Theory*, 2009 MICH. ST. L. REV. 1091, 1091–92.

<sup>64</sup> See Jeffrey Nesteruk, *Corporate Theory and the Role of Narrative*, 2009 MICH. ST. L. REV. 933, 935.

the documents, and as a result provide a more “complete view” of a transaction.<sup>65</sup> These early corporate narrative scholars, to a certain degree, showed a lack of imagination when failing to recognize how transactional documents and their creators could effectively use narrative in their practice and drafting.

More recently, however, scholars have begun to recognize and value the inherent role of story in particular types of transactional dealings. Specifically, Susan Chesler and Karen Sneddon correctly observe that “[c]onceptualizing [the] transactions [underlying corporate law] as narratives benefits the negotiation, drafting, implementation, interpretation, and, ultimately, enforceability of the transactional document.”<sup>66</sup>

Chesler and Sneddon provide specific examples of how transactional lawyers can bring the client’s story into transactional documents.<sup>67</sup> They suggest various techniques across a range of documents, including the use of: “(1) stock stories, (2) plot and narrative movement, (3) character, (4) point of view, (5) narrative setting, and (6) themes and motifs.”<sup>68</sup>

Specifically, they suggest that using these “techniques in the drafting of transactional documents acknowledges the presence” of a client’s story, and “leverages it[]” to improve outcomes.<sup>69</sup> These techniques bring the human story into the contract from the bottom up, thus countering Kuykendall’s contention that corporate text’s “elusiveness . . . to its putative readers” stands as a “telltale sign[]” of a troubled relationship between narrative and corporate law.<sup>70</sup> The elusiveness is rather the symptom of the underlying lack of narrative skill and knowledge in the transactional drafter’s arsenal.

Chesler and Sneddon astutely recognize potential fears that applying these specific types of narrative techniques within transactional documents may “increase the quantity of information . . . and introduce inaccurate or conflicting information, thus creating ambiguity, promoting litigation, or

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<sup>65</sup> Rideout, *supra* note 18, at 57.

<sup>66</sup> Chesler & Sneddon, *Narrative Techniques*, *supra* note 8, at 263.

<sup>67</sup> See generally *id.*

<sup>68</sup> *Id.* at 269.

<sup>69</sup> *Id.* at 268.

<sup>70</sup> See Kuykendall, *supra* note 9, at 556–57.

increasing transaction costs.”<sup>71</sup> They conclude, however, that narrative techniques “spur innovation while remaining grounded within the principles of good drafting.”<sup>72</sup>

More recently, Chesler and Sneddon have studied the application of the particular narrative tool of stock story in transactional practice.<sup>73</sup> A stock story, as defined by Sneddon and Chesler, is a “generic stor[y] conveyed in broad brushstrokes that [is] readily understood by audiences.”<sup>74</sup> By “triggering” a stock story in a reader’s mind, a writer can depend upon a “stock response” by a reader to the particular, culturally-embedded narrative.<sup>75</sup> Sneddon and Chesler invoke the biblical tale of David and Goliath as a typical stock story, triggering sympathy for an underdog who needs to overcome obstacles to secure victory against all odds.<sup>76</sup> The narrative technique of using stock stories, the authors note, has value in creating “patterns and models” for crafting individual transactional documents.<sup>77</sup>

Recognizing the inherent usefulness of narrative theory in transactional practice is an important step toward redefining the transactional drafter’s role to include storytelling as a primary means of achieving client objectives. Transactional lawyers’ behavior as client advocates and the benefits or risks that the adoption of a narrative approach may provide to the deal-making process must be more closely examined.

Lawyers’ actions within the negotiation of complex documents mirror those of advocates in other negotiation settings. However, transactional drafters concern themselves primarily with creating an ongoing relationship between the transacting parties. When viewing the transactional drafter in this nuanced role, it becomes difficult to articulate best practices for achieving these seemingly competing norms.

Further, an inherent gray area exists when balancing the best interests of a client with the consummation of a multiparty transaction. This Article will show that the understanding and promotion of a client’s interests using narrative techniques

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<sup>71</sup> Chesler & Sneddon, *Narrative Techniques*, *supra* note 8, at 267 (footnote omitted).

<sup>72</sup> *Id.* at 295.

<sup>73</sup> See Chesler & Sneddon, *Stock Stories*, *supra* note 8, at 237.

<sup>74</sup> *Id.* at 238.

<sup>75</sup> *See id.*

<sup>76</sup> *Id.* at 252–54.

<sup>77</sup> *See id.* at 239.

grounded in Walter Fisher's concept of "narrative rationality,"<sup>78</sup> in addition to the drafting techniques promoted by Chesler and Sneddon, can enhance outcomes and ethical behaviors by transactional lawyers behaving as advocates throughout a transaction.

### C. *The Transactional Lawyer as Advocate*

Despite traditional misconceptions, transactional lawyers often behave as advocates. To understand how narrative techniques apply to transactional practice, the nuanced role of the transactional lawyer in the context of sophisticated deal making must be explored. When dealing with high-dollar value transactions, each side of a transaction usually retains its own attorneys, whether in-house or outside counsel, to draft, negotiate, and review the terms of deal documents.<sup>79</sup>

Specifically, sophisticated transactional lawyers dealing with opposing parties engage in two primary activities to create the documents outlining their clients' desired deal. First, one side or another drafts the document. Documents are not often drafted from scratch, but rather from a form with significant edits to reflect the transaction at hand. Second, the parties exchange competing versions of these drafts, negotiating the addition, subtraction, and editing of the terms of the original documents as the deal evolves. This process requires frequent engagement with and among the lawyer, client, transacting party, and opposing counsel.

Based on this complex series of interactions, scholars of legal drafting have begun to recognize that transactional attorneys do not merely draft contracts, but also "add value to the deal" from a business perspective by "advanc[ing] the client objectives."<sup>80</sup> Skills used in advancing client objectives include negotiation, analysis, and evaluation of business issues.<sup>81</sup> Scholars have asserted that transactional attorneys should strive to place client expectations as their "foremost" concern.<sup>82</sup> This would inherently

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<sup>78</sup> FISHER, *supra* note 14, at 19.

