

When Your Client's Been Sued: Early Case Assessment and Preliminary Action

- Ask whether the firm should take this case.
 - Financially.
 - Ethically.
 - Politically.
 - Other?
- Run conflicts.
 - Are there any hard conflicts?
 - What about “soft” conflicts—issues with representing one part of an industry that might be aligned against another that we represent, etc.?
 - Make sure to give yourself time to run conflicts.
- Have a frank discussion with the client.
 - One of the first things you may need to get a handle on is who the client is (this needs to happen as a technical matter before conflicts are run, but there are always possibly more-subtle distinctions within a client re: who's running what or responsible for the litigation).
 - Is the person you are taking direction from actually “the client,” or some other entity?
 - If more than one entity, are there times where the entities' interests won't align?
 - This may be the first opportunity you have to establish a rapport with the client and instill confidence in you and the firm.
 - Ask the client for its side of the story right out of the blocks.
 - Take detailed notes.
 - Who, what, when, why, how.
 - Be a journalist as well as a lawyer.
 - Be aware that the client might not know the facts or the answers, and might be defensive, emotional, and otherwise not particularly wed to objective versions of the facts.
 - Balance empathy and advocacy.
 - Ask the client to think carefully about what it wants out of the defense.
 - What does a “win” look like?
 - What are the business factors at play?
 - Get to know the business—and the details of the issues affecting the client.
 - Figure out what the real pain points are.
 - Be sensitive to what the emotional factors are.
 - Ego, taking things personally, historic relationships, etc.
 - Sort the emotional from the business side from the rational.
 - Create and implement a litigation hold.
- Assign a team.

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- Partner(s).
- Senior associate(s).
- Junior associate(s).
- Discovery attorney.
- Paralegal.
- Have regular meetings
 - Deadlines.
 - Schedule.
 - Strategy.
 - Fact-and-law discussions.
- Set up a share site.
- Pick up the phone and call the attorney on the other side.
 - Establish a good rapport and relationship right away.
 - Ask for the attorney's version of what happened and the reasons for the lawsuit.
 - Probe for information.
 - Take good notes.
 - Ask what the plaintiff really wants.
 - Often can save time and money by starting with an honest initial chat.
- High-level case review
 - What are the immediate risks for the company?
 - How to mitigate them?
 - Put out immediate fires as needed.
 - Do the first high-level general investigation into allegations, damages after chatting with the client.
 - Does the complaint seek a provisional remedy?
 - TRO, preliminary injunction?
 - Garnishment?
 - Etc.
 - Did the plaintiff exhaust administrative remedies?
 - Subject-matter jurisdiction?
 - Does it exist in this court?
 - Personal jurisdiction?
 - Does it exist over the client?
 - Is the lawsuit in the right court?
 - Venue issues?
 - Removal?
 - Is removal from state court to federal possible based on diversity, federal-question jurisdiction, etc.?
 - Is removal desirable?

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- What other third parties might be implicated?
 - Impleader, etc.
- Are there non-parties at fault?
- What defenses (affirmative and otherwise) might exist?
- Cross/counter-claims?
- Easy disposal on procedural grounds?
 - Feasibility?
 - First, think strategically about whether it makes sense to file a motion to dismiss.
 - If so, then, assess Rule 12 triggers:
 - Justiciability questions?
 - Pleading problems?
 - Statute of limitations issues?
 - Improper service?
 - Lack of personal jurisdiction?
 - Failure to exhaust administrative remedies?
 - Etc.
- Early planning for answer or motion to dismiss.
 - Consider potential counterclaims.
 - Consider potential claims against third parties.
- Calculate applicable deadlines.
 - What are they?
 - Is an extension of time to answer or otherwise respond to the pleadings necessary?
 - Would a waiver of service be useful to provide additional time to respond?
 - Read the applicable rules on how to compute time.
 - Federal, state, local, agency, judge's, as applicable.
 - Check for applicable local statutes, regulations, rules.
 - *e.g.*, C.R.S. § 13-21-111.5 – designation of nonparties at fault due within 90 days of filing or service of case.
 - Check and double-check applicable deadlines.
- Research judge, opposing party, counsel for opposing party.
 - Ask colleagues.
 - Have paralegal collect information and present it.
- Budget.
 - Work with client to decide what form the budget should take.
 - We have many templates, from very simple to massively complex.
- Damage control within company/client.
 - Avoid creation of bad facts.
 - Litigation hold check-in.

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- Inquire into how things are going since the initial lawsuit filing.
 - Changes in perception of facts?
 - Changes in business approach?
 - Softening or hardening of positions?
- Hand-holding on what the litigation might look like and how it likely will proceed.
- Be honest and straight forward.
- Be an advocate and a counselor.
- Empathize.
- Interview witnesses / perform early fact investigation.
 - Note, notes, notes.
 - Ensure attorney work-product protection.
 - Ensure attorney-client privilege wherever possible.
- Protective order.
 - Do you need one?
 - Many judges have individual and specific rules.
 - Use templates to start.
- ESI protocol.
 - Do you need one?
 - Numerous issues are associated with ESI protocols.
 - Use templates to start.
 - Involve discovery attorneys/paralegal.
- Begin proof chart and fact timeline.
 - Pull jury instructions/cases.
 - Identify elements of each claim, defense, counterclaim, etc.
 - To prove.
 - To defend against.
 - Who has the burden of proof for each claim and counterclaim?
 - Collect black-letter-law and leading cases in the jurisdiction.
 - Map of proof will help focus discovery and shape litigation plan.
 - Map facts to timeline(s) as they are collected.
 - Keep electronic files related to witnesses/subjects/claims, etc., so that they are easily interrelated, cross-referenced, and accessible.
 - Start triaging what the most-impactful claims/defenses are.
- Collect documents before discovery begins.
 - Create discovery plan in collaboration with in-house counsel.
 - Based on who, what, where, when, how.
 - Accounting for custodians, storage media, devices, locations, etc.
- Create and maintain legal research and case-evaluation memo for internal use, and to provide to client periodically.

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- Begin consulting with experts early (ideally, before any fact depositions).