

Winning Strategies in White Collar Civil Defense

How to Stay One Move Ahead

By David Gannaway, Principal

In a progressively complex financial landscape, corporations are facing a growing number of civil claims filed by shareholders and other stakeholders alleging financial fraud or misappropriation of assets or funds. In response, building a civil defense becomes much like a game of chess – a match of skill and strategy. Our decades of experience in this arena underscore our commitment to providing guidance and clarity for clients inundated with the many moving parts of a case and its complex variables.

Setting the Scene

In a civil suit, the litigant may be asking for financial compensation or the issuance of an injunction. A case generally centers upon unraveling convoluted financial transactions designed to conceal or hide the truth, or tracing the flow of funds to their ultimate disposition to show who benefited financially from the fraudulent transactions.

Civil cases generally fall into one of four categories:

- Shareholders against current management
- Business owners
- Shareholders within same business
- Company A vs. Company B (unrelated except for contractual civil complaints)

Steps in the Process

In a civil case, the defendant is typically facing a claim calling for moderate to large financial remuneration. In order to diffuse the plaintiff's claims, the defense team needs to arm itself with the most comprehensive, credible information possible, including (and often most importantly) a compelling expert report that can persuasively rebut the opposing expert's report.

Let's say, for example, there's an alleged violation of a purchase contract between two business owners, Smith Co. (plaintiff) and Jones Co. (defendant). Here's a quick view of how that case may play out:

- 1. Filing of initial complaint** – Smith Co. files a complaint citing alleged infractions and estimated damages. Jones

Co. answers the suit, likely with a counterclaim. The process of discovery begins, if it has not already, and the parties initiate filing competing motions.

- 2. Fact finding and discovery** – Smith Co. and Jones Co. prepare for questioning and deposing witnesses. This step is significant in bringing the documents to life and illuminating the full circumstances of the case. The expert witness can add significant substantive value and efficiencies to the case in this phase assisting with deposition preparations relative to accountants, internal financial managers and the opposing expert. In many cases, a digital forensic expert is necessary to uncover all pertinent documents.
- 3. Submission/rebuttal of expert witnesses** – It is typically after the complaint has been filed and after the witnesses have been deposed, when legal counsel from each party bring in experts with relevant knowledge and experience in the subject matter to provide an opinion on specific facts and to rebut the opposing expert to help them build their case. This is a battle of the experts.
- 4. Pre-trial settlement** – While the parties each prepare for trial they can – and, in these types of cases, often do – settle before going to court. Circumventing court often serves the interests of both parties allowing them to avoid additional professional fees and ancillary expenses.
- 5. Continuation to trial** – In the event the parties proceed to court, civil cases are most often heard and decided by a judge. In trial, Jones Co. (defendant) may call on an expert witness testimony to validate their case by explaining technical information and delivering an assessment of the opposing expert's report.

Considerations in Hiring an Effective Expert Witness

In light of the influx of civil cases in the current landscape, retaining qualified, experienced experts can be a great advantage to counsel. Accordingly, counsel must be able to rely on the ability of an expert witness to hone in on the essentials of the case, clearly present damage calculations and provide deposition and/or trial testimony.

There's a common perception that an expert witness is really just a hired gun. To disprove this assumption and ensure the most favorable outcome possible, you want to make certain your expert witness is well equipped with:

- Laser-focused approach in addressing identified priorities and quantifying financial damages;
- Prior education or experience in a related field with appropriate credentials;
- Mastery of breaking down and explaining complex transactions and delivering them in clear, easy-to-understand language; and
- Experience testifying and credibility with the courts.

Expert witnesses or subject matter experts can add significant value to the defense from the initial phases of a case through to trial. Retaining an expert as early as possible in the process enables that expert sufficient time to gain a comprehensive understanding of the case, conduct a more thorough investigation and prepare a more impactful report – ultimately more efficient, effective and less costly.

Building a strong civil case depends largely on your ability to employ a calculated strategy, navigate the complex process and leverage the right expertise to produce the most beneficial outcomes and enable you to accomplish your goals.

Navigating the Digital Landscape

In an increasingly digital world, it is almost certain that the issue at hand will involve systems, data and electronic communications in some capacity. This progressive shift into the digital arena will demand the need for specialized expertise to support the civil case.

When choosing a litigation support firm, it will be key to ensure the firm can provide a team capable of combining the traditional in-depth assurance and tax accounting experience with digital forensics, analytical and litigation finesse. Such a firm should be at the forefront of new and emerging technologies, threats and trends, and capable of investigating the full range of devices that store digital data – from mobile phones, USBs, tablets and computers to social media, clouds, company intranets, networks, archiving systems, file and mail servers.

To support the legal proceeding, the investigative team will need to identify, collect and analyze all relevant information, paper or digital, including that which may be hidden, deleted, encrypted or protected. Shutting down key business systems is usually not an option during the investigation, as the techniques employed must be capable of preserving vital data while limiting disruption to ongoing operations.

Digital forensics is necessary to:

- Identify, secure and preserve computer hard drives, servers, mobile devices.
- Validate document authenticity.
- Recover viewed, downloaded, transferred or erased data.
- Extract data from mobile devices, cloud solutions, or social networks.
- Identify those involved in suppressing, destroying or falsely manufacturing evidence.
- Extract metadata to prove date and time of data input.
- Confirm or refute assertions and alibis.

Wrap-up

While your business may not currently be involved in civil litigation, it is wise to be prepared on a general basis should that day come – whether your organization is the plaintiff or the defendant. Learn the capabilities of your accounting and auditing firm: do they have staff with litigation experience and who have served as expert witnesses? Do they have credentialed cyber professionals who can support the pursuit of needed documentation, as well as help ensure that your digital hardware and data are protected from hackers?

PKF O'Connor Davies can support you before, during and after litigation.

About the Author

David Gannaway is a Principal in PKF O'Connor Davies' Litigation Support Group. With more than 30 years of experience, he has served as both an IRS special agent, handling criminal investigations and a private sector consultant. David is skilled at unraveling complex domestic and international white-collar financial fraud schemes across numerous business sectors, including healthcare, non-profit and financial services, among others. Applying high-level technical expertise, he is recognized for preparing meticulous damage calculations and successfully refuting the computations presented by opposing witnesses. With a widely-respected record of producing impressive and favorable results in criminal and civil trials at both the state and federal levels, David is an exceptional client advocate in tax controversies, white-collar criminal investigations, offshore IRS disclosure issues, shareholder disputes and settlement negotiations.

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