<sup>79</sup> See Duhl, *supra* note 7, at 112.

<sup>80</sup> STARK, *supra* note 4, § 30.2, at 456–57.

<sup>81</sup> *Id.* §§ 30.2–3; see also, Lori D. Johnson, *The Ethics of Non-Traditional Contract Drafting*, 84 U. CIN. L. REV. 595, 605 (2016).

<sup>82</sup> James P. Nehf, *Writing Contracts in the Client's Interest*, 51 S.C. L. REV. 153, 154 (1999).



suggest that transactional attorneys are seeking benefit for their client, which puts them in the role of advocate. Transactional attorneys must determine how to fill that role both effectively and ethically.

While guidance in this area is increasing,<sup>83</sup> focus on the overall transactional skillset remains somewhat sparse. Specifically, law school instruction in transactional skills often focuses solely on the technical skills of drafting, rather than the surrounding skills of persuasion, document commentary, transactional negotiation, and deal making. Several of the leading textbooks on transactional drafting provide some insights into these ancillary skills,<sup>84</sup> but to date only one textbook specifically targeted to the skills of transactional lawyering has emerged.<sup>85</sup> Thus, deeper discussion of how to effectively perform these skills is merited.

With regard to advocacy specifically, ethics scholars have suggested that the traditional construct of the “zealous advocate” typically identified with the courtroom advocate, fits the transactional attorney less comfortably.<sup>86</sup> Advocacy that is too zealous can, in fact, cause a transactional attorney to act as merely the client’s “instrument” in entering into transactions with fuzzy legalities.<sup>87</sup> Ceding all authority to the client in this manner can potentially lead to fraud,<sup>88</sup> which is one of the few heavily regulated areas of transactional practice under current ethical rules.<sup>89</sup>

Nonetheless, this Article will demonstrate that the application of narrative theory helps a transactional attorney better understand and document a client’s story. This approach

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<sup>83</sup> See AM. BAR ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010, at 78 (Catherine L. Carpenter et al. eds., 2012) (noting that as of 2010, 122 law schools offered some course in the area of contract drafting, up from only thirty-one schools in 1992).

<sup>84</sup> See, e.g., ROSS GUBERMAN & GARY KARL, DEAL STRUCK: THE WORLD’S BEST DRAFTING TIPS 75–80 (2014) (discussing the use of precedents and models in transactional practice); PAYNE, *supra* note 8 (discussing in each simulated transaction client interviewing and counseling skills); STARK, *supra* note 4, §§ 25.1–.6, at 369–77 (discussing related business skills and client counseling).

<sup>85</sup> See RICHARD K. NEUMANN, JR., TRANSACTIONAL LAWYERING SKILLS: CLIENT INTERVIEWING, COUNSELING, AND NEGOTIATION § 1.1 (2013).

<sup>86</sup> Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor’s Touchstone*, 38 FLA. ST. U. L. REV. 251, 281–82 (2011).

<sup>87</sup> *Id.* at 260.

<sup>88</sup> *Id.* at 277–78.

<sup>89</sup> MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2014).

can enhance completeness and truthfulness in transactional documents. As a result, lawyers create more holistic and ethical outcomes. Relying on the narrative paradigm of theorist Walter Fisher, narrative theory can improve a transactional lawyer's approach to lawyering, relationships with clients, overall persuasiveness, and client outcomes.

## II. NARRATIVE RATIONALITY AND ITS BROAD APPLICABILITY

*"[I]f narratives are a primary form through which humans configure ideas and experience, an innate way of human understanding, then it follows that narratives can add something to the more traditionally accepted ways of reasoning about the world . . . ."*<sup>90</sup>

Narrative theory has concrete applicability to legal discourse and enhances legal discourse and communication in myriad ways. This Article focuses on one particular mode of narrative theory and its application to deepen understanding and communication. Specifically, the paradigm of narrative rationality, as proposed by Walter Fisher, provides a helpful model for understanding and creating a deeper relationship between narrative theory and transactional law.

### A. Fisher's Theory of Narrative Rationality

Fisher developed the concept of narrative rationality as a hearkening back to the "ancient conception of logos,"<sup>91</sup> before theories of logic evolved to apply more specifically to pure mathematical and scientific fact finding.<sup>92</sup> This transformation of logic into pure "technical discourse," asserted primarily by Descartes,<sup>93</sup> seemed to Fisher to lack the element of "phronesis," or "practical wisdom," that was subsumed within the definition of "logic" during the time of Plato and Aristotle.<sup>94</sup>

The technical logic of Descartes and his progeny, according to Fisher, lacked recognition of humans as narrative beings, and failed to account for the inherent human awareness of narrative

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<sup>90</sup> Rideout, *supra* note 18, at 63.

<sup>91</sup> FISHER, *supra* note 14, at 6.

<sup>92</sup> *Id.* at 8.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 89.

probability.<sup>95</sup> Humans continually test "whether or not the stories they experience ring true with the stories they know to be true in their lives . . . ."<sup>96</sup> Thus, according to Fisher, understanding narrative is important in configuring knowledge and testing truth.<sup>97</sup> Fisher views any argumentative scheme without a basis in narrative as incomplete.

Based in part on the theories of Chaim Perelman, Fisher asserts a concept of narrative rationality as a tool "for assessing such communicative forms."<sup>98</sup> According to Fisher, narrative rationality "offers systematic principles, procedures, and criteria for assessing" communication.<sup>99</sup> It permits listeners to determine whether to believe in, or act upon, such communication.<sup>100</sup> The paradigm of narrative rationality that Fisher creates acknowledges that not only experts, rather, all humans "possess[] equally the logic of narration" and have the ability to test the coherence and fidelity of communication.<sup>101</sup>

In short, Fisher suggests that communication based on narration allows us to examine a sequence and test cohesion and fidelity. "From this examination, we shall be able to determine the truthfulness of the characterization and decide to believe or not to believe in it" or abide by it.<sup>102</sup> To accomplish this examination, Fisher breaks narrative rationality into a two-part paradigm, consisting of narrative probability and narrative fidelity.<sup>103</sup>

Narrative probability is grounded in the formal, logical construction of the story, and narrative fidelity in its substantive truthfulness.<sup>104</sup> Later scholars such as Christopher Rideout have identified two sub-elements within narrative probability, leading to a commonly accepted three-part paradigm of narrative rationality, consisting of narrative coherence, narrative correspondence, and narrative fidelity.<sup>105</sup> Rideout suggests this

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<sup>95</sup> *Id.* at 16.

