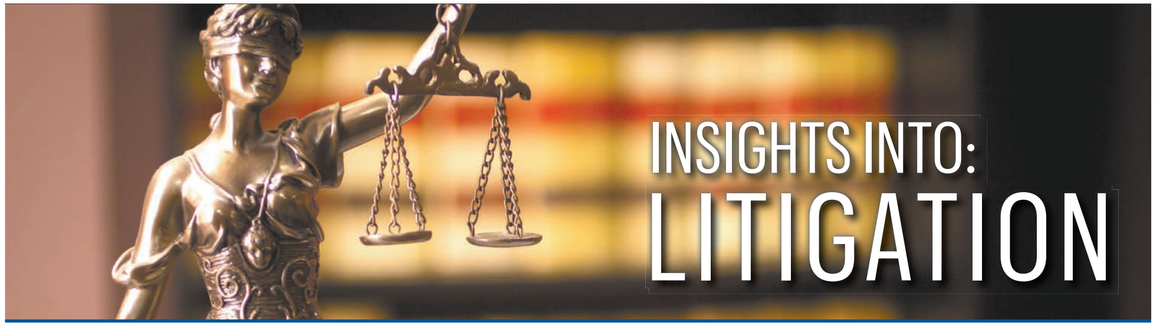

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STARNES DAVIS FLORIE LLP

Jay Ezelle | Partner, Starnes Davis Florie

Jay represents companies, professionals, and universities in high profile matters, including commercial disputes, intellectual property infringement, NCAA compliance investigations, and other complex litigation. His experience ranges from the massive securities litigation in HealthSouth, Just for Feet, Enron, and Worldcom to representing The University of Alabama and its President in litigation stemming from the termination of former head football coach Mike Price. Jay received B.S. in Biochemistry from Rhodes College and his law degree from The University of Alabama School of Law, where he graduated summa cum laude.

Q: What are some best practices for companies when it comes to avoiding litigation?

Jay Ezelle: That is a great question. Unfortunately, there is not a single set of best practices that will apply to every situation as it will depend on the nature of the business, the company's risk tolerance, and the impact of that particular practice on the bottom line. One practice that many companies fail to use is to seek the input of a litigator before a dispute arises. Far too often, companies do not think to bring in a lawyer experienced in the courtroom until an issue hits a boiling point and, by that time, it is much more difficult to avoid a lawsuit. As trial lawyers, we view the world through the lens of how a judge or jury will react to a particular action, and readily factor in the likelihood of a claim, the value range of the claim, and the cost to defend against the claim. Most normal people – by that I mean non-lawyers and lawyers who practice outside of the courtroom – don't go through life thinking about how each and every action will be perceived in a trial. Thus, a quick consult with a litigator may cause a company to rethink a certain course of action or tweak how they approach an issue to reduce the risk of litigation. In fact, many of our clients rely on us just as much for advice on litigation avoidance as they do to represent them in a lawsuit.

Q: How would you characterize the civil litigation climate in Alabama in 2017?

Ezelle: Alabama judges and juries do their absolute best to be fair. They typically resolve cases based on who they believe is telling the truth. As evidence of this, jury verdicts in civil cases have hovered around a 50-50 split between plaintiffs and defendants over the last decade. In the last year, the percentages increased slightly in favor of plaintiffs, but not by a statistically significant amount. That being said, we have seen a substantial uptick in bet-the-company type claims and seven-figure verdicts. That has resulted in a 2.5 percent increase in the chance of a million dollar verdict. Historically, 5.5 percent of verdicts exceeded a million dollars, but 8 percent of the verdicts last year exceeded that amount. Moreover, several recent verdicts have been extremely large – such as a $20 million verdict in a medical malpractice case, a $16.8 million verdict in a trucking case, and a $16 million verdict in a medical malpractice case – and have caused a substantial increase in the average verdict amounts in the last year.

Q: What are some questions businesses should ask when choosing a litigation firm?

Ezelle: First, I would ask who will be working on my case. Lawyers are not fungible and the results in a case can vary greatly based on how the lawyer handles the case. Just because a firm has a great reputation does not mean that every lawyer in that firm is the best choice to handle a particular case. Thus, a client needs to know at the outset who will actually be doing the work. Second, I would want to know what experience the proposed team has before this particular judge. Trial lawyers act much like tour guides in a foreign and dangerous country. If the lawyers do not personally know the judge, their clerks and assistants – as well as the practices and expectations in that particular courtroom – then it is like being in a foreign country with a guide who does not have a roadmap and does not speak the local language.

Q: Are there any particular hot areas for litigation that businesses should be aware of and prepare for?

Ezelle: Beyond the typical employment and personal injury claims, we have seen an increase in cyber-security, white-collar criminal, and commercial litigation cases. The cyber-security claims are merely a byproduct of the escalating frequency and scale of cyber-attacks. As for white-collar cases, the most complex regulatory thicket in history combined with government investigators making enforcement a priority have created an extremely dangerous environment for any company in a regulated field. We have also seen a rise in commercial litigation between businesses, including breach of contracts, failure to honor non-compete agreements, and misrepresentation of financial information.

Q: What are some questions businesses should be regularly asking their attorneys to avoid litigation?

