

Lawyers, Clients & Narrative

Lawyers, Clients & Narrative

A Framework for Law Students and Practitioners

SECOND EDITION

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CAROLINA ACADEMIC PRESS
Durham, North Carolina

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Library of Congress Cataloging-in-Publication Data

Names: Grose, Carolyn, author. | Johnson, Margaret E. (Law teacher), author.

Title: Lawyers, clients & narrative : a framework for law students and practitioners / Carolyn Grose and Margaret E. Johnson.

Description: Second edition. | Durham, North Carolina : Carolina Academic Press, LLC, [2023] | Includes bibliographical references and index.

Identifiers: LCCN 2023020096 | ISBN 9781531024994 (paperback) | ISBN 9781531025007 (ebook)

Subjects: LCSH: Practice of law--United States. | Law--Vocational guidance--United States. | Lawyers--Training of--United States. | Attorney and client--United States.

Classification: LCC KF300 .G76 2023 | DDC 340.023/73--dc23

LC record available at <https://lcn.loc.gov/2023020096>

Carolina Academic Press

700 Kent Street

Durham, NC 27701

(919) 489-7486

www.cap-press.com

Printed in the United States of America

*To Matt, Max and Maya for being so supportive
and loving.—Margaret*

*To my parents, Claudia and Peter Grose, for their enduring
curiosity and encouragement. You live on in every class
I teach and word I write.—Carolyn*

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Acknowledgments

This book has been a labor of love, aided along the way by countless colleagues, mentors, students and friends. Mitchell Hamline School of Law (MHSL) and Dean Anthony Niedwiecki and Vice Dean Jim Hilbert supported Carolyn with summer research fellowships; and Roger Haydock, Ann Juergens and Peter Knapp contributed ideas and experience to chapters throughout the book. University of Baltimore School of Law (UBalt) and Dean Ron Weich supported Margaret with a summer research fellowship and sabbatical leave to write this book. And UBalt's current and former clinical faculty supported and inspired us in our narrative journey, especially Jaime Lee, Leigh Goodmark (U. Md.), Michele Gilman, and Jenn Kim (Cardozo).

In addition, thanks to our readers and editors—Elizabeth Cooper (Fordham), Michele Gilman (UB), Peter Knapp (MHSL), Binny Miller (WCL), Sarah Paoletti (Penn), Laurie Morin (UDC David A. Clarke School of Law) and Shanta Trivedi (UB); research assistants—Kathleen Seifert, Jennifer Mahan, Elizabeth “Addie” Crawford, Eva Cox, and Melissa Murphy; UBalt law librarians—including Bijal Shah, Adeen Postar and Savanna Nolan; and workshop participants at MHSL, UBalt, UDC LLM program and University of Pennsylvania. Thanks also to the Clinical Law Review Writers' Workshop and the AALS Clinical Conference for allowing us to workshop portions of the book two years in a row! And thanks to our patient and

creative students (at UBalt, MHSL, Georgetown, and WCL) who have used narrative and storytelling to represent clients, and taught us more and more about its power as a tool for effective lawyering. Margaret wants to give thanks to Carolyn for this fun and amazing opportunity to collaborate. Carolyn wants to thank Margaret for launching us on this incredible journey—and keeping us on track till the last cite was checked!

Finally, we list below particular people or resources who helped shape different pieces of each chapter. Thanks to all of you for your generosity and wisdom.

Chapter One: We are indebted to those with whom we have taught storytelling and lawyering, from whom we learned so much, and with whom we developed many of the lessons shared here. First and foremost is Ann Shalleck (WCL) with whom we taught early in our teaching careers and whose work in this area is an inspiration. In addition, thanks to Nancy Cook, Diane Weinroth (WCL), Vivian Hamilton (William & Mary), Matt Fraidin (UDC), Leigh Goodmark, Binny Miller, Deborah Epstein (Georgetown), and Rachel Camp (Georgetown).

Chapter Two: We thank Roger Haydock, Ann Juergens, and Peter Knapp for their guidance and materials on self-evaluation in a required course.

Chapter Three: Thanks to Ann Shalleck and Diane Weinroth and the rest of the Women and the Law Clinic crew who provided the foundation for the Evaluation and Reflection exercise at the end of this chapter.

Chapter Four: We are grateful to Michelle Jacobs (Florida) for bringing the importance of cross-cultural competency to the forefront in clinical teaching, Susan Bryant (CUNY) and Jean Koh Peters (Yale) for providing teaching resources for clinicians to help our students grapple with and learn about these important lawyering issues, and Liz Keyes (UBalt) for teaching us about cultural humility and responsiveness. Also, thanks to Deborah Epstein for creating a practical exercise to build students' ability to reflect on their identity and their collaborations and Liz Keyes for her ideas about collaboration. We thank Deborah Epstein, Sophie Sparrow (UNH) and Rachel Camp for their work in collaboration. And finally, we thank Kim Grose Moore (Carolyn's sister) for enlightening us with her research and ideas, especially as to cross-cultural competency and collaboration.

Chapter Five: Thanks to the Clinical Law Review (CLR) for encouraging and publishing clinical pedagogy scholarship. For its 25th Anniversa-

ry, CLR hosted a symposium, and we were able to publish an article that is the basis for this chapter on Critical Lawyering.

Chapter Six: Thanks to Laura Rovner (Denver), Marty Guggenheim (NYU), and Jean Koh Peters, who, along with Margaret, created the *Derri-co* hypothetical for the 2011 AALS Conference on Clinical Education; and to Ann Shalleck who introduced us to the terms “narrative probing” and “narrative listening.”