<sup>96</sup> *Id.* at 5.

<sup>97</sup> *Id.* at 6.

<sup>98</sup> *Id.* at 25.

<sup>99</sup> *Id.* at 49.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 67-68.

<sup>102</sup> *Id.* at 58.

<sup>103</sup> *Id.* at 75-76.

<sup>104</sup> *Id.*

<sup>105</sup> Rideout, *supra* note 18, at 63-70.

expanded version of the narrative paradigm can be applied to enhance legal documents and arguments, because narrative theory “can add something to the more traditionally accepted ways of reasoning about the [law].”<sup>106</sup>

### B. *Specific Applications of Narrative Rationality’s Elements*

Each element of narrative rationality has been identified as applying to modes of litigation advocacy. This Section explains each mode, and then explore various recognized applications in the litigation context. Understanding how narrative coherence, narrative correspondence, and narrative fidelity have enhanced advocacy in other areas of the law previews how these theories can also apply to transactional practice.

#### 1. Narrative Coherence

The element of narrative coherence functions to test the coherence or completeness of a legal story. Whether the story is complete and coherent, from a formal perspective, “greatly influences” the overall persuasiveness of that story.<sup>107</sup> Rideout supports this contention about the first formal element of narrative with social science research suggesting that “the more coherent the story a party presents at trial, the more likely it is that jurors will accept that party’s story independent of the informational content of the evidence.”<sup>108</sup>

Litigators have used the theory of narrative coherence to construct stories, in pleadings and at trial, in a more complete fashion than might be permitted by the existing fragmentary evidence.<sup>109</sup> Legal stories must remain consistent with the “credible evidence that is being presented,” but Rideout’s work suggests that crafting a more cohesive story around such evidence provides persuasive value.<sup>110</sup>

Additionally, with regard to negotiation between parties, it has been recognized that the use of narrative to integrate law and fact into a complete or cohesive view of a legal problem

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<sup>106</sup> *Id.* at 63.

<sup>107</sup> *Id.* at 66.

<sup>108</sup> *Id.* (quoting Richard Lempert, Comment, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 562 (1991)).

<sup>109</sup> *Id.* at 64.

<sup>110</sup> *Id.* at 65.

makes an agreement between parties "more likely."<sup>111</sup> Litigators and scholars of civil procedure have recognized and applied narrative theories to settlement negotiations between parties, recognizing the inherent value of clients telling their stories.<sup>112</sup>

Negotiation scholars suggest meaningfully integrating clients' stories into the pretrial litigation process as a method of combining law and fact to make negotiations more complete.<sup>113</sup> Providing the "client's coherent narrative" through the exchange of "demand letters . . . notebooks . . . settlement brochures, and . . . sophisticated documentaries" has been suggested as a potentially successful strategy in encouraging parties to come to an agreement in the settlement context.<sup>114</sup> Interestingly, like the negotiation of transactional documents, much settlement negotiation goes on behind closed doors, enhancing the need for deeper guidance and additional scholarship regarding applicable techniques for enhancing outcomes and ethics in practice.<sup>115</sup>

Further, legal writing scholars suggest that the utility of narrative in the law goes beyond the basic concept of presenting information in the form of a story to enhance parties' understanding or agreement.<sup>116</sup> It has been argued that legal rules themselves have a narrative quality.<sup>117</sup> Rules require a necessary "logical coherence" to function as the core of a common law system.<sup>118</sup> Specifically, "the people, things, events, and circumstances referenced by the rule have a logical relationship to each other."<sup>119</sup>

Without this logical relationship, grounded in the formal properties of narrative coherence, rules would be nothing more than "playthings" or "after-the-fact justification[s]" for rulings.<sup>120</sup> Thus, it would seem that Fisher's narrative coherence, the most formal aspect of his narrative paradigm, underpins rules of

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<sup>111</sup> Carrie Sperling, *Priming Legal Negotiations Through Written Demands*, 60 CATH. U. L. REV. 107, 125 (2010).

<sup>112</sup> *Id.* at 125-26.

<sup>113</sup> *Id.* at 128 (citing Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 2002-03 (2004)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 128-29.

<sup>116</sup> Paskey, *supra* note 10, at 52.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 59.

<sup>119</sup> *Id.* at 61.

<sup>120</sup> *Id.* at 59 (quoting KARL LLEWELLYN, *THE BRAMBLE BUSH* 5 (3d ed. 1960)).

public and private law. Rules must possess consistency and understandability in order to be obeyed, interpreted, and persuasive. As such, “the roots of storytelling run deeper” than searching for voice in legal conflict, “and are grounded in the very nature of the law itself.”<sup>121</sup>

## 2. Narrative Correspondence

The second formal aspect of Fisher’s narrative paradigm is narrative correspondence.<sup>122</sup> This element has been described by scholars as relating to the relationship of what a “judge or jury knows about what typically happens in the world” and whether the case presented aligns with that knowledge, known as internal correspondence.<sup>123</sup> Narrative correspondence is also measured by a listener comparing the narrative presented to “a store of background knowledge” such as “a set of stock stories,” known as external correspondence.<sup>124</sup>

Specifically, when a provided legal narrative corresponds with a listener’s existing knowledge, it enhances the structural plausibility and inherent persuasive value of a legal story or document.<sup>125</sup> As such, the “the advocate’s task” in a litigation setting, “is to successfully match the trial story to the appropriate stock story.”<sup>126</sup> This alignment has been harnessed by litigation advocates to craft various types of documents and trial strategies, and could potentially be used by transactional drafters to align documents with established interpretations to enhance persuasion.

