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## Roundtable Discussion - Part I

### Case Evaluation

Jan. 28, 2004

*One of the most important aspects of practicing law is the effective evaluation of cases. Taking on the wrong cases or clients can be disastrous to a firm's finances and its reputation. Wisconsin Law Journal editor Tony Anderson sat down with a panel of veteran lawyers to learn how they approach case evaluation and to find out some of the pitfalls they face.*



**(Front) Kelly Centofanti, Stadler & Centofanti, LLC; Mark Silverman, Legal Action of Wisconsin, Inc.; Charles Barr, Croen & Barr, LLP; (Back) Jeffrey Hynes, Jeffrey S. Hynes & Associates, S.C.; Jay Urban, Urban Taylor & Stawski, Ltd.; Merrick Domnitz, Domnitz, Mawicke & Goisman, S.C.**

**Wisconsin Law Journal:** Let's go around the room quickly and talk a little bit about your different practice areas and how that impacts the way that you approach case evaluation.

**Mark Silverman:** I am the staff attorney with Legal Action of Wisconsin. We receive a mix of funding. Our biggest funder is the Legal Services Corporation in D.C. We also have some grants, so our clients are all low-income people. With grants come grant restrictions. So one of the things that we have to look at for evaluation is whether the client is eligible and whether it's a kind of case that we're allowed to take. That's a little bit of an extra level of evaluation that we have to go through compared to the private attorneys.

**Jeffrey Hynes:** I come from the unique perspective of an employment lawyer who has worked on both sides and also worked in government practice. I was with a large defense firm in the 1980s and left that firm to start a plaintiff's-side practice which we built from the ground up. My general comment based on that experience is that, while screening is important for corporate lawyers, I think it's absolutely imperative to the survival of a plaintiff's-side practice. Plaintiff's-side law practices that fail to effectively screen and evaluate cases eventually wither on the vine.



**Merrick Domnitz:** I'm a plaintiff's personal injury attorney emphasizing, I guess, mostly insurance, bad faith, and general liability cases. I dabble in medical malpractice from time to time when life requires me to do so. I would echo what Jeff said. I think that, for a plaintiff's personal injury



practice, there may not be a more important aspect or component of the practice than to be able to evaluate which cases you ought to be spending your time and money on.

The minute you evaluate a case as something you're going to be involved in, you start spending money. It doesn't take long to dissipate as much money as you can make on the good cases. You can bring it in the front door as fast as you want. If you're not evaluating your cases right, it will go out the back door just as fast.

**Charles Barr:** We have a small firm. It's two attorneys. We do civil litigation, usually commercial disputes and consumer matters, but a lot of other things kind of along the fringes of that that make our practice harder to categorize than the practices of many of the other attorneys sitting around the table here.

But case evaluation is important for us too, particularly if we're on the plaintiff's side. Just as often we're on the defense side, and then it's somebody already being sued and it's less of an issue... Because our practice is kind of unstructured, we probably take a somewhat unstructured approach to case evaluation, sometimes to our detriment. We've learned some hard lessons.

**Kelly Centofanti:** I am a plaintiff's personal injury lawyer, with Stadler & Centofanti. I come from a little bit different perspective, and that is that all my cases are referred. So I spend a lot of time talking to lawyers, who've already taken the case and sometimes spent considerable money on the case, explaining why not only do I not want to spend my money on the case but they shouldn't have either. So I talk about this topic a lot with them to try to explain some of the knock-out factors that instantly tell you it's not a case to take.

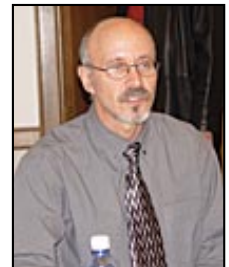
Case evaluation to me means analyzing it to determine whether or not money should be spent on it. When the plaintiff's personal injury client comes to us or to one of my referring lawyers, they're asking us to spend our money on their case and to gamble that there will be a fee at the end. Although plaintiffs in this state are lucky that there are lawyers who do contingent-fee work, they do have to find someone who will be willing to gamble on the case. That means that the clients have to agree to do certain things, be cooperative, meet with you to prepare, and be interested in the case. They also have to have the facts to support it.

