

THE NATIONAL LAW JOURNAL

WWW.NLJ.COM

THE WEEKLY NEWSPAPER FOR THE LEGAL PROFESSION

MONDAY, JULY 7, 2008

ALM

IN FOCUS

LITIGATION MANAGEMENT

Lights! Action! Litigate!

An IP litigation director, like an auteur, must inspire a creative team to sell a compelling story.

By David Henry Dolkas
SPECIAL TO THE NATIONAL LAW JOURNAL

THERE ARE STRIKING similarities between the roles of a film director and the chief of operations (COO) of a complex intellectual property (IP) case. This article discusses those similarities and, in doing so, provides suggestions about how to function in the role. The same principles apply to any complex case, including large commercial or products liability disputes.

The first suggestion is to understand the similarities between a film director and a COO. A film director controls all aspects of making a film, including its artistic, dramatic or comedic aspects, and guides the technical crew and actors to achieve the director's vision. The COO of the complex IP case directs all aspects of the making and, ultimately, the presentation of the case and guides the legal team to achieve the "mission" of the case, which is obtaining the ultimate relief sought by the client. However, there are no retakes in a complex case, because the COO/director is not afforded the chance to reshoot a scene. If an actor (one of the lawyers or a witness) botches a cue or his lines, the COO is stuck with that bad performance.

Having to present and explain the IP in dispute complicates effective storytelling. Often, the IP involves complicated technology and wordy, unfamiliar and esoteric patent claims, laws and procedures. Presenting the IP is the equivalent of introducing sophisticated special effects into the story. The jury (or perhaps a judge unskilled on patent law or the

technology) will naturally gravitate to the humanness of the story and not the IP itself.

The challenge for the COO/director is to present a compelling story with the special effects of the IP at issue without compromising the humanity of the story. The success of the blockbuster films of director James Cameron (*Terminator I and II*, *Aliens*, *Titanic*, *Spider Man*) are generally attributed to his ability to marry awesome special effects with the humanity of the story, e.g., Arnold Schwarzenegger's cyborg character learning to say: "Hasta la vista, baby."

Marrying the humanity of the story with the special effects requires the development of a strong plot line. Plot line refers to the way the story is divided and told. The COO/director's job is to create, shape and supervise the creation and presentation of the plot line.

Most tragedies and comedies follow a five-act plot line articulated by German dramatist Gustav Freytag, consisting of:

■ Exposition—the necessary background to understand the story.

■ Rising action—the part of the story where the basic conflict is complicated through the introduction of the record evidence that fills in the story's gaps.

■ Climax—the point of the story where things change for better or worse in the affairs of the protagonist.

■ Falling action—the part of the story where things completely unravel, leading to the conclusion.

■ Denouement, or conclusion.

If the COO/director is directing a complex case for the plaintiff, then the story is a tragedy and must show and prove how things have gone from bad to worse, e.g., the protagonist finds itself in the awful position of having to compete against its own technology. If the

COO/director is directing a complex case for the defendant, then it's a comedy or a farce. A comedy ends with the protagonist better off or at least no worse than at the start of the story—meaning there's no infringement, for example. Or, the COO/director makes it a farce by showing that there really was never a "gee whiz" to these patents because someone else had beat the inventors to the idea, as proven by invalidating prior art.

Unlike a film, where "The End" appears and the credits begin to roll, the conclusion of the complex IP case ends with the request for the relief sought, i.e., the ultimate goal of the mission. The audience is asked to do something and, specifically, to make a decision. Audience members cannot simply get out of their seats and drive home. The ultimate job of the COO/director is to ensure that the presentation of the story causes the audience to reach the desired decision.

Every production requires a directing style and actors to match it. There are a variety of directing styles. Some directors employ loose directing styles, outlining the general plot line and letting the actors improvise the dialog. Directors such as Christopher Guest (*Best in Show*) and the late Robert Altman (*M*A*S*H*, *Nashville*) employed this style. On the opposite side of the spectrum are directors who control every aspect of the film and demand that the actors follow specific instructions. Directors such as Steven Spielberg (*Jaws*, *Schindler's List*, *Saving Private Ryan*) and James Cameron (discussed above) employ this type of controlling style. Alfred Hitchcock took this approach to the extreme by storyboarding the entire film in such detail that he reportedly did not bother to look through the viewfinder of the camera to watch the performances.

The COO/director who is loose in approach

David Henry Dolkas is a partner in the Intellectual Property, Media and Technology Department in the Palo Alto, Calif., office of McDermott Will & Emery. He can be reached at ddolkas@mwe.com.

and encourages freedom and improvisation will need highly skilled, self-starting and probably more senior litigators who don't need or want a lot of supervision. In contrast, someone Spielberg-like in style, who needs to manage every detail of the case, should staff it with lawyers who thrive on that type of directing style.