The application of narrative correspondence in litigation writing becomes most obvious when dealing with fact documents. Scholars of legal advocacy, particularly Mary Beth Beazley, have

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<sup>121</sup> *Id.* at 53.

<sup>122</sup> Rideout, *supra* note 18, at 66 (identifying narrative correspondence as a second prong of the formal element of Fisher’s paradigm, along with narrative coherence).

<sup>123</sup> *Id.* (discussing BERNARD JACKSON, LAW, FACT AND NARRATIVE COHERENCE 37–60 (1988)).

<sup>124</sup> *Id.* at 67.

<sup>125</sup> *Id.* at 68.

<sup>126</sup> *Id.* at 69.

adopted the narrative correspondence theory of relying on stock stories in the context of preparing persuasive statements of the case in trial and appellate briefs.<sup>127</sup>

Beazley suggests that framing a case statement in the vein of a stock story—such as a trip in celebration of an important life event, rather than a needlessly frivolous vacation—will more likely permit the reader or listener to sympathize with a traveler who suffered an unpleasant experience during that trip.<sup>128</sup> Thus, harnessing the existing positive correspondence between the suggested stock story and the speaker's injury enhances the persuasiveness and believability of the narrative.

Beyond fact statements alone, scholars have suggested that the stock story and the lure of narrative correspondence can be put to work throughout appellate briefs and even motion memoranda.<sup>129</sup> Specifically, narrative correspondence has been identified as an important element of effective brief and motion writing.<sup>130</sup> The innate effects of stock story on “an individual's perceptions and reasoning processes . . . are not easily overcome,” and therefore, should be used to add persuasion to the legal analysis of briefs and motion memoranda, beyond the story of the facts section.<sup>131</sup>

Specifically, “[N]arratives not only allow individuals to predict what will happen in a particular situation, but what they will need to do in response to the circumstances.”<sup>132</sup> Narratives, and their relationship to existing forms of stock story in an audience's mind, can particularly assist in the understanding of “abstract principles.”<sup>133</sup> Most importantly, the use of noncorresponding narrative in writing to a particular audience, that is, a judge, will damage the lawyer's credibility, and therefore her effectiveness in persuading that party to act or rule in a certain way.<sup>134</sup> It follows that the use of a narrative

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<sup>127</sup> See MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 203–09 (4th ed. 2014).

<sup>128</sup> *Id.* at 206.

<sup>129</sup> See generally, 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 (2009).

<sup>130</sup> *Id.* at 268.

<sup>131</sup> *Id.* at 257–58.

<sup>132</sup> *Id.* at 262.

<sup>133</sup> *Id.* at 261.

<sup>134</sup> *Id.* at 264.

corresponding to an audience's expectations enhances credibility and persuasion, as supported in Fisher's discussion of plausibility.<sup>135</sup>

Beyond legal documents themselves, others argue that governing legal rules are also grounded in stock story and therefore rely upon correspondence with existing understandings of well-known narratives.<sup>136</sup> As such, the act of legal reasoning itself is an exercise in comparing a given set of facts to the stock story set forth in a given legal rule.<sup>137</sup> Thus, the underpinnings of all written advocacy in litigation—rules themselves—gain persuasion through the theory of narrative correspondence.

### 3. Narrative Fidelity

Finally, and perhaps most importantly, Fisher's substantive property of narrative fidelity enhances the normative persuasiveness of legal argument and documents.<sup>138</sup> Rideout acknowledges that competing legal stories can be equally persuasive under the two previously discussed formal elements of narrative: coherence and correspondence. However, Rideout agrees with Fisher's assertion that applying the theory of narrative fidelity can help a listener compare two competing narratives by determining substantively, rather than formally, which one of them "ring[s] true with the stories they know to be true in their lives."<sup>139</sup>

An author who embraces narrative fidelity provides an additional layer of persuasion, one that gives a more complete view of a document or argument, based on its truthfulness to a broader "social reality."<sup>140</sup> Rideout recognizes that audience must be considered when employing this theory.<sup>141</sup> Because of its substantive focus, "the validity of an argument" under a theory of narrative fidelity "would be determined, in part, by the judgment of the audience to whom the argument was addressed."<sup>142</sup>

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<sup>135</sup> Rideout, *supra* note 18, at 68.

<sup>136</sup> Paskey, *supra* note 10, at 52.

<sup>137</sup> *Id.*

<sup>138</sup> Rideout, *supra* note 18, at 69.

<sup>139</sup> *Id.* at 69–70 (quoting FISHER, *supra* note 14, at 64).

<sup>140</sup> *Id.* at 70.

<sup>141</sup> *Id.* at 71.

<sup>142</sup> *Id.* at 71–72. Note that Fisher more closely tailors the idea of the "audience" than other rhetoricians, such as Chaim Perelman, who envisioned the appropriate audience for judging persuasion to be a "universal audience." While Fisher



While the judge or jury is the typical audience that springs to mind when applying Fisher's narrative fidelity to the law, the notion of tailoring arguments and documents to a probable audience can also provide guidance to the transactional drafter in preparing contracts. Legal writing scholars have noted that lawyers "shape their arguments in light of . . . [particular] audiences."<sup>143</sup> In the case of transactional lawyering, the parties bound by the contracts, as well as those who may interpret them, constitute the relevant audience for a transactional document.<sup>144</sup>

Fisher suggests that even a broad, modified audience can be effectively persuaded by employing the theory of narrative fidelity. Each reader of a document looks for a "communal validity," and thus relies upon "shared norms of the community" when interpreting a document.<sup>145</sup> Thus, not only the "immediate audience" but also the "community within which that audience . . . [is] situated" is involved in construing the "self-definition" of the meaning of a text.<sup>146</sup> Therefore, normative values of a language community are in play when a reader measures a document's persuasiveness.<sup>147</sup>

Fisher applied the narrative paradigm to test persuasiveness and effectiveness of communications in the realms of politics, drama, and literature.<sup>148</sup> Legal scholars have recently expanded the application of his paradigm to various modes of litigation advocacy. For example, advocacy scholar Beazley suggests that when reading a prepared case statement, readers often "leap[] to conclusions, and, at times, leav[e] the text entirely."<sup>149</sup> In doing so, readers bring embedded conceptions of "human or institutional behavior" to bear on their understanding of the persuasiveness of a text.<sup>150</sup>

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acknowledges Perelman's universal audience as an "ideal," he evinces a belief in a more "particular audience" which is "historically situated," and "evident in the world." FISHER, *supra* note 14, at 136.

