

CORPORATE COUNSEL

An **ALM** Website

corpcounsel.com | November 30, 2017

How to Prepare Your Company's Litigation Story

An effective litigation story follows the same literary rules as any compelling story, with two notable differences. Like other stories, a litigation story has characters, setting, plot and conflict, and resolution. The critical difference is that the litigator's story must be based on actual admissible evidence, and must be legally sound and persuasive.

Adam Rosenthal

An effective litigation story follows the same literary rules as any compelling story, with two notable differences. Like other stories, a litigation story has characters, setting, plot and conflict, and resolution. The critical difference between an ordinary story and a litigation story, is that the litigator's story must be based on actual admissible evidence, and must be legally sound and persuasive. The objective of this article, the third in this four-part series, is to discuss how in-house and outside counsel can draft an effective litigation story.

To recap, a successful litigation story includes the following five essential ingredients: (1) it must convey a story about what makes the party deserving, unique, and worthy of justice; (2) it must provide a solid evidentiary basis for the desired outcome; (3) it must be tethered to the law, logic, and common sense; (4) it must carefully weave in the major themes that are central to the case; and (5) it must anticipate the opposing party's story and legal arguments, and explain why the other party's position is legally deficient, not credible, and/or unworthy. The litigator's challenge is taking these



ingredients and pairing them with the elements of narrative. To do this well, in-house and outside counsel must analyze the case using the tried and true methods of storytelling.

Step One: Create Character Snapshots

In preparing your litigation story, the first thing you need to do is identify the people within your organization who will speak on your company's behalf, as well as those who will speak for your opponent.

Focusing first on your own witnesses, the goal here is twofold: first, counsel must articulate each character's role and contribution to the overall narrative (i.e. the part that they play in the case); and second, counsel must grasp each witness' personality, beliefs, and life experiences, which tend to inform and shape many decisions the witness made while working on behalf of your organization. The trial attorney's job is to know the facts of the case inside and out, while at the same

time, understanding the “essence” of each key witnesses.

Several years ago I helped prepare the key witness for a jury trial involving serious allegations of discrimination and wrongful termination. The case was a classic “he said/ she said,” placing the credibility of the plaintiff and her former boss in the octagon. Before getting into the specifics of his upcoming testimony, I spent several hours getting to the know the witness. He told me about growing up on a farm, where, at an early age he learned the value of hard work and perseverance. We also discussed his religious beliefs, family, and personal and career aspirations. During direct examination the witness had the opportunity to tell some of his personal story. This had a very positive impact on several jurors. After we obtained a complete defense verdict, three jurors told me that when it came down to credibility, they aptly determined that our star witness was telling the truth and was not the “type of person” who would engage in the alleged wrongdoing. Through this witness, we accomplished the first ingredient of a successful litigation story.

To begin your litigation story, write several paragraphs for each of the main characters in the story. Take the raw information you compiled during your investigation and describe the witnesses’ role in the case. But do not stop there. Include personal information and characteristics of the witness that bolster the witness’s credibility and likability.

Let us put this into practice. Imagine you have been tasked with writing a character snapshot for Terry Bollea (*nom de guerre* Hulk Hogan) for his invasion of privacy trial against the now defunct “news” website Gawker. You may recall that in 2012 Gawker posted a 1 minute 41 second

video showing Bollea having sex with his then best friend’s wife. Gawker apparently knew that the tape was secretly filmed (by the husband who had no problem with the tryst). Yet they posted it for the world’s prurient consumption because, in Gawker’s view of the world, the video constituted legitimate journalism. A Florida jury found for Bollea to the tune of \$140 Million (Bollea ultimately settled for \$31 Million after Gawker filed bankruptcy). If you have the time, take a moment and draft a character snapshot for Bollea. How would the snapshot differ from the perspective of the plaintiff and the defendant? How would you portray Bollea/Hogan? How would you want the jury to see Bollea/Hogan in light of the two competing trial themes of freedom of the press versus the right to privacy?

If you were writing on behalf of Gawker, your character snapshot of Bollea would likely stress the fact that Bollea and Hogan are one and the same, which makes his personal and public conduct fodder for legitimate—albeit unsavory—First Amendment expression. You would point out that he has spent his entire adult life promoting and profiting from his personal brand as an obnoxious chauvinist who boasts of his sexual exploits. The character profile would also focus on the fact that well before Gawker posted the video, he premiered in several reality shows as Bollea where he further forfeited the right to claim that anything in his personal life is off-limits. Gawker’s snapshot would also likely play up the fact that Hogan’s first reaction to the video was not to claim that he suffered an invasion of his privacy, but rather that Gawker had infringed on his copyright. He had no qualms with the video itself- he just erroneously believed that he should profit from its distribution.

