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How to Prepare: The Nuts and Bolts of Creating a Litigation Story

The late U.S. Sen. Daniel Patrick Moynihan often reminded his Senate colleagues that "everyone is entitled to his own opinions, but not his own facts." Had Sen. Moynihan been a trial attorney, his mantra would have likely been, "in litigation, attorneys are entitled to rely on their own reading of the facts, but the only opinions that actually mater are those of the judge and jury."

Adam Rosenthal

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One of the most challenging aspects when crafting a litigation story is that lawyers do not possess the creative license of fiction writers. Lawyers must piece together evidence, separate actual facts from fiction, and then create a logical and compelling narrative that weaves the factual evidence into legal and emotional arguments. While making sense of the evidence is often challenging in its own right, a trial lawyer's true value lies in the ability to present evidence in a logical and compelling manner. Combining the evidence with the trial themes and legal arguments is the essence of a litigation story. As I detailed in the first article in this series, *What is a litigation story?*, the consequences of not having a strong litigation story can be disastrous.

Too often litigators rush into a case like tourists being chased by a pack of bulls in Pamplona. With the goal of showing their client that they have everything under control and can efficiently litigate the issue at hand, litigators often ignore the task of actually crafting a litigation story, figuring that one will miraculously emerge down the road. As will be discussed in the fourth and final installment of this series, passively waiting for the litigation story to develop is an ineffective strategy. While a freshly minted attorney and a seasoned litigator will obviously approach a new case in very different ways, both are well-served to strategically develop a plan to investigate

and develop their client's story. The purpose of this article, the second in this series, is to identify the 10 practical and process-oriented steps in-house and outside counsel can take to develop a winning litigation story.

Step 1: Define the Questions

The 18th century French philosopher Voltaire famously wrote, "judge a man by his questions rather than by his answers." Before jumping into a new case it is imperative that the litigator simply "define the questions." Put another way, the role of the litigator is to figure out at the earliest juncture the central questions that all of the relevant stakeholders will ask, and from there begin the process of answering these questions.

Litigation questions generally fit into two buckets: standard questions and unique questions. The standard questions are the basic questions that guide every case. These include for example, What is this case about?; What are the main legal claims at issue (for the plaintiff)?; What are the main legal defenses (for the defendant)?; Who are the main witnesses?; What is the basic timeline?; and most importantly What does my company/client want to accomplish (i.e. what does a "win" look like)?

In addition to the standard questions, every case has a number of unique questions that should be defined as early as possible. For example, if at the outset you know that your client's main witness may not be "friendly" it is important to ask how you are going to engage with this witness. Another example of unique questions pertains to the procedural posture of the case. In the first article I discussed a gender discrimination class action. At the outset of that case the company's attorneys likely asked (or should have asked) the following unique questions: what is our strategy to defeat class certification?; how are we going to deal with the fact that some of the individual plaintiffs may have viable discrimination claims?; how can we develop evidence that the company does not have a widespread "pattern and practice" of discriminating against female employees?; and what type of empirical/statistical evidence will we need to develop to disprove the plaintiffs' claims?

Depending on how complex the case is, this first step should take no more than an hour to put on paper. Once finished, the questions help in-house and outside counsel accomplish step two.

Step 2: Map Out The Initial Investigation

One of the many responsibilities you have as in-house counsel is to make sure your outside litigation counsel is effectively using their time and not spending your company's money in a wasteful manner. While the topic of effective litigation management is not the primary subject of this article, the process of formulating an effective litigation story and cost-effective litigation are not mutually exclusive. To the contrary, a focused attention to crafting a litigation story should result in significant savings.

After being retained to represent a company in a new matter, one of the first things outside counsel must do is arrange a call with in-house counsel to discuss a plan of action for the initial investigation. Typically when a new litigation matter comes in, after I define the questions, the next thing I do is compile a list of the individuals I would like to interview, the key documents that need to be analyzed, and the data that will need to be pulled. I then speak with in-house counsel to assign responsibilities for these tasks. The purpose of deliberately mapping out the initial investigation is that it avoids a haphazard and chaotic investigation, which leads to a sloppy and disjointed litigation story.

Step 3: Gather Important Documents

This step is self-explanatory. Because your litigation story must be firmly grounded in evidence, it is imperative that from the outset you and your outside counsel have a handle on the significant documents that will impact the case. This step is separate from the formal discovery hold that will go out to relevant custodians and your IT department, and certainly is not as involved as a deep dive into potentially relevant ESI (although depending on the case it may be necessary). Rather, during step three, you and outside counsel are tasked with locating the

key documents that will be used during interviews with the key witnesses in step four. In pulling documents for these interviews, the goal is to locate the key pieces of evidence that are reasonably obtainable (both favorable and unfavorable) that will likely have a significant impact on the litigation. One way to prioritize which documents you want to review with your key witnesses during the initial investigation is to select the critical documents that you and your opponent would want to ask the witness about, if you only had the witness on the stand for two hours.

