304 Taking a Proactive Approach to Catastrophic Litigation

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Faculty Biographies

John Sabine DeGroote

John Sabine DeGroote currently serves as vice president, deputy general counsel and chief litigation counsel at BearingPoint, Inc., in McLean, Virginia, a global consulting firm. As BearingPoint's chief litigation counsel, Mr. DeGroote maintains primary responsibility for the company's worldwide litigation docket and litigation prevention strategies, which he manages with a team of six full-time in-house litigators. As one of three deputy general counsel, Mr. DeGroote is involved in the management of BearingPoint's legal department as a whole; he has also managed the company's insurance portfolio and BearingPoint's intellectual property protection strategies, including its worldwide rebranding and name change from KPMG Consulting in late 2002.

Prior to joining BearingPoint, Mr. DeGroote practiced with McKool Smith, P.C., a Texas-based litigation firm specializing in intellectual property and complex commercial disputes. Prior to joining McKool Smith, Mr. DeGroote served as vice president and counsel at First USA, Inc., where he maintained responsibility for litigation and intellectual property issues. Prior to practicing with First USA, Mr. DeGroote was an associate in the Dallas office of Jackson Walker L.L.P.

Mr. DeGroote earned his B.A. from Mississippi State University and his J.D. from Duke Law School.

James L. Golden

James L. Golden is general counsel at Covenant Transport, headquartered in Chattanooga, Tennessee. Mr. Golden's responsibilities at Covenant include supervising catastrophic trucking accident claims, as well as providing general direction and support on Covenant's compliance programs and contract law.

Mr. Golden had previously been a partner with the law firm of Leitner, Warner and Moffitt in the area of defense litigation.

He is a graduate from the University of Tennessee at Knoxville.

John R. Linton

John R. Linton is general counsel for JRL Enterprises, LLC, located in Highlands Ranch, Colorado, which is a professional training and service company.

Prior to assuming his current responsibilities, Mr. Linton served RE/MAX International, Inc. (RE/MAX) in various capacities, including as its general counsel. Over this period, Mr. Linton personally managed all major litigation in which RE/MAX was involved. Among other responsibilities, Mr. Linton selected and supervised outside counsel in the defense of these cases and secured management's authorization of the expenditures necessary for use of extraordinary trial preparation tools and techniques and the latest courtroom technologies. Mr. Linton boasts of an undefeated record in the defense of RE/MAX in complex litigation brought against that entity during his long tenure as its general counsel. Prior to assuming his position as the chief legal officer of RE/MAX and its affiliated headquarter companies, Mr. Linton served the National Association of REALTORS as its vice president of legal affairs, managing the legal department he created there after leaving private practice at Kirkland & Ellis, a Chicago based law firm.

Mr. Linton is a member of the bars of the United States Patent and Trademark Office and of the United States Supreme Court.

Frank C. Vecella

Frank C. Vecella is the associate general counsel-litigation for Ericsson Inc. in Plano, Texas. He is responsible for managing and supervising all significant litigation matters involving Ericsson and its affiliates in the United States and Canada. He also provides advice and guidance to upper management with respect to all major litigation in other parts of the world.

Prior to joining Ericsson, Mr. Vecella was a partner in the Dallas office of Jackson Walker L.L.P. His practice focused on general commercial litigation, with primary emphasis on intellectual property litigation, deceptive trade practices, unfair competition, defamation, and other First Amendment-related litigation. While at Jackson Walker, Mr. Vecella served, at various times, as head of the litigation and intellectual property sections, respectively, and also on the firm's practice management, business development, and recruiting committees.

In addition to national, state, and local bar associations and activities, Mr. Vecella has served as a barrister in the Dallas Inn of Court and as a research fellow of the Southwestern Legal Foundation. He has done pro bono work for the South Dallas Legal Clinic and Legal Services of North Texas. He also is a member of the Dartmouth Lawyers Association and the Dartmouth Alumni Club of Dallas.

Mr. Vecella received a B.A. from Dartmouth College and is a graduate of the University of Virginia School of Law.

"Taking a Proactive Approach to Catastrophic Litigation"
Litigation Track Course #304
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Our goal in this presentation is to share with you the proactive thinking we have adopted and the additional or unusual measures we have employed when confronted with one of those rare cases where a realistic, possible outcome is the total loss of the company, from financial ruin to complete loss of goodwill to an injunction prohibiting the use of its business model.