A COO/director may not be able to match his or her directing style with the lead actor's way of preparing for a performance. For example, someone Hitchcock-like in approach might carefully storyboard the entire case in writing and expect the team members to learn their lines and cues through this scripted and written treatment. What if the highly gifted lead actor (i.e., the lead trial attorney) learns by listening and not by reading detailed summaries? In that case, the COO/director must adapt to the learning style of the lead actor by, for example, setting up rehearsal sessions and orally outlining the case themes, key evidence, key points, etc., to make sure the lead knows the case and is ready for his or her performance.

The production schedule

Another suggestion is to develop and use effective work-product and communication protocols. The complex case will be on a fast production schedule and likely on a fixed budget. To ensure that the case comes in on time and within the budget, the COO/director needs to have effective and standardized protocols. Work-product protocols include every key piece of work product that the team will generate, e.g., witness interview summaries, deposition summaries, claim charts, client memos, cross-examination outlines, etc. Nothing regarding the format for key work product, which captures the essence of the record evidence to be presented in the story, should be left to the discretion or whimsy of any of the actors on the legal team. Additionally, all of the key work product must be posted at a central, shared and easily accessible location. The entire team must know where and how to find information quickly, and that can only be done if all key work product is standardized and readily available.

There must be standardized communications protocols to ensure that team members and the COO/director receive only what they truly need to receive. Valuable creative and production time can be lost in a morass of needless voice- and e-mail messages. The COO/director must articulate to the team exactly how members will communicate with each other, with the adversary and with the client.

The COO/director also must control what information he or she receives. The COO/director simply cannot be "all knowing" about every fact of the complex case. Great reliance must be placed on the team members assigned to the various projects or aspects of the case (e.g.,

the infringement team) to know the details. The job of the COO/director is to know enough of the details to accomplish the mission, tell the story as set forth in the plot line and guide the entire cast and crew and, ultimately, accomplish the mission. This means that in a fast-moving complex case, the COO/director must place limits on the flow of communications.

With time at a premium and constraints on the budget, the COO/director must conduct effective and efficient production meetings, like short team huddles. For these huddles, no preset agenda is necessary, and often the action item list will drive the discussion. The agenda also can be defined by going around the horn and asking what's hot and needs to be discussed or fixed. Then the topics identified should be prioritized and addressed. Unless absolutely necessary, decisions on matters ripe for decision should not be postponed to the next meeting. Finally, detailed strategic discussions should be set for off-line discussion or key strategic meetings (e.g., the rehearsal sessions discussed below).

The COO/director must impose accountability. This means setting realistic deadlines for the assignments, making sure that the team knows that all assignments are closely tracked to ensure their completion, and then actually tracking those assignments through completion.

The importance of holding rehearsals cannot be understated. In advance of significant presentations, e.g., major client presentations or, obviously, court-related presentations (e.g., a *Markman* hearing, summary determination hearing, trial, etc.), there should be a full rehearsal. Everyone in the cast who has any connection to the presentation should meet in person (ideally) and rehearse the presentation from start to finish. Rehearsals can be used to address key strategic considerations, evidence or witness problems. Rehearsals will expose the gaps and goofs in the preparation and the presentation and will allow correction before the actual performance, where, again, there are no retakes.

If a COO/director expects the actors to show up on time, completely prepared and ready to give their best performance both in the rehearsals (at team meetings) and performances (in the courtroom), the COO/director should model the expected behavior. If there are problems in the case, including team members who are faltering or repeatedly delivering bad performances, the COO/director must deal with them promptly. The problems will not go away and will not get better with time. Tolerating substandard performance will breed discontent among high-performing team members.

Good vibrations

Finally, the COO/director should strive to create an environment that makes team

members want to be on the team and part of the cast—that there's a "good vibration" running through the team. This is accomplished in several ways.

At the outset, the COO/director should promise the team members that their advocacy skill-sets will be elevated and will improve through their team participation. The COO/director then must make good on that promise by giving team members good opportunities to act like advocates, while also ensuring that team members are completely ready for performances. Further, the COO/director must provide immediate positive and constructive feedback to team members.

The COO/director should stress that teams and not individual lawyers win big, complex cases. Critical to building a strong team is staffing it with lawyers who are smart and hard working, but also humble, willing to compromise their individual performances for the good of the team and the mission.

After the team is staffed, the COO/director should set the ground rules for participation so that there's no ambiguity about the expectations of team participation. The COO/director should encourage a brutally frank confrontation of ideas, proposals and case strategies, but never make things personal; insist that team members show up on time and be fully prepared; insist on decency and fairness in all dealings with staff and support crew; require that the team follow the work-product and communication protocols; reinforce that once decisions are made, the team must get behind those decisions and pull together; and, most importantly, stress that accomplishing the mission is every team member's No. 1 priority.

Lawyers and staff who believe they are part of something larger than themselves, are growing their talents and skills and are recognized for great team and individual efforts will deliver strong, team-based performances. **NLJ**

Reprinted with permission from the July 7, 2008 edition of THE NATIONAL LAW JOURNAL. © 2008 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact 800-888-8300 x6111 or visit www.almreprints.com. #005-07-08-0005.

**McDermott
Will & Emery**

David H. Dolkas
ddolkas@mwe.com
650 813 5115