Turning to the plaintiff’s case, how did Bollea/Hogan’s attorneys successfully portray him? In his opening statement, Bollea’s attorney painted a picture of his client as a complicated person who did not deserve to have a secretly-recorded video shared on the internet with millions of viewers, with the proceeds landing in Gawker’s bank account. While not shying away from Bollea’s public persona, they humanized their client by telling the jury stories about his youth, his strong work ethic, the physical and mental injuries he suffered as a professional wrestler, and his commitment to his family. They did an excellent job highlighting the fact that Bollea was not aware of the tape’s existence and felt ashamed by his actions. As the jury verdict illustrates, his attorneys did a masterful job telling their client’s story. While not every case and witness merits the full Bollea-treatment, litigators need to be mindful of the fact that witnesses are three-dimensional people who are shaped by their own life stories and experiences.

Step Two: Describe The Setting

A story’s setting describes the environment or surrounding where the story takes place. A setting paints the background of the story, whether it is a particular location, a time in history, or a cultural milieu. A setting can blend into the background or become one of the main characters in the story (e.g. New York City for most Woody Allen films). Effective litigation storytelling requires that counsel pays special attention to setting.

Consider the case of former Illinois Governor Rod Blagojevich. In 2011, a federal jury convicted Blagojevich of extortion for, among other serious transgressions, trying to sell President-elect Obama’s vacant US Senate seat. From a lay perspective,

the Blagojevich “pay-to-play” case was an easy layup for the prosecution (although it took two trials to get the conviction they were looking for). You had a very unpopular and eccentric impeached official with a comical jet-black pompadour (interesting fact: he made his aides carry around his special hairbrush at all times which he referred to as the “nuclear football”), who was caught on wiretap engaging in a host of transgressions.

The prosecution’s and defense’s descriptions of the setting of the case is particularly noteworthy. The prosecution set the stage by describing a toxic environment in the Governor’s Mansion where Blagojevich and his minions used their power for personal gain well beyond acceptable political horse-trading. The prosecutors painted a picture of a crude political operator who wielded his influence with little regard for the law and the public’s trust.

Faced with a difficult case, Blagojevich’s attorneys attempted to create a setting that showed Blagojevich not as a criminal mastermind sitting on his throne in Springfield, but rather as a fool who erroneously relied upon his lawyer’s advice that it was lawful to “trade” a Senate seat for political favors. His attorneys tried to paint a picture of a simpleton who did not have the requisite intent to know that he was breaking the law. Clearly, the second jury did not give any credence to this setting. They were not keen on letting Blagojevich off the hook because of his attorney’s misguided advice (which, in retrospect, was a poorly-conceived theme given that Blagojevich himself is a lawyer). For our purposes, the lesson of the Blagojevich trial is that in order for a setting to have credibility, it must be grounded in actual evidence.

When creating the setting for your company’s litigation story it is important to decide whether the setting will be another character or mere background. Sometimes the setting is the Company’s origin story. Other times, when a company wants to distance itself from a bad actor (such as a rogue employee) the setting creates a fisheye lens of the entire company, drawing attention away from an isolated individual. When creating a litigation story, the litigator needs to place the action into a setting that credibly puts the events in context.

Step Three: Chart The Plot

When discussing the importance of plot in literature, English novelist E. M. Forster famously said, “The king died and then the queen died is a story. The king died, and then the queen died of grief is a plot.” In telling a litigation story, the litigator must work hard at drawing out the plot lines, which explains what the case is really about. While the Court serves the important role of gatekeeper, deciding which evidence is presented to the jury, the trial lawyer alone directs the plot. Our adversarial judicial system is built in large part on the sacred idea that once the evidence is admitted, each side has the right to present their version of the plot.

As a thought experiment consider how the Trial Of The Century would have turned out had the Los Angeles District Attorney and O.J. Simpson’s legal team been unable to describe their own plot. What if the trial took place not in LA, but in Berlin, where under the German system, the judge questions the witnesses, selects the expert witnesses, and sets the overall structure of the proceedings? My hunch is that it would have been a very different outcome if the lawyers were sidelined and Judge Ito dryly

examined all of the witnesses without any attention to the competing plots.