<sup>143</sup> Bruce Ching, *Argument, Analogy, and Audience: Using Persuasive Comparisons While Avoiding Unintended Effects*, 7 J. ASS'N LEGAL WRITING DIRECTORS 311, 311 (2010).

<sup>144</sup> REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* § 3.2, at 26-27 (2d ed. 1965).

<sup>145</sup> Rideout, *supra* note 18, at 74.

<sup>146</sup> *Id.* at 77.

<sup>147</sup> *See id.* at 86.

<sup>148</sup> FISHER, *supra* note 14, at 143.

<sup>149</sup> BEAZLEY, *supra* note 127, at 203.

<sup>150</sup> *Id.* at 205.

This “leaping away” from the provided text, and reliance upon social conceptions to interpret and test the truth of a provided text, comports with Fisher’s suggestion that readers will bring their own social realities to bear on the text presented, in order to test its fidelity to what they “know to be true in their lives.”<sup>151</sup> If this fidelity can be established, a document becomes more effective and more persuasive.

With regard to appellate brief writing, experts recognize that the power of a narrative rests largely on its “emotional appeal.”<sup>152</sup> This substantive, rather than formal, concept of emotion can be harnessed in brief writing by a lawyer, recognizing that “[p]eople like to hear about what other people are doing, or what has happened to them.”<sup>153</sup> Thus, a lawyer placing the client’s narrative into the audience’s social reality provides the benefit of predicting how different types of audiences would respond to the narrative.

A lawyer does not often know the specific judges or clerks who will evaluate a particular brief. Therefore, recognizing the importance of the modified universal audience as proposed by Fisher can be a particularly helpful approach in using narrative to craft a brief. When a lawyer recognizes the modified audience for the document, they can better draw that audience into the narrative by appealing to social realities. Transactional lawyers, too, must engage in this recognition of audience in order to harness the persuasive power of narrative fidelity.

Recognizing the substantive desires of the intended audience can assist a transactional lawyer in crafting a mutually beneficial, enforceable, client-friendly document. By considering the intended audience, and using a narrative that the audience will view positively, a transactional lawyer can better situate her client within the transaction. As discussed in Part III, fidelity to the social understanding of the audience for a transactional document is accomplished by applying Fisher’s narrative paradigm to the transaction from initial negotiations to closing.

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<sup>151</sup> See FISHER, *supra* note 14, at 64.

<sup>152</sup> Chestek, *supra* note 31, at 130–31.

<sup>153</sup> *Id.* at 130.

### III. APPLICATION OF NARRATIVE RATIONALITY TO IMPROVE TRANSACTIONAL OUTCOMES

*"[I]f the story you are telling is one that already is embedded in tradition and culture, you need not fill in all the details; you can simply name the characters, and the plot will spring to life in the listener's mind."<sup>154</sup>*

Theories of narrative rationality can apply to transactional practice in much the same way as in traditional litigation practice. Having examined the prevalence of narrative in litigation practice, the applicability to transactional practice becomes clear. Specifically, if transactional lawyers understand and apply narrative rationality, they can provide a more complete view of a client's legal problem and assist in identifying potential means for satisfying client and opposing counsel demands throughout the course of crafting a deal.

This is not to say that the techniques of narrative are completely lacking in current transactional practice, more so that they are not consistently and effectively recognized or harnessed by many transactional practitioners. Transactional lawyers practicing as outside counsel struggle with harnessing a client's story in the course of their demanding, multiclient practice. As evidenced by "Michael's" story at the outset of this Article, in-house attorneys in particular are becoming more open to the idea of crafting agreements and drafting deal documents such that they comport with their client's corporate "story."

According to Michael, it has become clear over the course of his time with MicroChips that a corporate culture focused on the narrative of the enterprise can assist lawyers in effectively executing complex deals to their client's benefit. The previously discussed "walk-through" of the company's workspace before documenting and negotiating a deal frames the entire transaction in terms of a story about MicroChips' success. This framing inherently creates a sense of narrative correspondence, which Michael and the legal team can draw upon as they negotiate and draft documents to complete deals with these transacting parties and their counsel.

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<sup>154</sup> Berger, *supra* note 17, at 278.

Further, the walk-through of the workspace helps to frame the transaction in terms of MicroChips' goals, and thus inherently builds a desire for narrative coherence. That is, according to Fisher, the opposing party would begin to feel as though any "complete" transaction with MicroChips would need to comport with the narrative that has been presented. This focus on MicroChips' "enterprise" also helps add the social and normative components that support the development of narrative fidelity. One could presume that even the opposing transacting party, once embedded in this narrative, would desire that the transaction "ring true" to the social and cultural setting developed through the tour and discussions.

That said, not all in-house lawyers have the level of understanding of their particular client or business unit required to easily apply narrative theory. Most sophisticated outside counsel likely have even more tenuous relationships with their clients and are additionally burdened by handling numerous transactions at one time under unrelenting deadlines. The remainder of this Part provides practical and attainable strategies for attorneys to bring Fisher's narrative theories into their transactional practice, thereby improving the effectiveness, persuasiveness, and accuracy of the documents they produce for their clients. The final Section of this Part identifies and discusses potential ethical issues and pitfalls associated with this method.

#### *A. Narrative Coherence in Transactional Practice*

Inherently, introducing opposing counsel to the "story of the enterprise" before beginning to document a transaction builds a desire for narrative coherence. That is, according to Fisher's paradigm, the opposing party will begin to feel as though any "complete" transaction with the company would need to comport with the narrative that has previously been presented. To do otherwise would seem jarring and incomplete.

