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When an Upcoming Trial Is Keeping You Up at Night

From the Experts

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"Inaction breeds doubt and fear. Action breeds confidence and courage. If you want to conquer fear, do not sit home and think about it. Go out and get busy."
Dale Carnegie

Litigation can be a long and tedious process. Your company may have the right lawyers for litigating the underlying issues; however, as the prospects of actually going to trial move from highly improbable to DEFCON 2, you must ask two essential questions. How do you assess if your trial team is ready to actually try the case? And when/how do you bring in a specialist to improve your chances of winning at trial?

After more than 30 years of practicing law, I have been called in to many jury trials at the last minute, after summary judgment has been denied, 30 days before trial, and, in one instance, a few days before trial. Clients bring me in because the stakes are high, the attorney who has handled the litigation does not



Photo: J. Albert Diaz/ALM

Beth Tanis of King & Spalding, left, writes notes as Steven Thomas of Thomas Alexander & Forrester gives his opening statement in front of Miami-Dade Circuit Judge Jacqueline Hogan Scola, right.

have sufficient jury trial experience, and/or because the case presents serious challenges in terms of evidence, witnesses and the opposing counsel. Over these years, I have developed techniques to evaluate cases, evidence and witnesses and then to refocus and reposition the case for a successful jury trial.

Here are some practical approaches to ensure that your case is best positioned for success.

Is the Trial Team Ready?

Although you may have been getting updates and assessments as the case progresses, here are some tips to determine whether your trial team is actually prepared:

- Who will be sitting at counsel's table? How many trials to verdict has each attorney had, and what was the outcome of each? What is the division of responsibility among those at counsel's table?

- What are the strengths and weaknesses of each witness? What is the plan for addressing witness weakness? What is the schedule for witness preparation?

- Who does counsel propose as the company's representative at trial? Why?

- What are the themes for trial? What are the themes anticipated from the other side? Can your attorney effectively and credibly tell your story to the jury?

- If punitive damages are available in the case, what is the plan for addressing/defending punitive damages?

- Do you have the right expert witnesses in place?

- What is the status of settlement negotiations?

- What are the biggest problems in the case for trial? How are you going to address those problems at the outset of litigation?

When Should You Bring In a Trial Specialist?

- A trial specialist can bring a fresh, innovative perspective to the case. Most of your lawyers have been mired in dealing it from the other side's perspective, i.e., summary judgment, discovery issues, etc.

- Difficult witnesses, including high-level executives with limited time available, may respond better to a different counsel and a

different approach to communicate key testimony and prepare for cross-examination.

- Trial specialists have techniques to deal with what may appear to be bad facts, bad documents and/or ineffective witnesses. Owning the flaws and putting them in context can result in a much better outcome, and experience has helped us turn these kinds of problems around.

- o For example, in a recent trial where I "parachuted in" long after discovery, we had a situation with a key witness who did not come across particularly well or credibly on video. And we knew that the plaintiff planned on playing hours of deposition testimony to the jury, before the witness could testify, in an effort to make him the "bad guy" in the case. We worked with the witness over several days to break down a number of communication barriers. Result: Complete defense verdict and, according to many of the jurors, the witness was the most liked and believed witness in the case.

- o Another example involved a document that lawyers thought contained "smoking gun" language was really nothing more than an honest comment by a supervisor about having to keep working with a difficult employee. When the jury understood the context, the result was a defense verdict.

- o In yet another case, HR had argued with management via email to try to force the termination of a supervisor for an inappropriate remark. HR's recommendation was rejected, and a

lesser penalty was enforced. To counter these key documents used by the plaintiff to establish liability, defense witnesses explained why such dialogue is healthy and, in this case, resulted in a fair and sensible outcome.

Instead of feeling "stuck" and worried, be proactive and ask the difficult questions of your trial counsel. Trial counsel can stay in the case with the assistance of a trial specialist, or a new trial team can be developed efficiently and in short order. Judges appreciate experienced counsel at trial, and we have not encountered problems with new counsel entering the case.

Juries have never heard the case before, and are not influenced by the fact that there is a different lawyer in the case than the one that took a deposition. Opposing counsel, even where the interactions with existing counsel have been contentious, tend to be thrown off balance with the entry of trial counsel. Often this is to your advantage in the courtroom, and sometimes the change promotes settlement discussions initiated by the other side.

Nancy E. Pritikin is a partner in the labor and employment practice group in Sheppard Mullin's Silicon Valley office. She has extensive courtroom experience and specializes in employment discrimination, wrongful termination and sexual harassment matters.