We must emphasize at the outset that the practices we will describe have to do with the degree or extent of analysis and preparation of the case for trial rather than any fundamental change in the basic steps that must or should be taken with any new matter. These well-known basic steps have been covered in previous seminars and include, but are not limited to, promptly suspending the document destruction component of the company's document retention program and related steps to avoid the spoliation of evidence, doing an early case assessment on the merits, affirmative defenses, possible counterclaims and likely costs to defend the case, reporting the case to the appropriate insurance carriers with recommendations of defense counsel, explorations of early settlement opportunities or of staying the case pending the outcome of third-party mediation, and so on.

The focus of this presentation is instead on 19 case preparation measures, shifts in thinking and extraordinary expenditures for additional outside litigation team players and various preparation and testing processes that have been of great value in previous catastrophic cases. This is certainly not an exhaustive list, as it is designed only to help in-house counsel prepare at the outset for what will likely become a long, arduous lawsuit defense. Whether and to what extent you adopt the measures discussed (or others) will depend upon the type of catastrophic case you face, the jurisdiction you find yourself in, and the extent to which you are successful in winning the battles required to fund these measures. The added costs are great and can generally be justified best only when the stakes are exceedingly high — like when the continued existence of your client is on the line.

As with Sarbanes-Oxley compliance, the buck stops in this setting with General Counsel. But also as with Sarbanes-Oxley, within the legal department, duties and roles may be delegated and responsibilities must be shared, since defending a catastrophic case is never a one-person assignment. To the contrary, the case preparation measures discussed in this presentation will usually require the involvement not only of general counsel or chief in-house litigation counsel, but likely other in-house lawyers making up the corporation's legal department. The following are 19 measures to consider if and when the catastrophic case finds its way to you.

A. Part One: Recognizing the Catastrophic Case

The first step in a catastrophic case is to recognize it and convince others that it is what you see it to be — a battle that can't be avoided, forfeited or ignored, a high-profile encounter with goodwill and the future of the organization at risk. Whether you call it “bet the company” litigation or not, some thoughts to consider as you assess whether your case merits treatment as catastrophic include:

1. A catastrophic case is never denominated as such, and the damage demand is not a reliable indicator since frivolous case plaintiffs sometimes seek tens of millions of dollars in damages.

2. There is no typical "plaintiff," as the catastrophic case may be brought by the DOJ or some other federal or state regulatory body, by a competitor, by a lone consumer who later postures himself to represent a class, or by an inventor. Or the catastrophic case may arise as a counterclaim to an action initiated by the company.

3. There are no common denominators in the causes of action asserted, the forum selected or the relief sought.

4. The inquiry instead must involve a search for tell-tale markers ("TTMs") of a possible catastrophic case — things that don't seem to fit or track logically, such as: a refusal by plaintiff to even discuss a resolution or settlement or a demand for an outrageous, absurd monetary payment to settle; or some indication that the motivation for the suit is your client's destruction, such as a ruinous case brought by a disgruntled competitor or former employee; or a plaintiff, such as a state attorney general, who has a political/image purpose that may only be served by something to brag about, like a harsh consent judgment or a favorable jury verdict after trial.

5. Additional TTMs may be evident from the law asserted or the causes of action presented. Catastrophic cases often assert new or novel theories or untested causes or are based upon little-known, as yet not judicially interpreted, or very recent changes in the law.

6. Still other TTMs may be revealed by the nature of the relief sought, such as injunctive relief designed to foreclose some competitive advantage or to preclude continued use of an invention/business model or a credible argument for monetary damages many times your client's reserves and net worth.

7. While a single TTM in isolation is not usually determinative, when three or more are noted in a particular case, that matter should at least be regarded as a potentially catastrophic case.

8. Supreme Court Justice Potter Stewart once said of obscene material, "I know it when I see it." You will find that the same is true of a catastrophic case — at some point in time you'll see it for what it is.

B. Part Two: Choosing the Forum

Every opportunity should be taken to get your catastrophic case into the jurisdiction where the law — both substantive and procedural — is most favorable to the corporate-client. If a potentially catastrophic case is identified prior to its being filed against the corporate client, an effort should be immediately undertaken to identify the most favorable proper forum, and serious consideration should be given to filing the case there, even if it requires the filing of a declaratory judgment action. There are always advantages to being able to frame the issues and choose the jurisdiction. If a case has already been filed, an inquiry should be made into the possibility of getting to a more appropriate (if more favorable) jurisdiction through appropriate motions.

