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Roundtable Discussion - Part II

Case Evaluation

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: During the first half of our discussion, Jeff Hynes talked about using a client survey to help with screening. How do others approaching that process?

Jay Urban: Well, I share Jeff's concern, too. It's a battle that we'll all have until we retire. How much time do you spend looking for new business versus how much time do you spend promoting your old business or making sure that your old business is as successful as it should be? ...

We do similar things to what Jeff does. Rather than hire quantity of staff, we really try to hire quality staff. As the lawyer though, especially if your name is on the door, you have a little more leeway on how quickly you can get off the phone with somebody if you realize the case is going south. So I'm constantly in battle with a staff person screening a case might spend 20 minutes doing it. Sometimes I can get in and out in five.

If it's just a general referral to the firm or even if I'm unavailable and it is a personal referral, a very competent staff person ... will take the call and be able to use different forms that we have to pigeonhole the case into a particular type.

The staff person communicates to the potential client, what we're looking for. Then we force them to send us an e-mail. That does two things. Number one, when they communicate orally, they'll spend all sorts of time. They're not worried about condensing it, but if they have to sit down and write it ... then they're going to think, to put the best information in there.



Number two, I can screen that a hundred times faster. I can often do it after my family goes to bed. So I'll take those e-mails home for the day. I promise to get back to everybody the next day.

Kelly Centofanti: That makes me feel lucky to get most of my cases from other lawyers because a lot of that screening is done. So when a lawyer calls me with a question about a case, I always return that call. Or if a lawyer sends me someone, I always talk to that person myself.

What happens from there as far as the blowout letter, that's handled through a paralegal. Sometimes the paralegal will screen cold calls that aren't the product of a lawyer referral. Then we have a form, and I can sort through them at my leisure.

Charles Barr: I think it's much more difficult to screen cases when you have a rather unstructured practice. By "unstructured," I mean a practice with a lot of different kinds of cases rather than all employment cases or all plaintiff's personal injury cases or that sort of thing. It's harder to have a non-lawyer staff person participate in the screening. It's more difficult to come up with a set of criteria or boxes to check which you can then review and say automatically you're going to take or not take the case.

There's also the issue of access to an attorney. Obviously, I can't talk to everybody who calls, but I try to talk to as many of them as I can, if only for a few minutes. I think people feel a lot better if they have talked to an attorney than if they've talked to a person that they know is a staff person.

There's the public perception of the legal profession to think about as well. I'd like to think that we all have an obligation to make ourselves somewhat accessible to potential clients rather than closing ourselves off completely to 98 percent of those. You obviously can't talk to everybody who calls.

WLJ: What role does your personal assessment of a client's credibility play when looking at whether to take a case?

Centofanti: Huge.

Jeffrey Hynes: Yes.

Centofanti: I don't think you could take a case if you don't think the client is credible.

Merrick Domnitz: I think in every post-verdict jury study that you'll see — speaking with regard to personal injury trials — that the number one factor in the jury's decision is what they thought of the plaintiff.

Centofanti: It's a human system.

"Evaluating cases begins on the first day that you meet the client and doesn't end until the case is over."

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



"I don't think you could take a case if you don't think the client is credible."

Kelly Centofanti, Stadler & Centofanti, LLC

Domnitz: The jury has to like the plaintiff. The jury has to believe the plaintiff. The jury has to perceive that the plaintiff is seeking just compensation and not overreaching in areas. I constantly have clients waive certain components of their claim that will look to the jury to be overreaching. I have a client that I'm handling a case for right now who's got a legitimate loss of earning capacity claim from a very bad back injury in a bad automobile accident case. I can't prove it in a court of law.

I told him because he was a commissioned salesperson, and his accident happened just as the economy took the big downswing, there were simply too many variables at play there for me to likely be able to prove to the satisfaction of the jury. And I told him that I thought that we would impair the credibility of the rest of what was otherwise a very good claim...



I've had clients in catastrophic injury cases where we're going to run into the cap anyways. I think one very effective way for a plaintiff's lawyer to argue it is to go up there and to say, my clients, the parents, have a right to the loss of services of a minor child. My clients have asked me to tell you that they want you to put zero in there. They don't want compensation for what their child can't do for them anymore. They want your attention directed to the plaintiff.

"If you want to reduce the surprise factor, don't commit to representation without having a chance to contact the other side."

