TERMINATING MANAGEMENT PERSONNEL IN SUBSIDIARY AND OTHER BUSINESS INVESTMENTS

By: Douglas Alan Albritton

Introduction

Like a traditional employer-employee relationship, owners and investors of all varieties occasionally find themselves frustrated with key legacy management personnel who remain after an investment or acquisition. Far from being unknown quantities, these individuals probably were the subject of pre-investment due diligence, ranging from background investigations to interviews (of both the official and lower-level employees) to management assessment tests. More often than not, new employment agreements may have been negotiated with such personnel establishing, among other terms, specific job responsibilities, compensation, grounds for termination and new stock rights.

Unfortunately, these processes do not always turn up all matters of concern. Prior conduct and even current practices may have gone undiscovered or purposefully concealed. In many instances, the official’s post-investment outlook simply may have changed because he or she no longer is the controlling voice at the company and must account to new owners, and/or due to new-found liquid wealth resulting from the sale of personal ownership interests to the new owners or investors. Disputes may arise from simple disagreements about corporate strategy, or from more serious concerns relating to fulfillment of job responsibilities, the use (or misuse) of corporate property, and compliance with state and federal laws of general applicability. Left unaddressed, these problems can foment sarcasm and indifference among the general employee group, and, even worse, may generate liability risks for the company.

When these matters arise, the new owners must decide whether the issue is minor enough to be capable of resolution through consultation, or whether the dispute is so severe (or repeated after consultation) that the circumstances require termination (even if the

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To our Members and Readers,

Welcome to the latest installment of the BLC Newsletter. We have worked hard to put together another newsletter of articles that are both timely and thorough and hope that you will find it useful in your practices.

We just finished the Midyear meeting in Dallas where our Committee co-hosted a panel presentation with the Corporate Counsel Committee regarding Value-Based Billing from the Client’s Perspective: A Panel Discussion of Viewpoints from Corporate Counsel at the Dallas Anatole Hotel. The presentation was standing room only, and a panel of innovative and engaging corporate counsel was followed by a reception for all corporate counsel in the Dallas/Fort Worth area. Also at the Mid-Year Meeting, the BLC held its Strategic Planning Session. At this meeting, we discussed our ideas and goals for the next five years of the BLC. We discussed topics ranging from training for business development, networking events outside of the quarterly meetings, hot topics for the articles and tele-CLEs, and podcasting our presentations and CLE events. As always we welcome input from our Committee members regarding their ideas for your BLC going forward.

Our next big event is the Spring Leadership Meeting in Washington, D.C. on April 23–28 at the J.W. Marriott. We are co-hosting a panel on Ethics & Experts – What You May Not Know That Can Destroy Your Case on Thursday, April 25 from 8-10 a.m. with the Trial Techniques Committee. It would be great to see you at the Spring meeting. Please check out the TIPS website, http://www.americanbar.org/groups/tort_trial_insurance_practice.html, for information. Be sure to advise me that you will be attending so you can join us for the “social” dinner, an event we have at each meeting to provide food and fellowship in a more casual setting and to catch up with each other and our new guests. We always have a great turnout and a lot of fun.

As always, we look forward to seeing you in Washington D.C. If in the meantime, if you want to join BLC or get more involved, or if I can be of assistance in any other way, please let me know.

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Note from the Editor: The BLC is always looking for business litigation related articles for upcoming editions of the Newsletter. Additionally, in the upcoming issue we plan to publish articles on civility in the profession. Please email any submissions to Rick Vanderslice at rlv@vanderslicelaw.com.
Nearly every matter presented in court has a visual component. Whether it is a document excerpt, a series of photographs, deposition testimony or an educational demonstrative, today’s means of persuasion consistently includes visuals. And more and more frequently courtroom technology has proven to be the most flexible, comprehensive presentation method.

Courtroom technology consists of two primary phases: the pre-trial production work and the actual in-court presentation of evidence by the trial tech.

**PHASE I:**
The pre-trial production phase consists of building the database of relevant documents and exhibits, determining what equipment is needed in the courtroom and war room, ordering audio-visual equipment and working with the Court to ensure all requirements are met prior to set-up. The database usually contains: 1) documents and other exhibits; 2) demonstratives; and 3) videotaped depositions.

**PHASE II:**
The second phase is the live operation of the presentation system in court by a trial technician. A talented trial tech knows the intricacies of the software, the details of the database, and the strategy you plan to use with each witness so he or she can effectively maximize the capabilities of the system and manage the presentation.

**Can It Be Shared?**
In today’s environment of limited budgets and greater scrutiny of costs, is it possible to pool resources and jointly engage a single presentation technology provider?