Chapter Seven: We thank Ann Juergens for the Judge Wapner example. The family of this “son of a tailor” was actually her client!

Chapter Eight: Thanks to Peter Knapp, Ann Juergens and Roger Haydock for their creation, with Carolyn, of the tort simulation we use in this chapter. Thanks to Jaime Lee and Bernice Grant (Penn) and Amy Dillard (UBalt) for their ideas regarding fact investigation and transactional lawyering and criminal lawyering respectively.

Chapter Ten: Thanks to Alison Korn (Duke) for sharing her adaptation of Joy Radice (Tenn) and Paula Schaefer’s (Tenn) presentation at the 2013 Southern Clinical Conference entitled “Integrating Negotiation into the 1L Curriculum.” The Jack Donaghy clips and exercise came from them. The landlord-tenant hypothetical comes from Mitchell Hamline School of Law’s first-year Lawyering course. Thanks to Dean Raths and, before him, Mehmet Konar-Steenberg and Deborah Schmedemann for the excellent material.

Chapter Fourteen: We thank Peter Knapp for introducing us to the *Picket Fences* example and analysis.

Chapter Sixteen: Thanks to Andrew Krouse, formerly of MHSL, for the “IRAC” paragraph example. We thank Elizabeth Cooper and Marcy Karin (UDC) who shared legislative advocacy ideas and materials with us.

Final Notes: Any analysis of others’ creative work is the opinion of Professors Carolyn Grose and Margaret Johnson, and not necessarily those of the authors of the other creative work. Professors Grose and Johnson provide opinions in this text that are the product of their legal and teaching expertise and experience. Also, the authors have chosen, for editorial reasons and without presumptions about gender identity, to use she/her when referring to or describing lawyers or law students; and he/him for all other characters—e.g., clients, judges, witnesses, etc.

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 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 and pervasively addresses lawyering and narrative across the broad array of lawyers’ skills and values. Each chapter is built around one such skill or value, providing examples of storytelling from the media, and specific exercises to teach lawyering through narrative.

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, identify choices in constructing stories, implement those choices in conducting interviews, legal counseling, negotiation, fact investigation

and planning, case and project theory development, and 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 cultural humility and to engage in 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!

I. Lawyering Practice and Narrative

Lawyers engage in 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 other kinds of 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 trials; 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 who are able to identify and resolve ethical issues professionally. We must be culturally humble and pursue justice, whatever form that 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

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) (hereinafter “MacCrate Report”).

2. ALICIA ALVAREZ AND PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 6–12 (2d ed. 2022).

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

So what does all 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 two 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 in 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.

The parties create narratives from the same broad set of facts (events and people) and apply them to the same law. Yet they are different narratives, and whichever one is believed by the judge or jury will lead to the outcome of the trial. Accordingly, constructing narratives is important to achieving our clients’ outcomes.

B. Legal Counseling and Problem-Solving

Although most of popular culture focuses on lawyers as litigators and in litigation, where narrative and storytelling are critically important, a large percentage of lawyers engage in lots of other forms of lawyering. For one

thing, most cases are not resolved by trial. In 2013, only 0.8% of federal civil cases and 3.6% of federal criminal cases were resolved by jury trial; and in 2002 in state courts, 0.6% of civil cases and 1.3% of felony criminal cases held jury trials.⁴ It is estimated that 80–92% of all civil cases settle.⁵ In addition, a large number of all lawyers perform transactional work as well as or instead of litigation work.⁶ 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 what his goals are in resolving it. Then the lawyer must work with the client to identify legal and non-legal options that could potentially address the issue given the applicable legal framework. The lawyer works with the client to evaluate the options based on the client's goals by thinking through the legal and non-legal consequences of all of the potential options. Finally, the client needs to make a decision. How can narrative and stories help with this? Narrative involves identifying a steady state, a normal, for the characters in the story that explains their everyday life and then the plot usually entails a problem that disrupts that steady state propelling the characters to engage in action to resolve the problem. Narrative then centers on the problem disrupting the steady state, just as problem-solving centers on the issue the client hopes to resolve. Through narrative, lawyer and client can clarify what the problem is and identify potential resolutions through identifying the narrative components contextualizing the problem such as the characters, setting, and steady state.⁷

II. Structure of This Book

Part One of this book provides a primer on basic narrative theory, including narrative components, and how to construct a narrative. This Part provides you with the vocabulary and tools to construct your legal narra-

4. Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 122 (2020).

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

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

7. 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.

tives with your client. These elements are malleable by you as Chapter 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 of how to construct your narratives to achieve your client's or other lawyering goals.

Part Two focuses on general legal skills and values, such as collaboration, cultural humility, critical reflection and professionalism. This Part will help you integrate narrative into your lawyering to enhance your performance in these areas. In addition, this part shows how increasing your cultural humility, for example, will increase your narrative competency as well make your lawyering more effective.

Part Three teaches you how to use narrative theory and storytelling across a range of specific lawyering skills and values including interviewing, case theory and project theory development, fact investigation, legal counseling, negotiation, and oral and written advocacy. Just as with the general skills and values, these are ones that all lawyers use 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 in listening.⁸ 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.

8. Andrew Stanton, *The Clues to a Great Story* (March 2012), <https://www.youtube.com/watch?v=KxDwieKpawg> (Stanton is the screenwriter for the successful Pixar movies *Toy Story*, *Finding Nemo* and *Wall-E*).

