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CORPORATE COUNSEL

Controlling the Narrative: Early Case Assessment and the Myth of the 'Not Winnable' Case

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With the economy in disarray, the number of employment lawsuits has, quite literally, exploded.

In the past, companies would often choose to settle employment cases, regardless of merit, simply to avoid the expense and inconvenience associated with participating in a lawsuit. Not any more.

Companies, and upper management, are tired of being wrongfully accused of treating employees in a manner that was unfair or discriminatory. It is time, many feel, to take the target off their backs. As a result, in-house attorneys are being instructed to fight the meritless cases, regardless of the cost. And that is exactly what is happening ... or is it?

THE PROBLEM: Too often, the general counsel is told that a particular case is a "strong" one for the company, with few, if any, major problems. The decision is made that you will not settle for anything other than nuisance value, and proceed to prepare the case for trial or disposition by summary judgment.

The case proceeds with expensive document and e-discovery, even more expensive discovery disputes, depositions which consume an incredible amount of company time and resources, and quite possibly, a very expensive summary judgment motion that is rejected — in whole or in part — by the court.

At that point your in-house lawyer comes to you and recommends you settle the case for six figures.

WHAT????

After you calm down (or maybe not), you pointedly ask why, after the company has spent thousands of dollars (or more) defending a "strong" case, he is now suddenly recommending such a substantial settlement.

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Your lawyer sheepishly tells you that (a) he or she discovered some really "bad" company documents that hurt the company's position; (b) he or she recently discovered some really "bad" facts about certain company witnesses; (c) your key management witnesses did very poorly during their depositions, looked bad, said the wrong thing(s), and won't be able to stand up during cross examination; or (d) all of the above (and more).

You settle the case and determine that there has to be a better way. There is.

THE SOLUTION: There is no "perfect" employment case — every case has facts that are messy and, at best, unfortunate.

Plaintiff's attorneys count on this and on the hope that companies — particularly large companies — will be so frightened by the negative facts of any particular case they will automatically pay to settle a matter. But, if you demand that a meaningful Early Case Assessment ("ECA") be completed within the first 90 to 120 days after outside counsel is first given the case, you can *identify* and then *control* and *minimize* any negative facts before a plaintiff's attorney can effectively use them to weaken your position.

You are then in a much stronger position regardless of whether your decision is to settle the case or to proceed to trial. And, you decrease your chances of spending significant amounts of money defending the case only to turn around and pay significant amounts to settle the matter on the eve of trial.

WHAT IS A MEANINGFUL EARLY CASE ASSESSMENT? The best way to economically resolve or settle a case favorably is to prepare for a jury trial from day one (it is also, by the way, the best way to obtain a favorable verdict if the case goes to trial).

All too often discovery closes and then the effort to develop a theory or story of the case begins. By then your witnesses have done poorly and harmful admissions have been made. It is time to reverse the order.

Outside counsel should be provided with all the relevant company documents as well as access to all critical company witnesses no later than the first 90-120 days after they first receive the complaint.

Then, they need to assess the case from a jury's point of view. The emphasis should

be on determining what your story is — not simply on refuting the plaintiff's story.

Develop a theme and language that is consistent with the facts and that best describes the events from the company's perspective. Then "discover" your story — explain the story to company witnesses and prepare them for depositions with your theme in mind. Serve discovery and depose plaintiff's witnesses with a goal of getting admissions consistent with your story.

Will the story you wanted to tell correspond with the story you can tell after discovery has closed?

Not always. But charting the course in advance is the safe and efficient way to navigate the litigation and arrive at a favorable destination.

The actual effort of developing your story or theme of the case does not have to be expensive. It can simply take a day or two of working with an expert in jury behavior, human communication, persuasion, and argument.

Cases are about facts, but they are also about stories, values, and beliefs. Linking the experts in law with the experts in human communication sooner rather than later provides in-house counsel with valuable information to help resolve cases favorably and economically.

ONE REAL LIFE EXAMPLE: Sometimes the company has no choice but to proceed to trial because of the position taken by plaintiff's counsel. In those instances, a meaningful ECA can provide the roadmap to victory. For example, in a recent case that went to trial, the plaintiff — an African American male — complained that his manager repeatedly used derogatory racial epithets. He complained to management twice.

The first time he complained, he made general statements about the manager's inappropriate comments but never stated that the manager made derogatory racial epithets. Four months later — once he knew that he would be quitting the job and moving out of the area — he hired an attorney and complained again.

This time, however, he stated that the manager had made derogatory racial epithets on two occasions. By the time the case proceeded to trial, the plaintiff's story had evolved to the point where the manager allegedly made derogatory racial epithets on a daily basis.

We immediately obtained and reviewed the company's documents and interviewed the critical company witnesses — including the manager in question — before a single deposition was taken. Our early investigation revealed that there were no "smoking gun" bad documents; but there was one really bad fact — specifically, that the manager in question admitted to using derogatory racial epithets on a few isolated occasions.

Our investigation also revealed, however, that the company promptly investigated both of plaintiff's complaints; and that after learning about the first complaint, the company disciplined the manager and his behavior improved. This became our "story" of the case — the last and most critical part of ECA.

We then prepared to — and did go about — discovering it. We prepared the manager in question extensively for his deposition.

Specifically, we prepared the manager that whenever he admitted to making inappropriate comments, he should also acknowledge that after being disciplined, he never engaged in such behavior again. We prepared the company witnesses to say that as soon as they were advised of the offending behavior the manager was disciplined and his behavior immediately improved. And, when taking the depositions of the plaintiff's witnesses, we got them to admit that the manager's behavior improved after the first complaint was made.

We defined our story and then we discovered it!

When it became clear that the case would proceed to trial the "story" we had developed was easily transformed into the "theme" of the case "*... this is not a case about a work environment that was so hostile it affected the Plaintiff's ability to work effectively — rather, this is a case about a teachable moment — where the company responded and the manager stopped his behavior.*" The theme was described to the company witnesses and their behavior towards the plaintiff was always discussed/considered in this context.

As a result, the witnesses were much stronger on the stand because they were able to focus on what they did right — as opposed to what they did wrong. A simple dry erase board graphic was used to identify any instances of derogatory language before and after the company's corrective action. The right side of the board was still blank at the time of closing argument.

The plaintiff had been counting on chronological confusion, exaggeration, and emotional impact to win his case. Because we had prepared "our story" early on in the case, we — and not the plaintiff's attorney — were able to control the language and characterization of the case. We had discovered and then dealt with the "bad facts" in a manner that was believable and persuasive. We received a complete defense verdict in a case that many told us was simply "not winnable."

CONCLUSION: Early Case Assessment allows you to develop a believable and persuasive story that can be used to minimize the effects of any "bad facts"; control the characterizations and terminology of the litigation; and prepare company witnesses for depositions. Commitment on the part of both corporate counsel and outside counsel are required in order to make ECA work, however.

The ultimate goal is efficiency of the process and a wise use of limited resources. To be effective, ECA — with the proposed "story" of the case — should be completed no later than 120 days after outside counsel first gets the complaint; and certainly before any company witnesses are deposed.

If ECA reveals significant problems either because of documents or witnesses or both, the goal should be to try to settle the case before a substantial portion of the litigation budget is consumed. Because your witnesses will be prepared with a believable story, however, the chances of your being forced to pay significantly more than the case is worth will have been minimized. If, on the other hand, you can't settle because of an unreasonable plaintiff or because you do not believe the company to be at fault, ECA allows you to create a story that can become the winning theme of your case.

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