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What Is a Litigation Story? Advice for GCs Preparing Their Company's Litigation Strategy

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Adam Rosenthal

If after two months into a new case outside counsel is unable to clearly articulate a thoughtful, unique, and convincing litigation story about the case, you should find a new attorney. Successful trial lawyers are master storytellers. They must take a disparate and complicated set of facts and a cast of often unwieldy characters and tell a story that resonates with a diverse group of stakeholders. These stakeholders include the judge and possibly a jury, a mediator, and most importantly, in-house counsel and the company's key decision-makers. Despite the importance and centrality of storytelling in the legal profession, as I will discuss in this four-part series, too often outside counsel are incapable of telling a winning story.

A successful litigation story must incorporate each of the following five elements: it must convey a story about what makes the party deserving, unique, and worthy of justice, in order to elicit an emotional connection between the party and the stakeholders; it must provide a solid evidentiary basis for the desired outcome and avoid the pitfalls of hyperbole, unsubstantiated theories, and unconvincing circumstantial inferences; it must be tethered to the law, logic, and common sense; it must carefully weave in the two to four major themes that are central to the case; and 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.

Before we delve into the finer points of how to craft, test, refine and use your story, we will take a step back and discuss why focusing on your litigation story is essential. To demonstrate this point, I will discuss one of the most significant

civil trials of the past decade, and why it should be a warning to every in-house attorney about the importance of effective storytelling in litigation. To avoid embarrassing the company, I will refer to it as "defendant" or "company" instead of its actual name. Other than changing the name, everything else is based on actual events.

In the early 2000's, the company received a complaint from a sales employee claiming that she was discriminated against due to her gender. That initial claim was followed by a second claim of discrimination. Eventually, a handful of mostly former employees banded together as putative class members, and filed a nationwide class action alleging that the defendant had a "pattern and practice" of discriminating against female employees.

The case lingered on for five years. Eventually, the federal court made the rather unusual decision to certify a nationwide class. The defendant likely chose not to settle the case (one has to assume that the plaintiffs' settlement demands were outrageously high), and proceeded to trial.

Over a five week trial the jury heard a smattering of "anecdotal evidence" from the plaintiffs about serious allegations of discrimination (from claims that a manager told his subordinate to get an abortion, to a shocking allegation that a manager disregarded the fact that a customer raped one of the plaintiffs). In its defense, the defendant put forward witnesses to refute the damaging testimony from the named plaintiffs. The jury also heard expert testimony from dueling statisticians.

After a brief deliberation, the jury awarded the named plaintiffs over $3 million in compensatory damages plus a whopping $250 million in punitive damages. Notably, this award did *not* include front and back pay to every woman in the roughly 5,000-member class, which the court ruled would be decided on an individual per class member basis. Had the defendant not settled for north of $175 million, and had the appellate court not reversed the jury verdict, the total exposure could have been in excess of $500 million.

At trial the defendant was faced with a strategic dilemma: either focus on attacking the plaintiffs' credibility, or concede that while a few plaintiffs may have been subject to various degrees of discrimination, their experiences were not evidence of a "pattern and practice" of companywide gender discrimination. The company's folly was that they were so preoccupied with the individual claims that they lost sight of the bigger picture.

In his closing argument, the company's counsel made every mistake in the book. In addition to his lack of any substantive themes, he rambled insistently, made several remarks that were inappropriate and downright offensive (while discussing one of the plaintiffs he said, "Honestly, what was wrong with this woman?"), fumbled his way through much of the evidence, and gratuitously called the plaintiffs liars.

Putting aside the train wreck that was the closing argument, let's look at what the company's trial themes were, and what they could have been had their counsel spent more time crafting an actual litigation story.

The defendant's three central trial themes were: Just because the company did not go out of its way to support women does not mean that it discriminates against them; n o matter what the plaintiffs' counsel says, the company is not really an "old boys' club;" and the plaintiffs' are all liars. These themes entirely missed the mark.

Perhaps the defendant would have come out of the case unscathed, or at least without the jury feeling a burning desire to punish the company, had it had an actual litigation story that went something like this:

The defendant is in the business of saving lives. The company, and its thousands of employees all over the world, are singularly committed to developing groundbreaking cures for the world's most pernicious diseases. From developing cutting-edge medication for cancer and AIDS, to training health professionals in Africa on

how to treat malaria, the defendant believes that it has a sacred responsibility for helping to bring life changing drugs to market. In order to be a strong company, it must be a diverse company. The defendant is committed to being an equal opportunity employer. That means that in addition to hiring a diverse workforce, the company has a robust human resources and compliance department that serves employees who believe a co-worker is not abiding by the Code of Conduct.

Like a skilled magician, the plaintiffs are trying to pull a fast one on the jury. They want you to believe that a few isolated incidences of what they have claimed constitute gender discrimination are somehow evidence of a company that systematically mistreats and denigrates women. The plaintiffs' arguments are just as foolish as claiming that every New York Giants fan is a criminal hooligan, because in a stadium of 82,500, on average 22 fans are arrested every Sunday for disorderly conduct.

The evidence at trial establish four truths. First, the company is committed to being an inclusive and diverse company. Second, the defendant takes claims of gender discrimination seriously. In order to weed out the few bad apples that exist in every organization, the defendant has a robust HR and compliance system that employees are expected to use when they believe they are being mistreated. Third, it is abundantly clear that the plaintiffs have serious credibility problems. In their effort to try and sell you on their circumstances, they have bent the truth and proved that their experiences, whether or not factual, are hardly evidence of a "pattern and practice" of gender discrimination. Finally, we did not need to conduct a trial to demonstrate that American society at large has a gender disparity problem. This is well-known and well-documented. The trial, however, did show that the company is not sitting on the sidelines. Rather, every day the company is playing an active role in working to level the playing field. We should not punish the company and try to "make an example" of them as the plaintiffs are crudely arguing. Instead, justice demands that the jury find that there is no basis to find systemic gender discrimination. It would be a gross miscarriage of justice to find in the plaintiffs' favor on any of their classwide claims.

This alternative narrative hits all five elements of an effective litigation story. Rather than making the case that the company is not as bad as the plaintiffs claim (a strictly defensive posture) or focusing exclusively on attacking the plaintiffs' credibility, the litigation story could have been hitched to principles of justice and fairness, while at the same time understanding and utilizing the cultural zeitgeist. Perhaps if outside counsel had taken a step back and framed the case on his terms, rather than allowing the plaintiffs' counsel to control the narrative, the company would have obtained a better result.

In next three articles of this series I will explore the nuances of an effective litigation story and specifically the role in-house attorneys can play in ensuring that their outside counsel are able to formulate and deliver a credible story. In-house counsel must be deeply involved from the beginning, as they possess in-depth knowledge of the company's culture and ethos, intimate familiarity with the facts of the particular dispute, and a sophisticated understanding of the legal issues underlying the dispute. In order for outside counsel to deliver an effective litigation story, it is imperative that in-house counsel not only endorses it, but play an active role in crafting the story. My ultimate goal in this series is to provide in-house counsel with the tools and terminology to demand that their outside counsel develop and deliver a winning litigation story.

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