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Outside Counsel

The Essence of Litigating Successfully: 'Communicating Your Story Credibly'

By **Scott M. Himes**

Recently I have had the exciting opportunity to work with younger lawyers who strive to be effective litigators. We have talked about all the stages of a lawsuit—preparing a case for filing; drafting the complaint; determining your defenses; planning and taking discovery; writing persuasive motion papers; preparing for trial; and recognizing the importance of "thinking strategically trial-wise" from the get-go. After a while, I found that for each stage I kept coming back to one overarching theme. The consistency of this theme underscored what it takes to litigate a case successfully from the outset through trial.

It boils down to this: *"(1) Communicate (2) your story (3) credibly."* Those four words tell it all. If you treat that short theme as a maxim from beginning to end, you will go a long way to advocating persuasively—and to winning your cases. To elaborate:

'Communicate'

The typical dictionary definition of "*communicate*" is "to convey knowledge of or information about," or to "make known." But as used in this litigation maxim, it means much more, becoming a term of art for the trial lawyer. *How* a lawyer conveys information or makes it known to the finder of fact means everything. It is often said but cannot be over-emphasized: To "communicate" in the litigation world means "*to show*, not *to tell*."

That is, the trial lawyer's job is to show the judge or jury what conclusions you want them to reach—that your client is not guilty, that the defendants breached the contract with your client, that your client did not defraud the plaintiff, and the like. Of course, the ultimate determination—guilt or innocence, liability or no liability and so on—is comprised of numerous "subsidiary" conclusions. The critical point is to make the facts speak for themselves, so that the judge or jury can reach their own conclusions (which, of course, coincide with yours and your client's). The trial lawyer cannot preach the results she wants the jury or judge to reach. Human nature is that people want to figure things out for themselves, not be told what to conclude. Consider, for example, these competing passages from a brief on a motion to dismiss (involving a claim for breach of fiduciary duty arising from corporate waste):

> Every case is a story. It is your client's story. You are your client's storyteller for the jury or judge.

• *"Defendant Smith, the corporation's CEO, blatantly committed a breach of fiduciary duty and clearly wasted the corporation's assets by entering into a contract to sell the corporation's Smalltown real estate for $5 million less than the property's appraisal value."*

vs.

• *"On January 1, 2018, defendant Smith, the corporation's CEO, executed a contract to sell the corporation's Smalltown real estate. The sale price was $10 million. Smith had received an appraisal report for the property on Dec. 31, 2017, which concluded that the property's current market value was $15 million. Plaintiff sues Smith*

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for breach of his fiduciary duty arising from this sale contract."

To "communicate" for persuasive advocacy means to present your case—particularly in motion papers and at trial—by ordering the facts, highlighting the positives, and painting a picture for the mind's eye that *guides* the fact-finder to your desired conclusions. Make the facts lead the jury on its own to the conclusion in your favor. Don't dictate the conclusion you want. Rather, reveal the way.

'Your Story'

Every case is a story. It is your client's story. You are your client's storyteller for the jury or judge.

A story makes your client's cause or position come to life. Litigation is about real people and real-life disputes. You want the fact-finder to become invested in a real world situation—to care about what's at stake. No less so where the litigants are corporations or other entities, since they of course act through individuals. As the trial lawyer, you are reconstructing the past. But that past needs to be told to capture the attention of the fact-finder and to compel the fact-finder to "see it your way." While of course the legal principles underlying a dispute are important as the ratio decidendi—the fancy terminology for the rule of law that governs a decision—most cases turn on their facts.

In presenting the story, two seemingly inconsistent approaches need be kept in mind. On the one hand, the litigator needs to simplify what occurred. Consider the preliminary statement in a brief on a dispositive motion. Think "elevator pitch." Describe the story simply. The judge or jury needs to understand the big picture, from 30,000 ft., to become prepared to accept your client's position.

But the simple story needs to be supported—that is, it needs to be *proven*. Think, at this stage, the particulars, the details, the specifics. Your story only rings true if it is supported in detail. You need to build the story from the simplified version. While this is obvious for the trial, the particulars of the story typically must be presented whenever you pitch your client's position. For example, a pleadings motion must drill down into the particular allegations vis-à-vis the elements of a claim. In supporting the motion to dismiss, key in on the important factual allegations to describe how they fail to plead the necessary. Or, on the other side, highlight the allegations that do plead the necessaries.

Another way to think about the simplified/particularized dichotomy is to consider the differences between the opening and the closing at trial. Your opening will paint the dispute and your client's position in broad strokes; your closing will describe the specific evidence admitted at trial that proved your client's position. All too often lawyers lose sight of the particulars. Persuasive advocacy must give the particulars to back up your client's story.