As contracts create the private rules of law pursuant to which parties transact, and legal rules themselves have been identified as narratives, it follows that contracts themselves have narrative qualities. Thus, contracts require narrative coherence, or centering around a complete story. It becomes important then for a transactional attorney to meet with his client and discuss story and goals prior to drafting. This would permit narrative

information to form the basis of any drafting, discussion, or negotiation of deal documents. In promoting this story, the lawyer inherently relies upon opposing counsel's innate desire for a coherent story that comports with presented narratives. In this way, narrative coherence in drafting creates mutual benefit.

The transactional lawyer must understand their client's story at all phases of the dealmaking process, particularly when engaging in document negotiation. Transactional lawyers typically negotiate changes to documents through providing written or verbal comments on various drafts.<sup>155</sup> If transactional practitioners understand their clients' story, and frame comments in ways that build on the coherence or completeness of that story, it would follow that opposing counsel would be more likely to accept proposed changes to documents. Opposing counsel and opposing parties, according to Fisher's theories, would have an innate desire for the documents to comport with the story being advanced.

This suggestion to weave the client's story throughout document negotiation is supported by recent examinations of settlement negotiation. These studies suggest that providing outside information to help integrate facts with pure law during the negotiation process can better lead parties to agreement. This type of integration can only be achieved in the transactional context by understanding and presenting the story of a client's enterprise to all transacting parties.

In the case of MicroChips, the walk-through of the company space at the outset of negotiations, and the discussion of the company's original story and ethos provide these additional facts, making the information surrounding the documents more complete. Framing the negotiation of any comments to the documents in terms of this existing story, therefore, becomes a more persuasive means of successfully suggesting changes to documents in favor of a client.

Specifically, use of a tone that builds accord can assist opposing counsel in viewing comments as necessary to the coherence of the documents, and therefore advance narrative coherence. According to Fisher, the way comments are presented, that is, the particular symbols and structures chosen

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<sup>155</sup> See STARK, *supra* note 4, § 28.7.1, at 429.

to provide them, will have a significant bearing on audience judgment about the coherence of the comments with the overall "story" of the transaction.<sup>156</sup>

In thinking of the audience as opposing counsel, document comments should be framed in a positive and story-advancing way to persuade opposing counsel that any suggested changes to the documents are important to the completeness of the deal itself. Michael's practice at MicroChips has borne out the effectiveness of this theory, in his view.

At MicroChips, Michael has been able to frame discussions of "pros and cons" of the documents instead as "pros and considerations."<sup>157</sup> In doing so, he believes that he has received less pushback in negotiating the terms. The idea that comments comprise a cohesive part of a larger story assists in negotiating client-favorable outcomes. Thus, when revising and commenting on documents, transactional lawyers should think about moving the story forward and completing a narratively coherent deal.

#### *B. Narrative Correspondence in Transactional Practice*

Next, in considering narrative correspondence in transactional practice, one must consider both internal and external correspondence. According to Rideout, both types of narrative correspondence are important to advance persuasion,<sup>158</sup> and each should be present in transactional documents and practice. Transactional practitioners can use a variety of tools to enhance both types of correspondence throughout deal documents.

With regard to external correspondence, scholars Sneddon and Chesler have argued that stock stories inherently exist in transactional form documents.<sup>159</sup> By recognizing that transactional documents such as wills, trusts, employment agreements, and premarital agreements contain stock characters, plots, and situations, Chesler and Sneddon demonstrate that narrative theory is directly applicable to transactional practice.<sup>160</sup> Specifically, Chesler and Sneddon argue that recognition of the inherent stock stories within

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<sup>156</sup> See FISHER, *supra* note 14, at 58, 68.

<sup>157</sup> See *supra* note 2 and accompanying text.

<sup>158</sup> Rideout, *supra* note 18, at 66.

<sup>159</sup> See Chesler & Sneddon, *Stock Stories*, *supra* note 8, at 237, 245.

<sup>160</sup> See *id.* at 243-62.

transactional form documents, which transactional lawyers often use as expedient bases when crafting a contract,<sup>161</sup> can assist in forming more complete, accurate, and confidence-promoting documents.<sup>162</sup>

Evaluating whether the stock stories embedded in existing forms help or harm a client is one example of how recognition of the importance of Fisher's narrative correspondence can shape a transactional lawyer's practice. Considering whether a particular form corresponds with the client's preexisting story can assist a transactional lawyer in determining whether to use a form document and how to edit it to comport with client goals. If a transactional practitioner has a strong understanding of the client's corporate story, it follows that she will be better equipped to choose and edit a form with corresponding, beneficial, embedded stock stories.

To support and enhance narrative correspondence, drafters must attempt to frame their client in the role of protagonist. Returning to the previously discussed stock story of David and Goliath, the stock response favoring the underdog against the giant showcases the external reference points that might arise for parties and judges later interpreting a contract between a large corporate party and an individual or small company.<sup>163</sup> To frame the client persuasively, drafters can wield the power of the stock story, but also remain cognizant that stock stories often have plausible counter-stories and invoke these when necessary.<sup>164</sup>

Returning to Michael at MicroChips, he understands his client as the innovative upstart.<sup>165</sup> It follows that he should be cautious of any form documents that would place MicroChips in the role of "Goliath" in relation to a smaller company's underdog role. Keeping the story of the client consistent with stock stories embedded in existing transactional forms is a concrete skill

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<sup>161</sup> *Id.* at 242-45.

<sup>162</sup> *Id.* at 268-69.

<sup>163</sup> *Id.* at 252 ("When one hears the phrase 'David and Goliath,' what immediately comes to mind is an unfair match, or, in the terms of contract transactions, unequal bargaining power between the parties.").

<sup>164</sup> *Id.* at 253-54 (cautioning that David can be viewed as a "skilled shepherd," and Goliath as a "sitting duck," thereby acknowledging the "potential problem[s]" with embedded stock stories).

<sup>165</sup> *See supra* note 2.

transactional drafters can use to enhance external correspondence, and thus the overall narrative fidelity and persuasiveness of a transactional document.

