

Session 4:

Case Analysis & Planning

Session Goals

- Demonstrate ability to clarify client's goals
- Identify potential legal and non-legal options for achieving client goals
- Evaluate legal options using a conceptual framework
- Identify creative methods for acquiring/developing facts necessary to prove elements of legal claim

*Adapted from “Case Planning” materials, Benchmark Institute, 1996
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INTRODUCTION

Winning cases don’t just walk through the door; they are crafted by skillful advocates. Case planning at its most basic consists of defining the client’s problem, identifying possible solutions and selecting courses of action. In more specific terms, it involves identifying not only the legal aspects of the case and the legal remedies, but also placing those aspects into an overall picture of the client’s goals. It must include articulating a theory of the case – a detailed, coherent and compelling story with only one possible conclusion. It also must include a case work-plan with clear deadlines and assignment of responsibility if more than one person works on the case. Case planning must begin with the initial interview and opening memo and be continually revised as the case proceeds.

The following materials contain one model of case planning. It is not the only model, and the steps are rarely as sequential as they appear in any written outline. The advocate will find her or himself going back and re-analyzing or refining work done at an earlier step, but the process will move forward each time that occurs. Some of the steps may be performed in the advocate’s head rather than formally on a chart, particularly as the advocate gains experience with particular types of cases. In many instances, the specific order is less important than the fact that all of the steps occur consciously and thoughtfully in the course of representing the client. The forms that are provided following this section can be used as templates for the various steps, as they will be used during the training.

1) Assess Client Goals & Prioritize

What does the client want? In many cases the client’s objectives will be obvious, but not always; for example, the client may initially complain about conditions in her apartment, but she would in fact rather put up with them than have to pay rent. Sometimes the client has multiple objectives that conflict with one another in the context of pursuing a legal case, *e.g.*, she wants to stay in her apartment, but she does not want to have to go to court or pay rent. Or, perhaps the client wants increased visitation with her child, but is unwilling to waive privilege regarding her medical records.

The advocate should have a clear sense of the client’s goals, preferably realistically prioritized with the assistance of the advocate, at the end of the initial interview. (If legal research is needed to provide the client with basic counseling regarding her goals, the goals should be clarified as soon as possible.) It can save a lot of time.

2) Gather Key Facts

What happened? Who said what? Who did what? Who are the key players and what is their relationship to the client? The factual summary should be specific enough that someone unfamiliar with the file can grasp the key facts.

3) Identify Legal Issues

What are the apparent legal issues? Did the client have good cause for quitting her job? Is the notice to quit sufficient? Does the client have a qualifying disability?

Experience makes issue identification easier, but don't fall into the trap of assuming that most cases in the same substantive legal area are the same. Many will have their individual wrinkles. In addition, a good advocate should spot issues beyond his or her area of expertise. Sometimes offices have checklists to assist with this task.

4) Brainstorm Remedies & Solutions, Analyze Practicality, and Present to Client

Brainstorming involves generating as many possibilities as possible, without analyzing how reasonable they are. If possible, brainstorming is best done as a group process. Crazy, far out and completely impractical ideas can spark creative ideas that are more practical. Do not be bound by reality. If the law does not provide the client with the solution she needs, changing the law should be on the list of possibilities. Include non-litigation and impact strategies. Fit the client's problems into the larger picture. Do welfare workers routinely fail to assist clients to obtain necessary documentation? Do the police threaten to arrest domestic violence victims who call for help?

Then get practical. Who is your best target? If you are going to bring a lawsuit, consider all possible defendants. What leverage do you have? What resources are available for achieving the goal? Does the program have the resources to devote to a class action suit? Conversely, does the program's policy require that representation cases only be accepted if the result has an impact beyond the individual client?

Which of the potential strategies meet the client's legal and non-legal needs? Which can be accomplished given the program's resources and priorities? All reasonable possibilities should be reported to the client, but the client must be counseled about which options are really practical. At this point, the client's legal and non-legal goals are reevaluated. How can the advocate help her to achieve her goals?

Don't forget to include the client in this process. Make sure that what you are planning best meets the client's needs. As domestic violence lawyers know, sometimes leaving the state is a better option than obtaining a restraining order. The best educational placement for a learning disabled child might be a residential placement on the other side of the state, but this option may not be best for your client if there no reliable transportation to the placement site. Your client may have a great fair housing suit, but her most immediate problem is that she needs some money and a place to live now.

Decide together which solutions you will pursue. Then determine the best forum. Which goals can the client pursue without your assistance?

5) Analyze Within Legal Framework

- a) Parse statute and regulations: What are the elements that you must prove in order to prevail?
- b) List legal issues which still need to be researched: Have all the terms in the statute been defined? Sometimes the simplest words have specific legal meaning in context. Who has the burden of proof? Does the case law clarify the statutory elements?
- c) Review facts which need to be proven to establish each element: What facts would tend to establish each element? What information would convince the trier of fact?
- d) Link facts to the proof that is available at this point: How much of the necessary information do you know? How do the facts you know fit into the required elements?
- e) Preliminary theory of the case: Your best argument is a simple, convincing, compelling and detailed story. Think of it as the opening statement in your pretrial or the opening paragraph in your summary judgment memorandum. Ultimately, everything in your trial plan will flow toward the goal of selling your theory to the decision-maker.
 - i) First tell the story without the legal framework: What was unfair about what happened to your client? What distinguishes this case from all other cases in the same substantive area? What distinguishes your client? In plain English, why should the decision maker give her what she wants? Tell the story (preserving confidentiality of course) to a non-lawyer without telling them the law. What is the reaction? Is there a theme or unifying principle? What is it that will make the decision-maker want to find in favor of your client?
 - ii) Then add the legal theories (causes of action or defenses): Now that the decision-maker wants to rule for your client, tell the decision maker why he or she must do so. Fit your story into the elements you outlined in the preceding steps. Don't forget the details that make it unique and compelling. But at the same time, make the story as simple and straightforward as possible.
- f) Identify proof still needed and discovery method: Where are the factual holes in the elements you need to prove? How will you uncover those facts? A simple phone call might suffice, or you may need to file formal discovery, or visit the premises with a camera.

