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WINNING STRATEGIES SERIES: 10 PROVEN STEPS TOWARD QUICK VICTORY BEFORE LITIGATION BY LARRY FRIEDMAN

"Keep Calm, and Make Them Bleed" is one of my favorites of the ubiquitous internet parodies of London street signs posted during the Battle of Britain. It is also an excellent statement of the proper temperament of a commercial litigator. But "making them bleed" has its costs. Simply put, "litigation" is expensive.

In this, the first installment of a series, "Winning Strategies in Commercial Litigation cases," I want to focus your attention upon winning -- without incurring the costs of going to court. First, let me say, "I get it." When you have been harmed, "making them bleed" is a valid, normal reaction. And, at times, litigation cannot be avoided. Often, however, clients are best served by a quick victory, which also avoids high litigation costs altogether. The key is: (1) "preparation" of the case; and, (2) placing your case in the hands of the right lawyer for the job. The following are 10 proven steps in winning your case, before litigation begins.

INSIDE

Step 1: The Client Interview: Creating a Timeline/Identifying Relevant Documents. The first step in any case is the client interview, getting the facts under control, creating a timeline and then identifying relevant documents. In the initial interview, I first listen to the client, while standing at a white board. Every fact, every important event, and every potential party and witness is listed. Relevant documents are discussed and a plan is made to marshal these documents.

Step 2: Witness Interviews. Once the timeline is created, it is crucial to interview the fact witnesses. Witnesses often form a kind of bond with the lawyer who has the first meaningful contact with the witness. It is crucial that we get to them first.

Step 3. Investigating Defendants and Potential Third Parties. Commercial case defendants often involve not only the signatories to a contract, but third parties who conspired, or benefited from the breach. It is important to research all defendants and potential defendants, in order to fully identify all sources of recovery or "deep pockets".

Step 4: "Begin with the end in mind." Steven Covey, in *7 Habits of Highly Effective People*, advises that we should "begin with the end in mind." When it comes to litigation, this means first researching the questions the jury will be asked to answer (which are found in the pattern jury charges) and researching case law listing the elements of each cause of action.

Step 5: Case Theme Development. In this step, it is important to analyze, "What the defendant did? What the defendant had a duty to do?" What would "perfect performance" be compared with what the defendant actually did? (How did the defendant fall short of "perfect" performance?) Why didn't the defendant do better (motive for the failure)? How hard would it have been for the defendant to do better? And importantly, whether the harm could have been avoided with just a little more care or effort? Frankly, this is a test no defendant could pass. There is always something the defendant could have done better with just a little more thought, care and effort.

Step 6: Prepare Targeted Discovery. Often, cases are resolved by "looking under rocks" the defendant doesn't want exposed. With a properly developed theme in Step 5, discovery, including requests for admissions, practically write themselves. Texas rules allow discovery questions to be served with the lawsuit. Nothing precludes you from forwarding the lawsuit and discovery *before* the suit is filed. A properly developed theme, coupled with targeted discovery, forces the defendant to consider the case from your point of view.

Step 7: Prepare the Petition. The Petition spells out exactly how the defendant's conduct was wrongful, starting with the facts from the timeline and documents, and continuing with the various ways the defendant's conduct is actionable, concluding the relief (money damages) a court could award, if the case were to proceed to trial.

Step 8: The Pre-Suit Demand and "Litigation Hold." Once the lawsuit and discovery are completed, it is important to convey a demand for settlement. Often, a contract will require pre-suit negotiations. In certain injunction cases, a pre-suit demand might lead to the destruction of evidence or fraudulent transfer of assets, if the defendant is warned in advance. In most cases, however, it is usually in your best interest to make a demand first or forward a copy of the lawsuit and discovery in an effort to avoid litigation costs. Every demand should include a "litigation hold" demand, which requires the defendant to preserve (not destroy) all evidence, including emails.

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Common Mistakes When Applying Stark's "In-Office Ancillary Services Exception" By Martin Merritt

As physicians continue feeling the squeeze of declining reimbursements, uncompensated care, and recoupments, many are exploring the revenue-generating potential of ancillary services. There appears to be some confusion as to the Stark Law "in office ancillary services" and "group practice" exception.