Step 4: Meet With The Key Witnesses and Stakeholders

There is a trend, particularly in employment litigation, to cut costs by "project managing" cases. There is one large employment "boutique" that has taken this to the extreme, by having "flex" attorneys sitting in their homes, often thousands of miles away, conducting telephone interviews with key witnesses. They then report their findings to the lead lawyers, who usually only meets the witnesses before the witnesses' deposition. While there are certainly ways to streamline inefficiencies, cutting corners during the initial interviews is the epitome of a penny wise and pound foolish strategy.

Witnesses win lawsuits. The key to an effective litigation story is having credible witnesses who can tell your story. It is for this reason that the lead trial attorney must be directly involved in interviewing the key witnesses. Where possible, these interviews should be conducted in person, and if that is not feasible, at least via video conference. Unless there is a concern that a key witness will be intimidated by the presence of two lawyers, a best practice is to have in-house counsel participate in these interviews as well.

Spending quality time meeting with the key witnesses at the outset of litigation serves four essential purposes. First, it allows an experienced attorney to efficiently understand the factual landscape of the dispute and identify the central issues of the case. Second, your key witnesses are also your main custodians. Meeting with these witnesses at the beginning often helps avoid costly fights down the road on the production of relevant discovery. Third, meeting with key witnesses helps to forge a level of trust between the witnesses and in-house and outside counsel. Developing trust and mutual respect between witness and lawyer is invaluable as the case progresses, particularly during deposition preparation and leading up to trial. And finally, a skilled trial attorney uses these face-to-face meetings to evaluate the witnesses' credibility and uses the interviews to "test drive" different theories of the case.

Step 5: **Create an Evidence Matrix & Chronology**

Concurrent with the witness interviews, outside counsel should be putting together an evidence matrix and chronology. In order to articulate a litigation story, and develop a cohesive "plot," it is important to have a clear understanding of the evidence, documents, and timeline (in cases where the chronology is important).

Step 6: Identify The Major Legal Issues and Arguments

By the time an experienced outside counsel arrives at step six, counsel should be able to rattle off most of the major legal issues and arguments. The purpose of step six is not to state the obvious legal issues (e.g., elements of a *prima facie* case), but rather to focus on the legal issues that could play a significant role in the case. This could be everything from preserving essential testimony to relying on a complicated conflict of laws argument to position the case in a more favorable jurisdiction. The key here is that the litigation story needs to fit, hand-to-glove, with the legal arguments and theories.

Step 7: Develop Up to Three Themes

Litigators often confuse themes with stories. This results in themes that die on the vine.

Trial themes are a component of a solid litigation story, but they are not the entire story. The theme serves as a lens through which the litigator wants the decision-maker to view the case. Like a compelling topic sentence, the theme sets the table for the litigation story.

Strong themes must satisfy four elements. First, the theme must be understandable to a lay audience. Second, the theme must comport with the evidence. Third, the theme must be memorable. And finally, the theme should be authentic.

A few weeks into a new case I recommend asking outside counsel to provide you with their initial themes. While some themes take time to hatch, at the very least outside counsel should be able to come up with a set of basic themes that complete the sentence, "This case is about … ."

Step 8: Write Your Opponents Litigation Story

Much like in judo a skilled litigator is able to use the opposing party's strengths to the litigator's own advantage. In order to create your story you must be able to anticipate and articulate your opponent's story. Early in every case I sit down and brainstorm what my opponent would likely say about the case if opening statement were tomorrow. The goal of this exercise is to recognizes your opponent's strengths and your side's weaknesses early in the litigation. This process also helps all of the internal stakeholders understand the challenges and opportunities that the litigation will present.

Step 9: Draft an Early Case Assessment Memorandum

No matter how complex the case is, after completing the initial investigation, outside counsel should draft a concise early case assessment memorandum that includes the following elements: a summary of the claims; initial recommendations (e.g., compel arbitration, engage in early settlement discussions, commence percipient discovery, etc.); procedural posture; background on the opposing party; summary of key witnesses; factual summary; analysis of legal claims/defenses; (8) damages/exposure analysis; evaluation of the judge and opposing counsel; proposed litigation budget; and areas of additional investigation.

Step 10: Embrace the Zeitgeist

Litigation does not exists in a vacuum. Successful trial attorneys know that all of the relevant stakeholders are influenced to some degree by the zeitgeist that exists in society—the defining spirit or mood of a particular period as exhibited by the overarching ideas and beliefs of the time. To be effective, a litigation story must understand and account for the zeitgeist.

Many of the attorneys that are suing your company are masters at incorporating big picture public policy arguments and social trends into their litigation stories. The plaintiffs' attorneys that sue companies, whether in employment, consumer, personal injury/tort or securities cases, tend to be head and shoulders above their counterparts on the defense side in terms of developing their litigation stories. Their stories tend to be more effective, as they are adept at connecting their client's individual lawsuit with the prevailing zeitgeist.

As attorneys representing companies, we have to do a much better job recognizing how societal currents impact litigation, while at the same time using these trends as additional lenses through which stakeholders can view our cases. In order to be effective, your company's outside litigation counsel must be a skilled litigator as well as a curator of societal and cultural trends. If your litigation story appears anachronistic the results can be devastating.

After completing these 10 steps, you and outside counsel are now prepared to begin drafting your litigation story. The next article in this series focuses on how to piece together a winning litigation story.

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