6) Create Discovery Plan

Relate your questions and requests to the specific elements you or your opponent needs to prove. What is the sequence of discovery? Will you do requests for admissions first, or interrogatories and request for production? Are there any deadlines for filing discovery?

7) Create Case work-plan

The work-plan should include both task assignment and deadlines. This step is crucial in all cases. It is more important in affirmative cases that can sometimes languish due to the need to react to court or plaintiff imposed deadlines in other cases. What are the steps needed to take the case from here to the end, whether that end is negotiation or trial? Who is responsible for each step (you, co-counsel, paralegal, support staff, client) and what is the target date for completing each step? The date may be imposed by court deadline (*e.g.* statute of limitations, briefing schedule, pretrial order), but if not, it should be self-imposed. Be realistic about your self-imposed deadlines; if anything, overestimate how long things will take. (Some people suggest doubling the length of time you think you'll need.) Include a "tickler" date or system to warn you sufficiently in advance of deadlines to enable you to meet them.

8) Identify & Assess Witnesses

Who are the potential witnesses and what will they be able to say? Which are friendly and which are hostile? How persuasive are your friendly witnesses? Will they make good witnesses, or will they be so nervous that they appear less than completely credible? Do they have any credibility issues such as bias, prior inconsistent statements or a criminal record? Do you need to obtain an interpreter?

9) Analyze Opponent's Case

What is the opposition's burden in this case? Can they meet it? What are the strength and weaknesses of their case? What is their theory likely to be?

10) Refine Your Theory of the Case

Whose story fits the facts and law better and is more persuasive? Make sure it's yours. Identify a few of your best facts, ones that you know you can prove and which support important elements. A good theory of the case:

- a) Is based on facts and inferences that are not subject to much dispute, *e.g.*, uncontested facts, admissions or reliable unbiased witness testimony.
- b) Is not inconsistent with some incontestable fact.
- c) Refutes or minimizes as many unfavorable facts as possible. You must account for unhelpful facts that you cannot disprove. Try to turn them to your advantage.
- d) Is grounded in common sense and common experience. Your theory is more persuasive if the trier of fact can relate it to his or her own experience.

- e) Contains details that enhance the credibility of your story and detract from your opponent's story. However, be wary of details that might be subject to dispute. You don't want to lose focus over a minor detail.

11) Create Negotiation and Trial Plans

Successful negotiations require careful planning. Create a trial plan to make sure that you can introduce all of the necessary evidence in a persuasive manner and be prepared to meet objections to your important evidence. Be prepared to make objections to evidence which you believe will be introduced by your opponent. Remember that it should all fit into your theory of the case.

The following forms are useful in case analysis and strategy development. In this session, we will work primarily with Form B. The forms that deal with discovery planning and conduct are beyond the scope of the Basic Lawyering Skills Training, but are explained in greater detail in the training on Case Planning & Discovery. We hope that you will find that these forms provide you with a useful framework for preparing your cases, both during the training and in your day-to-day practice.

Form A (“Case Opening Summary”) is a sample case opening memo. This form permits the advocate to briefly summarize the client’s problems and goals, as well as the advocate’s initial impressions about the case, the applicable law, the deadline for appeal and the next steps to be taken. This form is not a substitute for a memo summarizing the initial interview, but it is useful for providing a quick, one-page synopsis of the status of the case at opening.

Form B (“Preliminary Legal / Factual Analysis”) provides the advocate with a system for breaking down the applicable law(s) in the case into its elements, assessing what facts would prove each element, and determining what evidence is already available to prove those facts and what evidence still needs to be developed.

Form C (“Outstanding Legal Issues”) should be used to keep track of legal elements of the case for which there is a question of definition or interpretation. For each such element, write down the outstanding question about the issue should be written along with the facts that apply to that element. As you complete additional research on the legal issues, you may also use the form to cite the sources and the result of your research, whether legal or otherwise (treatise, dictionary, etc.) and to summarize your conclusions regarding the proper interpretation of the element in question.

Form D (“Evaluation of Strongest Arguments”) provides spaces to record the strongest arguments supporting both your client’s case and the opponent’s case, which will permit you to begin to develop a theory of the case as well as evaluating the merits of your client’s and your opponent’s cases.

Form E (“Theory of the Case”) asks you to state a preliminary theory of the case, which should address all of the elements and include the relevant facts and research that are known at the outset of the case. For an example of a statement of the theory of the case, see “Theory of the Case – Example”. Remember that you can and should revise your theory of the case to best fit the facts of the case as you obtain more evidence, and you should likewise continually consider how the facts discovered might affect your opponent’s theory of the case.