1. Become the plaintiff if at all possible so you can frame the issues and select the venue/forum.

   a. This may be difficult to sell if there is insurance that would respond if you wait for your adversary to bring the action.

   b. This may mean bringing the case as a declaratory judgment action in a distant and thus more costly jurisdiction.

2. Determine how courts in different circuits have ruled on key issues that will arise in the case.

   a. This allows you to determine if there are advantages or disadvantages to different circuits where the case may be brought.

   b. This information will influence the decisions required by "1" above.

   c. This includes procedural issues — for example, attorney/client privilege is determined by the forum, not the location of the communication.

C. Part Three: Overcoming Internal Resistance

Because the techniques and practices required to maximize the prospects for a successful defense in a catastrophic case can be exceedingly expensive, the direction proposed by general counsel for the defense almost always puts the legal department at odds with the marketing and finance departments and others who get praise, if not monetary rewards, when quarterly and annual budget metrics are met. For catastrophic cases the outcome of this internal battle must be directed in favor of a liberal, if not unfettered, defense expenditure authorization — a directed verdict that must come from management's highest levels. The challenge of winning this internal financial commitment, at the probable compromise of short-term earnings goals, falls at least initially on the shoulders of general counsel and requires a persuasive showing of true necessity.

As you approach this battle, consider:

1. General counsel or litigation management counsel must set the tone for the case, point out the dangers posed and become the advocate of a pro-active strategy that puts winning ahead of, or at least on an equal level with, the company's highest priorities.

2. General counsel must also take the lead in selecting outside counsel to handle the matter and local counsel if the case is to proceed in a jurisdiction other than that in which primary outside counsel practices. A willingness to work collaboratively and cooperatively under the direction of in-house counsel is essential to the type of team effort required for victory.

3. The course of action proposed will be entirely different from the course usually taken in the context of the company's everyday, garden variety litigation matters.

4. The case will require a fundamental shift in corporate-client thinking, led by in-house counsel, which involves acceptance of the probability that the expense of the new litigation may significantly reduce the amount of the next shareholder dividend and cause the company to miss its upcoming earnings projections.

5. The case will require the focus to be on appropriating the money necessary to take the proactive course that a catastrophic case warrants/requires.

6. A new corporate goal must be to create the greatest chance that the company will survive or, said another way, the greatest chance that the shareholder's shares will retain their value and that, in the future, dividends will be possible.

D. Part Four: Dealing the Carrier In

If the catastrophic case comes within the scope of the company's insured risk coverage, one of the first needs is to persuade the insurance company to support the effort — and to do so timely. This is far from a sure or an easy task because the interests of the corporation and the carrier are going to be perceived as competing, if not in direct conflict. General counsel wants to have the policy limits made available, if necessary, for an all-out defense to save the company from ruin while the carrier wants to pay out as little as possible in the matter so as not to erode its loss ratio or profit margins. The passion of general counsel, so important to winning internal support for the corporate financial commitment to fund the defense, must yield to the analytical and persuasive skills of that same general counsel. If you are dealing truly with a catastrophic case for monetary damages, then the corporation's exposure may well exceed the policy limits, particularly when combined with the defense costs in what is sure to be protracted litigation. The task is to persuade the carrier that a greater likelihood of success is better than the alternative — a possible judgment that not only exhausts the policy limits, but may financially destroy the insured. In order to achieve these goals and keep them on track:

1. Coordinate with the company's risk management department and insurance brokers to ensure that any potential bases for insurance coverage (either for defense of the case or for indemnity) are fully explored and diligently pursued in a timely fashion.

2. Consider hiring coverage counsel at the onset of the case so coverage "gotchas" are avoided.

3. Over communicate with your carriers, subject to assistance from coverage counsel.

E. Part Five: Selecting Trial Counsel

The ever present need for close coordination, cooperation and communication between general counsel and outside trial counsel becomes even greater in the context of catastrophic litigation. Of these three "Cs", cooperation takes on additional meaning as outside counsel will be asked and expected to participate in mock trials, focus groups, and many of the other measures suggested. Where outside counsel has not engaged in these activities in the past, and thus can't appreciate their value, resistance is likely. In the selection process, general counsel must assure before selecting a firm that outside counsel is willing to enthusiastically support and participate in the special measures believed to increase the chances for victory — and the company's continued existence. The last thing needed in the catastrophic case setting is a reluctant outside counsel intent on second-guessing and criticizing the special measures proposed — labeling them as unnecessary, too expensive or of no value.

