

Standard 7.11-1 on Litigation Strategy

STANDARD 7.11-1 ON LITIGATION STRATEGY

STANDARD

The practitioner should develop a clear, long range strategy for pursuing or defending the client's interest in the litigation and should continually update the strategy in light of new developments in the case and in the governing law.

COMMENTARY

Litigation should be carefully and thoughtfully planned to best serve the client's objectives. Before deciding to affirmatively litigate a case, the practitioner and the client should carefully assess and plan the case.¹ Where possible, the practitioner should develop an overall strategy for pursuing or defending the client's interest well before the pleadings are filed. The practitioner should do sufficient legal research and factual investigation to fully assess the strengths and weaknesses of the case.²

The practitioner should carefully plan the timing of significant steps in the litigation and, to the extent it can be controlled, should plan those steps for maximum advantage to the client. The practitioner and the client should periodically reassess the plan as the case progresses.

Long-range strategy planning should include the following considerations:

- Identification of facts that must be obtained through discovery and other means;
- Identification of the legal issues to be researched;
- Identification of defendants in affirmative litigation who are necessary to litigate the case fully and consideration of their likely impact on such matters as the effectiveness of discovery or breadth of available relief;
- Choice of forum;
- Whether to demand a jury trial;
- Choice of possible causes of action or defenses, considering such factors as 1) their importance to the overall strategy; 2) their potential impact on the court at trial and on appeal; 3) their strategic value in settlement negotiations with the adversary, including the possibility of insurance coverage for a potential claim; 3) the availability of attorneys' fees; 4) problems of proof; and 4) areas of discovery open to both the client and the adversary;
- Choice of potential remedies;
- Assessment of the adversary's probable responses to the client's claim and how they may be countered;
- Thorough analysis of the case from the opponent's point of view so that the practitioner can anticipate the adversary's tactics and plan to counter them;

¹ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.7 (on Case Planning).

² See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 7.5 (on Investigation); Standard 7.6 (on Legal Research and Analysis).

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- Assessment of any collateral matters that may arise and that may impact either the client's or the adversary's willingness to proceed with litigation, including any risk of potential physical or other harm to the client in domestic violence or other domestic relations cases;
- Consideration of the availability of attorneys' fees and their possible impact on the outcome of the litigation;³
- Estimate of the provider's resources that will be necessary and that are available to pursue the client's objective;
- Estimate of the cost of the litigation to the adversary, including non-economic costs such as adverse publicity, and the possible impact of such costs on the adversary's willingness to engage in settlement negotiations or to settle the case in favor of the client.

In reality most litigation is settled after negotiation or through some form of alternative dispute resolution⁴ and can result in favorable outcomes for the practitioner's clients while preserving the provider's resources. A practitioner should not approach litigation, however, with the expectation that the case will end in a settlement, but should be ready to go to trial. Settlement negotiations can always break down and unexpected situations may arise that would make settlement less likely than it might have appeared at the beginning of the case.

A clear commitment to go to trial can also have a positive effect on settlement negotiations. An adversary who wishes to avoid trial may accept a settlement substantially more favorable to the provider's client if the practitioner's resolve to litigate the case fully is clear from the outset. There may be circumstances where the practitioner consciously chooses to push for settlement. In those situations, the practitioner should focus strategically on actions that will strengthen the client's negotiating position. The practitioner may, for instance, aggressively pursue discovery to demonstrate the factual weakness of the adversary's case or file a motion for summary judgment to establish the weakness of the adversary's legal position.

In those circumstances where settlement is unlikely or where it is difficult to predict at the outset whether a settlement that is favorable to the client is likely to be reached, the practitioner should proceed as though the client's claim or defense will have to be established in a full trial, and should base a long-range strategy on a realistic evaluation of likely success at that level.

The practitioner should constantly keep in mind the client's objectives and should consult the client frequently during the planning and conduct of the litigation. All major strategic decisions should be made in consultation with the client. It is essential that the practitioner inform the client of the status of the case at each stage in the litigation. The practitioner must obtain specific client approval before a final settlement offer is made or accepted on the client's behalf.⁵

Practitioners should try to identify as early as possible those cases that may be subject to appeal, either by the client or the adversary, so that a sufficient record can be made from the outset to

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.4 (on Client and Attorneys' Fees).

⁴ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.10 (on Alternative Dispute Resolution).

⁵ See Model Rules of Professional Conduct R. 1.2(a) and 1.4 (2003).

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preserve the issues for appeal. If appellate review is likely, those practitioners who will be handling the case at both the trial and appellate levels should participate in developing strategy, if practicable.