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Civil Justice Reform – Service Providers

Reverse Engineering Discovery: Case Valuation And Issue Analysis

The Editor interviews Paul J. Neale, President & CEO, DOAR Litigation Consulting LLC.

Editor: How do you define Early Case Assessment?

Neale: There has been a lot of discussion among corporate lawyers and outside counsel about early case assessment (ECA), which, as the name suggests, means assessing all of the legal and business components of a particular legal action as early as possible. The intent here is to gain a comprehensive overview of the action and to develop an effective and reasonable plan to manage it. A very good ECA model has been developed by CPR (www.cpradr.org) that lists the criteria that should be collected and considered during ECA. Other forms of ECA relate to technological solutions and methods to evaluate potential evidence to get a better sense of what that evidence says about the strengths and weaknesses of your case before you invest in a full-scale and costly document discovery plan.

Editor: Describe reverse engineering discovery.

Neale: Our approach, which we refer to as reverse engineering discovery, fills the critical gap between in-house ECA and the use of electronic discovery tools. We test the case before objective third parties, such as mock jurors, arbitrators, or judges, so that our clients get feedback from the ultimate triers-of-fact, which



Paul J. Neale

provides empirical data to determine the value of the case and define the key issues at play.

Therefore, you can make an informed decision as to whether to pursue the litigation or try to resolve it prior to engaging in discovery and incurring the relative expense. If you pursue the litigation, the research will guide your discovery efforts by identifying issues that you may not have otherwise considered. This type of research, typically reserved for trial preparation, is as effective at the earliest stage of an action as it is before trial.

Editor: How do you go about identifying those facts at such an early stage?

Neale: The key here is to let your audience tell you what facts are most important. We provide a synopsis of both sides of the case and ask the participants which issues resonate with them. They most often provide insight into issues that wouldn't have otherwise been considered.

Editor: Suppose that it is a notice pleading jurisdiction, and there aren't any facts in the pleadings?

Neale: You have to evaluate it on a case-by-case basis. This approach does not apply to all litigation matters. There needs to be a certain sense of size and risk or a kind of institutional risk profile, which doesn't have to do with any individual matter, e.g., a series of cases or arbitrations related to a particular product or type of investment, depending on the nature of the client or the company.

Editor: What decisions are directly impacted by this approach to Early Case Assessment?

Neale: An effective ECA approach is meant to guide several critical decisions. These include what is the value of the case, should it be settled if possible, which outside counsel should be retained, do litigation reserves need to be established, what type of notice should be provided to insurance carriers, what is the public relations plan, what is the optimal litigation strategy, what are the core issues, and how do you approach discovery.

Please email the interviewee at pneale@doar.com with questions about this interview.

In considering setting reserves, one should take into consideration the FASB proposed accounting standard (topic 45) regarding Disclosure of Certain Loss Contingencies (www.fasb.org) which, if adopted, would require greater detail in disclosures related to active litigation.

Editor: What types of reverse engineering exercises are most often applied?

Neale: There are three general types. The first is a community attitude survey. This is basically a statistically relevant poll of potential jurors to gage their attitudes or biases toward a company and how, if at all, those attitudes impact the outcome of litigation. For instance, do jurors have a bias against British Petroleum that would adversely affect them in litigation unrelated to the oil spill in the Gulf? If so, how do you address that bias or is the bias so pervasive that it significantly increases the value and risk of the litigation?

Case-specific research would be a mock trial or a focus group where we impanel mock jurors, arbitrators, or judges. We present both sides of the case to get a sense of not only what issues are most prevalent that are good or bad for the client, but also what is the likely value of the case, and how would a jury decide if this case were presented to them at that time?

The third type is focused on testing key witnesses to determine whether they will have a positive or negative effect on the action. This is particularly critical in actions relating to employment disputes, allegations of fraud, intellectual property/patent litigation, and, of course, white collar criminal actions.

You need to get a sense of how effective and believable they are before a judge, arbitration panel, or jury because this could have a big impact on how to handle the case going forward. In some cases, the client feels comfortable that they can depend on the testimony of that witness. In others, it is obvious that the case should be settled or be avoided altogether.

Editor: How do you determine case value and test issues prior to, at least, some e-discovery efforts?

Neale: Having a good understanding of

the case. Some of the key documents give you a pretty accurate representation of the risk and the value. Obviously, that may change over time as new facts are discovered. But having been an expert in thousands of large discovery engagements and being involved in taking cases to trial, I have found two key components.

The first is that there is very rarely such a thing as a smoking gun, so discovery is an exercise in collecting information and finding documents that are never used at trial or in developing a litigation strategy.

The second is, despite the time and cost of the discovery process, jurors are almost always interested in issues that the trial team were either unaware of or thought were not important to the success of their case. This is after 70 percent of the cost of litigation is incurred. Discovery should be based ultimately on what your jurors want to hear, not on what you think is important. The longer the case goes on, the more myopic the lawyers become, and the less sensitive they are to the people that they are ultimately going to address.

Editor: Lawyers say that you find very little new information from looking at a million documents. The critical documents boil down to relatively few, and most of those documents are available even before you might get through e-discovery. Do you agree?

Neale: The numbers continue to get smaller in terms of percentages. Our trial consultants generally go to trial with, at the very most, a few thousand documents that were gleaned from several million documents from the outset. Of those, most are not critical documents. In just about every one of our discovery engagements, we start with some number of critical documents that the client organization knows they have that relate to that matter.

Sometimes it is just the contracts, patents, or underlying documents that are critical to the case but not necessarily determinative on their own. That is a good start. To be able to present those facts to your triers-of-fact and weave in some of the arguments that are being made on both sides is the real basis of the methodology.

Editor: Smoking guns abounded in emails produced in recent congressional hearings concerning the financial industry. These undoubtedly will be used in litigation. Do you vary what you do in terms of discovery by doing some minimal discovery in similar litigation?

Neale: We have been involved in just about every major financial fraud action, from Enron to Adelphia Communications to WorldCom. Our experience in testing these types of cases before jurors is that supposed smoking gun emails are usually relatively benign, once put into proper context and explained by witness testimony. However, given the size and significance of these types of actions, it is not uncommon to run multiple rounds of research to determine how attitudes have changed over time as new facts come to light or as similar types of cases are filed. As I mentioned earlier, it is important to understand your potential jurors' attitudes and biases and how they change over time based on new information.

Editor: Would most companies run an internal investigation before they would use a reverse engineering approach?

Neale: There are not too many significant litigation matters that surprise a company. Many are initiated by a government agency prior to the filing of civil actions. The agency actions rarely lead to a trial, but they do involve an extensive internal investigation. The evidence you collect is directly related to the civil actions. This evidence can be used during the research.

Editor: What types of cases do you believe are appropriate for reverse engineering discovery?

Neale: I would not say that our reverse engineering discovery methodology is for the run-of-the-mill breach of contract case or for most employment actions. They usually don't warrant this type of assessment because the risk isn't particularly high. If, however, it is something that is endemic to the firm, critical given its size or effect on the perception of the business, then it certainly is worth doing at the earliest possible time.