1. Select the right legal team. This decision is critical and is different from selecting counsel in garden-variety litigation. In addition to the usual criteria, consider:

   a. Actual trial experience. There is no substitute, and you can't fake it.

   b. Experience before the judge and in the forum involved.

   c. Supplement your usual outside counsel with law firm(s) with applicable specialty knowledge/experience or greater capacity to deal with the resource demands that will be involved in the complex litigation on the horizon.

   d. Ensure that firm(s) chosen will work cooperatively and under in-house counsel's direction on the course directed and with the lead counsel appointed.

   e. Hire local counsel on day one and treat them like more than a mailbox.

2. Is there a role for in-house counsel in the courtroom on the team actually trying the case?

   a. Possible Pros:

      1) Familiarity with the client.

      2) True subject matter expertise.

      3) Cost.

      4) Access to the client.

      5) Interests aligned directly with the company.

   b. Possible Cons:

      1) Ability to focus on the case.

      2) Objectivity.

      3) Outside counsel's ability to integrate in house counsel onto the team.

      4) Experience.

5) Credibility with the jury.

F. Part Six: Identifying Your Key Witnesses

The goal here is to use only those persons with experience as witnesses and who communicate effectively and present well. Unfortunately, that goal is rarely, if ever, fully attainable. In the course of discovery, names of individuals will be revealed from documents and deposition notices for these individuals will be triggered. Substitute deponents may be offered on the grounds that they are more knowledgeable or more senior or (if true) that the person to be deposed is no longer employed by the company, and the company will have some latitude in the naming of Rule 30(b)(6) deponents (persons most knowledgeable) on particular topics. All persons to be deposed must go through a deposition training and rehearsal exercise and be carefully admonished as to truthfulness, cadence, pauses, speculative testimony, etc., so their depositions can be effectively defended. As you consider who your key witnesses will be, recognize that they are the people who will have to tell your story.

Select a corporate representative who will personify the company at trial:

1. Find "storyteller" witnesses.
2. Provide witnesses with witness instruction/training.
3. Test them before mock juries for acceptance, image, credibility, etc.
4. Select and further train those that score the highest.

And when you finish selecting and preparing your strong witnesses, don't forget to properly prepare those who aren't so strong.

G. Part Seven: Looking for Vulnerabilities

The discovery initiated in a catastrophic case may be ten or more times as extensive as discovery in a more typical case. The goal is to uncover or find all evidence important to your defense, no matter how obscure. This may require sequences of depositions and interrogatories to fully explore leads and follow threads. If a short discovery cutoff is imposed by the court, effective discovery may require double tracking or triple tracking — the simultaneous taking of several depositions in different locations all in the same day or same week. Prepare for this by:

1. Send the team to Trial School.
    a. Conduct an all-hands meeting held offsite early in the case – complete with an agenda, case notebooks, key documents, and the structure required to keep a room full of short attention spans focused on your case.
    b. Used to discuss facts, core equities, need for credibility, and tenor of the case.
    c. Also used to promote cohesiveness among lead counsel, in-house counsel, local counsel, consulting experts, client representatives, any anyone else on the team who shares the attorney/client privilege.
2. Hold team meetings regularly, even if your insurer cringes at the thought.
3. Run case logistics as simply as possible and over-communicate.
    a. Circulate newly-discovered "hot" documents in hard copy form.
    b. Pre-mark exhibits.
    c. Use the same exhibit numbers for every witness.
    d. Require an *immediate* three paragraph deposition summary by the lawyer who took the deposition, emailed to everyone on the team.

H. Part Eight: Build Your Case Infrastructure Early

Case infrastructure can make or break a case. Does that associate taking that that "minor" deposition know what happened in yesterday's depositions? Who has a copy of the Exhibit 1324? Who is getting the documents from that witness we talked about three months ago? How was I supposed to know that the deposition was moved?

