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## COMPLEX LITIGATION & *E-Discovery*

### Taking the Complexity Out Of Complex Litigation

Simplify the case by formulating a general theme

By John Lacey

The cases in the federal and state courts are getting more complex every year. Rather than serve a notice pleading, plaintiffs' attorneys now file complaints that read like short novels, with numerous legal claims alleging that the "hero" plaintiff was victimized by the "villain" defendants. The legal theories themselves are varied, from common-law torts, to statutory whistleblower claims, to breaches of contracts. The parties often will possess hundreds of thousands of records that may be relevant to the claims, counterclaims or affirmative defenses.

On first glance, many of these cases appear to be unmanageable, even chaotic. Fortunately, by recognizing the problem at the outset, the goal of managing a complex case can easily be achieved.

My experience in simplifying a complex case came in handy a few years ago. I was brought in to help try a motor vehicle rollover case that our firm had been preparing for several years. The trial was only months away and I knew virtually nothing about the underlying facts when I agreed to get involved. Equally important, the vast majority of my practice involved defending clients against commercial, personal

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injury and criminal claims. Now I would have to prosecute claims on behalf of an injured woman against a very well-funded corporation, the same type of corporation I normally defended.

I soon learned that the defendants had produced several hundred thousand documents generated over more than 20 years. It was a classic "document dump," where the defendant inundated plaintiff's counsel with more documents than any attorney could reasonably expect to review in five years, let alone in several months.

#### Getting Started

The initial task for any litigator facing the complex case is not to panic. That is not always easy, especially when the subject matter involves mathematical formulas and terminology that is unknown to most people. I simplify the case by formulating a general theme. This is probably the most important step in any case, but it is especially important in a complex case. If your theme is good, your preparation of the case will be dramatically simplified. You will have to review in detail only those documents that relate directly to your theme. Similarly, you will be able to use that theme at trial, thus transforming a very complex case into a very uncomplicated one.

The theme should have several characteristics. It must be short. If I can't say it in 30 seconds, it is too long. The theme

also must be simple. If the average juror can't understand the theme, I won't use it. This is especially so in a complex case because your listener is more likely to get "lost" in the details if you fail to keep the message simple. Next, the theme must be powerful. I want the jurors to have a visceral reaction when I state the theme of the case, whether it be in favor of my clients or against the opposing party. Finally, the theme must be supported by the credible evidence. The best way to lose a case is to overstate it to your jury. If you formulate a short, simple, powerful and credible theme, then every piece of evidence and every argument you present will further that theme.

Since we represented the injured plaintiff in the rollover case, our general theme at the beginning of the case was very simple: The plaintiff suffered brain damage as a direct result of the defendant's defectively designed vehicle. That theme would be refined as more facts were uncovered in discovery, but it remained our basic theme throughout the entire litigation. In doing this, we were able to narrow our focus to a few dozen documents and four or five witnesses that would provide direct evidence of the product design defect. That left hundreds of thousands of documents that we did not have to review in great detail. More importantly, it left us with a theme that would be easy for a jury to understand and relatively easy to prove.

#### Finding the Theme for Your Case

The search for a good theme also is simple. In a plaintiff's case, I will formulate the theme based on the elements of the claim. If it is a tort, I will focus on the harm proximately caused by the defendant. If it is a breach of contract case, I will focus on the defendant's failure to honor his agreement.

Conversely, in a defense case, I usually will find the theme in the complaint. The complaint will usually have factual "holes" that will guide me to the weak points of the plaintiff's case and will thus provide me with my general theme. For example, if the complaint describes many events in great detail, but then glosses over or dismisses a particular event, it is usually because the facts surrounding that event are not favorable to the plaintiff.

No matter what the theme or the party I represent, I always want to make the theme short, simple, powerful and credible. However, the theme is not meant to be static. It is designed to evolve and to be refined as the case is developed, documents are reviewed and witnesses are deposed.

### **Research the Subject Matter**

After you formulate your initial theme in a complex case, you will want to learn more about the subject matter. I begin by searching for information online, often starting with Wikipedia or Google. From there, I will find relevant articles or names of attorneys whom I can call for relevant information. Often the attorneys can give me some strengths and weaknesses that they see in the case. In our motor vehicle rollover case, for example, I was able to locate a trial transcript from a similar case and several transcripts from deposition testimony given by the defendant's key expert. These transcripts helped us to identify not only the themes that the defendant would likely use at our trial, they also showed us

some of the plaintiffs' strategies that had failed at trial.

I next will find the best available experts in the particular field and interview them. In their quest to be hired, they will often give me information and insights that I could never find on my own. Finally, as I did in the rollover case, I will call my adversary. At this stage, I am not concerned about appearing ignorant and unsure of myself. My adversary will often tell me how strong his or her case is, how weak my case is, or he or she may tell me that the client is very flexible on a settlement demand. In virtually every instance, the adversary will give me important information about the case in a very short time period.

### **Learning the Case**

I next will read every transcript and review as many documents as possible in order to develop and refine my basic theme. The documents that do not further the general theme can be reviewed quickly and be put to the side. I will not use them. In the rollover case, we found evidence from the early design phase that showed the vehicle had a rollover problem. We also found a document reflecting highway statistics that showed the vehicle in question had been involved in rollovers at a substantially higher rate than other vehicles. Thus, after reading tens of thousands of pages of company documents and transcripts of testimony from similar cases, I was able to refine the general theme and to narrow the complex case into something very simple: Not only did the defendant design a defective vehicle, it was aware of the defect both from early testing and from post-production information obtained from the federal government. In other words, they knowingly put this dangerous vehicle on the road just to make more money and, in doing so, their vehicle directly caused

our client's permanent injuries.

### **Building My Adversary's Case**

The next step for me is to build my opponent's case and to attack my own case. My goal here is twofold: (1) to anticipate what my adversary will say and do at trial to support his or her case; and (2) to determine how the adversary will seek to attack my case or the credibility of my witnesses. As to (1), if I know what the adversary believes is his or her strengths in a case, I can present specific evidence to undermine those strengths. Similarly, if I correctly anticipate my adversary's attacks on my case, I can modify my theme and neutralize those attacks by gathering documents or testimony that will refute my adversary's arguments. Thus, every piece of evidence used at trial will serve to support my theme of the case and to undercut my opponent's arguments.

### **Conclusion**

Many attorneys often will feel overwhelmed by the volume of discovery in the complex case. Millions of pages of documents, thousands of e-mails and dozens of witnesses, all combine to make a case extremely difficult to manage. However, if you develop a short, simple, powerful and credible theme, and you gather evidence in support of your theme and in conflict with your opponent's theme, you will be able to narrow the scope of the case and to make it far less complicated. In doing so, your case will be stronger and you will be able to cause your adversary to settle the case on terms more favorable to your client. If the case does not settle, you will then be fully prepared to win the complex case at trial by sticking to your basic theme. It is that simple. ■