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January 2009 Newsletter

DOAR Litigation Consulting provides clients with a highly experienced consulting team that has a deep understanding of the legal and regulatory issues. Our areas of expertise are:

- **TRIAL CONSULTING**
- **DISCOVERY CONSULTING**
- **MANAGED REVIEW**

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TRENDS IN M&A CASES: IDENTIFYING AND OVERCOMING COMMON CHALLENGES

In M&A Litigation, time is money. Decisions are made in real time and directly impact case issues.

Attorneys representing their clients in M&A cases have millions, if not billions of dollars at stake, yet little time to prepare for trial. Although you can't control all of the elements of a fast-moving M&A case, what you can control is the presentation of information and witnesses.

Over the past twenty years, DOAR has supported some of the largest corporate merger cases on the East Coast and has insight into challenges associated with M&A litigation.

Based on our experience, we offer the following tips in the areas of Electronic Presentation, Levels of Expertise, Graphics and Witness Preparation:

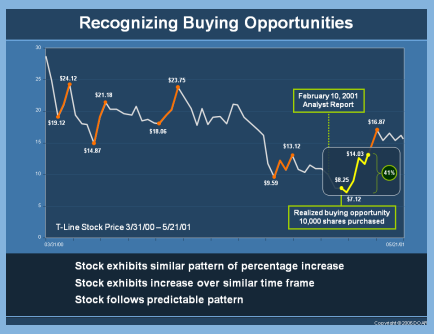
Electronic Presentation

Organization impacts the persuasiveness of a case

- The importance of electronic presentation can not be overstated. Seemingly insignificant details, such as the ability to pull up a given document at any time can have a major impact on the case. For example, stopping a direct examination to locate a record steals attention away from witnesses, diminishes the content of the examination, weakens testimony, and creates tension in the courtroom. Moreover, the trial team reflects the client. People are more likely to believe a company performed its due diligence if the attorney representing the corporation is prepared.

Preparation is critical in cases involving a voluminous amount of documents

- Lawyers rarely have more than a few weeks between the time of the filing date and the beginning of trial. Because M&A cases are document intensive, having a skilled trial presentation consultant to manage millions of documents and hundreds of hours of deposition video makes all the difference in case presentation. Pulling up a video



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deposition clip in a matter of seconds to help impeach a witness increases the perception that the trial team is prepared, polished and professional. In the *Cerberus v. United Rentals* case, the main witness for the defendants was continually confronted with his prior testimony in this way. Eventually, he seemed resigned to the fact that if he disagreed with the questioning attorney, he would be confronted with his prior testimony and began to agree with the questioner so as not to be confronted.

Levels of Expertise

Plaintiffs are held to a higher standard of expertise in M&A cases

- Judges hold what they perceive as sophisticated plaintiffs, such as large companies and corporate executives, to higher standards of expertise, expecting business savvy individuals to be aware of the risks associated with acquiring a company and to perform due diligence accordingly.

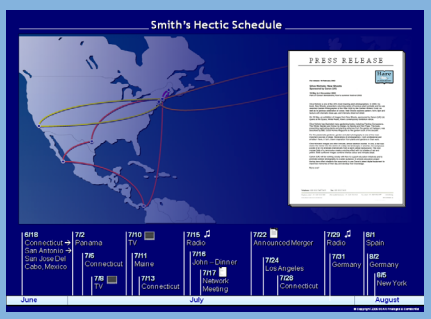
Judges' expertise varies – and you must be prepared to address that

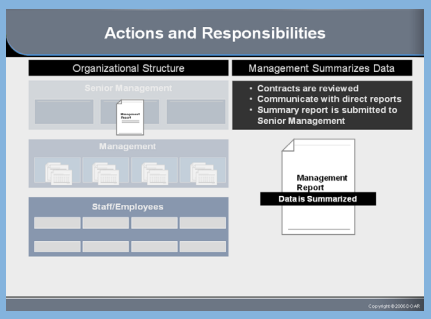
- The onus is on the lawyer to clearly present the case, not on the decision-makers to decipher it. Judges have different levels of experience with M&A cases. Do not assume that the judge knows important background information simply because he or she has experience trying these cases. DOAR's courtroom experience shows that some judges are familiar with vital information, such as solvency issues, while others are not. When millions, if not billions, of dollars are at stake, it is better to err on the side of caution and repeat information that the judge may already know than risk the alternative.

Graphics

Visually communicating information strengthens case arguments

- Graphics strengthen arguments by simplifying complex information and focusing attention on certain details or events. They cut through the clutter of the case by clearly communicating what the main arguments are, and the information that supports them. In M&A litigation, graphics can be used to show that either there is a value





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in the merger and it should be upheld, or there is no value and the merger should not have taken place. The former can be accomplished by visually emphasizing the synergistic relationship between two companies and graphically performing a cost-benefit analysis that shows, for example, that products complement each other, or there is a cost savings from consolidating departments.

Timelines provide context and help explain mindset

- Visuals can also be used to provide context and explain expectations, mindset or intent. The CEO must tell his story, what he was thinking at the time, and why he made the decisions he did. Timelines refocus the case and highlight the information available at a particular time. Using a timeline as a springboard, the CEO can address the origination of the deal and go through his understanding of the anticipated performance of the merger as events unfolded.

Graphics simplify complex information

- Graphics make complex information simple by presenting bite-size information and bolster the effectiveness of witness testimony by controlling the pace at which the information is distributed. This encourages the witness to clearly explain concepts and gives the lawyer more control over direct-examination. Visually spoon-feeding financial information can help a CFO explain debt structure or an independent expert show why the company is or isn't solvent.

Witness Preparation

Witness preparation is critical when so much depends on intent and credibility

- Intent of parties when entering the contract is a crucial element in the case and only the corporate executives can speak to that. They have to carry the day. Corporate executives must answer the question of "why" and clearly communicate their story for their testimony to be credible:
- Why did the CEO do what he did?
- Why was the contract written in that particular way?
- Why did they use that language?

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The testimony of those involved in drafting the contract can make or break your case. Therefore, the importance of witness preparation can not be emphasized enough. Prior to placing the witness on the stand, the lawyer needs to be certain that the witness can communicate effectively.

Today's financial landscape is undergoing a tectonic shift and, without a doubt, unforeseen issues will continue to rise up before us in the months ahead. We will be put to the test to develop innovative strategies that evolve as fast as this cutting-edge area of litigation. Fortunately, forewarned is forearmed and, as we at DOAR take on the new challenges of today's complex financial litigation landscape, we look forward to sharing our up-to-the-minute knowledge and spectrum of consulting services with you and your clients.