1. Create a living proof outline and a chronology.
    a. Update both continually.
    b. The proof outline (and the evidence that fills it) is what the trial team is working for during discovery – don't let them forget that.
2. Keep an Action Item List to be continually updated.
3. Hire a "Snapping Turtle" Paralegal.
    a. Your paralegal must be hyper-organized.

b. Your paralegal must have previous trial experience.

c. Your paralegal must demonstrate leadership abilities.

d. Your paralegal cannot let anything fall between the cracks.

I. Part Nine: Education by Motions

At some point the judge needs to know your side of the story. You can gain important advantages through early education of the judge in complex cases, and these should be pursued when available in the defense of the catastrophic case. Even if not likely to be successful, pre-trial Motions for Judgment on the Pleadings or Motions for Summary Judgment, when done in good faith, can be used to explain and exploit your strengths and your opponent's weaknesses or fatal shortfalls.

J. Part Ten: Case Themes and Story Line

The conduct of the company must be explained through the evidence and testimony as a complete, logical story with which the jury can relate and accept as innocent, including the challenged conduct. Any "gaps" will be filled in by the jury based upon their own individual life experiences and expectations — a process to be avoided by avoiding gaps in the story line. The themes of the case will be selected and designed to win jury sympathy or support and to posture the company as highly desirable, a good citizen, and undeserving of any financial penalty or other punishment. The story line and themes will be tied to a time line and will help guide the case preparations and sequence of evidence presentation in the case.

1. Develop winning themes on day one.

   a. They can be modified over time.

   b. They must be concise, credible and consistent.

   c. Develop analogies, examples, and catch phrases that are consistent with your case themes and that your witnesses are comfortable with.

2. Be aware of the potential roles/value of trial consultants.

   a. Retain the best to help you develop the theme(s) for the case.

   b. Help you develop a complete, plausible story line into which the evidence and testimony can be organized.

K. Part Eleven: Expert Witnesses

Where outside expert testimony may be helpful or necessary on some key issue in the case, the catastrophic case warrants securing the best and most respected expert witnesses. You will want your testifying experts to be better and more respected than those of your adversary. Prior testimony experience, an impressive curriculum vitae and satisfaction of the three "Cs" (coordination, cooperation and communication) are most important in selection. Interview those prospective experts you would use and would hate to see your opponent use in the selection process. You may discover who your adversary is using and may prompt those you interview but don't select to decline to be experts for your adversary. Survey evidence can be helpful on some issues and may be expected or required on some issues, such as questions of consumer confusion and some damages issues, but keep in mind that the survey firm you hire will have to support and defend its survey, so the same standards as applied for other expert witnesses in the selection process should be followed.

As you consider retaining your experts, remember:

1. Expert selection should be done early.

2. Win the war of experts by selecting the best.

3. Test your positions with consulting experts before discussing with testifying experts.

4. Make sure your position, surveys, etc. are properly supported and not susceptible to easy collateral attack.

5. Unearth impeachment evidence to be used against the other side's expert witnesses — and your own.

L. Part Twelve: Demonstrative Exhibits

Demonstrative exhibits can be powerful tools during the trial for summarizing evidence and making key points. The old saying "a picture is worth a thousand words" is true, and it's why we have demonstrative exhibits. Be careful to make sure your demonstratives are easily understood, not misleading, and consistent with your themes. Test alternative approaches before focus groups and make the selections and refinements that will best communicate your message. As you consider the demonstrative exhibits you will present:

1. Have your consulting experts approve your demonstratives before you show them to anyone besides counsel.

2. Test their effectiveness and understandability before focus groups.

3. Make whatever changes are needed to make them most effective.

4. Consider using demonstrative exhibits in depositions — particularly chronologies and summaries.

M. Part Thirteen: Document Scanning & PowerPoint

Jurors have seen hundreds of trials on television. TV trials are never boring, and juror attention spans are getting shorter every day. Jurors soon get bored of testimony, particularly about documents they can't see or read for themselves. Courtroom technology can be used to entertain and focus jury attention on key documents and statements within key documents. PowerPoint presentations can be effective tools for showing event reconstructions or to bring visual life to regular processes or procedures followed by the corporate-client. Take advantage of all technologies available for better reaching and keeping the attention of your jury. Your opponent should be expected to use these technologies and you don't want to lose the technology war, but never forget that these tools are intended to make you look more credible, more organized, and more efficient.