**Jay Urban:** I think all the folks that are doing plaintiff law do it a little bit differently even though there are some overriding concerns that we all have, especially on a contingency fee.

Our practice is about 80 percent plaintiff's personal injury and about 20 percent employment law, which Jeff does. We have a karma approach to case selection, which means if we do good to others, good will come back to us. As a result, I have a fair amount of referring lawyers...

**"For a plaintiff's personal injury practice, there may not be a more important aspect or component of the practice than to be able to evaluate which cases you ought to be spending your time and money on."**

**Merrick Domnitz, Domnitz, Mawicke & Goisman, S.C.**



**"If we were to take a lot of cases and lose, I think the judge would wonder about us knowing what we're talking about in the next case that comes."**

**Mark Silverman, Legal Action of Wisconsin, Inc.**

Sometimes we'll take a case that isn't a very good case. In fact, lots of times we'll take cases that aren't very good cases. But we'll be honest with the clients up front that this isn't a very good case; we're not going to invest very much time or very much money. Maybe you do a little good will. We'll take cases pro bono.



**"There are times when you may win and you may get paid. ... But if you're not going to do something good for the client, I don't think you should take it."**

My mom said when we were growing up, you can pick your friends but you can't pick your enemies. So I just try to pick good friends and then hopefully get better cases that way. But I do agree with Ric. When it comes to dabbling in medical negligence cases, those concerns go out the window. You've got to be looking at, can I make money on this case.

**WLJ:** As you begin evaluating cases, what do you see as the most important factors that you consider?

**Silverman:** I should mention that at Legal Action I primarily do eviction defense. So after evaluating in terms of our funding source and whether the client is eligible and whether it's the proper kind of case, then I evaluate in terms of whether there is a defense to the eviction; and then, if there is no defense, is there room for negotiation.

**Kelly Centofanti,  
Stadler &  
Centofanti, LLC**

The ultimate goal of mine is always to be sure that the person or family remains living in their rental unit so that they don't become homeless. Most of our clients in the eviction area are facing homelessness if they're evicted.

When someone was mentioning evaluating their cases in terms of whether it's a good case or a bad case, I thought of some of the harm that would result if I were to take a case and lose, not only harm to the client. But because eviction cases in Milwaukee County are pretty much in front of the same judge, if we were to take a lot of cases and lose, I think the judge would wonder about us knowing what we're talking about in the next case that comes.

So we don't want to hurt our client, but we wouldn't want to be perceived as someone who doesn't understand the law.

**Urban:** I don't know that we've ever put pen to paper, but we have sort of a three-pronged approach. First, we probably look at the caliber of the plaintiff or the caliber of the client. I'm not so concerned about the size of the case. I'll take a soft tissue case if the client is of very, very high caliber.



I'm not talking about education and things like that, but somebody who's able to explain what happened and is likeable. I think that a lot of times people forget about the likeability factor in litigation. We're all judged by human beings in the system.

Second would probably be the quality of the case, whether there is good liability, good damages, good causation. Sometimes you get two out of three. Well, as Meatloaf said, that ain't bad.

The third factor we look at is sort of the energy or the inertia that the firm has to put into the case and try to match that up with the first two factors. If it's a relatively straightforward case on the law and we're not going to have to break any new legal ground, maybe we don't have to put a lot of energy in it and we can go with a smaller damages case. All three factors kind of flow together.

**Hynes:** We try to stick to the tenet "Don't take the case unless you're willing to try it." I think that has all sorts of connotations.

**"Client baggage is the number one reason that I will turn down a case. I think a case with good facts and a bad client spins worse than a case with bad facts and a good client."**

**Jeffrey Hynes,  
Jeffrey S. Hynes  
& Associates, S.  
C.**

Client baggage is the number one reason that I will turn down a case. I think a case with good facts and a bad client spins worse than a case with bad facts and a good client. I think that's true with respect to settlement negotiations, as well as the way administrative agencies view cases and the way courts and juries view cases.



