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CHAPTER ON
CASE
EVALUATION

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Chapter 5

Case Evaluation

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I. INTRODUCTION

- § 5:1 Scope note
- § 5:2 Need for and objectives of case evaluation at every stage of a litigation
- § 5:3 —Initial evaluation
- § 5:4 —Evaluation regarding motions
- § 5:5 —Evaluation regarding settlement
- § 5:6 —Evaluation regarding trial and post-trial appeals

II. INITIAL CASE EVALUATION

- § 5:7 How to evaluate a case at the outset
- § 5:8 —Plaintiff's perspective
- § 5:9 —Defendant's perspective
- § 5:10 Understand the client's goals
- § 5:11 Existence of insurance coverage
- § 5:12 Need for a thorough factual investigation
- § 5:13 —Identify and interview witnesses
- § 5:14 —Gather and review critical documents
- § 5:15 —Review of publicly available information
- § 5:16 —Informal versus formal discovery
- § 5:17 Identification and research of key legal issues
- § 5:18 How readily available is necessary proof?
- § 5:19 Availability and likelihood of jury trial
- § 5:20 Identification of strengths and weaknesses of case
- § 5:21 Cost-benefit analysis, generally
- § 5:22 Development of litigation plan based on cost-benefit analysis
- § 5:23 —Are motions cost-effective?
- § 5:24 —What discovery approach will be most efficient?
- § 5:25 —What is the most cost-effective way of achieving the desired objective?
- § 5:26 Quantitative models for evaluating litigation risks and costs
- § 5:27 Consideration of alternative dispute resolution procedures

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- § 5:28 —Court annexed or other form of mediation
- § 5:29 When should settlement overtures be made?

III. EVALUATING LIKELIHOOD OF DISMISSAL BASED ON CPLR 3211 MOTION IN RESPONSE TO THE COMPLAINT

- § 5:30 Significance of the CPLR 3211 motion to an early evaluation of the case
- § 5:31 Ability under CPLR to move on the basis of documents and other extrinsic facts
- § 5:32 Possibility of automatic stay of discovery pending motion
- § 5:33 Significance of interlocutory appeal procedures
- § 5:34 Cost-benefit analysis of moving for dismissal

IV. EVALUATING LIKELIHOOD OF DISMISSAL BASED ON MOTION FOR SUMMARY JUDGMENT

- § 5:35 Significance of summary judgment motion to evaluation of the case
- § 5:36 Does the case lend itself to summary judgment prior to discovery?
- § 5:37 Does the case lend itself to summary judgment following discovery?
- § 5:38 How extensive is the discovery needed to get to the point of having summary judgment motions considered by the court?
- § 5:39 Significance of interlocutory appeal procedures
- § 5:40 Cost-benefit analysis of moving for summary judgment

V. EVALUATING THE CASE FOR SETTLEMENT

- § 5:41 Ongoing process from commencement of the case
- § 5:42 —Changing evaluation as the case progresses
- § 5:43 —What do documents reveal?
- § 5:44 —What is the impact of deposition testimony?
- § 5:45 —How are the issues being framed?
- § 5:46 —Impact of court orders and decisions
- § 5:47 Formulas and other models for settlement evaluation
- § 5:48 Assessment of settlement overtures from one's adversary
- § 5:49 Factoring in settlement initiatives by the court

VI. EVALUATING THE CASE IN THE CONTEXT OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

- § 5:50 Cost-benefit and other considerations
- § 5:51 —Mediation, including court ordered mediation
- § 5:52 —Arbitration, including non-binding arbitration

- § 5:53 —Baseball style or other forms of binding arbitration
- § 5:54 —Non-binding mini-trials
- § 5:55 Use of alternative dispute resolution procedures to better evaluate the case