1. **Courtroom equipment? YES!**
   
   In most circumstances, sharing audio-visual equipment in the courtroom is common and highly recommended both by Judges and their staff. Since the audio-visual equipment merely provides the transmission of evidence or demonstratives, there is no reason not to share. Many courtrooms, especially those in federal courthouses, have been updated to include state-of-the-art audio-visual presentation equipment or “rolling cart” audio-visual systems that can be reserved. Ideally, both parties will have agreed to the details regarding equipment set-up, live feeds for LiveNotes, and wireless routers well in advance of equipment set-up day. We recommend having key representatives from your both your trial team and that of your opposition present at the set up, so that trial technicians, attorneys and legal assistants can meet the courthouse technical staff and interact with the judge’s staff. The time to troubleshoot moving monitors, the podium, and other equipment is during set up rather than on the first day of trial.

   Since arbitrations and other alternative dispute resolution proceedings (ADR) often take place in a conference room setting, the amount of equipment needed is generally less than that of a courtroom. Factors such as venue (trial, arbitration, or other ADR proceeding), type of evidence to be displayed, space constraints, and budget will drive the type and amount of audio-visual equipment needed.

2. **Database? TO A POINT**
   
   Typically each party brings to the courtroom its own database containing documents, video deposition clips, demonstratives and other evidence that may be presented to support its case. In theory, one could build a single database that includes all documents, deposition clips, and demonstratives for both sides. Since most elements are generally exchanged to some degree in advance of trial, what is the drawback? Revealing trial strategy.

   In practice, the trial technician will work with attorneys, experts and other witnesses to assemble relevant data into a presentation (sub-folder) that advocates for one side. For instance, a sub-folder for an expert witness may include his/her demonstrative slides for direct testimony, the opposing expert’s report for possible reference, and other documents or evidence the expert may or may not choose to access during cross-examination. Another sub-folder may consist of deposition clips or documents that could be used to impeach the testimony of an adverse witness. An opening statement sub-folder

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Most people recognize that they need to undertake asset protection planning after a claim has been made against their personal assets. However, such “after the fact” planning has very limited effectiveness. In our experience, owners of businesses that are either contemplating a sale of a business or who have recently completed the sale must consider undertaking asset protection planning to protect the sale proceeds. In addition, business professionals, such as doctors, accountants, attorneys, and architects, as well as executives of public companies, also should consider undertaking some type of asset protection plan.

There are various levels of asset protection, ranging from something as simple as forming an LLC or corporation to the complex. However, regardless of what level of asset protection is undertaken, the planning must be completed prior to the happening of an event that would give rise to a claim. Understanding the various asset protection techniques that are typically used and the “fraudulent transfer” rules that may undermine any asset protection structure is critical to examining what level of asset protection is best suited for a particular client.

Do Not Wait for the Claim

In order for asset protection planning to be effective, it must be done in advance of the event giving rise to the claim. Otherwise, a creditor may claim that the transfer to protect an asset is a “fraudulent conveyance.” This is not a criminal concept, but rather a civil right to void a transfer. For example, after a major malpractice action is filed, a physician transfers all of his assets to his spouse to hide the assets from his creditors. This transfer is an obvious fraudulent conveyance.

There are two types of fraudulent conveyances. An actual fraudulent conveyance is a transfer made with actual intent to hinder, delay or defraud creditors. A constructive fraudulent conveyance is a transfer in which the debtor receives less than reasonably equivalent value, and the debtor either is insolvent on the date of the transfer or is rendered insolvent as a result of the transfer. If a court determines that a transfer is a fraudulent conveyance, the creditor may recover either the property transferred or the value of the property transferred. The creditor may recover against the transferee or the party for whose benefit the transfer was made. In a bankruptcy, the trustee stands in the shoes of the creditors; the trustee may void fraudulent transfers and recover assets for the benefit of all creditors.

Asset protection planning cannot be used to illegally evade income taxes or to hide assets from legitimate creditors who have an existing claim prior to the transfer of assets.
Basic Techniques

The following discusses basic asset protection techniques that are readily available to the majority of people.

Liability Insurance

Asset protection structures are not a substitute for adequate liability insurance. The first defense against a tortious claim (e.g., a car accident) is the liability insurance. Such insurance will cover the cost of the initial litigation defense of such claims, and that is often half the battle. Additional coverage through “umbrella” excess liability policies should be considered to defend against large claims. That said, there are many types of claims that are not insurable as a practical matter, or simply exceed coverage. The following techniques may provide additional protection.