**"We have a karma approach to case selection, which means if we do good to others, good will come back to us."**

**Jay Urban,  
Urban Taylor &  
Stawski, Ltd.**

I think particularly for young lawyers the objective should be to overcome that tendency to want to take on anything that walks in the door just so you have something to do and in the hopes of obtaining recoveries and paying the bills. I would advise young lawyers in particular to avoid that temptation. I think that it's better to starve earlier in your career and build a good reputation than to take anything that comes through the door.

**Domnitz:** I look for balance in cases that I'm evaluating. I would separate here for purposes of this conversation medical malpractice cases from all other types of civil cases. With regard to all other types of civil cases, I'm looking for a balance between liability and damages.

I think it's a common error for plaintiff's lawyers to be lured by either rock-solid liability with very difficult or nonexistent damages or, more often, to be lured by a case that has enormous damage potential but really difficult or tenuous liability situation. What you really need to look for is a sense of balance between those two things in what I call general liability cases.

That having been said, I will bend my criteria somewhat for a case with large damages, but difficult liability if I feel that there's a viable theory that's available. ... But I don't ever want to be in a court of law where I'm trying a case and I'm trying to make up what the damages are. The damages have to be there in order for me to be willing to take a case.

With regard to medical malpractice cases, what I'm looking for very simply from the beginning is a reason not to handle the case. The first time a reason comes up not to handle a case for medical malpractice, I drop it. Under the best of circumstances, they are so expensive and so time consuming and plaintiffs prevail in such a small percentage of the cases. ...

**Barr:** It may sound a bit idealistic, I suppose. But I guess for me .... it always boils down to, whether I can help this client. Do I have a reasonable prospect of getting anything accomplished here? That's not the same question as, is it a great case? And it's not the same question as, if I take the case to trial, will I win? The question is can we come out the other side for this client better than the position that the client is in now? The rule is not based on certainty, but is there a reasonable prospect of that.

A big part of that ... would be is this a client we can work with; is it somebody that's coming in here with an agenda and who's going to start telling us what the case is and how to handle it and not be flexible to our ideas or our advice or receptive to our advice, or is it somebody who's really come to us for advice and guidance on how to deal with a legal problem?

**Centofanti:** Of course, you look at a file or potential case and ask if you can win. Then you look at it and ask if it is worth enough money to justify what you'll be spending. I agree with everything Ric said about medical malpractice cases. I do them. I often regret it.

In normal personal injury cases, another consideration after can we win and is it worth enough to justify the work and the cash outlay is — will we help the client?

There are times when you may win and you may get paid — contingent-fee lawyer's fee comes off the top. But if you're not going to do something good for the client, I don't think you should take it.

An obvious example is in some of the really small cases that come in. Sometimes the adjusters made an offer to the client already. When we look at the facts and talk to the client, we realize that, although we could get them some more money, it isn't all that much more. Maybe we can give them a couple of negotiating tips and they can go settle it themselves. ....

Another area where it comes up a lot in my practice is in nursing home cases. Many of the victims are on Medicaid or other types of state or county aid, which means that there's a very large state lien, not your typical subrogation lien that's linked to the medical bills, but the fact that the people have no money and have been essentially on assistance in order to survive.

Those liens are there and have to be paid back if the client gets money. So sometimes you may win, you may collect a very nice fee, and all the money might go to the state.

I think the families need to know that they may not recover any money. Some of them, frankly, don't care. They want the nursing home to pay. They want to put nursing homes on their toes so that what happened to mom or grandma doesn't happen to someone else. ...

**Domnitz:** The most difficult part of being a plaintiff's med mal lawyer is to talk to people on the phone who have a story to tell you that you can tell, without even reviewing records, is one where there's likely to be liability on the part of a physician or a nurse or somebody like that. But you can also tell from talking



**"For me ... it always boils down to, whether I can help this client. Do I have a reasonable prospect of getting anything accomplished here?"**

**Charles Barr,  
Croen & Barr,  
LLP.**

that there just is no way that you're going to be able to do work that's going to benefit this client.

