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## **Litigation Support Case Study - Make That Declaration Count**

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You've just been contacted by an attorney seeking civil litigation support related to a fraud allegation. The hiring attorney is representing the defendant, who has been charged with embezzling almost \$200,000, and the plaintiffs have filed a motion to compel the defendant to submit all personal financial records for review. The defendant's attorney would like you to prepare a declaration for the courts to contend that the plaintiff's motion to compel is unwarranted, but the attorney has a short time frame for submitting such a declaration. Which steps should you take to ensure diligence in preparing the declaration, while adhering to the attorney's time frame?

We experienced the above situation recently, and quickly realized that we had relatively little time to understand the details of the case enough to prepare a noteworthy declaration for the courts. Here's how we proceeded:

Before accepting the engagement, we first considered the requirements of Rule 201 of the AICPA Code of Professional Conduct, and specifically addressed two of the requirements that caused us the most concern: "due professional care" and "sufficient relevant data." One the ways we needed to exercise due professional care in such a short time frame was to ensure that we had sufficient relevant data! We informed the hiring attorney that we needed immediate access to all of the documents related to the case, including every court filing. Because of the seriousness of the plaintiff's allegations, we informed the attorney that he must allow us time to carefully review every document as soon as possible before even agreeing to accept the engagement; the hiring attorney cooperated fully with us.

We then considered whether we had any conflicts of interest and determined that there were none, and performed a public records search to find information about the potential client. We determined through our public records search that there appeared to be no red flags regarding the defendant, such as the presence of an exorbitant lifestyle.

We met with the hiring attorney to learn some basic facts about the case. After hearing the details of the case, it appeared that the plaintiff used insufficient measures to determine that fraud was committed. In fact, according to the hiring attorney, the plaintiff's attorney requested that the court grant access to all of the defendant's personal financial records - before even reviewing the company's own records to determine whether a fraud occurred!

We were both intrigued by this case, to say the least – how did the case get this far without a sound basis for predication? It sounded hard to believe, so we both agreed that we had to perform our own analysis before accepting the hiring attorney's side of the story. We applied our standard firm practice for completing projects: define goals for the project, develop our strategy, and describe the activities necessary to reach our goals. We also needed to address the immediate problem - we didn't have several weeks to understand the case (we only had about one week to review six months of court documents), in addition to our usual workload of other projects.

We discussed the scope of the project and ensured that the hiring attorney and his client authorized us to perform a thorough forensic examination if necessary; we suggested to the attorney that he (rather than the defendant) hire us to ensure that our work was protected under attorney-work product privilege. We advised the attorney that he hire us initially to prepare the declaration only, and that any subsequent work related to the case would be covered under a separate engagement letter. We prepared an engagement letter for the attorney in which we included a detailed scope of work; in our engagement letter we reiterated our role as purely a fact-finding one.

We returned to the hiring attorney's office and reviewed each and every court-related document for the case, and carefully reviewed all supporting documentation provided by both plaintiff and defendant - including several hundred pages of text messages between the plaintiff and the defendant that occurred over a period of several months.

There are inevitably numerous leads to follow whenever personal communications (such as emails or text messages) are provided as supporting documentation in these types of cases. We followed up on every lead or clue (names mentioned, trips and other expenses discussed, etc.) that we found in the supporting documentation, and made a determination that it was impossible from the documentation provided to ascertain whether the defendant actually misappropriated funds from the plaintiff – there just wasn't evidence to support such a serious accusation. Compounding the lack of evidence problem was the fact that the plaintiff had consistently comingled business and personal funds, as well as comingled business funds with personal funds provided by other family members – there was little or no evidence of internal control at the company, and we hadn't even truly delved into the company's records yet.

We researched all payees for whom we had access, and the sources of funds used – business versus personal accounts, etc. At the same time, we read each request for information made to the court by the plaintiff, and it was apparent that there were also personal issues between the plaintiff and the defendant – another complication. This case didn't just involve a business transaction, and it would take some time and research to properly present facts regarding any alleged fraudulent activity.

The plaintiff had requested that the court require the defendant to produce a number of documents, including all personal bank statements, and the sources and uses of all funds for the defendant and the defendant's entire household. After reviewing all of the available documentation, we knew our goal was to properly inform the judge about: 1) the lack of documentation supporting the accusation, and 2) the appropriate steps to be taken to perform a proper forensic examination. It was not a question of guilt or innocence – our responsibility is to properly report the facts we obtain in an investigation, not to opine on the guilt or innocence of the defendant. However, there were not enough facts for anyone to determine the guilt or innocence of the defendant, especially without a proper review of the plaintiff's accounting records.

We also knew that in order to conduct a proper forensic examination to address the plaintiff's allegations, we needed to develop our own request list for viewing the plaintiff's records. Completion of this task was complicated by the comingling of business and personal funds we noted while reviewing the documents

provided by the plaintiff to the courts. Furthermore, we knew we would have no face time with the judge assigned to the case, therefore it was essential we present a sound written declaration that supported performing a thorough review of the plaintiff's accounting records before requesting the defendant's personal financial records.

To assist the judge assigned to the case in understanding our expertise related to fraud investigations, we included our background information in the declaration: degrees held; certification and designations earned, and investigation experience. We then described the steps that we generally take in conducting a proper examination (analyze the scope and assess the parties involved, gather evidence, review and analyze it, quantify the fraud and produce a report, and recover funds, etc. if possible), and addressed why those steps are essential in conducting a proper examination.

Furthermore, we provided the judge with a few examples of problems that might occur if accusations are made without proper evidence supporting those accusations, and illustrated how the examples we provided related to specific accusations made by the plaintiff in the case. For example, the plaintiff claimed that the defendant negotiated checks without the plaintiff's permission; however, as evidence the plaintiff provided checks written and properly signed by the plaintiff himself. The plaintiff also alleged that the defendant fraudulently claimed reimbursements, yet the plaintiff provided reimbursement checks made out to the defendant (and properly signed by the plaintiff), and offered no supporting documentation for the reimbursements. When pressed by the hiring attorney about the lack of supporting documentation for the reimbursements, the plaintiff stated that he generally did not require receipts or other evidence of expenses paid by his employees or independent contractors.

Finally we discussed a few common business best practices in accounting and addressed the faulty business practices we noted in a number of plaintiff records we reviewed. One example: we discussed the necessity of maintaining proper expense documentation (receipts, account coding, detailed descriptions of business purpose, etc.), and noted that it appeared to be common practice for the plaintiff to complete and sign large checks (\$10,000 or more) made out to "Cash" with no description of the purpose of the checks – making it difficult to prove that the monies were spent appropriately or inappropriately for that matter.

The hiring attorney raised numerous concerns about the plaintiff's request as well; in the declaration we addressed all concerns raised by the attorney, specifically the attorney's privacy concerns for the defendant and the defendant's family.

We followed up by preparing a preliminary document request list for the plaintiff and included the list with the declaration. We produced all of the documents for the hiring attorney a few days early in order to provide ourselves the opportunity to address all questions or revisions the hiring attorney might have for us. After receiving the attorney's first draft of the court declaration (based upon our written declaration), we were pleased to find that the hiring attorney left our original written declaration intact. We signed the court declaration and waited to hear the result.

The result: the judge assigned to the case granted our request and denied the plaintiff's motion to compel. To be continued...