Your damages are capped anyway and you give away something that really isn't giving away anything in order to enhance your credibility. There's nothing that's more important than what the people in the jury box think about the veracity, and the worthiness of the people who are asking them to put amounts of money into that verdict. It's absolutely the controlling factor.

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

Centofanti: I had a death case once where the kids lost their mom. And there was a husband, a widower. He was really not a good plaintiff. The kids were pretty good plaintiffs. If the jury thought they would have to give Dad money or Dad was going to be involved in those kids' money, there would have been no way the case would have been won. So we got Dad to waive his claim... Now we represent the kids and the jury won't get to meet Dad.

Hynes: Same thing holds true in the employment discrimination realm and I'm sure in other areas of civil litigation. The same client who comes in angry, vindictive, sour grapes toward their employer is going to come across that way to an administrative agency investigator, as well as to a judge, as well as to a jury.

Other indicators are clients who start the conversation by telling you they have a great case before you've had a chance to evaluate it, clients who tell you what their case is worth before you've had a chance to make that determination.



Some of the other panelists have consistently made a good point. We all break the rules that we're trying to establish at this table. I think there's an uneasiness with us over

that. While I say don't take a case unless you're willing to try it, I could identify several cases I've taken that I probably won't try — cases that are just service-oriented, severance packages, et cetera.

So we all break these rules. But I think these are tenets that are worth pursuing.

Clients who are driven by greed, don't have that fire in their belly that's necessary, at least in my realm of practice. When I left a defense firm, I decided I was going to do this with passion and fire in my belly. And I insist that my clients have that passion for justice, for making a difference in the workplace, not just for obtaining money or revenge.

My experience is clients who are not seeking revenge end up doing much better because their employers view them as reasonable. And the employers are not able to demonize my client. ... If the employer demonizes my client, the order comes down to corporation counsel and to outside counsel, millions for defense, not a penny for tribute. So it becomes very difficult to settle a case with a client who is carrying baggage into the office...

Urban: We call this part of the exercise "goal setting." One of the very first questions that I always ask prospective clients is, what are your goals; what do you hope to accomplish. That's probably the most important thing. And that's where you get answers to the questions, is it the money; is it this nebulous claim for lost earnings.

Ric's exactly right. I think I learned one other thing from Ric or somebody else and that is giving up loss of consortium claim you advance the claim for settlement purposes...

When you have that goal-setting expectation, that allows you to have this cross-examination of your own client, so you don't have these hiccups that come up later that give us all indigestion.

Domnitz: I've tried a lot of cases in 27 years where my client's view of liability was much stronger and much more confident than mine was. But I've never gone into a court of law on behalf of a client who thought that their case was worth substantially more than I thought it was worth.

I won't try a case for a person if they want me to get up and ask for an amount of money that I can't believe in...

Centofanti: I had a funny thing happen recently. I had this little old lady who was run over by a cement truck. She wasn't hurt horribly bad. It's a PI, soft tissue kind of case. But they had to cut her out of the car. Well, she's really kind of crotchety. And apparently from all the lay witnesses I've gathered up, she always has been.

So I was talking to the adjuster. And I said the jury is really going to like this lady; she's independent, retired from Nestle's after so many years; and she's a sweet little... And he says, before you go too far out on a limb, I think I should

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

tell you that I met her. And the jury is not going to buy that nice, little old lady thing.

That one may be destined to settle.

Hynes: Another way to weed out bad cases and sort of flesh out whether the client is carrying baggage is to carry your burdens of proof and defenses on your sleeve. I routinely confront my clients in a first meeting with the defense's arguments against their position. And I do so in a rather "ruthless manner." I tell them ahead of time that I'm going to be playing devil's advocate. Because the way you win employment cases is not to toot your own horn about your good facts. I wouldn't have you in here if I didn't feel you had good facts.



"I'd like to think that we all have an obligation to make ourselves somewhat accessible to potential clients rather than closing ourselves off completely to 98 percent of those."

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

In doing so, I think you test not only your client's knowledge of their case, but also their own psychology, their own disposition. ... If you face somebody who is confronting you or asking you if you're on their side 15 times during that conversation, I think it does raise issues which are both ethical as well as case evaluation issues. Do you trust your client and does your client trust you?

You have a choice as a lawyer to not take a case for a client who you don't like and don't trust. I really have not had a client get angry at me if I say in a first meeting, I don't think we're going to get along; and I think you may have a good fact pattern here that another lawyer may find attractive and may find a better relationship with you.

