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## Putting Your Litigation Story Into Action

In this final part of a four-part series, explore the various ways you and your outside counsel can use your company's litigation story.

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Several years ago, an accomplished mediator told me the following story. He was mediating a complicated case between two rival companies that had been dragging on for years. The defendant faced significant exposure. Although he pleaded with the attorneys on both sides to share their briefs in advance of the mediation, each side stubbornly refused. Undeterred, he figured he could persuade the attorneys to give him permission to share the portions of their brief that best encapsulated their cases. The plaintiff agreed, provided the exchange would be mutual. The defendant refused on the grounds that they were concerned about "showing their hand" to the other side. Suffice it to say, the case did not settle. A year later it went to trial and the jury hit the defendant with an outsized damages award. The defendant's General Counsel later told the mediator that the jury did not find his company's theory of the case credible. In response, the mediator told the GC that had the company taken his advice at mediation, they would have either



discovered the flaws in their story and adapted their case before trial, or settled for much less than what the jury awarded. The key takeaway: it is foolish and irresponsible to save your litigation story for trial.

If you have read the three previous articles in this series you hopefully have an appreciation for the value and necessity of having a credible and persuasive litigation story. This article, the final in this series, explores the various ways you and your outside counsel can use your company's litigation story.

### **Sharing Your Story With Internal Stakeholders**

Once you have a solid litigation story, it should be presented to key internal stakeholders within your organization. The presentation can be part of a larger discussion on litigation and settlement strategy, or it can be conducted as a stand-alone meeting dedicated to the litigation story.

Which internal stakeholders need to be involved in this meeting is dictated by the type and significance of the case as well as

your company's internal procedures for handling litigation. If it is a high-profile or "bet the company" case, then in addition to the usual C-Suite executives, you may want to have a representative from the Company's Board participate. If it is a relatively typical lawsuit, it is best to include the principal decision makers and the managers who will serve as key witnesses as the case develops. As you prepare for this meeting, be mindful of the laws governing the attorney-client and work product privileges, and only include individuals who are covered by the privilege. In addition, you will need to ensure that the materials and communications with those internal stakeholders are kept confidential.

The meeting should cover three essential objectives. First, it is important to "test drive" the litigation story with other people in your organization. This is one of the first opportunities you and your outside counsel have to tell the story to non-lawyers, including individuals who are very familiar with your company and others who have a strong grasp of the facts of the case. After telling your story (and where possible your opponent's story as well), you and your outside counsel will want to ask probing questions from the stakeholders, including for example: (1) Do you believe the story accurately represents the facts?; (2) Does the story make sense?; (3) What parts of the story resonate most with you?; (4) What aspects of the story are the

strongest and weakest for us and for our opponent?; (5) What are our main trial themes?; (6) How can we improve the story?; and (7) Are you comfortable with how the story describes our company, the conflict, and the resolution we are seeking? The answer to these questions will help shape and refine the litigation story and overall strategy going forward.

Second, it is important to have "buy in" from the internal stakeholders. If your internal stakeholders do not support your litigation story you are going to have a very difficult time achieving the desired result. Some of the participants in the meeting will be called upon to testify in the case, either as percipient witnesses or company representatives. Others will help drive key decisions, particularly around litigation strategy and settlement decisions.

Finally, the meeting gives your outside counsel an opportunity to show you how well he/she can tell your company's story. As you critique the story alongside the other stakeholders, you have the opportunity to determine whether your outside counsel "gets" the case and "gets" your organization. If you conclude that your outside counsel is not hitting the mark, then you can make a course correction early in the litigation process.

### **Telling Your Story in Written Discovery**

Usually the defendant's first opportunity to formally present

the litigation story occurs when responding to written discovery, particularly interrogatories. Not every interrogatory response requires a full retelling of your story, but there can be strategic reasons to tell parts of the story when responding to discovery. Similarly, a plaintiff's lawsuit must incorporate the litigation story in the Complaint.

Some readers of this series may be concerned that the time spent investigating and crafting a solid litigation story is costly. There may be a perception that such an endeavor is only useful if the case is heading to trial. However, outside counsel must be prepared, whether or not a trial ensues. Unless the case settles before any discovery, your outside counsel would be forced to haphazardly cobble a story together in order to respond to written discovery. As we have discussed throughout this series, a half-baked litigation story can be the thread which pulls apart an entire case.

### **Using Your Story in Depositions**

At some point in their career, every litigator will likely hear and repeat the saying, "lawsuits are rarely won during your client's depositions, but they certainly can be lost." Inadequate deposition preparation and poor delivery is often the reason an otherwise decent case goes south. On the flip side, obtaining damning testimony from your opponent in deposition often leads to successful litigation outcomes.

Depending on the nature of the lawsuit, you and your outside counsel can use the litigation story defensively in preparing your own witnesses and offensively when taking depositions.

Your litigation story provides a roadmap on how to prepare your company's own witnesses for their depositions. Before sitting down with a witnesses in advance of his/her deposition, a skilled attorney is able to shape the preparation sessions around the litigation themes and narrative. In some situations it may be appropriate to read or summarize the litigation story with a key witness, so long as the conversation is privileged and the attorney is acting well within the ethical guidelines and rules of professional responsibility. Yet even if your witness is not told the story in advance of his deposition, the preparation session should be guided by the bigger narrative.

