

Career Development

LEADING A NEW ACTION



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A junior attorney who demonstrates that she is serious, possesses good judgment, and is reliable and enthusiastic may receive an early opportunity to assume primary responsibility for the prosecution of a new lawsuit. Often, the chance

will arise in the context of a smaller claim for an existing client.

Regardless of the matter's magnitude, the assignment will pose significant challenges to a junior lawyer who must adapt from her customary role of following the direction of more senior colleagues to one in which she will be primarily responsible for developing and implementing the overall strategy for the litigation.

The junior attorney will now make strategic decisions regarding pleadings, discovery, valuation of the case, settlement, trial preparation and a host of other issues. Beyond strategy, she will primarily be responsible for communicating with the client, opposing counsel and the court.

Many of these tasks will provide new challenges to the heretofore novice. Following is practical advice designed to ease the transition into this new, and seemingly overwhelming, role.

Among the first tasks requiring attention is an investigation into the factual circumstances giving rise to the new lawsuit. A fact investigation can be conducted in many different ways, and the right approach will depend on the unique circumstances surrounding the claims.

Perhaps the most obvious way to collect background information regarding the claims is to interview the client. Remember though, if the client is a corporation and you are interviewing an employee, this conversation may not be protected from disclosure by the attorney-client privilege. The applicable privilege law should be reviewed in advance of any such conversation to determine whether the communication is protected from disclosure.

Also give consideration as to whether it is appropriate to conduct pre-suit interviews of non-party witnesses. Beyond fact witness interviews, you will often want to collect and carefully review the likely key documents to insure they support both the factual allegations and legal theories that will form the basis of plaintiff's case.

In addition to review of hard copy documents, you will need to develop an understanding of what categories of electronic documents are likely to be relevant in the lawsuit. While collection

and review of all potentially relevant electronic documents might not be possible (or desired) prior to instituting suit, consideration should be given to reviewing key players' e-mail files in advance of commencing the lawsuit.

Further, work with the client to insure that it takes appropriate steps to preserve for the duration of the lawsuit potentially relevant hard copy and electronic documents. Other sources can provide valuable background information regarding the claims, so carefully consider all potential avenues for developing information, including, but not limited to, public record searches, public and private database searches and conversations with other attorneys or individuals who have previously brought similar claims against the defendant.

Jurisdiction and Venue

Among the most critical initial decisions to make is in which court to bring suit. First, consideration must be given to which particular court or courts have subject matter jurisdiction over the claims, personal jurisdiction over the defendant(s) and venue under applicable law.

Assuming the claims may properly be brought in more than one court, determine which forum is best suited for the lawsuit. A variety of factors will come into play depending on the circumstances of the particular action, including such things as: (i) the average period of time from commencement of an action to trial in a particular court; (ii) the quality of each bench and its presumed familiarity with the subject matter of the action to be filed; (iii) the availability of discovery devices under applicable rules during different phases of a lawsuit; (iv) the applicable procedural rules; (v) the availability of equitable remedies; (vi) the jury pool demographics; and (vii) whether the court has an alternative dispute resolution program.

By no means is this an exhaustive list, so discuss this decision with more seasoned colleagues who can share their prior experiences in, and accumulated knowledge regarding, particular courts.

Drafting the Complaint

You will need to quickly turn your attention to drafting the complaint.

It should be obvious that the complaint must include sufficient allegations to satisfy the court's minimum pleading requirements. However, consider whether there are potential benefits to be reaped from serving a complaint with detailed allegations of the defendant's wrongdoing that go well beyond

the minimum pleading requirements.

A complaint with detailed allegations can force the defendant in its answer to provide more meaningful admissions or denials, thereby enhancing the utility to the plaintiff of the defendant's answer.

In addition, a detailed complaint can send a strong message to the defendant regarding plaintiff's likelihood of success and internally held assessment of the merits of the action. That message may make the defendant more amenable to reaching an early settlement.

A more detailed pleading may also dissuade the defendant from moving to dismiss the complaint for failure to state a cause of action. Further, a detailed pleading will provide the plaintiff with support in a discovery dispute where a defendant or non-party objects to discovery as irrelevant. In such situations, the plaintiff can demonstrate relevance by directing a court's attention toward the express allegations of the complaint.

Moreover, in federal court or other jurisdictions requiring automatic disclosure at the commencement of an action, detailed allegations will likely expand the scope of these required disclosures, thereby providing plaintiff with greater discovery of the defendant at the commencement of an action. Of course, there are times when a more bare-bones pleading makes sense, so do not simply assume that more details in a complaint are preferred.

Research

Prior to drafting a complaint, conduct research to determine what legal theories should be pleaded, and what remedies may be sought. Further, review decisional law to develop an understanding of the elements of each legal theory that must be pleaded in order to state a claim for relief. Essentially, this will require examination of decisions where courts evaluated a claim against a failure to state a cause of action standard.

Finally, review the applicable procedural rules to determine whether the forum affords the plaintiff an opportunity to seize, in part or in whole, priority of discovery. This will vary from jurisdiction to jurisdiction (and indeed, could be a factor to consider when selecting between multiple available forums).

Where the rules permit the plaintiff this advantage, strongly consider preparing discovery to be served with the summons and complaint.

In sum, resist the temptation to feel overwhelmed when first asked to take primary responsibility for a new action. With careful and thoughtful planning, this experience will be both professionally rewarding and painless.