Considering internal correspondence, specific drafting practices become important. Chesler and Sneddon have suggested that the use of party names within documents can enhance clarity and enforceability.<sup>166</sup> Specifically, using actual party names “rather than generic characterizations like ‘buyer’ and ‘seller,’ . . . reinforce[s] the individualized, personalized nature of the transactional document.”<sup>167</sup> Doing so promotes internal correspondence, because the parties begin to view the personalized document as more directly aligning with what they intend to have happen in the world.

Additionally, transactional documents require someone to be benefitted and someone to be burdened by certain terms.<sup>168</sup> If obligations are clearly allocated to named parties and drafted using short, well-organized, active-voice sentences,<sup>169</sup> the parties are more likely to enforce and perform those terms. Specifically allocating obligations to named parties in actively constructed sentences increases the overall alignment of the document with readers’ expectations. This enhancement in readability, when considering Fisher’s modified universal audience,<sup>170</sup> would extend to the acting parties and potentially to external enforcers, such as arbitrators or courts, leading to more predictable outcomes.

In certain cases, where these narrative drafting suggestions are not followed, client outcomes can face substantial risk. A recent case found unenforceable an attorney fees clause in a promissory note written in the passive voice without specifying who was responsible to pay the fees.<sup>171</sup> This is an outcome all drafters would seek to avoid and which likely could have been avoided had the drafters used party names throughout the

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<sup>166</sup> Chesler & Sneddon, *Narrative Techniques*, *supra* note 8, at 282.

<sup>167</sup> *Id.*

<sup>168</sup> See STARK, *supra* note 4, § 3.4, at 26 (describing the way covenants in contract create a burden to a performing party and a related benefit to the receiving party by explaining that “[a] contract right flows from another party’s duty to perform; that is, it flows from a covenant. The person to whom the performance is owed has a right to that performance”).

<sup>169</sup> See *id.* § 20.3.1, at 288 (demonstrating that drafting by keeping the “core” of the sentence, consisting of the subject, verb, and object, close together, and near the beginning of a short sentence, enhances readability, particularly of obligations).

<sup>170</sup> FISHER, *supra* note 14, at 136.

<sup>171</sup> *In re Simoukdalay*, 557 B.R. 597, 601–02 (Bankr. E.D. Tenn. 2016).



document. Ultimately, use of stock story, first-person drafting, active voice, and party names enhances narrative correspondence.

### C. *Narrative Fidelity in Transactional Practice*

MicroChips' focus on the "story of their enterprise" helps to add the social and normative components that support the development of Fisher's element of narrative fidelity. One can presume that even an opposing transacting party, once embedded in an established client narrative, would desire for the transaction to "ring true"<sup>172</sup> to the social and cultural setting developed through the initial framing of the transaction. For example, the workplace tour and discussions engaged in by MicroChips begin to set this normative framework.

Transactional lawyers should look to enhance narrative fidelity by attempting to frame the documents and negotiations in terms of the broader corporate stories of their clients. Specifically, drafters can and should utilize the initial recitals of a contract to frame documents in a client-friendly narrative context.<sup>173</sup> Recitals are one of the few areas in a contract available to provide important background regarding the goals of the agreement and offer an easy opportunity to enhance narrative fidelity.

The use of narrative in recitals also implicates Fisher's notion of audience. Transactional documents have many audiences, from the parties who perform, to the judges who later interpret. Therefore, narrative fidelity, particularly in the background of the contract, can assure that a wide variety of audience members feel as though the document "rings true" to the expectations established. Harnessing the value of recitals becomes particularly important when acknowledging that courts use recitals to assess parties' intent.<sup>174</sup>

Scholars have noted that "narratives persuade by providing vicarious experiences for their audiences."<sup>175</sup> As such, providing "descriptive information about the parties" in recitals can give a more "three-dimensional, human" feel to transactional

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<sup>172</sup> FISHER, *supra* note 14, at 64.

<sup>173</sup> See generally Pollman, *supra* note 8.

<sup>174</sup> See, e.g., Wood v. Lady Duff-Gordon, 118 N.E. 214, 214-15; 222 N.Y. 88, 90-92 (N.Y. 1917).

<sup>175</sup> Ching, *supra* note 143, at 311.

documents.<sup>176</sup> The more narratively compelling the experience in the recitals, the more likely that the audience feels a positive normative connection to the document. Once this fidelity is established, according to Fisher's theory, parties would be more likely to perform, and judges more likely to appropriately enforce.

Michael, MicroChips' attorney, noted that the story-building approach to entering into a transaction, "shapes the deal, and [opposing counsel] read the [documents] differently." Thus, the focus on narrative fidelity can lead opposing counsel to look at existing terms in a new and potentially more client-favorable way. Further, Michael senses that the more he and his team "bring the opposing party and their counsel into the MicroChips' story," the easier it becomes to understand and recognize the concerns both sides bring to the table. This broader understanding enhances the substantive outcome of the transaction and has a positive effect from a normative perspective, which is the goal of narrative fidelity.<sup>177</sup>

#### D. Caveats and Pitfalls

There are, of course, risks associated with adopting a new and untested approach to defining the role of the transactional attorney. In using a narrative approach to serve as a client advocate while working toward a mutually beneficial transaction, the practitioner risks slipping into the role of zealous advocate. Overzealousness has been recognized by ethics scholars as an inappropriate stretch into advocacy for transactional lawyers.<sup>178</sup> The use of narrative in transactional documents also risks misleading opposing parties and courts through manipulative use of storytelling skills.<sup>179</sup> Both of these potential risks can be addressed and avoided, while still employing narrative techniques in transactional drafting.

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<sup>176</sup> Chesler & Sneddon, *Narrative Techniques*, *supra* note 8, at 281.

<sup>177</sup> *See supra* note 2.

<sup>178</sup> *See Schaefer*, *supra* note 86, at 258.

<sup>179</sup> It is important to note that this Article addresses the practices and norms of sophisticated transacting parties represented by counsel. Any and all potential ethical risks associated with these techniques of narrative and persuasion would be dramatically heightened in the context of consumer or adhesion contracts. Therefore, this Article strives to address high-level, sophisticated deal making and cautions against the use of narrative in contracts where parties are unsophisticated or unrepresented.