Business Limited Liability Entities

Any operating business or real estate (other than one’s home) should be titled in a corporation or a limited liability company to limit the liability arising to the owner from the operation of the business or real estate. Single member LLCs are a common and simple way to limit liability with respect to rental real estate. One should note, however, that these entities must be specially structured to protect your assets from judgments against you personally. For example, an LLC that owns real estate protects you from a slip and fall claim on that property. But a judgment against you caused by an unrelated claim (e.g., a car accident or a medical malpractice claim, in which the creditor is attaching your personal assets, including your ownership in the business) is a different matter. If you personally guarantee a debt incurred on behalf of a corporation, limited liability company or partnership, for example, that creditor will be able to reach your personal assets. Entities can be structured to resist such lateral attacks.

See the discussion of family partnerships on page 8 for an illustration.

It should be noted that certain types of claims can penetrate limited liability entities (e.g., environmental claims and securities law liabilities).

Life Insurance

In many states life insurance, and in some cases annuities, is exempt from attachment by creditors. This exemption carries over to bankruptcy. For Illinois residents, all proceeds on death, and the cash value of life and annuity policies payable to a spouse, child, parent or dependent, are exempt from judgment by creditors even if the insured can change the beneficiary.

IRA and Qualified Retirement Accounts

A debtor’s interest in an IRA or qualified retirement plan is exempt from judgment by creditors. Federal bankruptcy law limits the IRA exemption to approximately $1 million plus all qualified plan rollovers, including growth of those rollovers. Because rollovers and rollover growth have no cap, IRAs remain substantially exempt as a practical matter. In addition, many states, including Illinois, exempt the full value of an IRA from attachment. This exemption carries over to a bankruptcy.

Tenancy by the Entirety

Tenancy by the entirety protects property titled in that manner because a creditor cannot cause the division and liquidation of the asset. In Illinois, tenancy by the entirety only applies to the primary residence of a married couple residing in Illinois. Tenancy by the entirety will not protect you from a mortgagee–both spouses have consented to that lien.
The tenancy by the entirety exemption varies from state to state. In Florida, a Florida resident may also treat personal property as tenancy by entirety property, allowing investment accounts to be exempt from certain creditors. The law of one’s state of residence must be checked.

In tenancy by the entirety, bankruptcy trustees have limited power to cause the sale of a home to satisfy joint debts. Conversion of a house to a tenancy by the entirety may constitute a fraudulent conveyance; advance planning is key.

Estate Planning

Transfers to family members should have a purpose other than creditor avoidance. Estate planning is such a purpose. Several basic planning techniques to consider are as follows:

1. Annual Exclusion Gifts

As of 2012, you may give $13,000 to each donee. For minors, this may be done to a U/T/M/A account. The donor should not be the custodian. Other options include trusts for minors and/or 529 accounts (discussed below). The donor may effectively shift more of the assets by making a “split-gift” election with the spouse to use his/her annual exclusion, thereby allowing tax-free gifts of $26,000 per donee.

2. 529 College Savings Accounts

These tax-exempt accounts are savings accounts for one’s family to pay for college education costs. Donors should not be the “account holder,” meaning the person with power over the account. As with any annual exclusion gifts, the donor may give $13,000 per year to a 529 plan for education. They may also “pre-pay” up to five years of annual exclusion ($65,000). For asset protection purposes, the donor should not control the account.

3. Transfer to Fund Exemption Amount

As of 2012, each person currently has a $5,120,000 exemption from estate and gift tax. A valid estate planning goal would be to transfer assets to one’s spouse in order to fully fund this exemption, particularly as future tax legislation may reduce it.

Estate planning trusts are very effective asset protection devices for the beneficiary. For example, if one creates a properly drafted trust for his/her child, that trust will be effective in protecting the trust assets from the child’s creditors. So long as the child does not have the power to unilaterally withdraw the trust funds, a creditor of the child may not attach those funds. Also, if the assets have been transferred into the trust by gift, the assets no longer belong to the donor and are protected from the donor’s creditors as well (absent a fraudulent conveyance).

Advanced Planning

Family Partnerships

The protection afforded by a family partnership (or family limited liability company) is illustrated in the following example: Investment assets are placed into a limited partnership by a husband and wife (H and W). Each spouse is both a 1% general partner and a 49% limited partner. Together, the general partners control the partnership, and the consent of both general partners is required to liquidate the partnership. A creditor seeking to attach the assets of W cannot attach the underlying investment assets of the family partnership, but only the
partnership interest of W. H, as the other general partner, will not consent to a liquidation of the partnership. The partnership interest of W is non-transferable. The creditor is left with only a “charging order” against the future distributions to W from the partnership. Of course, distributions are unlikely to occur as long as the creditor is pursuing W.

