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Land wars in Asia

Battles – the most classic of blunders


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You have the products-liability case of a lifetime. The Complaint's been filed. The Answer is in. Discovery time. You sit down and craft a discovery plan. Fine-tuned. Perfection. You send it out and receive – blanket objections – the litigation world's joyous middle finger equivalent. Steaming, you decide you will crush them. You begin banging out a meet-and-confer letter that is the precursor to the motion to end all motions, the one that will set records for discovery sanctions. You and your three-person firm. Against the one hundred lawyer, let's rack those billables, defense counsel Scorchum, Burnem & Buryem, LLP. One of four defense firms for the four separate defendants in your product case.

Time to take a deep breath, step back, and evaluate options.

Identify the "must haves" and the "like to haves"

At the beginning of a case, lawyers take time to craft a discovery plan. An initial part involves reading the jury instructions – you need to know what you have to prove so you obtain the right material. It also involves brainstorming what you want and identifying the tools you'll use to get it. Another step is talking to your experts early on and getting their discovery wish lists.

Now that you have the universe of everything you want, you should also identify what you absolutely must have. There's usually a difference. Every construction change order for a project where the general contractor injured your subcontractor employee? Want. Prior incidents in the same location plus video and photos of the incident? Need. The first might occupy 20 bankers' boxes and provide limited utility. The latter is essential. This winnowing process is important. If you go toe to toe over every tangential document and appear in court on motions to compel, you may find yourself wearing on the judge. Judges typically liken discovery battles to playground disputes – everyone is partially at fault.

Is there another way?

In Terminator 2, Schwarzenegger, in an effort to steal a car, smashes the steering column open and starts trying to hotwire the car. His young charge folds the sun visor down – out drops a key. The lesson: there are easier ways if you look for them.

One example: the Sunshine Act, alternately known at the federal level as Freedom of Information Act. Most governmental agency litigation is contentious. I've received three pages of documents in response to 40 requests for production. But the folks answering my Sunshine Act request? They provided hundreds of pages. And they did not coordinate with the City Attorney's office. Imagine the deputy city attorney's surprise at the PMK deposition. Call it the Sunshine Act, FOIA, or what have you, it is an easier way.

There are other ways. Try searching for prior cases against your defendant to obtain court filings, depositions and documents. The Internet offers a host of resources. The company's Web site is a good start. Prior iterations of the Web site, hosted on the Wayback Machine, sometimes provide a snapshot of material the company tried to bury. Social media – searched separately from a general Internet search – can yield treasures. Social media moves fast. You're more likely to find material that is more cavalier and less thought out than a company Web site.

Think about how you would get what you need if you did not have the subpoena power. You'll find a source that does not require Law and Motion visits.

Andre the Giant has a posse

Some opponents are civil. Some are bullies. Some bullies are directed to act that way by their clients to see if it will wear you down. Remember Andre the Giant's character in The Princess Bride? (Inconceivable!) Others are simply sociopaths. Knowing your opponent – and the objective – helps you determine your response. Regardless, you lose once your ego gets involved. But you can be strategic. Stand up to those directed to bully. Use judo law on the sociopath to redirect that lawyer's energy.

A colleague of mine brought (and won) 38 motions to compel against a sociopath. This was not ego – they were necessary. They ultimately tilted the battlefield in my colleague's favor. They led to an incredible outcome on a very, very tough case. I tell this story to note that sometimes the road is tough even when the outcome is justified. Court-funded therapy was not part of the resolution (but warranted).

I do not think that word means what you think it means

Vague. Ambiguous. Privilege and privilege log. The need to engage in the bare-knuckled discovery brawling is part of the price paid to step into the ring for the eventual title fight – trial. If it were easy, everyone would be doing it. But it is not. That's why you're there, late in the evening, planning how to win. Buck up. You'll get there. And when the defense eventually buckles, your client will thank you, never knowing the effort it took to get there.

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