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THE BACK PAGE

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Career Development

EARLY CASE ASSESSMENT

Where the damages demanded in a lawsuit are, relatively speaking, of little significance, economic considerations favor charging a junior attorney with primary responsibility for the action. When granted the opportunity to be the case leader, among the first tasks a junior attorney will likely need to perform is a preliminary assessment of the strengths and weaknesses of her client's position.

These preliminary conclusions regarding the merits of the lawsuit will normally shape the client's litigation strategy, including, but not limited to, the level of detail pleaded in the complaint or answer, the type, quantity and subject matter of the discovery demands served, whether to engage in early motion practice and any recommendation to the client regarding settlement or its participation in an alternative dispute resolution process. This column provides junior lawyers with certain factors to consider when performing an early case assessment.

Like so many professional challenges, early case assessment begins in the law library. It is vitally important to understand the legal elements of each of the claims and defenses in the case. For instance, if a client is alleged to have defrauded the plaintiff you need to understand whether reliance is a required element of the fraud claim, and, if so, whether the reliance must be reasonable as adjudged on an objective standard. Legal research provides essential context for determining whether key facts can ultimately, as a matter of law, be sufficient to support your client's position.

Armed with a general understanding of the relevant law, turn your attention to conducting an initial fact investigation. The fact investigation includes several components. First, endeavor to learn who the relevant witnesses are, and to what facts they are expected to testify to. Putting together a complete picture of all expected testimony will be difficult at the beginning of an action as access will likely be limited to individuals the client controls and the occasional nonparty witness. You will not have access to witnesses controlled by your adversary. When making an evaluation regarding the merits of the claims, be cognizant of the potentially significant evidentiary gap not having access to all witnesses creates.

Further, critically examine and evaluate



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not only the witness accounts provided by those interviewed, but also be mindful of other intangible factors, such as the witnesses' credibility, background and demeanor when gauging how the witnesses' anticipated testimony will stand up to cross-examination. Also, consideration should be given to the witnesses' availability and general willingness to cooperate with your client.

Thorough fact investigation will also require reviewing the relevant, available documents. A comprehensive review is important for several reasons. First, determine whether the documents corroborate or contradict the witnesses' anticipated testimony. Documentary evidence can be particularly powerful because in most instances it is created before the parties are considering a lawsuit. As a result, such documents are often deemed to be 100 percent free of litigation bias, while witness testimony generally is not.

Second, early document review often yields details the witnesses neglected (often inadvertently, sometimes intentionally) to reveal during fact investigation interviews.

Third, the documents may reveal the names of additional material witnesses that the client failed to mention (again, often inadvertently, sometimes intentionally). Finally, the documents may provide a sneak preview of your opponent's case.

Another aspect of early case assessment is gathering intelligence regarding the particular judge assigned to the case. To the extent possible, try to determine how quickly the judge brings cases to trial, to what extent the court is likely to get involved in moving the parties toward settlement

or alternative dispute resolution mechanisms and other practices unique to that court.

Also, additional legal research should be undertaken to determine whether the court has heard other matters regarding the same factual and legal subjects, and if so whether the court's earlier writing provide meaningful guidance regarding the client's prospects in the current action.

The Internet is another resource that should be considered at the early assessment phase of the case. Well-designed searches may reveal significant background information relating to the parties, the factual dispute or the general business practices at issue. Moreover, search results often reveal new ideas and concepts that may prove valuable when designing a theory of the case.

Finally, when requested by the client be prepared to provide a preliminary budget as to the expected attorney's fees and costs likely to be incurred throughout the various phases of litigation. This information will assist the client in determining whether it makes better financial sense to litigate or attempt to reach an early settlement. Of course, be careful to inform the client that you are only providing an estimate of fees and costs and that actual fees may vary, perhaps significantly, depending on the factual and legal developments in the case.

It can be an incredibly exciting and rewarding experience to lead the prosecution or defense of a case. Getting off to a running start greatly enhances the prospects for a professionally successful and satisfying experience. Thinking about the case in broad strokes early on brings a better opportunity to develop a strategy for success.

Moreover, early assessment of the potential risks and/or rewards that await your client will greatly enhance the prospects that the client will have a realistic expectation regarding the likely outcome of the lawsuit and the overall expense involved. Like so many tasks in life, advance planning can be essential to obtaining satisfactory results. **NLD**

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