

Lawyers, Clients & Narrative

Lawyers, Clients & Narrative

*A Framework for Law Students
and Practitioners*

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for being so supportive and loving.
—Margaret*

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Introduction

I. Introduction

“Lawyers are storytellers.” “The law is all about storytelling.” “To be a good lawyer, you have to be a good storyteller.” These phrases appear throughout popular, scholarly and academic literature about our profession, so much so that students and new lawyers might well feel that although they have done well in law school and passed the bar, they might not, after all, have what it takes to succeed in their chosen profession. They are lawyers or soon-to-be lawyers, not experts in storytelling!

This book is for those law students and new lawyers who want to develop more fully as effective legal professionals by learning how to hear, tell, construct and deconstruct stories. Built around concrete lawyering skills and values, and using examples of storytelling from popular media, this book is a comprehensive examination of how to lawyer using narrative.

This is the first legal education text that systematically addresses lawyering and narrative across the broad array of lawyers’ skills and values specifically for law students in experiential-based courses. Each chapter is built around at least one such skill or value, providing examples of storytelling from the media, and specific exercises to teach lawyering through narrative. One tool we will use from popular culture to explore story construction, narrative, and storytelling techniques is Season One of the podcast *Serial*, which is described as “one story told week by week.” Through twelve installments, the podcast explores the alibi of Adnan Syed, a high school kid convicted of murdering his ex-girlfriend Hae Min Lin on an afternoon in 1999. We recommend you listen to the *Serial* podcast as you work on your narrative and storytelling through this book. All episodes are available for free at serialpodcast.org.

By the end of this book, we hope you will understand how the full range of lawyering fits with narrative and storytelling. After working through this book, chapter by chapter, you will be able to identify narrative components and the choices to be made in constructing stories. And you will learn to implement those choices when you conduct interviews; engage in legal counseling, negotiation, fact investigation and planning; develop case and project theories; and practice oral and written advocacy. In addition, you will be able to use narrative theory to engage in critical reflection and professional development, to explore questions of justice and multi-cultural competency, and to practice creative and effective problem-solving. We hope, in short, that you will feel that you do indeed have what it takes to succeed in your chosen profession!

II. Lawyering Practice and Narrative

Lawyers perform a range of activities that the American Bar Association and legal education categorize as “skills and values.”¹ Lawyering skills include activities such as: client, witness and stakeholder interviewing; legal counseling; legal research and analysis; fact investigation, development and analysis; negotiation and other alternative dispute resolution methods; oral and written advocacy; advising entities, groups or individuals regarding various kinds of legal compliance; legislative advocacy; community organizing; drafting of pleadings, motions, contracts and other non-litigation legal documents; engaging in discovery and other pre-trial activities; planning for and conducting trial skills; and creating business entities.²

To perform these skills successfully, lawyers need to be effective listeners and creative problem-solvers. We need to be able to collaborate effectively, and engage in critical self-reflection and evaluation. We must be open to examining and challenging assumptions we and those we interact with hold. We must be curious, critical thinkers, able to identify and resolve ethical issues professionally. We must be cross-culturally competent, and pursue justice, whatever form that

1. ROBERT MACCRATE, ESQ. AND THE AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 138–141 (1992), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf (hereinafter “MacCrate Report”).

2. ALICIA ALVAREZ AND PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 7–9 (2013).

may take. Most of all, we lawyers need to make intentional choices about how to develop, maintain, and exercise all of these skills and values.³

So what does all of this have to do with narrative and storytelling, and this book? Remember, “Lawyers are storytellers.” “The law is all about storytelling.” “To be a good lawyer, you have to be a good storyteller.” Trials and other kinds of advocacy, and legal counseling and problem-solving are examples of the ways in which narrative and storytelling are embedded in the lawyering skills and values described above.

A. *Trials and Advocacy*

Because good stories depend on an understandable and compelling ordering of facts, they are great tools for legal persuasion and advocacy. Cases go to trial because there are factual disputes, not legal ones. If the dispute is purely legal, the matter would be decided on a motion to dismiss or a motion for summary judgment. Trials, therefore, seek resolution of battling narratives. A judge or jury is asked to decide whose version of the facts—whose rendition and explanation of “what happened”—is the most persuasive and compelling. The facts themselves don’t win the trial—it is the choices the lawyer makes about how to order and use those facts that makes a story compelling enough to persuade the decision maker. Such choices might include which facts to highlight, and which to leave in the background; what character traits to emphasize and deemphasize; which details to use to appeal to the decision maker’s emotions in a way that helps your story; and which to leave out so as to avoid a negative emotional reaction. When we construct a compelling story to achieve the client’s goal then we are able to persuade the decision maker to see the facts the way we want him to see them and to resolve the dispute in a way that favors our clients.

Episode Two of *Serial*, Season One, provides a really good example of dueling factual narratives, and how they might or might not be persuasive to a decision maker. The parties created these narratives from the same broad set of facts (events and people) and applied them to the same criminal law. Yet they are different narratives, and whichever one is believed by the jury will prevail.

As laid out in Episode Ten, at the trial of Adnan Syed, the prosecutor described the defendant as a Pakistani male enraged about his loss of control over his ex-girlfriend, Hae Min Lee, after they had broken up. The prosecu-

3. The MacCrate Report includes a few other skills (communication and law practice management) and values (competent representation; justice, fairness and morality; improve profession; professional development). MACCRATE, *supra* note 1, at 138–141.

tion's narrative played into "masterplots" —stories that already exist in mainstream culture, often built around stereotypes,⁴ that capture an audience's imagination as familiar and compelling narratives. Here, the prosecutor's story was of an immigrant (despite the fact that Adnan was not an immigrant at all) from a non-western country (Pakistan). This narrative played into anti-immigrant fears, including those regarding Pakistanis because of the so-called "War on Terror." The prosecution's narrative also played into the masterplot of domestic violence, as seen in the O. J. Simpson case,⁵ where a male partner is shunned by the female partner, and then uses physical violence to harm or control her.