There may be a horrendous error made in a surgery that results in a person staying in the hospital for a few months and then having to have another surgery, and some enormous medical bills may pile up. But in the end, the person's really back where they would have been had the first surgery been done correctly.

Well, you have three months' worth of pain and suffering, which isn't going to be worth a tremendous amount of money. If the person's bills have been paid by an ERISA carrier, where they're going to demand on being paid first dollar after cost of collection ... you have to make up your mind as a plaintiff's lawyer, am I going to do this work so an ERISA carrier is going to recover their money but I'm not going to do any good for the client.

In terms of case evaluation, it's often the plight of the plaintiff's lawyer that you listen to somebody tell you their story and you realize halfway through the story that this is a situation where there probably is liability, there probably is causation, but this is just not a case where you're ever going to be able to put any money into somebody's pocket.

**Hynes:** This same sort of cost/benefit analysis certainly is a thread that runs through the decision of a plaintiff's employment lawyer. Our tug is a little bit less on remedy because some of our statutes will allow us to obtain attorney's fees.

I think it's so important ... to screen and screen quickly even if it means making the wrong decision and even if it means sometimes turning away someone with a terrible story to tell. ... You'll get egregious facts that can't be proved. I think it's a matter of weighing trying to make a difference and trying to help a client against economics, your own reputation and what I call the misery factor.

If you take on a bad case, it sticks to you like a bad tattoo. I think it reflects on your reputation if you're not careful, so I try to avoid them.

What I try to do is draw a distinction between consciously taking on pro bono work or work that makes a difference and being forced to as a matter of poor case selection.

**Centofanti:** There's a real interplay between all the factors. Leave med mal out of it — if it's a case that you're certainly going to win and the damages are fairly small, you might still be willing to take it. But if the case is difficult to win, then you have to balance the likelihood of winning and what the fee may be in comparison to what you'll be spending to pursue it.

If your chances of winning are only 30 percent and you're going to spend at least half of what you might possibly recover, that's probably not a good investment of the money. But if it's a certain winner, you may be willing to spend more. If you're going to take a great percentage of the recovery for costs because of the expense of the case, the client has to know that in advance.

I'm a huge proponent of putting things like that in writing. We've discussed your case; you're interested in pursuing it on principle; unfortunately, you don't have the money to hire a lawyer on an hourly basis to pursue the case for principle; so we're going to be partners in this endeavor; but you are aware that by the time you pay me and what we're going to spend to pursue the case, your likely return is rather low. That way you don't have somebody disgruntled at the end.

**WLJ:** Kelly, you had mentioned it might be a bad idea to take a case that you're only 30 percent likely to win, and where you'll spend half of the money that you're going to make on that case. Is there some kind of a financial formula that you work through in your head?

**Centofanti:** I think a starting point — and it's affected by many factors — is that you probably don't want to spend more than 10 percent of the likely fee. So if you think the case is worth \$90,000 and the fee will be \$30,000, you shouldn't spend \$6,000 on the case. Now, that's very loose. It can vary a lot. But how much you should spend on the case given the likely recovery goes down the less likely you are to recover at all. If it's a certain recovery, then you could spend a little bit more.

But, again, I think the client has to be involved in that process.

**WLJ:** Any other thoughts looking at the financial aspects and whether or not you use some type of formula?

**Urban:** I think formulas are dangerous. If you're going to make that kind of commitment of your time and effort, it's got to be case by case. Sometimes there are ways you can get rid of a lien, or a subrogation interest. That might factor into what you can spend on a case. Costs are a big concern in the plaintiff practice.

But anybody who's ever told me a formula, if you ask them what case they are handling next week, they'll tell you they broke all the rules. Sometimes the client wants you to break all the rules. Like Kelly said, sometimes it's not about the money at all.

In employment, more often than not, people are not after the money. They want their job back, which is never going to happen. Then they want the company to pay — not necessarily them.

