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Essentials of Pre-Trial Strategy

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The crux of an efficient pre-trial strategy is recognizing that it begins when suit is filed and continues – and morphs – throughout each stage of the litigation, right up to when your attorneys thank the jury for their time in the closing argument. It is a combination of playing the game half-a-dozen or so moves into the future and staying light on your feet as the ground shifts beneath you.

Every case can be distilled to a few (and sometimes just one) critical points. It is on these points that either liability or a leveraged resolution depends: Was there authority to sign the contract? Was there adequate notice? Are the liability theories on sufficiently stable ground? Identifying these pressure points (whether favorable or unfavorable) at the outset of the case is essential to efficiently and productively developing the case through litigation, which in turn lands you and your attorneys at trial with everything necessary to win. So how do you get there?

Ask questions. When a new piece of litigation lands on your desk, your law firm should scrutinize every allegation in the petition and confer with you to understand the basis of the allegations, your position on them, and what nuance or context affects their accuracy.

Construct your narrative. In any case – whether a simple personal injury defense or the most complex of commercial cases – a timeline of events is essential to understanding what led to the filing of a lawsuit. Collect every email, agreement, or other document that touches on the allegations and potential defenses for your legal team to review. This should be done before a single discovery request is served. Your legal team should piece them together – chronologically usually works best – to review and analyze, annotating and flagging pivotal or problematic documents, both favorable and unfavorable.

It is at this stage of the "pre-trial strategy" that your attorney should identify the likely critical points on which liability and your defense will hinge. These critical points will be found in the gaps: an email that went unanswered, a board resolution that was never put to a vote, an audit that flags for the plaintiff the very concern the plaintiff is now claiming was fraudulently withheld.

If timing and budget permit – and the potential defenses are strong enough – a dry run at drafting a motion for summary judgment may be warranted. In forcing pen to paper to identify the legal authority in support of a defense, the facts in support of defense, *and what evidence you're missing to bridge the gap*, your attorneys can quickly identify what your primary focus and goal should be in conducting the litigation.

Set your scope. With a narrative in place and defensive points and evidentiary gaps identified, you're able to rather surreptitiously engage in discovery that is laser focused on shoring up those defensive points (or potentially learning their folly early on). Laser focused discovery is efficient, effective discovery, more adept at evading a time consuming, expensive, and altogether wasteful motion to compel and hearing before the court. For example, for the audit example above, your attorney could request all correspondence reflecting the plaintiff's receipt or transmittal of the audit or internal communications about the audit, which would reflect their knowledge of the contents of the audit, thereby defeating their fraud claim outright. This is in lieu of a broad request for internal communications relating to the allegedly withheld information. Your lawyers should

continue to fold newly acquired information into your narrative, always assessing how it strengthens or weakens your position.

Stay the course. Every decision in the litigation going forward should be influenced by the critical points identified at the outset and honed through discovery. They are the guiding light in deciding whether it's necessary to resist procedural maneuvers by opposing counsel, motions filed, and so on. This is where the initial deep-dive into the case allows you and your lawyers to be half-a-dozen or more moves ahead of your adversary and well prepared for trial well in advance of it.

It's all in the preparation. There is no substitute for being the most prepared team in the courtroom. By helping your attorneys identify the pressure points and leverage points of your case – and from the outset – they'll be able to anticipate and respond to arguments and trial tactics with disarming ease. More importantly, they'll be able to serve your case to the jury on a silver platter.

If you have any questions regarding pre-trial strategy, please reach out to Kimberly A. Chojnacki or a member of Baker Donelson's Trials Group.