The very first question I ask a client is "whether or not referrals of Medicare and Medicaid patients are contemplated." This is the first question you must always ask when considering increasing income through referrals. If the answer is "yes", then the next question is whether the service is a Designated Health Service, or "DHS," which includes: clinical laboratory services; physical therapy services; occupational therapy services; outpatient speech-language pathology services; radiology and certain other imaging services; radiation therapy services and supplies; durable medical equipment and supplies; parenteral and enteral nutrients; equipment and supplies; and, prosthetics, orthotics, and prosthetic devices and supplies; home health services; outpatient prescription drugs; and inpatient and outpatient hospital services.

If the referral is for a DHS and Medicare/Medicaid cover the claim, then Stark Law applies. Stark Law prohibits physicians from referring Medicare and Medicaid patients for designated health services to any entity in which the referring physician (or immediate family member) has any direct or indirect financial relationship unless an exception applies. 42 U.S.C. § 1395nn.

Unlike the Anti-kickback Statute, when Stark Law applies, the only safe way to make a referral is to fit squarely within an exception. (Under the AKS, safe harbors are not mandatory, and the government must still prove a kickback was intended). Thus, if the referral is for Medicare/Medicaid patients, and the item is a DHS, then you must find an exception or you cannot make the referral if you have any direct or indirect financial relationship with the DHS provider.

The most obvious exception is the "in-office ancillary services" exception under 42 U.S.C. §1395nn(b)(2)) (or if the practice is actually a group, then you are supposed to apply the "group practice" exception under 42 C.F.R. § 411.352). This is where much of the confusion lies. In order to apply the "in-office ancillary services" exception, you do not go out and buy a pharmacy or a CLIA lab and set up down the street or across town. The ancillary services must be performed in the office or in the same building, and the people performing the services must be directly supervised by the physician or the physician in the group. The services must be billed by the physician, or his group, under the same NPI number, or by an entity that is wholly owned by such physician or such group practice. In other words, the NPI number on the HCFA 1500 claim form should normally be the same as the physician or group practice.

You cannot "go in with" other doctors to buy a CLIA lab, or pharmacy, if you are not truly a "group practice" which is a "single legal entity." That is, according to 42 C.F.R. § 411.352, the group practice must consist of a single legal entity operating primarily for the purpose of being a physician group practice in any organizational form recognized by the State in which the group practice achieves its legal status.

Further, a management services arrangement typically is problematic, where a number of referring physicians do not own the DHS provider, but attempt to pull profits out through a management company, because an "indirect financial relationship" exists under 42 C.F.R. 411.354(c)(2), which must be analyzed under the indirect compensation exception 42 C.F.R. 411.358(p) (provides an exception if compensation is FMV and not determined in any manner that takes into account the value or volume of business generated. The agreement must also not violate the anti-kickback statute or other state or federal laws.)

Finally, there are state laws to be considered. Texas, for example, will not permit a physician to dispense prescription medications for more than a 72 hour supply without complying with the Pharmacy Act. This would tend to eliminate in-office pharmacies altogether.

As always, it is best to consult an experienced health attorney in your state, before undertaking any plan which may implicate Stark Law. You can reach Martin Merritt at 972-450-7373 or at mmerritt@fflawoffice.com.

Winning Strategies Series: 10 Proven Steps Toward Quick Victory Before Litigation

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Step 9: Negotiation. The test of a good litigator is the ability to communicate with the other side and to achieve the client's objective at the earliest possible time and at the least possible cost. The biggest mistake lawyers make and, frankly, the greatest disservice to clients, is the "paper tiger syndrome." Too often, lawyers rely upon harsh emails and pleadings to do the talking. There is no substitute for picking up the phone and talking to the other side. I cannot tell you the number of cases I have settled, in my client's favor, by talking to the opposing counsel.

