Case assessments: do them early and often

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The great Yogi Berra once said, "If you don't know where you are going you'll end up someplace else."

All too often, lawyers fail to heed this advice. They move cases forward before really evaluating the merits of the claims. They are often on auto-pilot: Draft the pleading, bring preliminary procedural motions, start the document collection process, etc. The problem with this approach is that a lot of time and money is spent before the lawyers have actually determined whether the claims or defences are likely to succeed.

Ultimately, they have started the client's litigation journey without a clear destination in mind.

A lawyer should be conducting case assessments at every stage of the proceeding.

She should be evaluating the overall likelihood of success, the strengths and weaknesses of the case, and the likelihood of recovery. Indeed, assessing the odds of recovery is as important as assessing the odds of success: If a client wins a $2-million judgment but is unable to collect, the client has not really won anything at all.

Certainly, a lawyer's case assessment can *and* should change over time based on the discovery of new facts or legal issues. Clients should expect that their lawyer is constantly updating their case evaluation and providing a reasonable assessment based on the facts known at the time.

Why are case assessments so important?

First, a lawyer can only devise an effective strategy if she understands the strengths and weaknesses of the case.

For instance, if a lawyer determines early on that the relevant provision of the governing contract is legally unenforceable, the lawyer should probably be doing everything in her power to settle the case before any real money is spent. It would be a waste of time and money to fight a preliminary procedural motion, prepare an affidavit of documents, and conduct a discovery before realizing that the case was on shaky legal ground.

Second, a lawyer must assess the merits of a case in order to set reasonable expectations for her client. Too many cases settle at the last moment. It is absurd to waste valuable time, money, and energy litigating a case when it could have settled years earlier.

There are instances in which a last-minute settlement makes sense. If, just before trial, the smoking gun is found, an important witness comes forward, or a key witness recants, then it makes sense that a settlement would follow shortly thereafter. These circumstances, however, are rare.

Most last-minute settlements occur because one of the parties behaved unreasonably until the last moment. If, however, a client does not understand until the last minute that he or she is likely to lose the case, the

client is not to blame for having acted unreasonably; rather, the lawyer is to blame for having failed to set reasonable expectations for her client.

To be clear, I am not suggesting that lawyers always get it right. Early and repeated case assessments do not guarantee that a lawyer will accurately predict the outcome of the case. I suggest, however, that it would reduce the number of instances in which a party proceeds with a case until the eve of trial only to offer to settle for an amount that would have been reasonable early on in the case.

It is not surprising that lawyers are more likely to do early and repeated case assessments when their fee is tied in some way to the result obtained. Stated differently, if a lawyer makes more money when his client succeeds, the lawyer is more likely to determine upfront what the likelihood of success is.

Although value-based billing structures provide lawyers with the proper financial incentives, clients should be demanding that their lawyers perform case assessments early and often regardless of the billing arrangement in place.

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