VII. EVALUATING THE CASE BEFORE AND AFTER TRIAL

- § 5:56 Cost-benefit analysis of going to trial
- § 5:57 —Jury versus non-jury trial
- § 5:58 —Jury pool
- § 5:59 —Jury consultants
- § 5:60 —Mock trial
- § 5:61 —Where the judge is the trier of fact
- § 5:62 Cost-benefit analysis of post-trial motions
- § 5:63 Cost-benefit analysis of appeal after trial to verdict
- § 5:64 —Chances of success on appeal to the Appellate Division
- § 5:65 —Chances of having a successful appeal to the court of appeals

VIII. PRACTICE AIDS

- § 5:66 Case evaluation checklist
- § 5:67 Case evaluation timeline

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I. INTRODUCTION

§ 5:1 Scope note

Research References

West's Key Number Digest, Action ⇌1 to 71

This chapter will discuss the process of case evaluation with respect to commercial cases litigated in the New York State courts. The focus will be on evaluation of cases from both the plaintiff's and defendant's perspective, from the initial stage of a matter through trial and appeal. Proper case evaluation is critical to determining, based on a cost-benefit analysis and other factors, whether a client should prosecute or defend a particular action, the extent to which resources should be utilized on particular litigation strategies, and whether and when to consider settlement of a case or the utilization of alternative dispute resolution procedures in lieu of trial to verdict.

§ 5:2 Need for and objectives of case evaluation at every stage of a litigation

Case evaluation is a fluid process that should be undertaken before the commencement of the litigation and revisited throughout the course of the litigation. The evaluation should be continually revised to reflect the factual development of the case as a result of interviews, depositions and document collection and review, the assignment of a judge to the case, any changes in the law governing the dispute, the outcome of any motion practice, changes in your client's or adversary's personal or economic circumstances that impact upon their inclination or ability to continue with the litigation, revised damage analyses, and any settlement overtures made by the other side.

Evaluating the case on an ongoing basis serves multiple purposes. In every case, there are objectives that one or both parties are trying to achieve. As a plaintiff, those objectives may include the collection of a debt owed, an award of damages, an injunction against wrongful conduct, the unwinding of a business relationship or transaction, and myriad other possibilities. As a defendant, the objective is usually to defeat the plaintiff's claims, although the defendant may also have counterclaims that it seeks to enforce or business objectives that it may seek to realize through litigating the claims made against it, *e.g.*, vindication of a particular legal position that affects others with whom the company does business, or sending a message to other potential claimants that it will aggressively defend future complaints. In advising the client as to how best achieve its objectives, case evaluation serves a critical purpose.

Thus, in determining whether to commence a suit or whether to actively defend against one once brought, an initial evaluation of the case is critical to determining whether litigation is the proper course to follow. Once a case is commenced, as facts are developed and the case progresses, case evaluation is important to making cost-benefit decisions regarding the various litigation strategies to employ, as well as to consider on an ongoing basis whether and when to attempt a settlement of the case and, if so, at what price. Once discovery is completed and the case scheduled for trial, case evaluation remains important in assessing whether the expense of a trial is worthwhile assuming some type of settlement could be achieved in lieu thereof. And, even after trial, given the availability of post-trial motions and appeals, case evaluation continues to play a critical role in determining what avenues to pursue or oppose as part of the ongoing process of determining whether litigation or settlement is the preferred

course.¹

Speak to your client about the evaluation. Obtain the client's input. Keep a dialogue going with the client throughout the case.

§ 5:3 Need for and objectives of case evaluation at every stage of a litigation—Initial evaluation

The initial evaluation of the case¹ is important because it will serve as a guide to decision-making with respect to the case and may, in some instances, lead to a prompt resolution of the dispute. The extent to which an attorney will recommend to a client that it devote resources to the prosecution or defense of a case will depend to a significant degree on the attorney's initial evaluation of the strengths and weaknesses of the potential claims and defenses available. Therefore, the initial evaluation should be based upon as much information relating to the case as can be obtained.²

However, a preliminary evaluation is just that, and is subject to revision as more knowledge is obtained about the matter. After all, the primary source of information underlying the initial evaluation will usually be the client's own knowledge and documents in the client's possession. While there may be an opportunity to obtain some additional information from public sources or friendly third parties, information that is only in the possession of the potential adversary will usually remain unknown until there is an opportunity to engage in formal discovery.