Step 10: Close the Deal. The ultimate test of a great litigator is the ability to "close the deal." Any litigator can pick a fight and rack up hundreds of thousands of dollars in fees. A great litigator is one who is singularly focused upon "what is best for you and your needs." This may not always mean you get everything you want. It means actively applying proper negotiation skills, never losing sight of what is best for you, and counseling you when "closing the deal" is in your best interest.

Through decades of experience, clients have come to rely upon Friedman & Feiger to achieve the best results, at the least possible cost. Call for an appointment at any time, day or night.

Sincerely,

Larry Friedman can be reached at 972-788-1400 or at lfriedman@fflawoffice.com

JAN 2018

EMPLOYERS: NAVIGATING THE "ME TOO" MOVEMENT

BY MELISSA KINGSTON

Me Too or #MeToo hit social media and mainstream media like a wave in the fall of 2017. The movement was initiated to support victims of sexual harassment and sexual assault, call attention to and help stop widespread sexual harassment and sexual assault, and encourage people to report it. The movement gained momentum when high profile celebrities, many of whom shared their own stories of sexual harassment or sexual assault, championed it. And now, Me Too is a mainstream term that has been tweeted, shared, posted, and uttered millions of times.

As an employment lawyer, it was not long before the Me Too movement meant a wave of calls to my office. The calls were almost entirely from people seeking redress, but I did not hear from many employers even though I know (and they know as well if truth be told) that most employers are unprepared to adequately and fairly deal with claims of sexual harassment or assault.

So, is the Me Too movement a fad that will fade or the next iteration of social evolution? My guess is the latter, and employers need to pay attention.

Many employers have no written and distributed policy denouncing sexual harassment, gender-based discrimination or sexual assault in the workplace. Even those who do, often take a lackadaisical approach to ensuring that: (a) employees receive these policies; (b) the employer can document that the policies were distributed; and, (c) the employees know they exist and feel confident that they will be enforced. Instead, for many employers, they wait until they have a complaint to realize that they have not protected themselves or their employees. Then, they make matters worse by botching the investigation and response to the complaint.

ATTENTION EMPLOYERS! If you do not do the following, you should:

- Create and distribute to every employee a written policy that prohibits sexual harassment, sexual assault, and discrimination based on gender/ gender identity, sexual orientation and familial status.
- Decide (ahead of time) to whom complaints should be reported and make sure employees know this information.
- Get a receipt from each employee verifying that they received the written policy, and keep it where you can find it.
- Have a written complaint response protocol. Most employers do not have this, and this is where they really screw things up. The time to decide how to handle a complaint is not when it lands on your desk. Well before that moment, employers should decide who will investigate complaints, how the investigation will be conducted and documented, in what situations you should call your lawyer for assistance, what disciplinary measures will be taken in the event of violations, how to respond if the employer believes the complaint is false, and how the employer's decision will be communicated to the complainant.
- Conduct periodic training. Studies show that one-time training is not sufficient. Periodic and consistent training is far more likely to reduce the frequency and intensity of adverse events. The state of California requires annual training for supervisors, and I expect this trend to spread. For employees, remind them of: (a) the policy (with examples of behaviors that won't be tolerated); (b) the chain of reporting if there is an issue; and, (c) that complaints will be investigated and addressed. For supervisors, also include training on receiving, investigating, documenting, and responding to complaints.

Having and distributing effective policies and ensuring that your employees are properly trained regarding them is far less expensive than defending a lawsuit (and the reduction in morale and productivity that typically accompanies violative conduct). These policies and protocols also need to be tailored to your business, because when they aren't (e.g., something someone at one point in time pulled off the internet), employers do not consistently and effectively follow them. For assistance in developing or revising your policies and response plans to meet the needs of your business, contact Melissa Kingston at 972-450-7308 or at mkingston@fflawoffice.com.

YOUR UNINTENDED AUDIENCE

BY JAMES R. KRAUSE

The safest assumption nowadays is that virtually everything you type in an email or broadcast on social media is permanent and can be recovered by a skilled data retrieval specialist. The second safe assumption is that the material will find an unintended audience.