A family partnership is typically combined with gifts of limited partnership interests to family members. Because the limited partnership interests are illiquid, a family partnership also affords significant valuation discounts on any gift. Transfers may be on a small scale (i.e., $13,000 per donee annual exclusion gifts) or on a large scale using advanced planning trusts (e.g., GRATs) to further reduce the taxable gift. Execution of a valid estate planning structure will bolster the legitimacy of the partnership. Tax minimization is considered a proper and common purpose for creating a family partnership.

The weakness of the family partnership is that a creditor may attack the transfer of assets into the partnership as a fraudulent conveyance, thereby avoiding the partnership altogether. All gifts or transfers to family members also may be subject to such an attack. On the plus side, the family partnership actually allows individuals who are trying to protect their assets to retain an indirect ownership interest in the assets transferred, as opposed to outright gifts to others.

Domestic Spendthrift Trusts

This option is as yet unproven. Under Illinois law and the laws of most other states, an irrevocable trust created for one’s own benefit (a “spendthrift trust”) may be set aside by creditors. A number of states (e.g., Alaska, Delaware, South Dakota and Missouri) have passed statutes granting protection from creditors for these types of trusts. All of the statutes have fraudulent conveyance provisions. Creditors may attempt to apply the law of your residence (e.g., Illinois, as opposed to the law of where the trust is situated), as well as federal bankruptcy law, to penetrate such trusts. Federal bankruptcy law imposes a 10-year fraudulent conveyance look-back with respect to such trusts. Under the current state of the law, the effectiveness of these domestic spendthrift trusts to protect assets is unknown.

Off Shore Trusts

Off shore trusts are foreign spendthrift trusts (i.e., an irrevocable trust created for one’s own benefit). They are located in certain off shore banking jurisdictions that have statutes protecting these types of trusts from creditors. These jurisdictions include the Cook Islands, Bermuda, the Cayman Islands and the Bahamas, as well as others.

Off shore trusts are the ultimate protection device because a U.S. creditor must obtain a U.S. judgment and then seek to have the judgment enforced in a foreign court. Those considering the off shore trusts should be aware of the following:

i) One may still have his/her investments managed in the United States;

ii) The law and procedure in these jurisdictions makes it difficult to enforce foreign judgments;

iii) Most have a two-year limitation period on fraudulent conveyance;

iv) They are expensive to set up (more than $50,000) and maintain (annual expenses usually exceed $5,000 per year);

v) They do not avoid U.S. income, estate or gift tax (although the offshore jurisdiction is generally tax free);

vi) There will be additional tax compliance costs: ownership of foreign trusts must be reported to the U.S. government, which frequently triggers audits; and

vii) You must relinquish control over the assets in the trust to the foreign trustee.
Summary

Wealth may be structured to either protect assets or make them harder to reach by creditors. While fraudulent conveyance with respect to existing claims is an unavoidable risk, steps should be taken sooner rather than later. Each individual’s asset structure should have a personalized solution. One option may fit the needs of one person, but not another.

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conduct is not “illegal” but nevertheless causes a loss of confidence in the official’s ability to manage). Unlike terminations in traditional contexts, actions in this setting warrant the pre-termination consideration of a number of unique factors, and generally warrant pre-termination consultation with counsel to explore the multi-faceted legal issues that may be involved.

In addition to the various legal issues that matters such as these raise, and depending on the size and nature of the business, contemporary business realities, including the speed at which information is distributed across the internet and through social media, may require parallel development of the company’s message and a readiness to communicate that message as the need may arise through one or more channels.

No short article such as this can set out all of the law that will be applicable in these settings. And, the law will vary state-by-state (especially on matters relating to “cause” terminations and stock rights). Instead, this article provides a short checklist of matters to consider when evaluating whether to terminate such a legacy official, and some of the issues that may arise thereafter. Pre-termination consideration of these and related issues will go a long way towards insuring the least-disruptive transition possible.


When considering the termination of a high-ranking official, there are myriad matters that will require the assistance of someone else at the company to complete. This includes access to the computer and telecommunications systems, as well as physical access to the facilities and offices (including keys to open the building, the offices and any file cabinets). A good contact also will interface with outside counsel and any retained consultants or experts to help address other issues that may arise, including day-to-day operational needs.

2. Read the Employment Agreement, Understand any Applicable Employment Law.

The new employment agreement may contain choice of law and forum selection clauses identifying applicable law and the venue (including potentially arbitration) for any dispute. It is important to further note that other agreements, including the investment agreement, the new stock plan and other corporate documents, may contain provisions relating to other aspects of the relationship (including stock rights), and may, inconsistently, provide for the applicability of other law or a different dispute resolution venue. Consider which agreement or agreements apply, and contemplate the response to any choice of law and venue challenges. Be ready to make those arguments from the moment that the official is first approached about termination.