1. Win the technology/jury trial war.

   a. Scan key documents into a database.

   b. Secure the technology support and software that will enable you to display enlargements of key documents and to highlight excerpts by bar code numbers in the course of the trial.

   c. Have pertinent excerpts of deposition videos equally accessible.

2. Have a backup plan (a second and a third laptop) and a technician with trial experience there to help.

N. Part Fourteen: Opening Argument Design

Remember the old saying: You only get one chance to make a good first impression. The opening argument is that one chance in your defense of the catastrophic case, and it should be on your mind from the trial school you conduct early in the case. Great time and attention should be devoted to crafting a perfect opening argument. Preview the story line, introduce the case themes and win the best first impression contest over your opponent. Don't forget the importance of humor — but use it only if you can do so in a way that does not suggest the case is not important to your corporate-client (another place for guidance from your trial consultant).

O. Part Fifteen: Mock Trials & Refinements

Design the trial evidence plan with witnesses and sequence. Practice makes perfect and there are clear advantages to using mock trials and focus groups. The process can assist in identifying the "local language" to be used at trial, in determining whether there are "gaps" in the case story line and whether demonstrative exhibits are clear and communicate the message they are designed to carry. By including your trial consultant and other trial team members in these exercises, you provide them with insights that will be invaluable in jury selection and at trial. You can also use these processes to assess the effectiveness of your opening argument in getting jurors behind your case themes and for timing your opening argument. Among still other values, you can assess the impression your trial counsel's presentation style and demeanor are likely to have on the jury (whether good or bad) and your trial consultant can recommend appropriate changes. Finally, you can present your opponent's case to see how it is received by the mock jurors and determine how to make it less appealing.

P. Part Sixteen: Who Sits at Counsel Table?

The image created in (and near) the courtroom can positively or negatively influence the jury. How witnesses are dressed, how they groom their hair, and what kinds of jewelry they wear are subjects with which many trial consultants concern themselves. Also, the trial consultant can provide guidance on who should sit with lead counsel at the defendant's table — post-verdict juror debriefings indicate that jurors often see that as an indicator of the importance the corporate client places on the case — and they report feeling a greater duty of care respecting the party that views the case as having greatest importance. For a catastrophic case, the recommendation may be that a very senior client representative should be high profile, up front, with lead trial counsel at the defendant's table. If that is the recommendation, the person selected must be in attendance every day of trial. For cases in smaller venues, know that client conduct may be observed around the clock — don't ever let your guard down, and don't forget to tip well at the local diner.

Q. Part Seventeen: Jury Selection

An entire science has been built around strategies for selecting jurors (using juror challenges) in litigation. A trial consultant, particularly one who has been included to observe typical local jurors during mock trials and focus groups in your case, can assist in profiling juror types to be avoided. "You don't want nurses on your jury!" "Younger male jurors will not associate favorably with your facts or theme!," etc. The use of questionnaires, to be completed by all prospective jurors, should be used when permitted to uncover biases and other factors that may support or warrant a challenge. As we all learned from Grisham's book, The Runaway Jury, it only takes one to take a verdict the wrong way. The trial consultant can also be helpful in any negotiation of jury instructions.

R. Part Eighteen: Damage Control Plan

By anticipating various types of setbacks that may occur, plans can be developed for responding in ways that minimize the damage and salvage the defense. What if a key witness dies or takes ill and cannot testify? Who is the back-up witness? What if an important expert witness is seriously impeached? What if the judge rules that you cannot get into an important area of questing with a witness? How much is an appellate bond if the worst case actually happens? Most setbacks during trial can be effectively dealt with, but it's far better if they are foreseen and an approach for dealing with them is ready to implement.

S. Part Nineteen: Settlement

Some say that catastrophic cases cannot be settled. If it's truly catastrophic litigation, can you afford to settle? Isn't the case too big, too complicated, and too important to settle? No. Many catastrophic cases are too big, too complicated, and too important to take to trial – for both sides. As the professional responsible for the outcome of the litigation, your job isn't simply to manage the litigation until it's over. Your job is to help your client make the best choices between risk and reward from the outset of the case until it's over, one way or another. That choice may be to push for settlement on day one, to find the information your client and your adversary need to better assess liability as the case drones on, or to wait until both sides are a tired of the fight. Whatever your strategy, make sure you have one, since your outside counsel may not.

