

CONFRONTING CORPORATE AMNESIA

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Imagine this: Acquirer Inc. buys Predecessor Corp., or purchases Predecessor's assets. Post-merger, a Predecessor trading partner, Claimant, sues Acquirer for breach of contract. Apparently, Predecessor executives had made some sort of promise to Claimant years ago. Claimant says Acquirer has, without explanation, ceased to perform Predecessor's promise.

As Acquirer's new counsel, you investigate and prepare a defense.

Unfortunately, nobody at Acquirer seems to know about the alleged deal with Claimant. Predecessor's employees have long since retired or been laid off. Predecessor's records were stored at Predecessor's old headquarters, and now cannot be found.

What you need—and what Acquirer lacks—is “organizational memory,” the largely undocumented insight, experience, knowledge and skills that workers acquire over years at a corporation and pass on through informal training or mentoring. If organizational memory is not effectively captured prior to a merger, corporate amnesia may set in, causing invaluable knowledge to be lost forever.

Organizational memory is often the only way to understand unique facts underlying a dispute—for instance,

idiosyncratic terms in a contract or lease, a closely-negotiated warranty on custom-designed equipment, a custom-designed employee benefit plan keyed to Predecessor's now-abandoned compensation system, or the rationale behind Predecessor's product design and manufacturing decisions.

Your task as counsel is to resurrect that lost organizational memory. That will require surmounting four obstacles created by corporate amnesia.

The Opposing Side Knows More Than You Do.

Your defense is handicapped by a disparity in knowledge. The resulting tactical advantage to plaintiffs can be vast, since they essentially hold all the cards and know exactly how to use them.

To win Acquirer's case, you must build a theory from the ground up. Creating a timeline could suggest reasons for Predecessor's seemingly enigmatic acts. For instance, maybe the contract was amended immediately before a large order was placed. Or, perhaps Predecessor reduced its shipments to Claimant after receiving a complaint from one of Claimant's customers. When presented to a witness, juxtapositions of events sometimes stir the well of memory.

A testifying or consulting expert with industry knowledge also could assist in preparing your case, offering crucial insights on the disputed contract. Is a particular clause typically used in the industry? If so, what is its purpose? If not, why might these parties have adopted it?

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Similarly, an expert could educate you on industry developments at the time of the disputed transactions. Were legislative or regulatory changes afoot? Was the technology changing? Was it anticipated that companies like Claimant and Predecessor might be sold?

The primary source for additional information, however, will come from conducting due diligence within your client's organization.

Missing Documents

A wise first step is to implement a "litigation hold" and commence a thorough search for potentially relevant documents. Discussions with Acquirer's management may provoke eye-rolling and head-shaking, particularly if Claimant's lawsuit is one of those "toxic" items that nobody wants to touch. But, some uncomfortable probing may be needed to elicit the necessary information.

If no documents turn up after a reasonably thorough search, consider expanding your search to include the following potential

sources of information.

- **Counsel from the acquisition:** Contact Predecessor's deal counsel for documents about Claimant's contract. Did they know about the issue that has arisen? How was it handled in the transaction?
- **Predecessor's business counsel:** Predecessor may have used outside counsel to negotiate and document its contract with Claimant. Those counsel should have the Predecessor-Claimant agreement on file and, with luck, some organizational memory on the subject.
- **Predecessor's consultants and advisors:** Before companies are sold, management consultants often are hired to study the business and suggest ways to restructure it. Predecessor also will have engaged an investment banker to value the business for sale. These parties may have learned something about Claimant's contract.
- **Predecessor's former owner:** In many acquisition agreements, the seller promises to cooperate in the event of a lawsuit. Possibly, people at Predecessor's former parent company were aware of the dealings with Claimant.
- **Predecessor's computer records:** When Acquirer tells you that Predecessor's computer records are unobtainable, prudence may call for a deeper probe to confirm that. A court faced with a discovery motion will consider whether Predecessor's records are "reasonably accessible." If e-mails were retained only on backup tapes that are undifferentiated and prohibitively expensive to restore,

then production might be ruled unnecessary. But, advancements in storage technology and near-online archiving may make the data accessible without substantial cost. Consider enlisting a qualified in-house IT person or an e-discovery consultant to investigate the state of Predecessor's data, with an eye toward either extracting the necessary information from the old system or supporting a claim of undue burden.