The new employment agreement may contain established grounds for removal, and may then link those grounds to resulting financial and stock contingencies depending on whether the termination is with or without “cause.” Handled incorrectly, the employer’s actions could give the employee good reason to resign with different financial and stock contingencies. It is common, for example, that salary, stock (put and call rights) and stock option rights will continue for a period of time after a no-cause termination but may immediately cease in a for-cause termination. Also consider whether the official has statutory or common-law minority shareholder rights, and what obligations may arise therefrom.

The employment agreement’s definition of a “for cause” termination (frequently requiring at least negligence or gross negligence) should be investigated in light of the applicable law for precedent interpreting those terms. In the absence of state law defining those terms in-reported private employment disputes, most states have statutory “for cause” provisions for the removal of public officials and both those statutes and related case law may provide helpful precedent in the absence of other law.

If the termination is “for cause,” confirm that the standard is met by investigating and documenting the reasons therefore (including the identification of relevant witnesses and documents). Also explore whether the applicable agreement is clear that termination is effective upon announcement, or whether it is subject to either a “cure” period or an obligation that a court or other decision maker first “declare” that cause exists. If there is a cure right, investigate whether there are any cause categories not subject to a cure right. If there is an obligation to seek a judicial or other “declaration,” consider placing the official on paid leave pending the completion of any such process.

Finally, be sure to have considered any unique state or local law (as well as federal law) and satisfy yourself that the termination does not give rise to a claim for discrimination whether based upon a protected class or some other statutory protection (such as whistleblower protections).

3. Review Other Corporate Agreements.

A terminated official may look for ways to retaliate against the company, such as by terminating (or breaching) other contracts with the company. If the official is a signatory for any bank accounts, consider removing that authority (if permitted) before any action. Likewise, consider whether the official is the company’s
landlord. If so, review the lease and explore each party’s termination eviction rights. Be prepared to go to court to stop any eviction efforts. The official may also have had other businesses that were not acquired. Do any of those provide essential goods or services to the company and, if so, what are the parties’ termination rights under those agreements? If necessary, identify potential alternatives prior to the termination. Also, it is not uncommon for the utilities of many small business to have been in the personal name of the prior owners. Make sure that the utilities are in the company’s name and cannot be shut off by the former owner.


An upset official (and his or her friends and/or family) may seek retaliation by causing a scene, or even worse, by threatening other employees or damaging company property. To avoid these concerns, take steps before confronting the official to secure the office space. Change both the outside locks and those securing the official’s former office. While other employees may have a need for the building key, limit access to the new lock on the official’s office so that you can control access to that space (limiting arguments that anything was stolen, for example). Reset the password for the official’s voice mail and computer access, and consider doing the same for all employees as the official may have logged on using other access codes before the termination. Consider whether there are any other entry points to the facilities or its systems, and take steps to protect against unauthorized access. Consider whether any remaining employees might become sources to pass information to the official, and take steps as necessary to protect against such circumstances.

Modern litigation realities likewise will compel the collection and preservation of electronic and paper records potentially relevant to the dispute. Identify the personnel relevant to the matter, and collect and preserve the relevant information.

Depending on the circumstances, it may be prudent to hire short-term, twenty-four hour security (such as off-duty police officers) for a period of time after the termination to protect against any unauthorized visits.

5. Get The Corporate Formalities In Order.

It is likely that an acquired business is now part of a series of related operating and non-operating companies. As a result, the official probably is an executive of one or more of those companies, and similarly may serve on one or more boards of directors. The relevant corporate documents likely establish how removal from those positions is to be accomplished, and the relevant corporate resolutions and actions should be drafted and executed beforehand for quick implementation. If the termination is “for cause,” for example, applicable law may require a resolution that such cause exists (and may even require a short description of the cause).

On occasion, these documents may permit removal only through an official board meeting, and if the official serves on the board he or she may be entitled to both advance notice of the meeting, as well as an agenda of what is to be considered. In this circumstance, it may be proper to place the official on leave before the meeting, to avoid the circumstance of continued company access with a few days notice of a pending termination.

6. Prepare An Explanation For The Office.

The termination of a senior executive may create cause for concern among the employees, and almost assuredly will lead to gossip about what happened. The employees need to be assured that the change will not harm the company, and similarly informed about who is replacing the executive (if anyone). Someone other than counsel should deliver this message (ideally another senior official or director, and not outside counsel), and that message should be delivered personally either in a group meeting or through smaller meetings. This should be done the day of the termination, hopefully within a few hours thereof.

