

What Transactional Lawyers Can Learn From Novelists

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Transactional lawyers spend their days negotiating deals and then documenting them in lengthy contracts that cover not only all aspects of the transaction, but also every anticipated contingency. Novelists spend their days creating dramatic situations and then committing them to paper in a way that entices readers and keeps them involved in the story.

So, can transactional lawyers learn anything from novelists? Are novels and contracts so different in both purpose and structure that there can be no relevance between how authors write and how lawyers paper up deals?

Before we reject out of hand any connection between writing a novel and writing a contract, let's consider "the purpose" of drafting documents. Of course, there are many reasons to have a written contract. Written contracts memorialize each party's intent, and contracts comply with requirements of state and federal laws. Contracts define events of default and provide enforcement mechanisms. None of these things seem to have anything to do with writing a novel.

The underlying function of a contract, however — and therefore its ultimate purpose — is to be written in such a way that a court will have no difficulty understanding it and rendering a ruling recognizing and vindicating our client's rights. But who ultimately will make the decision on what the contract means? More often than not, no matter how carefully one tries to draft a contract, some degree of ambiguity will be claimed that results in the case being decided by a jury. Jurors, however, do not come to court aware of the intricacies of the transaction or well-versed in the meaning of the technical terms involved. Most jurors have never read any contract, even the ones that have signed to buy a house or car. Today, most Americans read things online, perusing text that is short, punchy, and, occasionally, even grammatically incorrect.

Novelists face a problem similar to the one litigants have in trying to enforce a long contract. How can you get a reader or juror, who knows little or nothing about the book or contract, to focus and spend the time and effort necessary to get to its essence and meaning? While judges can instruct jurors to pay attention and while litigators appearing before juries can eloquently present their client's position with passion, a novelist has neither a judge telling readers to "finish this chapter" nor a trial lawyer weaving a tale into which the contract fits.

Attorneys should make contracts as comprehensible as possible, not just for the benefit of the parties, but, more importantly, for the benefit of jurors who ultimately must determine what the contract means. It is here that transactional lawyers can learn a trick or two from novelists.

Novelists personalize their characters. The names they devise, along with their descriptions of the characters, become indelibly etched in our memory. For example, readers of thrillers and mysteries come to care about and therefore follow the adventures of Arthur Conan Doyle's Sherlock Holmes, John LeCarre's George Smiley, Agatha Christy's Hercule Poirot, Dashiell Hammett's Sam Spade, and Sara Paretsky's V. I. Warshawski. These authors write in such a way that readers have no difficulty remembering the characters and their attributes.

In contrast, despite the ease of search-and-replace word processing software, many transactional lawyers do not personalize the parties to a contract. Rather, document drafters often fall back on impersonal terms, such as "Vendor" and "Purchaser," or "Lessor" and "Lessee," or "Mortgagor" and "Mortgagee." When a contract uses terms that only a lawyer understands, and when jurors often can't remember whether the "Mortgagor" is the one who is borrowing the money or lending it, the lawyer has already created a barrier to a juror's comprehension.

Novelists endeavor to make their characters unique and memorable and avoid using multiple names for them, because doing so would confuse readers. No novelist writes, "Cathy thought she saw Louis Moxley Bernino (hereinafter referred to as 'the antagonist' or 'Louie' or 'Big Moxie' or 'Mad Bernsie') lingering in the shadows, ahead, ready to accost her." Yet, we often find contracts that include a sentence like: "Conglomeration Industries Inc. (hereinafter 'Vendor' or 'Conglomeration' or 'CII') hereby sells, transfers, and delivers unto Chemical-Electro-Bio Engineering Services LP (hereinafter 'Vendee' or 'Engineering' or 'ChemEB'), the following described property, to wit: ____." And, of course, no author of a modern thriller uses obscure phrases like hereinafter, hereby, or to wit — other than to poke fun at lawyers.

Authors of today's best-sellers do not write like William Faulkner or Henry James. They do not compose long, complex sentences that roll into endless paragraphs. Look at any thriller by John Grisham, Brad Meltzer and David Baldacci. Their books consist primarily of short sentences and short paragraphs.

On the other hand, all too many contracts are written as if complexity is valued and as if the use of periods has been rationed. A contract that contains succinct sentences, each with a single thought, is far easier to explain to a juror than to say, "now, let's take a look at this clause on page nineteen, which is right here in the middle of Section 8.2.1(d), which starts on page eighteen and extends onto page twenty."

Good novelists are precise. They spend a lot of time editing their work to excise excess verbiage and hone in on just the right word. No novelist would ever write, "It was either the sound of a gunshot and/or the backfiring of a vehicle, including but not limited to a car, truck, or motorcycle, that caused Linda to awake with fear. And, notwithstanding anything above to the contrary, she was sure she hadn't dreamed it." Many contracts, however, overflow with this kind of formulation.

We can all agree that novels and contracts are written for different purposes and for different audiences. Transactional lawyers, however, can learn from techniques novelists employ so that legal documents will be easier to understand and easier to enforce in court.

Michael Rubin is chairman of the appellate practice team at McGlinchey Stafford and has served as president of the American College of Real Estate Lawyers. His thriller, "The Cottoncrest Curse," published this fall by LSU Press, has been praised by Publishers Weekly as a "gripping debut mystery" and by Chicago's CBA Record as a "page-turning thriller."