



**Keller/Anderle** LLP  
BUSINESS TRIAL LAWYERS

## Using a Centuries Old Trial Attorney Technique to Create Extraordinary Efficiencies in the Discovery Process for Business Disputes

By Jesse Gessin

You are general counsel for a mid-size technology company. Your company has litigated with a competitor for about six months. You just received another legal bill where two associates have racked up seventy-five hours drafting discovery, responding to discovery, moving to compel answers or responding to a motion to compel. Your attorneys are locked in battle over deposition subpoenas for tangential witnesses. This bill follows the previous month's where another eighty hours was spent fighting over the same things. The case is important to the company and you don't want to settle on unfavorable terms, but the costs of discovery are eating up the litigation budget. If this sounds familiar, there is a solution.

Litigation attorneys spend too much time and resources discovering the case to death in order to "play it safe." No stone, no matter how unimportant, is left unturned. Evidence is developed without knowing the purpose for the evidence. This overreaching results in inefficiencies that erode litigation budgets better used for case development or dispute resolution. It leads to unnecessary discovery disputes that end up in court, and acrimony between the parties that makes settlement more difficult. The solution is a well-founded narrative theory of the case, developed at the outset.

For centuries, trial attorneys have anchored their case to a narrative theory. To understand what this is, it is necessary to define "narrative" and "theory of the case." While narratives are not unique to law, a theory of the case is. Narrative and story are often used interchangeably, but they are different. A story is an account of something that has occurred, while a narrative comprises broader themes and substance. Stories are but one of the building blocks used to construct a narrative.

In business disputes, a theory bonds the case to the company's view of the world. The history, culture, and leadership of your company help form the theory of the case. Your attorney must become steeped in your company's world-view in order to develop a compelling theory. That theory serves as a prism for defining reality, explaining the facts, relationships, and circumstances of the company and other parties. It combines the company and trial attorney's perspectives with an eye toward the ultimate audience – a jury or judge.

When these components - narrative and case theory - are combined, they become a roadmap for winning business disputes: an amalgam of law and fact that tells the judge or jury why your company should prevail.

The narrative theory gives direction and focus to the entire case, especially discovery. Here's an example. Your production company, Good Guy Media, was founded five years ago and now has over a hundred employees. The company creates and markets content for platforms such as YouTube and Facebook. The company's culture is imbued with trust and openness. These qualities have helped breed collaboration and teamwork, which have enabled the company to form vital relationships with media "influencers" who in turn trust Good Guy with their brand and private information. Unfortunately, these traits have also led to security vulnerabilities, including company-wide access to "The List," private contact information for all of Good Guy's influencers.

An early employee, Mark Mackerberg, took the list on his way out the door to work for a competitor, Bad Guy Media. You and your outside counsel learned from an internal investigation that another Good Guy employee was offered a thirty percent salary increase to come to Bad Guy. As part of the oral offer, a Bad Guy executive added, "It sure would be nice to have The List."

You learn from another employee that Mark has two DUI convictions from eight and 14 years ago. Should Good Guy Media's outside counsel develop discovery about the DUI convictions? This would include written questions regarding the DUIs, external investigation with a private investigator, subpoenas for police

records, depositions of police and witnesses involved in the DUIs, etc. The estimated litigation costs for this avenue of discovery could be close to \$50,000. While in all probability the evidence of Mark's DUIs would be inadmissible in the trade secrets theft case, it's possible the discovery about them could lead to something else.

Should your lawyers pursue this line of inquiry? While tempting, the DUIs do not advance Good Guy's narrative case theory, which is: Bad Guy could not compete with Good Guy playing fair, so they tempted a trusted employee to steal a trade secret that Good Guy spent years creating. They found someone, Mark, who was already having financial problems, and lured him away. Mark agreed to steal the trade secret not because he is a drunk but because he is greedy.

If costs were no concern, looking under every rock, such as the DUIs, would be the safe approach. But focusing on developing the narrative is far more efficient and cost effective. An experienced trial attorney will have the confidence to skip discovery about the DUIs.

How do you develop a narrative case theory? First, your outside counsel must do a careful internal investigation. He or she must also get to know your company. The narrative case theory stems from the stories of the people, who are often employees, at the center of the dispute. Data should be collected and reviewed to understand the corroborating or discrediting evidence. The data collection should be focused on the most important information about the dispute. Far too frequently, litigators fail to investigate their case thoroughly before launching into discovery, which as a result becomes aimless and expensive.

Once the internal investigation is complete, the evidence from the internal investigation can be distilled into good and bad facts, and a narrative case theory can be developed. Using both good and bad evidence to construct the narrative is difficult but essential; a narrative that contains only good facts and ignores the bad will eventually crumble.

Like any other trial skill, developing a narrative case theory is learned in courtrooms, not classrooms or conference rooms. Only real trial attorneys with experience persuading triers of fact - juries, judges, and arbitrators - will have the confidence and judgment to develop a narrative case theory that can streamline discovery, and *not* turn over every stone.

The next time you receive a costly bill for discovery ask your outside counsel, what's your narrative theory? If he or she doesn't have one, it might be time to switch lawyers.

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