For example, if more than five employees are being let go (such as because the official had family members on the payroll who were performing non-essential functions), it may be most prudent to have security at the front door at the start of the work day, letting in the remaining employees and turning away those who were let go. The remaining employees could be directed to an office for an explanation of the circumstances, and those who were turned away could be provided with an envelope explaining that they were being let go and would be contacted shortly to discuss the matter.

The explanation for the office does not need to be, and should not be, a nuts and bolts explanation of the dispute with the former executive. Rather, what should be communicated is the basis of what happened – the company has made a business decision to make a change, and this change will neither harm the company nor threaten the jobs of any of the remaining employees. Assure the employees that business will continue as usual, and let them know that if they have any questions they can privately meet with the designated person to discuss their concerns (avoid a group question and answer session). In this regard, the communicator
should have a brief conversation with counsel about the content of the message – it is not difficult to make a positive statement and avoid defamation concerns.

7. Prepare An Explanation for Customers and Identify Personnel to Work With Those Customers.

In all likelihood, the official will have relationships with some or all of the company’s important customers. Even with a non-disparagement or non-solicit clause in the applicable agreements, the official may nevertheless contact those customers after the termination. Work with counsel to identify any such customers ahead of time, understand their recent dealings with the company, and be prepared as necessary to have personnel make personal visits or calls to address any concerns.


Prior to confronting the official, consider why the problem has arisen and develop the meeting talking points and any separation proposal in light of those considerations. If the official simply has become inattentive to business matters (perhaps because of new found wealth), consider a message tailored to that circumstance (which may rightfully express understanding for the change in work ethic and could be presented in such a manner). The message to an official who has taken actions that have harmed the business may simply detail knowledge of those actions, note that the matter is not then subject to debate, and lay out future steps that the company will pursue in the absence of a separation agreement.

For location, generally speaking nothing good can come from terminating an official at the office. Regardless of whether this is a person who is likely to accept the decision and leave the dispute for an amicable resolution, or someone who may seek to provoke a loud or physical altercation, there simply is too much opportunity for disruption of the business and the creation of a scene for the other employees to witness (and then gossip about). The official, for example, is likely to insist on going to his or her office to collect personal matters and will then have access to the phones, business records and computer system. He or she may want to confront other employees to tell his or her “side of the story.”

Instead, if at all possible, approach the official outside of the office (such as at a hotel conference center in connection with a board meeting, while on a business trip, or some other location). Thereafter, consider collecting the official’s personal matters and returning them outside of the office. If an office visit is required, consider scheduling that well after normal business hours and subject to supervision.

If the situation presents potential claims against the official, consider the need to review files in the official’s office before the official is permitted to remove property to take home. Generally, formal office space belongs to the employer and an employee’s right to remove property without corporate review will be completely or significantly circumscribed by applicable law. Understand that law ahead of time, and if necessary negotiate a joint review among the company and the departing official.


Review of the agreements discussed herein, and the geographic location of the business. The official, will in all likelihood exhaust the potential laws of for any dispute. Identify counsel in those jurisdictions able to handle any matters. Depending on the nature of the basis for the termination, prudence and preparedness may dictate that the business either stand ready with a prepared complaint, or actually commence litigation contemporaneous with the termination. Regardless of the choice made, the decision makers for the process should have a clear idea of what they want from the official in connection with the transition, as well as what accommodations they are willing to make in order to document a fair and prompt resolution if one can be reached.

10. Insurance

One of the most undervalued corporate assets is insurance. In an instance where the official is being terminated for cause, consider whether the official’s actions triggered any coverage in the company’s favor. Likewise, if the official responds to the removal with litigation of his or her own, consider whether the company’s coverages provide for the defense or indemnity of any claims that are made. In either instance, be prepared to provide notice to the carrier(s) and to then work with them in completion of the matter.

Conclusion

The above list is a short summary of some of the matters that a company may wish to consider in connection with the termination of a legacy official. Once that official has lost management’s confidence, whether due to inattention, or worse, malfeasance, there may be little or no business justification for delay. Experience teaches that careful consideration of the process, and pre-termination coordination of the various steps involved, will lead to a smoother transition that is less disruptive to the business and, more often than not, avoids litigation.
may contain demonstratives as well as documents to be shown using technology. In this way, a sub-folder is a window into the trial strategy that counsel would not want accessible to one’s adversary.