Ethics scholars have recognized that many of the checks placed on the advocacy of attorneys under the ABA Model Rules of Professional Conduct, are inherent in “the watching” function of the courts.<sup>180</sup> Yet, “no one is watching” when a transactional attorney is at work.<sup>181</sup> Therefore, transactional attorneys must proceed cautiously, particularly when a client proposes conduct that is “arguably or technically legal” but on the boundaries of clearly legal conduct.<sup>182</sup> In these cases, transactional attorneys should avoid acting as “instrument[s]” of such questionable behavior, and consider additional factors beyond only their client’s best interest.<sup>183</sup>

Incorporating a narrative approach to transactional lawyering, while encouraging and enhancing client advocacy in the transactional context, can help avoid the risks of overzealousness. Enhancing the overall normative outcome of the transaction through a story that both parties feel “rings true” to their experience and goals, achieves more of a fiduciary approach, putting client interests first when appropriate, and deferring to other interests when obligated by law or professional duties.<sup>184</sup> As such, a client narrative should not misstate facts, but strive to frame facts in the light of the client’s preferred story, seeking commonality and narrative fidelity with opposing parties as much as possible.

While narrative provides a helpful method for enhancing transactional representations, there has also been some debate about the boundaries of ethical use of narrative in the law.<sup>185</sup> Transactional attorneys should be cognizant and cautious, so as not to use narrative to mislead or otherwise behave beyond the bounds of current ethical obligations. While some in the field argue that existing ethical guidelines are sufficient to provide lawyers guidance on how to ethically use stories in their

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<sup>180</sup> Schaefer, *supra* note 86, at 262.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 259–60.

<sup>183</sup> *Id.* at 260.

<sup>184</sup> *Id.* at 282–88.

<sup>185</sup> See Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ASS’N LEGAL WRITING DIRECTORS 229, 230 (2010).

practice,<sup>186</sup> others suggest that additional training on the use of narrative is required in order to address the “potential for abuse” associated with the use of narrative.<sup>187</sup>

As transactional lawyering itself lacks comprehensive regulation under the ABA Model Rules of Professional Conduct,<sup>188</sup> it would follow that the risks associated with the use of a narrative approach might increase. However, based on Fisher’s theory of narrative fidelity, which supports both parties’ buy-in to a transactional story that “rings true,” the use of narrative in transactional drafting may, in fact, enhance commonality between parties and allay fears concerning misleading narrative.

#### RECOMMENDATIONS AND CONCLUSION

Transactional practitioners can enhance their skills, and their clients’ outcomes, by recognizing their clients’ stories and framing their approach to documenting transactions in terms of those stories. The use of skills drawn from Fisher’s narrative paradigm can thereby enhance transactional outcomes.<sup>189</sup> To advance this theory, the checklist below provides easily adoptable narrative practices for transactional practitioners and students of transactional drafting, which can be employed throughout the deal-making process:

##### During the Pre-Drafting Phase:

- Before engaging with opposing counsel or potential transacting parties, work with your client to obtain an understanding of the overall “story of their enterprise” and any particular goals associated with the pending transaction.

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<sup>186</sup> See Steven J. Johansen, *Was Colonel Sanders a Terrorist?: An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS’N. LEGAL WRITING DIRECTORS 63, 84–86 (2010).

<sup>187</sup> Whalen-Bridge, *supra* note 185, at 235, 237.

<sup>188</sup> See Johnson, *supra* note 81, at 601–02.

<sup>189</sup> A recent recognition by a legal industry expert that attorneys should “get to know [their] clients’ business, and then show [clients] how deep [their] understanding of [the clients’] business really is” reflects a growing understanding that knowledge of client story is essential to effective lawyering. Staci Zaretsky, *The Biglaw Firms That In-House Counsel Recommend Most*, ABOVE THE LAW (Aug. 18, 2017, 10:47 AM), <http://abovethelaw.com/2017/08/the-biglaw-firms-that-in-house-counsel-recommend-most>.

- Make opposing counsel and all transacting parties aware of the “story” of the client and how all parties’ hopes for the particular transaction advance that story.
- Begin to frame other transacting parties as coherent parts of your client’s story and continue throughout initial negotiations.
- Obtain an understanding of the opposing party’s story, interests, and goals, while considering how these can be framed to correspond with your client’s dominant narrative.

During the Drafting Phase:

- Consider your client’s preexisting corporate story when selecting form documents to use, if any. Be sure that embedded stock stories included in such forms are complementary to your client’s desired story and role.
- Utilize recitals more robustly to outline the background, stories, intentions, goals, and relationships of the parties.
- Draft in the active voice, and use party names rather than defined terms or party roles, to bring clients into the story of the document.

During the Negotiation & Comment Phase:

- Frame comments in terms of “pros and considerations” in lieu of pros and cons.
- Be sure comments are framed to advance the story of the client and build accord around the facts, using language such as “my client views this transaction as accomplishing X, and we really cannot achieve that without . . . .”
- Rather than line item edits, consider using a narrative-style memorandum to provide feedback, incorporating language you would like to see included in the final document.<sup>190</sup>

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<sup>190</sup> See STARK, *supra* note 4, § 28.7.2, at 431 (suggesting use of a memorandum to provide document comments, and indicating it should be used as “a negotiating tool, explaining the business and legal reasons for each change”).

During and After the Closing Phase:

- Make best efforts to retain a strong relationship with the client, and stay apprised of changes in corporate structure, culture, or control, so that you can advise the client of the impact these changes might have on the documents as drafted, and the story upon which they are based.
- In negotiating any potential defaults or amendments to the documents post-closing, refer to the negotiation strategies above from the Negotiation & Comment Phase.

Using these techniques of incorporating narrative theory into the client relationship and deal-making process can bring Fisher's narrative theories directly and practically into a transactional lawyer's everyday practice. Doing so can enhance the transactional lawyer's role as a client advocate, while facilitating a mutually beneficial agreement between the parties. Redefining the role of the transactional practitioner to recognize and achieve these dual roles is best accomplished when the transactional lawyer recognizes and embraces the story of the client and the use of narrative theory in shaping transactional documents.