Despite the preliminary nature of an initial evaluation, the experienced lawyer can often form sound opinions as to the likely results in a case. In particular, based on an initial understanding of the facts and the law, the attorney can often determine what the likelihood is that a particular case will be disposed of on motion (either at the pleading stage or at summary judgment) as opposed to there being inherent factual issues that will ultimately lead to trial. Damages also can often be assessed realistically, even at the initial stage, based on an understanding of the relevant facts and applicable law. The expense of litigation should also be part of the initial evaluation. Based on an initial evalua-

[Section 5:2]

¹For an interesting discussion that notes the dynamic nature of case evaluation, see Robert H. Mrookin et al., *The Challenges of Dispute Resolution, Beyond Winning: Negotiating to Create Value in Deals and Disputes*, Chapter 4 (2000).

[Section 5:3]

¹See generally §§ 5:7 through 5:29.

²See generally Chapter 4, "Investigation of the Case."

tion of potential liability, damages and expense, the attorney can and should advise the client as to whether litigation is the preferred course or whether some form of early settlement or alternative dispute resolution³ is a viable and more cost-effective option in the particular case.

§ 5:4 Need for and objectives of case evaluation at every stage of a litigation—Evaluation regarding motions

Research References

West's Key Number Digest, Motions ☞1 to 66

Business and Commercial Litigation in Federal Courts, §§ 24.1, 24.3

Part of the initial evaluation of the case should focus on the possible availability of motion practice to dispose of the case. From the plaintiff's perspective, it is important to evaluate in determining whether to bring or actively prosecute an action, and whether the claims are likely to be dismissed before the defendant has to answer, on either substantive grounds or, for example, lack of personal jurisdiction.¹ The plaintiff should also consider whether the case is one in which it will be able to successfully move for summary judgment once issue is joined or following the completion of discovery.²

From the defendant's perspective, a cost-benefit analysis should be conducted as to whether a motion to dismiss in response to and in lieu of answering the complaint is worth making. Such a motion, if successful, will of course dispose of the case in an effective manner, and often with the least expense. As part of his evaluation, the attorney for the defendant should consider the cost of an initial motion to dismiss versus the chances of success, and also factor in what alternative strategies are available, such as taking discovery in order to establish a record for a subsequent summary judgment motion. The availability of interlocutory appeals in the New York State courts, including with respect to the denial of a motion to dismiss or one for summary judgment, is a factor that should also be considered in evaluating whether a motion to dismiss or for summary judgment should be made.

³See generally §§ 5:50 through 5:55; Chapter 46, "Alternative Dispute Resolution."

[Section 5:4]

¹See generally §§ 5:30 through 5:34; Chapter 7, "Responses to Complaints."

²See generally §§ 5:35 through 5:40; Chapter 28, "Summary Judgment."

§ 5:5 Need for and objectives of case evaluation at every stage of a litigation—Evaluation regarding settlement

Research References

Business and Commercial Litigation in Federal Courts, §§ 28.2, 28.3, 28.5, 28.6

From the beginning of the case, it is prudent to evaluate the prospects of and nature of a possible settlement.¹ Most commercial litigations settle at some point, and often an early evaluation of the realistic settlement value of the case can lead to the same settlement result that occurs many months and thousands of dollars later. Even where settlement cannot be achieved at the outset, evaluating the settlement potential of the case will serve as a guide to the ongoing evaluation of the case and the strategic decisions that need to be made. As with other aspects of case evaluation, the evaluation of settlement potential is one that needs to be continually reviewed as the matter progresses and more is known.