Domnitz: Something that occurred to me while Jeff was giving that answer is I think it's important who the lawyer in the office is that evaluates the claim on the initial intake. You have to have a lawyer who is experienced in the area that the client's claim lies in, or else that person isn't going to know when the knock-out facts appear. They may not recognize them, or if some really good potentially outcome-determinative fact is revealed, it may get by them.

I reevaluate the claims in our office even after they're in the office. When it's time to send the case to trial, you need to sit down and do another evaluation of the case. We have roundtable litigation meetings where we sit down and give every lawyer an opportunity to get input from every other lawyer in the firm about the case and the potential problem areas and how to deal with this issue or what should be done next.

I'm always careful to weigh not only what is being said but by whom it's being said in terms of experience. My way of evaluating cases is to kind of close my eyes and picture myself in the courtroom and remember when I last tried a case like this. I remember what seemed to fly and what didn't seem to fly. I'm about to give my advertising slogan, that there's no substitute for experience, but I really do believe that's true...

Centofanti: You can't have blinders on hiding the bad facts or getting vested in the case. Because you could really like your clients and as the case goes on, a knock-out fact could show up where you realize you can't handle it anymore. I get a lot of calls from lawyers who are unwilling to face the fact that their case has gone down the tubes before their eyes, and they like the client and don't want it to happen. But no one can fix that.

Domnitz: There's nothing that clients hate more than having you tell them that there's something outcome-determinatively bad about their case that's been on the table since the first day you met them two years before. They hate that...

And Kelly said it. Now you've spent your time and your money and things. You might as well come face to face with it early and get rid of it. There's an old saying, like in a holding poker game, you can't lose what you don't put in the middle of the table.

You can't waste your time and waste your money if you don't throw them in in the first place. You're much better off getting rid of 10 cases even if eight of them are bad and two of them are good than you are handling 10 that are bad. You're going to make some money on a couple of them. But the other eight are going to eat you alive.

WLJ: We're nearing the end of our time, so let's go around the room quickly and see if you have any final thoughts on things that we haven't touched on that are important for lawyers to consider when they approach case evaluation.

Centofanti: Well, one big thing, I think, that we've hinted at but not discussed is knock-out factors, like statute of limitations, insurance policy limits, state or municipality claims that have notice dates that are gone, things like that.

Mark Silverman: Conflicts of interest.

Centofanti: Conflicts of interest. In medical malpractice, there are a lot of restrictions on who can bring a claim and not bring a claim. So many times there just isn't anyone to bring the claim. And if people aren't skilled in the area that they're trying to practice in, they should consult someone. ... There are a lot of traps for the unwary.

Barr: When you asked what we look for in a client, we talked about clients who will impress a jury favorably or a fact finder or agency favorably.

I think we have to go beyond that though. Because there are clients who have wonderful attitudes, wonderful objectives, and who are nonetheless lacking the stomach for the process, for want of a better word. They won't hold up well in the courtroom, despite their best intentions, despite that they're wonderful people, despite that everybody would like them. They won't be able to take the pressure of settlement negotiations or even the pressure of mediation. They will just want to cut and run at the worst moment...

Another point that occurred to me is that you can have a client come in with a really wrong-headed idea about what the case is about and what the remedy is and how it should be handled. And you still might be able to help that client if the client is willing to listen.

Domnitz: I think as far as a summary statement, I would say that being honest with yourself about your evaluation of a case as early as possible is most important. I also think it's important to remain honest and open-minded about the potential that a case either has or begins to show during the discovery progresses.

The earliest time that you know that you're not going to be able to be of service to the client is the time to get rid of the case. On the other hand, don't be so negative about cases that you don't give imagination, creativity and hard work

an opportunity to produce a good result for the client.

For what seems to be a pretty straightforward and easy part of the practice, evaluating cases turns out to be a sort of complex and ongoing process that needs to be in the fore of the lawyer's mind. ... Evaluating cases begins on the first day that you meet the client and doesn't end until the case is over.

Hynes: My parting words would simply be along the lines of Ric's. Go with your gut with respect to justice and recognize that our primary goal is to service the client. But also recognize that servicing the client with a bad case and taking a bad case through the system does nothing but punish the client who you're trying to serve. Have the courage to say no.

That's the most difficult thing I've found in my career is to say no to bad cases and build your reputation on taking good cases. Don't be an enabler for the bad case. Don't be an enabler for the case that's been to four lawyers and now you're going to be the one who punishes yourself, punishes your client but also punishes the cause that you're fighting for. ... Bad cases make bad law.

