

# Tell Me Where It Hurts

## Early Assessment of the Strengths and Weaknesses of Your Case

By Karen Libertiny Ludden

**B**eing a lawyer is a bit like being a doctor. Lawyers don't know what the ultimate diagnosis will be when their "patients" first walk in the door, but early and accurate triage is the key to successful treatment. To be an effective attorney, it's important to listen carefully to the issues that led a client to seek assistance in the first place. There is an art to it; routine intake is a mistake. Early and careful assessment of the strengths and weaknesses of a case should be one of the most important elements of litigation and include the willingness to scrap the initial theory if the facts or law change during the life of the case. Like good doctors, good lawyers assess, act, and react to changes in the landscape.

When a client with a legal dispute knocks on the door or, more accurately these days, contacts you electronically, thorough preparation for the initial meeting is important. Not unlike a doctor's experience, a lawyer's original thoughts and observations may not be the final word but will guide the beginning stages and assist in establishing the most efficient and successful strategy to resolve a dispute.

First, consider the elements of proof for the case. For example, in an automobile negligence case, they are duty, breach, causation, and damages. To determine whether a driver was negligent, the attorney needs to evaluate whether the driver operated the vehicle similarly to an ordinarily prudent

driver under the circumstances.<sup>1</sup> In general, a driver must use ordinary reasonable care when operating a motor vehicle.<sup>2</sup>

The next step is always inquiry based on these basic legal principles. Careful practitioners should pose both open-ended questions and pointed questions that drill down into areas of concern. The initial question to a client should always be, "What brings you here today?" The attorney needs to hear why the client feels he or she ended up in litigation, without that client altering the story because of the questions the attorney asked. The attorney should listen carefully to filter facts from the client's narrative to obtain the evidence necessary to prosecute or defend the case.

The attorney must hear the client's story in the client's words, unedited, for several reasons. First, clients have an inherent need and right to be heard, particularly if they have come far enough along to consider litigation. Also, this story will likely be the client's default setting in front of a jury while under pressure. So a good attorney will ask: "How do you feel you were wronged? Why do you feel this is not your fault? Why is the other party at fault? What are the critical issues in your eyes? What do you want me to know?"

Next, the attorney should drill down for facts needed to support the case or the defense and to find and address weaknesses.

Can those weaknesses be explained, and are they important to the case? Many times, what seems like a weakness turns out to be benign. Other weaknesses may become more difficult to overcome as the case progresses. Only the methodical, careful collection of data will answer those crucial questions.

For example, I defend commercial auto cases. In those cases, many troubling complications can arise. Right from the start, there is invariably an allegation that the driver was distracted, crossed the center line, or took too wide a turn. Often, the driver, sitting in a big rig, did not see the other driver and may not have known a small vehicle swerved in his vicinity and crashed. The driver may say he was never involved in an accident, much to the outrage of the plaintiff. It may also be alleged that the driver does not have a perfect driving record and the company knew about it. Other complications can include the driver being laid off or quitting the company; in those situations, things might have ended on a sour note.

How I begin to sculpt the defense depends a great deal on how big these apparent weaknesses actually are. Sometimes they point in the direction of admitting liability from the start. Most of the time they don't. But every time, the client asks, "What are we going to do about this?"

Sometimes, the strengths of a case can collapse during the discovery process, and sometimes what appeared to be a weakness develops into a strength.

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Using a hypothetical trucking accident as an example, triage means gathering every shred of evidence to address these claims. Does the driver admit he was on his phone? What do his cell phone records—both data and voice—show? What does GPS and other tracking data show about the location and path of the vehicle in the moments before the accident? Are there witnesses? How wide is the road? Are there road markings from the accident? What does the accident reconstruction expert see as a potential fact scenario? With regard to this particular driver, what is his driving record? What do hiring documents show about his experience and driving history? What formed the basis for the employee's departure from the client?

These questions are important because they form the outline of how the rest of the case should proceed, at least until new information changes the course of the litigation. They show which records should be

ordered, experts consulted, and plans made. But that is not the end of the inquiry.

Good lawyers must be diligent to form an original strategy based on information they gather, but they should also be willing to revise their strategy as needed as the litigation continues forward. Sometimes, the strengths of a case can collapse during the discovery process, and sometimes what appeared to be a weakness develops into a strength. Maybe your driver's waterproof explanation of what happened develops a leak. Maybe the driver was swerving around a small child who had run into the road. Maybe the plaintiff crossed the center line, as shown by the skid marks. Maybe the wrong truck was originally identified and GPS does not put the driver at the accident location at the right time.

In other words, perform a careful triage and gather as many facts as you can from the start. Develop a plan, but be prepared to alter it if facts change. The successful out-

come of a case might depend on your willingness to be flexible as more facts arise during your representation of a client. ■



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#### ENDNOTES

1. *DePriest v Kooiman*, 379 Mich 44; 149 NW2d 449 (1967).
2. *Zarzecki v Hatch*, 347 Mich 138; 79 NW2d 605 (1956).

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