

How White Collar Attys Can Use Mythic Archetypes At Trial

By **Jack Sharman** (December 10, 2024)

Every story has a hero. In film, fiction and the courtroom, the hero's journey moves us. Along the way, there are archetypes — recurring characters and personality patterns.

As white collar defense lawyers at trial, what are the archetypes we need to identify?

Given that the end of the year sees a flurry of nominations and voting for film and television awards, we will rely on a volume from the screenwriting canon as our guide.



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This article sets out the hero's journey as it applies to white collar trials, and then offers practical archetypes that counsel should have ready in their toolkits.

Heroes, the Ordinary World and the Special World

What do fairy tales and courtroom struggles have to do with each other?

Quite a lot, as a careful reading of Christopher Vogler's book, "The Writer's Journey: Mythic Structure for Writers," reveals.[1] The foundation for the book was an industry-famous seven-page memo Vogler wrote while working as a story analyst for Walt Disney Pictures, called "A Practical Guide to Joseph Campbell's 'The Hero with a Thousand Faces,'" Campbell's tome on comparative mythology.

Vogler teaches that there are eight archetypes, discussed more below. And, tracking Campbell's work, Vogler identifies 12 stages in the hero's journey.[2]

For purposes of our white collar jury trial, we will consider only three stages of the journey: the first two stages — the "Ordinary World" and the "Call to Adventure," which leads to the "Special World" — and the "Return with the Elixir."

Then, we will consider archetypes we might encounter and how to use them to our advantage.

The Archetypes

The eight archetypes identified by Vogler are as follows:

1. Hero: This is someone who is willing to sacrifice their own needs on behalf of others.

2. Mentor: This is a character who helps or trains the heroes and sometimes give them gifts. Think of Merlin, the Fairy Godmother, Obi Wan Kenobi and the Veteran Sergeant.

3. Threshold Guardian: This character is a menacing face to the hero, but if understood, can be made an ally. In any film, consider the lookout, bodyguards, night watchmen, doormen and bouncers.

4. Herald: This character brings a new challenge to the hero and announces change. Examples include the voice in "Field of Dreams," Cary Grant in "Notorious," and the first tremors in "Earthquake."

5. Shapeshifter: This is a character who changes constantly from the hero's point of view. Examples include Glenn Close in "Fatal Attraction," Kim Novak in "Vertigo," and Michael Douglas in "Romancing the Stone."

6. Shadow: This is a character who represents the energy of the dark side. It includes most villains and antagonists.

7. Ally: This is someone who travels with the hero through the journey, serving a variety of functions. Examples include Knights of the Round Table, Sancho Panza and Dr. Watson.

8. Trickster: This is someone who embodies the energies of mischief and a desire for change. Think of Loki, the Norse god; Bugs Bunny; and Eddie Murphy in "Beverly Hills Cop."

Identifying the Hero

In most stories, the hero is obvious, but that is not the case in a white collar trial, or perhaps in any trial. Jurors are in deeply unfamiliar territory. They look around for heroes and villains. They want mentors to help them discern one from the other.

An oddity of the trial story is that we must persuade jurors that, in the courtroom, there is not just one hero, but actually two: the defendant and the jury.

Because of "Law & Order," "CSI," "NCIS" and similar media portrayals, and because federal courtrooms have pomp and circumstance, jurors may come prewired with a notion that the government — prosecutors and agents — are the heroes who seek to overcome the villainy of crime, personified by the defendant.

To shift the hero-location in jurors' hearts, we need to think creatively and aggressively about archetypes — first, by figuring out where we are.

Where We Are

Using Vogler's vocabulary, the "Ordinary World" was the defendant's life before indictment — an ordinary, healthy, honest place.

When the government indicts the defendant and brings them into trial, we are all now in the "Special World" — extraordinary, unhealthy, deceitful.

As defense counsel, we use all our tools — including the right archetypes — to bring the defendant out of the "Special World" and get them back to the "Ordinary World."

Trial Events and Their Archetypes

Each trial is different. Within each trial, there are dozens upon dozens of events that the white collar defense lawyer might use to move the jury from that strange, terrible, unfair place — the "Special World" of indictment, shame and potential guilt — and back to the

"Ordinary World" of grace, exoneration and liberty.

Here, we address six trial events and their archetypes: gap, overreach, misinformation, misidentification, transmutation and scout.

Gap

Defendant-friendly moments at trial are often less a matter of affirmative submissions of evidence than evidence's absence — for example, a lack of support for a necessary element of the offense, or no basis for an expert's conclusion.

The government faces a gap in its evidence, a gap that it asks the jury to jump over or ignore.

The defense lawyer — or sometimes a surrogate, such as an expert, a friendly fact witness or an unassuming document custodian — serves as what Vogler calls the threshold guardian.

Whether on direct examination or on cross-examination, we must signal to the jury that there is a threshold — a gap — that the government must cross, and that the prosecution has not paid the price or answered the riddle in terms of evidence sufficient to do so.