Urban: I think that my practice to some extent diverges from the pickiness of case selection. I'm a firm believer in being picky and saying no and all these things. But I just think that finding the heart of the case earlier and being able to see the forest through the trees, those things are important. That doesn't necessarily mean it's a kick-out factor.

That might mean that you approach the case in a novel way. Or this might sound like heresy if you hold yourself out to be a trial lawyer, but maybe it's a case where the client still needs help. We're in the business of helping people. If everybody in town just kicks them out, we're not doing anything for our reputation. The clients probably could use a hand on some aspect of the case.

Maybe they don't care about making precedent, and maybe they don't care about your reputation. What they care about is how they are going to extinguish this Medicare lien and get on with their lives. So if you can find the heart of your case early and you can explore the big picture and you can explore the motivations or the goals that the client might have for taking the case...

Obviously, you can't do that in every case. You have to have your bigger cases where you're focusing your efforts. Otherwise, you're not going to be profitable. But I think there are a lot of other ... reasons to be in a case than just considering whether it's a good case, or it's profitable. Frankly, sometimes in a contingency fee practice you're overpaid. Then more often than not you're underpaid. It's better to take sort of a holistic view.

Silverman: We had a discussion recently at Legal Action similar to what you were just talking about with pushing the law, taking a case that advances the law, hopefully not to the detriment of your client, but looking at cases not just in terms of is it an easy win or is it a loser.

When Tony announced this panel, one of the questions he asked us to consider was what are some of the classic missteps to avoid? I came up with three that I've run into.

One is taking a case with insufficient time to evaluate or investigate. That can happen often with eviction cases. You've only got five days often from the time of service of the summons and complaint to the first court date. Often a client will come to our office, and their court date is the same day or the next day.

If you want to reduce the surprise factor, don't just commit to representation without having a chance to contact the other side. Sometimes if there's a court date that same day and I think that it's worth following up on, I will only commit to investigating in the courtroom, talking to the landlord or the landlord's attorney, and not committing to an eviction defense until I have all the facts.

Another misstep is believing everything your client says. I notice that some of the younger attorneys or paralegals, when they come to me to evaluate the case, they're convinced that it's an excellent case because that's what the client says. When their client says what happened, that's got to be the truth. I always, if it's a fact-based eviction, contact the landlord or landlord's attorney to get their version of the story.

Finally, evaluating over the phone is dangerous if there are documents that are important to the case. A termination notice or whether or not a document is a lease may make or break a case. And I need to see those for myself.

In conclusion, I'd say that I agree that the primary goal for me in representing the client is what does that client want? That's something that can be determined right away in the evaluation. There are times when I have actually neglected to determine that right off the bat and I will be surprised when I come to court. The client will tell me, I don't want to stay here; I want to move out. And I should have asked that right away. What is your goal?

Domnitz: I just want to say one thing in follow-up to what Jay said. You know, maybe this is because I've been at this too long and I've soured on this one. But I don't perceive myself, as a plaintiff's personal injury lawyer, as being in the business of helping people. My job is to help people obtain just and reasonable compensation if they've been injured at the hands of another person according to the existing state of the law or a logical extension of the law.

If I perceive myself as being in the business of helping people, I'm going to get involved in a whole lot of cases that I shouldn't be involved in. I'm not saying that I'm going to necessarily put profitability ahead of humanity. But the truth of the matter is that lawyers run businesses and there are social service agencies that are in the business of helping people.

I will help somebody get to the right place where they can get help for their problem. I will make referrals and things like that. But I think my job, vis-a-vis my obligation to my partners, vis-a-vis my obligation to my profession, and my obligation to my family, is to use whatever tools I have to help tortiously injured people get the compensation that the law either does provide or should provide for that situation.

I send people away all the time who have legitimate problems that are simply outside the field that I practice in. Because I'll get them to somebody whose job it is, or whose desire it is to help them in those situations. ... I'm not really taking umbrage at what Jay said because I think it's noble. The only point I'm trying to make is I think a very important part of evaluating who you're going to try to help or what cases you're going to take on is to have a very good sense of who you are and where you fit within the system and to do your job as well as you can but not try to take on the problems of the world...

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Part I

I think that Jeff made a very valid point early on here. There's a huge difference between voluntary pro bono work and work that you take on trying to make a profit that ends up being pro bono.

Click here for **Part I**.

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

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