So, simplify the story, as a prelude. Doing so initiates the fact-finder to your cause or position. Then, use the details to make the story come to life, to make it understandable and—most importantly—to make it believable. The dual approach—simplifying and particularizing—raises no inconsistency. Each is a critical piece of communicating your client's story to persuade the fact-finder to accept it.

'Credibly'

Nothing is more important to a case than credibility—not only your client's credibility but yours as the client's advocate. Being, and appearing to be, believable must be part of the strategic thinking from day one.

Being credible, as part of communicating your story, is not just about your client's testimony being believed at trial. It is a much more all-encompassing notion. Each step a litigant takes, every argument the litigant makes, and all claims or defenses asserted must be well founded in the facts and law. Credibility must be built and maintained over time—that is, during the life of a case and, indeed, throughout a lawyer's career. The judge or jury might not always accept a litigant's position, but the litigant (and her lawyer) must always be *trusted*. If the judge concludes that the facts you present are not reliable, or your legal argument is not at least reasonably grounded in the law, your client's position will not succeed.

Some old saws of litigation do not survive the importance of credibility. Consider the often-heard advice to "sue everyone, on everything." This approach often is bad strategy. While some situations might call for naming peripherally involved parties or pleading tenuous claims, in most instances that approach undercuts a plaintiff's credibility. A plaintiff will find herself trying to defend an indefensible position that distracts from the main claim against the real defendant. When drafting the complaint, think hard about your credibility when naming defendants and formulating claims.

Another example: How often has a decision gone against you, and the client's immediate reaction is "The judge got it all wrong, and we just have to go back to the judge to fix this, " in other words, move for reargument? But the standards for reargument, for good reason, are difficult to meet. In the Southern and Eastern Districts of New York, the movant (per Local Civil Rule 6.3) must concisely set forth "the matters or controlling decisions which counsel believes the Court has overlooked." CPLR 2221(d) is similar, prescribing reargument "based upon matters of fact or law allegedly overlooked or misapprehended by the court." If a litigant can truly meet these strict requirements, reargument might succeed. But more often than not, the argument amounts to telling the judge that he "got it wrong." That stance invariably will harm the judge's sense of your trustworthiness. Think through "cost/benefit" thoroughly before seeking reargument. Whether the judge "got it wrong" is the stuff of an appeal, not reason for a mulligan in the same court.

"Communicating your story credibly" should be the mantra for preparing and trying your case. Those few words speak volumes about how to win the case.

Practically speaking, often the client does not appreciate the value of litigating with credibility. That is not surprising. The client is living the dispute. She cannot be expected to be judicious—that is the lawyer's responsibility. Even the more sophisticated client (such as the lawyer-client, as I have found in my experience) can miss the importance of always being credible. Consequently, the effective litigator must be an astute counselor. Explain to the client why, in litigation, less is often more.

Another frequent illustration is the counterclaim. Often the first words a defendant-client utters upon service of the summons and complaint is: "We must counter-sue" (and usually for "the moon"). Sometimes a counterclaim is warranted. But if it is just "lashing back," being too short on substance, think again. The defendant might well detract from a solid position in defense by putting on a plaintiff's hat as well. And the counterclaim can also complicate discovery, result in more motion practice, and cause the trial date to be put on a longer leash.

In communicating your story, making thoughtful decisions to assure credibility will often be the better part of litigation valor.

'Strategy, Strategy, Strategy'

Communicating your story credibly underpins a crucial mindset that must be front and center for the successful litigator and trial lawyer. Litigation is a chess game. The game begins at the outset of a dispute. The successful trial lawyer needs to think multiple steps ahead, and to plan ahead for the best overall strategy to communicate your story credibly.

How will you show the jury with compelling evidence at trial that your complaint's storyline and factual allegations are what occurred? How will your early document requests help unearth proof of the storyline for trial? How will you question the other side at depositions to bolster your story, and also prevent the other side from rebutting it? How will you make sure that your client's deposition testimony is not only accurate but also believable—that is, that your client's words will ring true for what you say occurred? How can your arguments in motion practice, whether "yea" for your positions or "nay" in response to the other side's, help (or harm) the presentation of your story at trial? How will your story need to be tailored based on the evidence that emerges in discovery?

You must continually reassess. Litigation rarely proceeds in a predictable, linear fashion. Complex commercial litigation, in particular, is better pictured as moving up a multi-branched oak tree while trying hard to avoid the too-frequent hornet's nest along the way.

Always keep in mind your client's endgame goal. Formulate the strategic steps to get there. In doing so, focus not only on the pros but also on the cons of each step. Think about the different paths that might exist—one invariable rule of trial practice is to expect the unexpected. In a nutshell, the litigator/trial lawyer needs to be strategizing throughout the course of the litigation how best to communicate credibly the client's story *at trial*.

Conclusion

"Communicating your story credibly" should be the mantra for preparing and trying your case. Those few words speak volumes about how to win the case.