One of the best ways to ensure that you maintain a coherent settlement strategy throughout the litigation is to retain dedicated settlement counsel. Settlement counsel, generally acting wholly distinct from the trial team, can remain "above the fray" of the day-to-day fighting in a case. They can be retained on a short-term basis, should have no incentive to prolong the litigation, and can be asked at various times throughout the litigation to evaluate the possibility of settlement. When the matter is ripe for settlement discussions, this counsel, distinct from your trial team (which is presumably committed to trial) can represent your client in settlement discussions.

— END —

TAKING A PROACTIVE APPROACH TO CATASTROPHIC LITIGATION

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Where Do We Start?

Catastrophic Litigation Means:

Potential Loss of the Company

Potential Loss of Significant Business Unit(s)
Potential Loss of Critical Business Model

– and/or –

Potential Loss of Reputation/Goodwill

Through:
- **Damages**
- **Injunction**
- **Negative Exposure**

Where Do We Start?

Catastrophic Litigation Requires:

Early Recognition

Immediate Action

Extraordinary Teamwork

Unprecedented Expense

– and –

A Proactive Approach

A Proactive Approach Can Be Seen in Every Aspect of the Case…

The First Steps

Recognizing the Catastrophic Case

Many Traditional Indicators Are No Longer Reliable:
- **Some threats designed to seem catastrophic are not.**
- **Damage demands are not determinative.**
- **There is no typical plaintiff.**

Often Catastrophic Cases Involve:
- **Competitors**
- **Regulators with Political Ambitions**
- **Novel Legal Theories**
- **Counterclaims**
- **Injunctive/Equitable Relief**
- **Patents/Business Model Challenges**
- **Aggressive Settlement Stances**
- **Very Good Lawyers**

"I know it when I see it."
- **-- Just make sure you see it in time.**

The First Steps

Internal Focus

GC sets the tone.
- **Advocates a proactive strategy**
- **Among the Company's highest priorities**
- **Manages expectations on:**
  - **Duration**
  - **Cost**
  - **Effort Level**
  - **Hassle factor**
- **Develops a clear understanding of roles & responsibilities.**

One CEO said: "You can bring me good news. You can bring me bad news. But never bring me a surprise."

The proactive approach based on an early, correct assessment that the litigation merits special handling.

Building the Team

Trial Counsel

The lawyers you select will say a lot about your view of the case.

You must insist on:
- **Coordination**
- **Communication**
- **Cooperation**

Select the Right Trial Team:
- **Actual Trial Experience**
- **Experience with the Judge and the Forum**
- **Specialty Knowledge/Niche Counsel**
- **Local Counsel**
  - **Local Counsel Is Not a Mailbox**
  - **Often Overlooked and Absolutely Critical**

Building the Team

Insurance

Communication Early:
- **Give Notice**
- **Articulate Positions**
- **Develop an Understanding of:**
  - **Case Scope**
  - **Case Strategy**
  - **Case Budget**

Over-communicate

Have Coverage Counsel Up to Speed and Handy

Building the Team

- Key Fact Witnesses
  - Identify Early
  - Evaluate "Storyteller" Status:
    - Image
    - Credibility
    - Future with the Company (Will They Be Around?)
    - Confirm Nothing Negative in their Personnel Files
  - Emphasize Strong Witnesses
  - Strengthen Weak Witnesses
  - Test Before Focus Groups and Through Mock Trials
  - Videocoach all Witnesses so Excerpts Played at Trial Are Not Harmful

Building the Team

- Experts
  - Testifying Experts
    - Credibility is Primary
    - Find them Early
    - Look for:
      - Experience on the Stand
      - Powerful/Relevant CV
      - Coordination/Cooperation/Communication
      - Availability
  - Do Opposition Research
  - Test Impact of Opinions and Conclusions/Theories
    - Focus Groups
    - Mock Trials
  - Consulting Experts
    - Availability
    - Coordination/Cooperation/Communication
    - Firewall from Testifiers