The Blame Game

When your client acquired Predecessor, it may have justified the cost by telling stakeholders that Predecessor was ineffectively managed and would grow in value under Acquirer's solicitous stewardship. Now, Predecessor's balance sheet appears less rosy than represented, and, a business unit inherited from Predecessor has been sued. Buyer's remorse may result in an almost-reflexive desire to cast stones at Predecessor's former managers.

Counsel therefore shouldn't be surprised to encounter a strong institutional bias toward condemning Predecessor's pre-merger conduct. "The officers of Predecessor were scoundrels," Acquirer's CEO will tell you. (That's a paraphrase; actual wording may differ.)

Blaming Predecessor won't help, however. If courts treat Acquirer as Predecessor's legal successor, Acquirer would be liable for Predecessor's acts.

Thus, if a mid-level manager's self-serving internal memorandum states something like, "This lawsuit

should not come out of my budget or affect my bonus because it resulted solely from the villainy and ineptitude of those fiends at Predecessor,” the screed may become a damaging admission in discovery.

Convincing a witness to testify concerning events that occurred while she was with a former employer and about which she no longer cares is a tough sell.

After-the-fact attacks on Predecessor often turn out to be unfair. When the truth is uncovered, Claimant’s interpretation of the deal may not be what Predecessor actually agreed to do. Or, Predecessor may have rendered final performance. Or, Claimant may have failed to fulfill a material condition of the contract. Revelations like this will result only from diligent inquiry.

Hostile Witnesses

After acquiring Predecessor, to reach cost-reduction targets, Acquirer’s management may have fired almost everyone in sight. By doing so, Acquirer risked losing not only institutional memory, but also the goodwill of Predecessor’s former employees.

Assume that one of the discharged former employees is identified in Claimant’s complaint as having overseen Predecessor’s relationship with Claimant. You may need to undertake the unenviable task of

cold-calling this person, interviewing her about the events underlying the lawsuit, and convincing the former employee to cooperate with Acquirer.

Acquirer might possess a right to the former employee’s services. Does her personnel file contain a separation agreement? Such agreements often require the separating employee to cooperate with the company on transition matters. Alternatively, as part of a separation package, Acquirer and the employee might have entered into a consulting agreement covering future services.

If Acquirer has no legal right to the former employee’s cooperation, you as counsel may need to rely on your native charm. This may present challenges: convincing a witness to be interviewed and to testify concerning events (and about which she no longer cares) that occurred while she was at a former employer is a tough sell.

At this point, the word “CAVEAT” should flash on your radar screen. Attorney ethics rules frequently cover witness contacts, and those rules differ state to state. Before contacting a witness, check the governing ethics codes and case law to determine what conduct is acceptable in the relevant jurisdiction. Subject to that warning:

- The witness may want to be paid for his efforts. Any compensation paid to a witness must be reasonable in exchange for his time and effort. Payments should be calculated purely on a per-hour basis. A written agreement with the

witness should specify the hourly rate—ideally, commensurate with the witness’s ordinary compensation for his daily work—and should state that the compensation will be unaffected by the content of the testimony. The agreement should also provide that the witness will testify truthfully, to the best of his ability. It is imperative to avoid even the appearance of a “success fee.”

- The witness may wish to retain Acquirer’s lawyers as his own counsel, to represent him at the deposition. That representation could be at no cost to the witness; Acquirer may agree to pay all the fees and expenses. If you and the witness enter into this sort of arrangement (preferably in writing), the attorney-client privilege should protect your interview and preparation sessions.
- If the witness testifies at a deposition, videotape the examination for use at trial and ask any questions that will help your case. There’s no guarantee that the former employee will be available for trial or that his attitude toward Acquirer will improve with time.

Aeschylus wrote that “memory is the mother of all wisdom.” By reviving lost organizational memory, corporate counsel will have the information necessary to mount a successful defense—or, at the very least, negotiate a wise and informed settlement.