In a recent case, a client planned to use demonstrative slides as well as excerpts from documents in his opening statement. When the court required a demonstrative exchange well in advance of trial, we created a PowerPoint slide deck of demonstratives only (without any document excerpts) so as to avoid tipping our hand by revealing the import of specific documents. At trial, we toggled between demonstratives shown in PowerPoint and document excerpts shown in TrialDirector. In order to present the excerpts quickly, we “pre-treated” the documents by highlighting excerpts in advance in TrialDirector.

There are certain circumstances, however, in which a database can be jointly developed as an initial stage. For example, developing a “first-stage” database loaded with all documents and video depositions that have been included in the joint exhibit list. This “first-stage” database can be distributed to each party, and then augmented to support each side’s trial strategy. We have provided this work product on occasion, especially when one side lacks the technical capability to create load files or encode digital files. In some cases, sharing the expense of developing an initial database may be a significant savings for the client. This cutting-edge approach is a clear indication to your client that you are committed to containing costs.

The setting and circumstances of the matter will guide whether this type of arrangement is feasible. To be successful, both parties must have a reasonable desire to work together, and a willingness to provide data and meet the financial obligation to develop the work product.

Recently we were retained by a client to prepare the database and provide an on-site technician for a contract dispute that was to be arbitrated before a JAMS panel. Videotaped depositions were to be used in lieu of live witness testimony. Our client asked us to create deposition clips for opposing counsel and both parties provided us designations and counter-designations which were reviewed in advance and shared with the parties. Both trial teams focused on ensuring a seamless presentation for the arbitration panel and the collegial attitude of the attorneys allowed both parties to streamline the preparation process and realize cost savings for their clients. The matter was a contract dispute regarding the interpretation of a particular clause. Interestingly, in several instances each side used the same video clip with different supporting evidence to claim a different characterization of the contract language.

3. In-court trial tech? NO

Once on-site, the trial tech provides two essential functions: first, he/she accesses documents, demonstratives and video deposition excerpts to support your argument and your witnesses’ testimony in a seamless manner. Second, your trial tech works with you in practice sessions so that he/she is familiar in advance with “where you want to go.” Not only does the trial tech have an intimate knowledge of the evidence and demonstratives that comprise your case, but he/she works alongside your team as you practice with witnesses, prepare your opening and closing, and assemble evidence for cross-examination. The trial tech may “pre-treat” documents with highlighting, a magnified view, or other annotations in order to present the evidence more quickly. If the trial team is using an interactive demonstrative that link to documents, video or animation, the trial tech needs to know how the attorney plans to use it and what internally linked options are available (i.e., are there links that will not be used in direct, but may be used in cross?). If an objection is raised during an expert’s PowerPoint presentation, the tech should be able to quickly access “the causation slide” or “the pie chart slide.” Often a witness presented via video deposition may reference a particular document; the trial tech must have the document available, know when to present it so jurors can see what the deponent is referencing, and perhaps annotate specific segments. To do any of these tasks seamlessly in court, one needs to prepare and practice in advance. The war room sessions not only assist in creating a smooth, well-timed presentation, they also educate the trial tech so he/she knows what the attorney is looking for strategically. During a work session, the trial tech may make suggestions for additional visuals to aid in clarifying or supporting the trial strategy. And during trial, an engaged, well-prepared trial tech can anticipate where the attorney is going, even if it is
off-script, and have documents or video clips ready in the event they may be used.

If a trial tech were to be used by both parties, one would lose the strategic advantage of having an individual who knows both the case evidence and the goal of the prepared presentation. Anyone who has stood before a jury waiting for a video clip to load can attest to how interminable a two-second pause can seem. A well-prepared trial tech can shave milliseconds from the pause time. However, when there is no opportunity to practice, the presenting attorney must direct the tech “live,” wasting precious trial time and interrupting the flow of the presentation.

Time constraints are a factor as well. There would be no opportunity to highlight or annotate documents in advance and, likewise, no time to review animations or other demonstratives to understand how to present them most effectively. For instance, the trial tech may not realize a PowerPoint slide “builds” from a simple illustration to a complex one or he/she may not know that video files must be accessed. Often documents, video, or graphics are updated at the eleventh hour and are passed on to the trial tech the night before they are used. Some updates, such as changes to designations, require additional work by the trial tech. The sheer volume of late-night changes may be too great for one person to complete for court the next morning, requiring the trial teams to assume greater responsibility in ensuring that all presentations are current and up-to-date. Competing for the tech’s time before opening statement or closing argument may strain even the most collegial trial teams.

Tips for Using Technology in a Cost-Effective Manner:

As you prepare for trial, there are several practices you can adopt to both limit the cost of developing the database and ensure a smooth process.