There's a case now that I'm handling where I'll be lucky to get my costs back on it. But I changed a young man's life so that he's going to be able to go through school. ... So I think it's really tough when you start putting formulas on money, because all of us would be better off just taking a FunJet to Vegas where we'd probably do much better.

**Domnitz:** I think costs are a trap. ... Plaintiff's lawyers have to understand that when the costs start to get away from you, what you're doing is you're playing fast and loose with your fee. I've had a rule for years that I don't let a client walk out of my office with less money than I take on a case. If the fee and the costs exceed what the client's net recovery is on the file because of subrogated carriers who had to be paid or whatever the reason is, I cut my fee to make sure that the client walks out of there with at least as much money as we take. I just think it's unseemly for a lawyer to end up with more money in his or her pocket than the client ends up with.

**Centofanti:** That raises one other thing. Sometimes clients will come to me and they have been seeing a different lawyer. And the lawyer has said, well, if you will cover costs, if you'll give me a check for \$15,000, then I'll do the case. That's something that I think is a little — little dangerous.

As a contingent-fee lawyer whose practice is to invest costs in cases that they think are likely to win, if you don't think the case is worth you gambling your money, it's probably not worth that client's money either. So they have to be

given very good informed consent and not think that they're definitely going to get that money back.

**Domnitz:** I think what happens to people is that ... from time to time you find yourself in the situation where you've made a determination during discovery, something's come up that was unanticipated or a defense witness has brought to light a view of the case that quite frankly hadn't occurred to you before. Or something is unearthed in discovery about something in your client's past. And all of a sudden the lawyer realizes that it's probably not in the client's best interest to move ahead with this case.

You can take a look at the rules of professional responsibility. They say that, if a lawyer believes that it's no longer in the client's best interest to move ahead with the case, the lawyer has the right, to go to the court and ask for permission to withdraw from the case.

One option to that is that you can call the client and you can say, here's the fact that's been developed; I don't think you're going to make it over the hump on this case anymore; and I want you to understand that I can't go on spending my firm's money and my time because there's been a material change from the day that I signed up your case.

Then I show them the rule and I say, if you and I can't agree, I want you to understand that I have the right to go to the court and ask to be relieved of responsibility.

But I'll offer you an alternative. If the client has the financial wherewithal to put up costs for the rest of the case, I'll say, I've gone this far with the case; if you want to finance the rest of the case, I'll keep moving forward. But I'm done investing my money in this case because of this material change in circumstances that's occurred. I don't think that you can do that if you just kind of sour on a case.

**Centofanti:** You could lay the groundwork for that in your retainer agreement too.

**Hynes:** That's the way to deal with it when the unanticipated issue comes up. Getting back to the focus of this discussion, the question would be how do we not get to that point. How do we screen cases out early?

I know with my law firm that's one area where we really do put some money into good staff. ... We have actual intake sheets with specific criteria, a checklist. There are boxes that staff check off with respect to different bases for discrimination, where has the case been before it's arrived at our office. For about every 25 of those I get, I will only consider maybe three out of the pile and call them back. Then I'm lucky if I get one case out of those three.

But what I do know is at that point it's been through a process that makes sure that good cases are what lawyer time is used on, not bad cases.

**Silverman:** One thing that separates a nonprofit, a legal-services-funded attorney firm from a personal injury firm is, as you mentioned, resources. Our resources are coming from the grants and the Legal Services Corporation, not from contingent fees. We're looking not for damages as our primary goal. That

## Resources

### Related Article

#### Part II

would be secondary to obtaining a benefit or keeping the client in a program that provides a benefit — for example, W-2 benefits, rent assistance, unemployment compensation, keeping someone from being evicted.

But our problem is that we are always facing a lack of resources. So we have to look at how we can do the most with what we have. An ongoing debate within a firm as well as between offices around the country is what kind of case you should take given the lack of resources. It was mentioned the problem in taking a case that doesn't have merit. Spending a lot of time on it means that you are not helping someone else who you could help, but you've run out of time in that day. You've been on the phone for a couple of hours with someone whose case has no merit and there's no advice that you can think of even to help them on their way.

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*Tony Anderson can be reached by **email**.*

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