Early Case Assessment:
Get Experts Involved From Day One

By Lisa Pierce Reisz. Esq. and David V. Dilenschneider Esq.

Early case assessment. It's a hot phrase right now amongst litigators, and although it's been defined in many different ways, it essentially boils down to gathering information, conducting research, and performing other tasks early on in litigation, when it often matters most. Many litigators and their in-house counsel clients recognize that this process facilitates better decision-making with respect to whether and how to proceed with a case—ultimately resulting in more certainty and a reduction of costs.

But how does one go about conducting early case assessment without running up huge legal bills? Part of the answer lies in bringing a qualified expert witness on board at the outset of the case to help shape litigation strategy. Spending money on an expert early on may seem counterintuitive to saving money (yes, we recognize the sometimes significant expense involved in the retention of experts), but in the long term, it usually makes sense. Oftentimes, the retention of an expert witness is almost an afterthought, done simply to meet a court-imposed deadline and conducted well after the pleadings have been filed, the issues have been framed, and discovery has commenced. But if expert retention is fast-forwarded to the initial stages of the case, better—and more informed—decisions can be made.

Retention of an expert during early case assessment may be a good strategic decision, regardless of whether you're representing a plaintiff or a defendant.[1]

Precluding the Opposition

There's no reason to beat around the bush about the first tip: In lawsuits involving unique products or issues, retaining the most-qualified expert first precludes the opposition from retaining that individual. Sure, most damages experts are interchangeable. But what about experts on flugelbinders?
If Sam Flotz is really the only one true expert on that product, it's imperative that you try to retain him first. Every litigator knows that the best, most-qualified, expert can positively affect the case by forcing a favorable settlement or swaying the jury at trial. It's imperative that, in such situations, you lock down the best expert.

Educating & Evaluating the Expert

The best candidate to serve as an expert for your case may not be one who is experienced in working within the legal system. In other words, he/she may never have served as an expert previously. By retaining that individual early, you'll have more time to educate him/her about the intricacies of testifying as an expert—especially the adversarial elements.

In addition, while educating and working with the expert, you'll give yourself more time to evaluate how he/she will be able to handle a deposition or a cross-examination. Oftentimes, the adversarial process of litigation can bring out the worst in an individual. If the individual you have retained gets flustered, "explodes" while discussing (trivial) matters, or tends to withdraw into a shell when pressed, you need to uncover that tendency early on, so you can decide whether to continue the relationship. Better that than to find it out during a deposition or cross examination.

Educating the Attorney

We both graduated from college with valuable degrees (Lisa from Harvard University, in government; David from the University of Notre Dame, in the Program of Liberal Studies), but neither degree truly prepared us for handling the technical aspects of representing clients in lawsuits involving complex products (e.g. mahogany wood, double thermal-paned, true divided light windows), certain medical conditions (e.g. depression), or unique situations (e.g. medical monitoring for groundwater contamination). Unless you have actual experience or education about such a matter, it's likely that you'll struggle absent in-depth training. And the longer that lack of knowledge exists, the more expensive it can be for a client. The hours spent with an expert at the outset of the case, learning details about the technology, the condition or the situation is time (and money) well spent. Certainly, that educational process will continue throughout the life of the case, but the more knowledge passed from the expert to you early on, the better.

Evaluating a Lawsuit's Merits

Is the lawsuit a slam-dunk winner or an outright dog? Some lawyers may be able to get a sense of the answer based on their own experience and knowledge and an analysis of the applicable facts and law. However—particularly in cases involving unique products and issues—having an additional, experienced viewpoint may make all the difference in evaluating whether a particular claim has merit and, ultimately, whether you should take on the case or decline representation.

Assessing Technical Strengths and Weaknesses

If a lawsuit cannot be immediately deemed a winner or loser (even with the involvement of an appropriate expert), assessment of its technical strengths and weakness is crucial. This assessment, especially as it relates to the finer details of the matter, requires a working knowledge of the issues. Such knowledge might be conveyed to you by the retained expert. With such knowledge, you can commence development of your strategic planning and, of course, keep your client advised of the same.

Helping Frame the Issues

In conjunction with assessing technical strengths and weaknesses, an expert who is retained early on can help frame the issues, help spot where standards and practices have been violated, and explain why these departures are important in a case. Moreover, if the expert has sufficient time to assess the case thoroughly, he/she may be able to advise you on whether you need a different type of expert or an additional expert.

Determining the Nature and Extent of Damages

Just as the strengths/weaknesses and key issues of a lawsuit are important, so too are the nature and extent of damages that could be recovered. Hiring an economist early on may assist you in evaluating the nature and extent of the damages sustained by a claimant. For instance, a plaintiff's lawsuit, while strong on liability, may not be a fight you'll want to take on if the likelihood of a significant damages recovery is minimal. On the flip side, an early determination that the case poses a multimillion-dollar risk of damages could necessitate advising the defendant to engage in settlement discussions sooner rather than later.

Assisting in Critical Preliminary Efforts

The nature of preliminary injunctions, class-action certifications, temporary restraining orders, and the like often screams out for the use of an expert. How can you argue the substantial likelihood of success on the merits, numerosity, and commonality, etc.—especially as those issues relate to more complicated matters—without guidance from an experienced expert?

VORYS

Higher standards make better lawyers.®

Analyzing the (Potential) Opposing Expert

If you retain a strong expert during early case assessment and also conduct research to ascertain which expert the opposition is likely to retain, your expert may be able to help you get a head start on determining the best avenue of attack when it comes to the opposition's likely expert. Research may reveal opposing counsel's tendency to use the same expert on a regular basis (something that does, in fact, happen frequently).

Or, perhaps, only a handful of true experts exist with respect to the product or condition at issue in the lawsuit. In either situation, with a narrow field of likely candidates, your expert can advise you when it comes to the appropriate plan of attack. This is especially crucial because so much information about experts is now available online. The more time you have to uncover that information, the more likely it is that you'll find something worthwhile and ultimately be able to use it. Being prepared with a motion to exclude—or just damaging information that can be used to discredit the expert in a deposition—will save you time and effort (and possibly cost) down the line.[2]

Creating Targeted Discovery

Any experienced litigator will tell you that "fishing" in discovery is a waste of time. In this day and age, you must almost always know what you want to discover before you make a request for it. Utilization of an expert can help you do just that by assisting in targeting the scope of your initial discovery requests, advising you exactly where to look in the files to support a position, or even outlining what questions should be posed to the opposing expert during a deposition.

Conclusion

Clients of law firms want certainty, but that's a fantasy—as litigators, we have come to learn that, in the law, certainty simply doesn't exist. However, we also have come to appreciate that effective early case assessment—including the early retention and utilization of a good expert witness—can make a difference in terms of strategic decision-making, cost, and, most importantly, favorable outcomes for clients.

1. Because of space limitations, this article will not differentiate between a strict consulting expert (i.e. one that performs many of the tasks described here but is never (ideally) disclosed to the opposition), and a testifying expert, as those terms are defined in Rule 26(b)(4) of the Federal Rules of Civil Procedure.
2. Certainly, another aspect of this suggestion is utilizing the assistance of the expert in preparing to depose the opposing side's expert. Although such efforts may fall outside the technical definition of early case assessment, its mentioning bears inclusion because of its critical importance.

VORYS
Higher standards make better lawyers.®