1. Materials preparation
   - If you choose to videotape depositions, request that the videographer provide the video already synchronized to the transcript. If you plan to use any clips at all during trial, the video must be synchronized to the transcript before editing. This is a relatively quick process for the videographer and it can speed up the designation editing process.
   - Use standardized format(s) for exhibits. If a uniform naming schema and file format type is set before production begins, the cost to develop the database is lower. There may be certain types of data that do not fit within an established format; those outliers are easier to identify and manage when all other material is in a standard format.

2. Coordinate with opposing counsel
   - Confirm the parties will share courtroom audiovisual equipment and split the costs. Some courts require a written letter requesting permission to either use the court’s equipment or set up third-party equipment. Often the technology provider will have experience in a particular courthouse and may be able to provide examples of letters submitted to the court or diagrams of equipment set-ups they have used in past trials.
   - Designate contacts on both sides for coordination of exhibits and logistics. Frequently one party’s technology provider acts as the resource for recommending equipment and arranging set-up. Ask local counsel if they have a discount program with any equipment providers and ask technology providers for references.
   - At the outset, agree upon a standardized naming convention for exhibits. At some point in the pretrial period exhibits will be shared with opposing counsel and both parties will benefit by using the same format. A universal naming convention also makes it much easier to pass exhibits to the court electronically, which has become a fairly standard practice.

3. Coordinate with your technology provider
   - Consult with your provider early in the case lifecycle, even if it is not certain that the case will go to trial. Often you can gain valuable information about the court or judge.
   - Forward depositions to your provider as soon as they are taken. The trial tech can load the file into the presentation database and deal with any file problems such as damaged discs early in the process.
   - Provide video deposition designations as early as possible. Although a “rough” clip can be created quickly, a polished clip takes longer. A diligent trial tech will edit the page/line designation to
ensure the view of the witness begins and ends as naturally as possible (no open mouth or closed eyes to begin or end the clip) and objections, long pauses or colloquy are removed. If a witness refers to specific documents, they must be indexed with the designation clips. Depositions using a translator take longer to edit as well.

• As much as possible, include your provider in the process of finalizing exhibits and logistics. You can avoid duplicating your trial team’s efforts and perhaps learn some time-saving procedures by including your trial tech early in the process.

Conclusion

General Dwight D. Eisenhower said, “In preparing for battle I have always found that plans are useless, but planning is indispensable.” At the end of the trial day, the trial tech’s first priority is preparing you for the next trial day. You will derive the greatest value from the relationship when the trial tech becomes a member of the trial team. Whether in trial or arbitration, there are a number of ways to limit the cost of courtroom technology, and forming a good working relationship with your adversary can help to streamline costs. However, a dedicated trial tech is a luxury you cannot afford to share.

Diana Bullard is a director at DecisionQuest, the nation’s leading trial consulting firm, resident in the firm’s New York office. For the past quarter century, she has worked with trial teams to develop and design graphics presentations in hundreds of high-stakes cases; she understands what jurors need to know, and when they need to know it.

Ms. Bullard specializes in creative presentation services and visual consulting for courtroom and ADR settings, such as arbitration hearings and mediations. Her work includes the design and development of computer-based interactive multimedia presentation systems, in addition to static exhibits. She has also worked extensively with expert witnesses, helping them tailor their message to their audience. She may be reached at dbullard@decisionquest.com. John Int-Hout, Gary Michaels, and Steven Rushefsky also contributed to this article.
# 2013 TIPS CALENDAR

## April 2013

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<td>4-5</td>
<td>Emerging Issues in Motor Vehicle Product Liability Litigation National Program</td>
<td>Arizona Biltmore Resort &amp; Spa Phoenix, AZ</td>
<td>Donald Quarles – 312/988-5708</td>
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<td>5-6</td>
<td>Toxic Torts Committee Midyear Meeting</td>
<td>Arizona Biltmore Resort &amp; Spa Phoenix, AZ</td>
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<td>13-17</td>
<td>TIPS National Trial Academy</td>
<td>Grand Sierra Resort Reno, NV</td>
<td>Donald Quarles – 312/988-5708</td>
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<td>23-28</td>
<td>TIPS Section Spring Leadership Meeting</td>
<td>JW Marriott Washington, DC</td>
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<td>Fidelity &amp; Surety Committee Spring Meeting</td>
<td>Walt Disney World Swan Orlando, FL</td>
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<td>16-18</td>
<td>Property Insurance Law Committee Spring CLE Meeting</td>
<td>PGA National Resort &amp; Spa Palm Beach Gardens, FL</td>
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<td>8-13</td>
<td>ABA Annual Meeting</td>
<td>San Francisco Marriott San Francisco, CA</td>
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<td>8-13</td>
<td>TIPS Fall Leadership Meeting</td>
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