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High-Stakes Litigation: Five Things for Directors to Remember

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High-stakes litigation invariably induces stress. As a director of a company, your shareholders, employees and customers count on your stewardship. But a high-stakes case forces you to turn over the fate of your company to a stranger (a judge) or a group of strangers (a jury). Doing so is never easy, but here are five tips to help successfully navigate your company through a "bet the company" litigation.

1. Do Not Litigate In The Press

High-stakes litigation often generates media attention. It also stirs a strong temptation to score litigation points in the press as your company seeks to defend itself, its case, and its reputation. That tactical choice, however, carries potentially grave consequences. While a party's public-relations interests and litigation interests frequently align, what advances one does not always advance the other. More than one case has been derailed by a punchy sound bite that garnered media attention but conflicted with long-term litigation objectives of greater import. Opposing counsel will comb through your company's every public utterance, and they may not be sensitive to placing comments in context. Steer your side towards litigating in the courtroom.

2. Be Involved

Successful litigation requires a team effort. As a director, your engagement is especially critical in cases where you are called upon to testify. Because directors generally are not as deeply involved in the minutia of the underlying events as executives, directors sometimes believe they do not require the same rigorous preparation. But in a complex case, it takes significant time to understand the precise legal and factual disputes between the parties and the context of the documents and questions you will be confronted with, and it also takes practice to learn how to best field tough questions from the witness chair. The side that is best prepared possesses a crucial advantage—ensure your side has it.

3. Put Your Best Face Forward

Corporate litigation often pits a Goliath-sized company against a David-sized competitor or an individual. While everyone knows corporations are owned and run by real people with human interests, if that fact is to be viscerally communicated, it must be done through your witnesses and through your corporate representative. You know your people better than your company's litigators. Think hard about which representatives will put your company in the best light and be proactive with suggestions. If your schedule permits, also consider volunteering to attend important hearings or trial. As a director, your presence in the courtroom will communicate to the judge or jury that the dispute is of the utmost importance to your company.

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4. Remember That All Email Accounts Can Be “Work” Accounts
Because (unlike employees and executives) directors are typically not engaged on company business everyday, they often use their primary external email address to discuss company matters. If you do so, keep in mind that the opposing party’s document demands will likely not stop at your official company account. Apply the same professional approach to work email across all your email accounts.

5. Resist Penny Wisdom
Litigation is expensive, and high-stakes litigation especially so. In many industries, a “bet the company” litigation is a rare occurrence, and directors at such organizations often ask their executives to apply the same approach to such litigation as they do to more run-of-the-mill disputes—to keep as tight a lid on costs as possible. But, in high-value litigation, life-or-death decisions should not be based on cost alone. Litigation frequently turns on the details. Foregoing the right expert, the use of a jury consultant or a follow-up round of depositions based on expense alone can result in a costly defeat. Keeping an eye on the purse is important, to be sure. But high-stakes litigation is not the place for penny wisdom.

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