Overreach

Experienced practitioners understand the human tendency of both defense counsel and prosecutors, in the course of representing their clients with zeal, to advocate so aggressively that one's case is diminished rather than enhanced.

This failing is overreach. While either side of the "v." is susceptible to overreach, defense counsel can more readily make use of the government's failing in this regard than vice versa, given the asymmetric power in play — i.e., the state versus the citizen — and the potential consequences, such as a loss of business or of liberty.

Here, defense counsel should consider the archetype of what Vogler describes as the shadow, the force of darkness that seeks to block, imprison or destroy the hero.

To the extent we have been successful in our advocacy by creating two heroes in the courtroom — the defendant and the jury — the jurors will feel the shadow's chill, even though they, obviously, are not its target.

Misinformation

If overreach involves advocacy and the shadow, misinformation involves evidence and the trickster. Misinformation is information about the defendant that is either affirmatively wrong, or that is so incomplete that it harms the defendant by misdirection.

When faced with misinformation, defense counsel should keep in mind Vogler's concept of the trickster. Unfortunately, there is little that can be done about the trickster, unless through pretrial and motion-in-limine practice, defense counsel can present evidence that offers the defendant's story as a whole, and in a more defendant-wholesome manner.

Otherwise, the trickster must be addressed in a later or more reactive stage, such as during cross-examination, during direct testimony if the defendant decides to testify, or in closing

arguments.

Misidentification

From time to time, the government does not fully understand what it is seeing. In financial, healthcare or professional responsibility cases, for example, a noninculpatory email or contract can take on a sinister cast because it is offensive to ethical practice, sound moral conduct or honorable behavior.

At such moments, the government has taken on the archetype of the shapeshifter. In the courtroom, as well as in fairy tales, a shapeshifter may contain elements of both good and bad. But at its core, it is unreliable.

Defense lawyers must explain the shapeshifting nature of the evidence and argument.

Transmutation

Ethics, morality and honor are deeply rooted concepts, but they differ from crime in critical respects. The government at trial may exploit a continuum of wrongdoing and present noncriminal conduct as, nevertheless, worthy of criminal punishment. Indeed, some jury research indicates the power of this approach with younger jurors in both criminal and civil cases.

The response from defense counsel should be to educate jurors on the shapeshifting nature of what the government offers. Reminding the jury of the elements of the offense rather than the sensational allegations is critical, as is preparation for testimony by agents who, for many jurors, will bring with them an aura of ethics and honor.

Flagging

Prosecutors sometimes "wrap themselves in the flag" and invoke civic virtues — patriotism, hard work and fairness.

In an insider trading trial, for example, the government may insinuate implicitly, and argue explicitly, how unfair it is for the defendant to have profited on information that others did not know.

In a government contracting case, the prosecution may attempt to weave in the commendable service of men and women in the armed forces — whether or not that service has anything to do with the offenses charged.

In such situations, defense counsel should consider Vogler's concept of the ally. What witness or document can be used, not to run from the flag, but indeed, to hoist it high in aid of the hero?

In a healthcare fraud or kickback case, for example, there may be patients, payors or providers who are part of the government's case, but have landed in the "Special World" of the trial unwillingly or unwittingly. With a measured approach, it is remarkable how often such witnesses can become an ally.

Conclusion

Vogler's archetypes are useful to the white collar defense lawyer at trial. Mythic structure is

as important in the courtroom as it is in film or fiction.

Archetypes are of little use, however, if they fail in the last step of the hero's journey: the "Return with the Elixir."

In mythology, the elixir is whatever the hero brings back that will do good for others or for the community. In the context of the white collar trial, the elixir is a not-guilty verdict.

At closing arguments, we need to take on the attribute of Vogler's mentor. By the conclusion of trial, if we have done our job, at least some of the jurors have realized that not only is the defendant the hero of the story, but so are they.

If we can cause jurors to look upon us, at least to some degree, as a mentor on their own journey, we will have discharged our duty to help the defendant receive an acquittal and return to the "Ordinary World."

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[1] Christopher Vogler, *The Writer's Journey: Mythic Structure for Writers* (Michael Wise Productions) (2020 ed).

[2] The stages are:

1. The Ordinary World: the hero is seen in their everyday life
2. The Call to Adventure: the initiating incident of the story
3. Refusal of the Call: the hero experiences some hesitation to answer the call
4. Meeting with the Mentor: the hero gains the supplies, knowledge, and confidence needed to commence the adventure
5. Crossing the First Threshold: the hero commits wholeheartedly to the adventure
6. Tests, Allies, and Enemies: the hero explores the special world, faces trial, and makes friends and enemies
7. Approach to the Innermost Cave: the hero nears the center of the story and the special world
8. The Ordeal: the hero faces the greatest challenge yet and experiences death and rebirth
9. Reward: the hero experiences the consequences of surviving death

10. The Road Back: the hero returns to the ordinary world or continues to an ultimate destination

11. The Resurrection: the hero experiences a final moment of death and rebirth so they are pure when they reenter the ordinary world

12. Return with the Elixir: the hero returns with something to improve the ordinary world