Ezelle: A company should consult with a litigator periodically to develop its own best practices and policies that are tailored to its specific needs and environment. The lawyer should be asked whether the company policies governing employment issues, workplace behavior, accounting, document retention, the use of technology and equipment, agreements with third parties, and myriad other day-to-day operations are consistent with the best practices to avoid litigation. Another important tool for avoiding litigation is an after-action review of any claim. This process allows a client to determine the specific causes of the claim, and provides evidenced-based solutions for avoiding being in that situation again.

Q: How has technology changed the practice of litigation?

Ezelle: First, the speed of litigation has increased dramatically. When I started practicing, the usual course was for one side in the litigation to send a letter about an issue. The other side would then schedule a meeting with their client, discuss the response, and then draft a responsive letter. Typically, a meeting of the lawyers would follow and, if the issue could not be resolved, a motion would be filed with the court. That process took weeks. Now, all of that back and forth can be handled by e-mail, whether people are in the office or not. What used to take weeks can now be handled remotely via smart phones and the entire process may take just hours. Second, the amount of information at issue in litigation has increased exponentially. In the old days, a client would simply pull their file and give it to their lawyer. Now, cases must be litigated using the mountains of electronic evidence we all generate every day. But, I would caution that although the speed of litigation and the amount of information has increased dramatically because of technology, there is no app for sound legal advice.

Q: What are some high-risk areas for litigation that companies often don't consider?

Ezelle: We continue to see a large number of trade secret claims that were not anticipated by the targets because they do not see their companies as intellectual property-based. Yet, companies across all sectors may have trade secrets such as customer lists. The trade secret cases not only emanate from the traditional corporate espionage framework, but now arise more frequently from lateral hires who, before leaving their previous employer, are thought to have downloaded company files. Many companies do not have policies and procedures governing employee access to trade secrets or due diligence measures to avoid trade secret transfers from new employees.

Q: How does experience in litigation translate to helping your client outside the courtroom?

Ezelle: It can help in two ways: First, as we discussed earlier, I think consulting a litigator about litigation avoidance at the beginning of the process is the most effective and least expensive way to reduce the impact of litigation. Second, I think trial experience is one of the single biggest factors in helping clients achieve a settlement at a reasonable value. This is somewhat counter-intuitive as many companies think they do not need real trial lawyers to handle a claim when they have no intention of allowing the dispute to ever make it to a jury. Yet, this typically results in a vastly elevated settlement value as the lawyers on the other side have the advantage of knowing their adversary is not willing to try the case. If you are playing poker, you would never tell the table that you always fold. If the other side thinks that a litigant is willing to actually try the case because they have hired real trial lawyers, then they must calculate the risk of trial into their valuation of the claim, which results in a much lower settlement value.

Q: If my company expects it will soon be the subject of litigation, what are the immediate steps it should take?

Ezelle: First, stop talking about the claim internally and retain a lawyer. Far too often, actions taken after a company becomes aware of a claim, but before it retains a lawyer, can become the focus of the case and make the potential exposure much worse. Internal communications about the potential claim outside the presence of a lawyer are not privileged and can be the subject of discovery in the lawsuit. Second, take steps to preserve the relevant evidence, including electronically stored information. If a company does not take the necessary steps to preserve the evidence once it becomes aware of a potential claim, then it could lose favorable evidence or face potential sanctions for destroying evidence, even if done innocently. Finally, in cases of substantial exposure, I think the company should have the lawyer conduct an early case assessment, which consists of interviewing the key witnesses, reviewing the key documents, and providing a written analysis of the potential exposure and particular areas of concern. Although it requires a greater up-front expenditure, this process almost always reduces the total litigation expenses, as it allows the client to evaluate the risk fully at the outset of the case, rather than being surprised by a development later in the case. The clarity provided by an early case assessment also enables the company to have a strategic advantage in the litigation by having a comprehensive understanding of the issues from the outset of the case.

"Jury verdicts in civil cases have hovered around a 50-50 split between plaintiffs and defendants over the last decade."

Q: How can employers craft policies that help reduce the likelihood of litigation stemming from the actions of employees?

Ezelle: When implementing policies governing employees, it is critical that those policies be tailored to that specific company. The policies should incorporate the best practices for that particular industry and the environment in which the company operates. Implementation of cookie-cutter policies can create confusion for the employees and ultimately cause more harm than good. Likewise, the policies should be readily attainable, not aspirational. That is, they should address litigation risks through standards that can be easily communicated to and implemented by the employees. This should typically be done through employee training, rather than just crafting policies and putting them on a shelf. In many cases, it can be far worse for a company to adopt a policy if it will just be ignored by its employees. We have been involved in a number of cases where companies have self-inflicted exposure by adopting policies that did not make sense for their distinct operation and were ignored by their employees. Yet, by adopting those policies, the companies set the legal standards by which they were ultimately judged.

Q: What does today's litigator need to know that the previous generation did not?

Ezelle: The profession has not changed. Our job is still to advocate zealously our client's interests. To do that, we must have a thorough understanding of the facts and implement the best strategy for explaining those facts in the most persuasive way allowed within the confines of the law. What has changed is the medium through which we communicate. This requires a lifelong commitment to learning, as businesses continue to become more complicated, and a willingness to evolve with the technology, as it continues to change the way we communicate with each other. It also requires a greater level of responsiveness than past generations, as the modern economy is no longer centered on a 9-to-5 workday and clients expect and deserve access to their lawyers whenever an issue arises.