The Simpson trial illustrates how lawyers can effectively use plot when representing their clients. Simpson’s legal team masterfully argued that the most important issue was not whether or not Simpson murdered two innocent people, but rather, whether a racist Detective planted evidence and engaged in serious misconduct in an effort to frame a successful Black celebrity. While the most (in)famous line from the trial, “*If it [the glove] doesn’t fit, you must acquit*” was a memorable and catchy theme, the plot that supported the line was developed throughout the trial, namely that the police should not be trusted. Plot is not the who, what, or where of a case, but the why. Simpson was likely acquitted because the jury was less concerned about whether he committed the crime, and more focused on the questions raised as to *why* Detective Fuhrman was sloppy in his investigation—was he merely negligent or did he intentionally plant evidence out of racial animus? The jury asked this question because Simpson’s attorneys knew how to tell a story with a strong plot.

There is not a one-size-fits-all approach to developing plot in a litigation story. As you and your outside counsel sit down to discuss plot you may want to employ the following strategies:

- Review the case chronology and circle the critical events that support your case in blue and the critical events that support your opponents in red. Next, ask whether these events tell a compelling plot. If they do not, perhaps you are missing an element to your case that unifies the critical events. Do the same thing with your opponent’s critical events.

- Answer the “why” of the case from your client’s perspective (e.g. *why* did the ex-employee misappropriate our trade secrets; *why* did the car catch on fire; *why* is our competitor engaging in false advertising; *why* did the company’s share price fall). Once you have diagnosed the why, go back to your chronology and key evidence, and see if there is a coherent and logical narrative that explains the why. If there is, that is likely your plot.

- Test drive your plot. Write the story with different plot points emphasized, and then through an iterative process, determine which narrative best satisfies the five elements of an effective litigation story.

Step Four: Find Your Resolution

Resolution in a litigation story is usually dictated by the nature of the case. This typically results in a binary outcome: our side prevails and the other side does not. And while a litigation story in trial always concludes with a call to action by the jury in your company’s favor, a case’s resolution needs to be tailored to different audiences.

By this point, you have distilled the basic elements of a story. You have introduced the characters, set the scene, identified the climax of the story and plot, and now you must resolve your story. Resolving a litigation story can be especially difficult when the outcome you want to establish is not supported by the evidence and the law. Because credibility is the hallmark of a successful litigation story, resolving your story mandates a serious reality check.

In the first article of this series I discussed an employment class action lawsuit where the plaintiffs obtained a significant jury verdict that in my opinion was the result of the defendant’s incoherent litigation

story. One of the biggest problems with the company’s story is that it did not have a credible resolution. Despite considerable evidence from some of the named plaintiffs that they experienced gender discrimination during their employment, counsel for the company asked the jury to find that not only were all of the plaintiffs’ individual claims baseless, but also that their class-wide pattern and practice claims had no merit. The company’s outside counsel did not need to take an all-or-nothing approach to resolving the case. Perhaps the company would have ended up in a considerably better position had it suggested to the jury that it could find that some of the plaintiffs may have individually experienced gender discrimination, but that their unique experiences were wholly insufficient to indicate widespread discrimination throughout the company.

Step Five: Weave It All Together

Now it is the time to put the pieces of the story together. In drafting your company’s litigation story, I recommend encouraging outside counsel to either draft a “clopening” (a hybrid closing and opening argument), or at the very least, to create bullet points touching upon the themes, characters, narrative, setting, plot, conflict, and resolution.

If outside counsel needs inspiration in drafting your company’s story, they should avoid relying too heavily on Hollywood’s lead. While some screenplay writers are gifted legal storytellers, most are painfully clueless about the law. An episode of *Law & Order* or epics such as *My Cousin Vinny* and *A Few Good Men*, are rarely useful in real world practice. This is not only because Hollywood can harness the magic of fiction and is not obligated to follow the law, but

also because in real cases, the complex nature of litigation tends not play well on the big screen. When lecturing new attorneys on how to better incorporate storytelling into their legal writing, I encourage them to spend their time reading quality long-form journalism from *The New Yorker* and the *Atlantic* and for persuasive writing, the opinion pages of the *Wall Street Journal* and the *New York Times*. If your story can be put on the same shelf as quality journalism your company will be well on its way to a successful outcome.

After outside counsel has drafted the company’s litigation story, two things need to happen. First, the story must be vetted to ensure that it is factually accurate, supported by the evidence, and above all, entirely credible. Second, after the story has been vetted, in your role as the client, it is imperative that you are comfortable with how the story portrays your company, the claims in the lawsuit, and the ultimate resolution. Once this is achieved, the next step is how to incorporate the story into the litigation. The final article in this series discusses how to effectively tell your story during the different phases of a lawsuit.

Adam Rosenthal is a partner at Sheppard Mullin Richter & Hampton based out of the Del Mar/San Diego office. He represents companies in single plaintiff and class action employment litigation. Adam can be reached at arosenenthal@sheppardmullin.com.