The Team in Action

- **Trial School**
  - Who?
    - Counsel
      - Lead
      - Specialty
      - Local
      - In-house
    - Key Stakeholders
    - Consulting Experts
    - Paralegals
    - Jury/Trial Consultant
  - What?
    - Agenda
    - Documents & Discussions
    - Notebooks
    - Jackets & Mugs
    - Free/Unstructured Time
  - Why?
    - Substantive Understanding of the Case
    - Development of the Themes/Fill Story Line Gaps
    - Strategy/Planning (to Overcome Weaknesses in Your Case or Strengths in Adversary's Case)
    - Development of the Team

The Team in Action

- **Case Themes and Storylines**
  - A complete, plausible storyline into which all the evidence can fit.
  - Credible
  - Consistent (Match Lock-Step the Case Fact/Event Time Line)
  - Concise
  - Complete (Gap-Free)
  - Nonlawyerish
- **Develop at Trial School or Before**
- **Test and Refine Everything**
  - Focus Groups
  - Mock Trials
  - Nonlawyer Friends
  - High School Students
  - In-Laws

The Team in Action

- Choosing the Forum
  - Become the Plaintiff If At All Possible
    - Get Your Insurer On Board
    - Declaratory Judgment Action If Necessary
  - Survey Every Proper Forum:
    - Substantive Law
    - Procedural Issues
      - Privilege
      - Potential for Interlocutory Appeal
      - Procedural Nuances Affecting Your Case
    - Environmental Issues

The Team in Action

- Case Infrastructure
  - Team Meetings
    - Regular
    - Mandatory
  - Day-to-Day
    - Simplify, Streamline and Share:
      - Exhibit Numbers
      - Deposition Outlines
      - Key Documents
      - Information of Every Sort
    - Calendar
    - Chronology
    - Fact Memo
    - Proof Outline
    - Action Item List
    - The Snapping Turtle Paralegal:
      - Hyperorganized
      - Trial Experience
      - Leadership Skills

The Team in Action

Mock Trials

- **Critical**
  - **Listen for & Use Local Language**
  - **Determine Gaps in the Story Line**
  - **Test Novel Theories**
  - **Assess Trial Counsel (Using in Part Jurors' Feedback)**
- **Repeat**
- **Repeat**
- **But be Mindful of the Results:**
  - **Insurance Companies**
  - **Accountants/Reserves**

At the Courthouse

Educate the Judge Early and Often

- **Needs to know your side of the case well before trial starts.**
- **Utilize Every opportunity:**
  - **Every Motion**
  - **Dispositive Motions**
  - **Never forget that judges read the paper too.**

At the Courthouse

Demonstratives

Simple, credible, consistent with trial themes.

Entertain, awaken jurors – don't be boring.

Use color, sound, motion, characters, re-enactments.

Consulting experts can help.

Test before focus groups.

Get your demonstratives into the "groundwater" of the case:
- **Through testifying experts**
- **Through deponents**
- **Attached to motions**
- **Particularly chronologies and summaries**

At the Courthouse

Win the Technology War (or at least don't lose it).

- **Scan Key Documents into your Database**
- **Bar Code**
  - **Documents**
  - **Deposition Excerpts**
- **Remember: Don't be Boring**

Have a Backup Plan

At the Courthouse

Opening Argument

Only one chance to make a good first impression.

Employ case themes.

Use trial consultants and focus groups.
- **Even if ego interferes.**

Rehearse.

At the Courthouse

Who Sits at Counsel Table?

May be:
Senior Officer

Must:
Be Available
Appear Helpful/Attentive
Be Able to Withstand Scrutiny Every Minute of Every Day

At the Courthouse

Jury Selection

- **Have a Plan**
- **Use Information from Focus Groups/Mock Trials**
- **Can Be Outcome Determinative**
- **Trial Consultants Can Be Very Helpful Here**

At the Courthouse

Damage Control Plan

- **Have a Plan For:**
  - **Loss of a Key Witness**
  - **Loss of an Expert**
  - **Adverse Evidentiary Rulings**
  - **Appellate Bond**

Where Does This Slide Go?

Settlement

Can you afford to settle?
Can you afford not to?
There is no one time to settle a case.
Whatever your strategy, make sure you have one.

Consider dedicated settlement counsel:
- **"Above the fray."**
- **No interest in prolonging the battle.**
- **Can see the forest for the trees.**
- **Can evaluate *when*.**
- **Can be helpful *if*.**
- **Can negotiate without derailing your team.**

Can the other side afford to settle?
Can the other side afford not to?