Last June, Harvard University revoked admission offers to at least 10 incoming students after the school discovered the individuals were posting explicit and obscene memes in a Facebook chat group. The potential students began sharing posts in a private chat group that splintered off from a larger one of about 100 students who contacted each other through the school's official Class of 2021 Facebook page that was meant for new students to meet each other. The online group was originally meant to share memes on popular culture, and started off as "lighthearted" but then a few members began posting inappropriate items. The students who began posting the explicit memes started their own subsect and demanded that members of the larger group post provocative memes in order to gain admission in their chat room. When Harvard learned of the group, school officials pulled the acceptance offers of about 10 incoming students who were a part of the online chat group.

In a separate situation, a 20-year-old was implicated in the death of her boyfriend because of the texts she had sent him before he died. Michelle Carter was convicted of involuntary manslaughter for sending her boyfriend text messages encouraging him to commit suicide. Her boyfriend, Conrad Roy III, killed himself on July 12, 2014. She was convicted based upon her texts.

As was the case in this second example, when it comes to your important legal matters, the unintended audience will be a Judge and Jury. In virtually every case we litigate, emails are now the best evidence. We all send hundreds of emails every day that reveal a virtual minute by minute timeline of our day. These emails often reveal your location when you sent it, what you

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FRIEDMAN & FEIGER
ATTORNEYS AT LAW

5301 Spring Valley Road, Suite 200
Dallas, Texas 75254

Telephone (972) 788-1400
Facsimile (972) 788-2667

Please visit our award-winning website!

www.fflawoffice.com

CALENDAR OF EVENTS

February 10, 2018	Friedman & Feiger sponsors the Goldberg Family Early Childhood Center's fundraiser, "Best. Date. Night. Ever." Aaron Family Jewish Community Center of Dallas, 7900 Northaven Road.
February 12, 2018	Selected by the *Dallas Business Journal*, Janelle Friedman will participate as a mentor in the "*Dallas Business Journal*'s Bizwomen Mentoring Monday" seminar, 3:30 p.m. to 6:30 p.m., Tower Club, 1601 Elm Street, 48th Floor.
February 18, 2018	Friedman & Feiger sponsors the Be The Difference Foundation's "Wheel To Survive" event helping women battling ovarian cancer, 9 a.m. – 3 p.m., JCC Dallas, 7900 Northaven Road.
March 2, 2018	Janelle and Larry Friedman will be honored by Dallas Can Academies at the "2018 Dallas Cares for Kids Luncheon," 11:30 a.m., Belo Mansion, 2101 Ross Avenue. For sponsorships and tickets, slucero@texanscan.org.
March 8, 2018	Friedman & Feiger invites you and a guest to attend the Spring Essential Energy reception for women business leaders featuring Guest Speaker Julia Cheek, CEO and Founder of EverlyWell. Julia recently appeared on ABC's Shark Tank where she accepted a $1 million offer from Lori Greiner, 6 p.m. to 8 p.m., Tootsies, 8300 Preston Road. Ladies only. Please respond to LaVonda Marsh, lmarsh@fflawoffice.com
April 4, 2018	Friedman & Feiger kicks off its Mentoring and Intern Program for the students of Dallas Can Academies.

For additional information, please contact Janelle Friedman via email at: JFriedman@FFLawOffice.com.

YOUR UNINTENDED AUDIENCE

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were doing when you sent it, and your instantaneous reaction to events—often in exaggerated language meant to amuse your colleagues—that can be taken out of context to paint an inaccurate picture of events, or your thoughts, feelings or opinions. Take a moment and look at your 'sent' folder. Opposing counsel can recreate your entire day from a review of that folder.

If there is a workplace incident that you believe might lead to litigation, and this is often hard to predict in the early stages, STOP discussing it in writing and require your employees to stop discussing it. Gossipy tweets from employees – even those who are not part of the decision group or group of actors – may lead to the discovery of misleading evidence. Good old-fashioned meetings or phone calls are always preferable.

Use email for scheduling and routine communications, not for expressions of remorse or confessionals. If in doubt, call Friedman & Feiger: a lawyer's investigative file is privileged.

CONGRATULATIONS JASON FRIEDMAN!

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