Crafting your company's litigation story before a deposition is important because it allows your outside counsel to focus the deposition on how the witness fits into the story. It is a best practice to highlight key plot points from your story when introducing testimony from your opponent's witnesses. Similarly, working out your opponent's potential litigation story in advance of the deposition is imperative as it allows the attorney taking the deposition to explore and test the contours of the story. Ideally, your attorney will be able to utilize the deposition to discover

more of your opponent's potential themes.

And now, for a cautionary tale about what can happen when an attorney fails to prepare a key witness for a deposition. In a previous article in this series, I discussed the *Bollea (Hulk Hogan) v. Gawker* invasion of privacy trial. In addition to the fact that Bollea's lawyers did an excellent job telling their client's story, they were able to take advantage of the fact that Gawker's former editor-in-chief gave some of the most damning (and revolting) testimony to ever be uttered in a deposition.

During his deposition, Bollea's attorney asked the editor: "Can you imagine a situation where a celebrity sex tape would not be newsworthy?" The editor replied, "If they were a child." In turn, Bollea's counsel asked the editor under what age would the tape be inappropriate. The editor replied, "Four." While the editor later tried to say that he was just being flippant and sarcastic during the deposition, the jury clearly did not find his testimony amusing. While there is always a risk that a key witness will go rogue during a deposition, the risk can often be mitigated if the witness understands the litigation story before the deposition begins.

### **Presenting Your Story to the Court**

In his book *The Winning Brief*, legal writing guru Bryan Garner identifies practical pointers every attorney should incorporate into

the brief writing process. The central theme of the book is that in order to convince a court to adopt their client's position, attorneys must write compelling and clear briefs. In presenting the following scenario to his readers, Garner illustrates the challenge every attorney faces when submitting briefs:

Imagine a judge sitting uneasily in a chair, with a thousand papers scattered nearby, all crying out for the judge's attention. Imagine that the judge is looking for an excuse to put your brief down and do something else. Your job is to get the judge to sit back and read—intently.

While there are many components of a well-drafted brief, chief among them are clear and cohesive themes and a solid litigation story. While not every brief requires a full recitation of your story, your story must shine whenever you bring or oppose a motion that will have a considerable impact on the case. At the very least, a well-crafted story will make it much more likely that the judge will enjoy reading your brief.

### **Effectively Telling Your Litigation Story During Mediation**

A mediation is an ideal forum to tell and test your litigation story. An attorney's main objective at mediation is to persuade the other party that it is in their best interest to settle the case for X amount and avoid the attendant risks of litigation. Using the mediator as the go-between, an attorney tells the other side why his/her position

is stronger than the opponents'. Litigants who come to the mediation with a thoughtful and vetted story have considerable leverage over those who are still trying to figure out what their case is about.

### **Telling Your Story to the Media, Employees and Customers**

As in-house counsel you will field the first call from your company's PR department when they get flooded with requests to comment about active litigation. And while relatively few cases attract media attention, you need to be prepared to provide the external communication experts with a factually-sound and persuasive narrative in those cases where it is needed. A friend and colleague of mine who has been in-house counsel at numerous companies over the course of his impressive career, and who has managed several very high-profile cases, is fond of saying that, "a company that responds to a reporter asking about a case by saying 'no comment' is a company that hasn't figured out what the hell their case is about." While certainly there are times when it makes sense not to respond to questions regarding pending litigation, if and when providing a comment becomes necessary, you will need to direct PR on what they can say about the case to ensure consistency with the litigation story.

A solid litigation story is equally helpful in the more common situation where your company's leadership has to discuss a pending

lawsuit with your workforce and customers. Some relevant examples include a contentious wrongful termination lawsuit that is making its way around social media, a products liability case that is calling to question the safety of your company's bestselling product, or a securities lawsuit alleging that your company failed to disclose material information to investors. Even without a highly engaged workforce it is not uncommon for employees to discuss active litigation around the water cooler and/or to be asked about the litigation by customers and vendors (*See, e.g.,* gender discrimination claims against Wal-Mart as set forth in the *Dukes* case, Volkswagen's false emissions tests, and McDonald's infamous "hot coffee" case). Having a well-crafted and credible litigation story is essential for internal and external communication.

### **Telling Your Story to the Jury**

It goes without saying that by the time outside counsel stands in front of a jury for opening statement, it is imperative your company has a well-crafted litigation story. Much of a trial is spent drawing out your client's litigation story and discrediting your opponent's story. Attorneys who only assemble their story in anticipation of trial are often caught flatfooted, when a position they take or an argument they make at trial contradicts earlier positions and testimony. The best way to ensure that this does not happen is by developing

a strong and consistent litigation story early in the litigation.

### **Conclusion**

In writing this series my goal has been to impart the following three lessons. First, creating a litigation story early on is an essential component of a robust litigation strategy, and offers considerable advantages as the case progresses. Second, when selecting outside counsel, it is important that you ask whether the attorney you are hiring to represent your company can develop and deliver a credible and effective litigation story. And third, in your role as in-house counsel you play an essential role in investigating, drafting, vetting, and finalizing your organization's litigation story. A final thought, as you embark on telling your litigation story, consider the wisdom of Ira Glass, one of the most prominent storytellers of our time, who when asked how he has been so successful at creating memorable stories he responded, "Great stories happen to those who can tell them."

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