The defense in the Adnan Syed case, meanwhile, presented a narrative based on a different masterplot—this time the one about a corrupt and/or inept police department. Interestingly, this is the same masterplot that the O. J. Simpson defense team used to great effect in gaining Simpson's acquittal.⁶ Here, the defense claimed the prosecution had the wrong guy, that Adnan Syed was not the murderer,⁷ and suggesting that the police and prosecutor had overlooked clues that could exonerate Adnan. Which of these two narratives won the day? *Serial* leaves the impression that the prosecution successfully convicted Adnan in part because its narrative was more persuasive and effectively presented, and because the defense failed to construct the best narrative it could have. Two narratives, based on the same set of facts, with wildly different results: lawyers' choices about narrative construction matter!

B. Legal Counseling and Problem-Solving

Although most of popular culture focuses on lawyers in litigation, where narrative and storytelling are critically important, a large percentage of all

4. STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION AND PERSUASIVE FACT ANALYSIS* 133–34 (4th ed. 2011) (discussing script schemas, akin to stock stories, that play into the audience's understanding of predefined events, groups, or personality types); ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 121–122 (2002) (discussing masterplots, what they call stock scripts).

5. *People of the State of California v. Orenthall James Simpson*, Superior Court of the State of California for the County of Los Angeles, Case No. BA097211 (1995). Trial transcripts can be found at <http://edition.cnn.com/US/OJ/trial/>.

6. <http://edition.cnn.com/US/OJ/trial/>.

7. The defense did not identify who the murderer was. Of course, legally the defense does not have the burden of proof in a criminal trial and only needs to show there is reasonable doubt that the prosecution's case is correct.

lawyers engage in lots of other forms of lawyering.⁸ For one thing, most cases do not in fact go to trial. In criminal cases, 97% of federal cases and 94% of state cases are resolved without a trial.⁹ It is estimated that 80–92% of all civil cases settle.¹⁰ In addition, a large number of all lawyers perform transactional work as well as or instead of litigation work.¹¹ And narrative and stories can help with all of these.

For instance, in legal counseling, lawyers must help a client identify the issue he is facing and his goals in resolving it. Then the lawyer must work with the client to identify legal and non-legal options that could potentially address the issue consistent with the applicable legal framework. The lawyer works with the client to evaluate potential options based on the client's goals by thinking through the legal and non-legal consequences. Finally, the client needs to make a decision.

How can narrative and stories help with this? As we will explore in Chapters One and Two, narratives describe a character's steady state, or status quo, and a problem that disrupts that steady state. The plot of the narrative is propelled by the character's efforts to resolve the problem. By requiring attention to both the qualities of a character's steady state and the characteristics of the problem disrupting that steady state, narrative helps the lawyer focus on the client, the client's problem and the client's hopes for resolution. Through narrative, lawyer and client can clarify that problem and identify potential solutions that are consistent with the client's goals for resolution.¹²

III. Structure of This Book

Chapters One and Two of this book provide a primer on basic narrative theory, including narrative components, and how to construct a narrative. Chapter One provides you with the vocabulary and tools to construct your legal narratives with your client. These elements are malleable by you, as Chapter

8. Ruthe Catolico Ashley, *Creating the Ideal Lawyer*, http://www.americanbar.org/content/newsletter/publications/new_lawyer_home/ideal.html.

9. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals* (March 22, 2012), http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html?_r=0.

10. Jonathan Glater, *Study Finds Settling Better than Going to Trial* (August 7, 2008), <http://www.nytimes.com/2008/08/08/business/08law.html>.

11. Kenneth N. Klee, *Teaching Transactional Law*, 27 CAL. BANKR. J. 295 (2004).

12. Don't worry! Chapter One goes into detail regarding the components of a narrative, including these elements of characters, events, including setting, masterplots, and closure, involving steady state, problem and resolution.

Two discusses, but first you need to know what they are and the purposes they serve. With this knowledge you can then make informed choices about how to construct your narratives to achieve your clients' or other lawyering goals.

Chapters Three and Four focus on general legal skills and values, such as collaboration, cross-cultural competency, critical reflection and professionalism. These chapters will help you integrate narrative into your lawyering to enhance your performance in these areas. In addition, these chapters show how increasing your multicultural competency, for example, will increase your narrative competency and make your lawyering more effective.

The remaining chapters teach you how to use narrative theory and storytelling across a range of specific lawyering skills and values, including interviewing, case and project theory development, fact investigation, legal counseling, negotiation, and oral and written advocacy. All lawyers practice these skills, whether they focus on litigation, transactional practice, legislative advocacy or community organizing.

Compelling narratives should begin with a “well-told promise” that the narrative will be worth the audience’s time.¹³ Season One of *Serial* begins with its storyteller’s explanation that “For the last year, I’ve spent every working day trying to figure out where a high school kid was for an hour after school one day in 1999, or, if you want to get technical about it, and apparently I do, where a high school kid was for twenty-one minutes after school one day in 1999.” These opening lines compel us to keep listening—over the course of twelve episodes—to learn everything we can about Adnan Syed and those twenty-one minutes. While perhaps not quite as compelling as a missing twenty-one minutes and a teenage homicide, we hope that our promise that this book will teach you how to be better lawyers is well told enough to keep you reading through to the end.

13. Andrew Stanton, *The Clues to a Great Story* (March 2012), http://www.ted.com/playlists/62/how_to_tell_a_story (Stanton is the screenwriter for the successful Pixar movies *Toy Story*, *Finding Nemo* and *Wall-E*).