In evaluating the potential for settlement, the attorney needs to consider the strengths and weaknesses of the case as well as the cost to both sides. Where both sides are paying their lawyers on an hourly basis, some litigation becomes “cost-prohibitive” at some point, given the amount in dispute. If one side, however, has the case on a contingency fee arrangement, this needs to be considered, as it can lead to a different evaluative analysis, since the expense of litigation in this circumstance will ordinarily not be as much of a factor as it is where the plaintiff is paying attorneys’ fees. Nevertheless, even where a contingency arrangement is involved, the time spent by plaintiff’s counsel can be analogized to tangible expense in evaluating the cost-benefit of when and how to settle a particular matter, particularly given the ordinary desire of the plaintiff’s attorney and the plaintiff to achieve a reasonable settlement in the least amount of time.

Business considerations also play an important role in the settlement evaluation process. In the commercial context, some clients will want to establish a policy of not settling cases in an effort to avoid or minimize “strike suits” being filed against them. The impact that a settlement (particularly in a well publicized case) could have on other potential plaintiffs needs to be considered even in the absence of such a policy. In some instances, settling a particular case could set a practical “precedent” that would encourage others similarly situated or with a similar legal

[Section 5:5]

¹See generally §§ 5:41 through 5:49; Chapter 32, “Settlements.”

issue to sue the particular client. Even in the commercial context, where economic rather than emotional considerations should be paramount, consideration should be given to whether, under the particular circumstances, it makes sense to “spend more money than the case is worth” to vindicate a particular position, to establish a reputation as an entity that does not get “intimidated” by litigation, or to simply stick to the principle of not paying to settle non-meritorious claims.

One needs also to consider whether the case involves a particular principle (*e.g.*, does the nature of the client’s business lend itself to personal jurisdiction in the New York courts) that your client wants to vindicate. If such a principle is at issue, consideration should be given as to whether the case is the appropriate one to test that principle.

All of these considerations cannot be factored in without client input. It is your job to raise these issues with your client and to make the client aware of how these various considerations can affect the evaluation and strategy of the particular case.

§ 5:6 Need for and objectives of case evaluation at every stage of a litigation—Evaluation regarding trial and post-trial appeals

An evaluation of the case must include an assessment of how the case will be perceived by the fact finder at trial, assuming that the case is not disposed of by pre-trial motion.¹ In making this evaluation, it is important to consider whether the case will be a jury or bench trial and, if a bench trial, what is known about the particular judge’s tendencies on a case of the type involved. The evaluation of the likely results at trial is one that will necessarily develop over time as the factual record of the case is developed during discovery, the demeanor of potential trial witnesses is observed, and the legal issues begin to crystallize. It is always hard to predict what a jury will do, and this factor should be considered in making the evaluation. Notwithstanding this inherent difficulty, if the amount in dispute warrants the expense, evaluative tools such as mock trials and jury research can assist, usually in the later stages of a case, in making an evaluation as to the likely outcome of a jury trial.

Even after a trial to verdict, case evaluation is warranted. Both sides recognize, following a verdict, that there is a potential for

[Section 5:6]

¹*See generally* §§ 5:56 to 5:61; Chapters 35 to 43, relating to various aspects of trials.

post-trial motions² and appeals.³ Evaluating the chances of success of such motions or appeals is critical to determining at this late stage whether to pursue a possible settlement in compromise of the verdict or continue the litigation process through the post-trial motions and appeals. There are times, for example, when a case is won at trial but an objective evaluation reveals that glaring errors were made that are likely to be corrected on appeal. In such a situation, the prevailing party's position will never get any better and, faced with an evaluation of likely reversal, the party in that situation may be well advised to pursue settlement at that late stage.

II. INITIAL CASE EVALUATION

§ 5:7 How to evaluate a case at the outset

Research References

Business and Commercial Litigation in Federal Courts, §§ 70.2, 70.6
 Successful Partnering Between Inside and Outside Counsel, §§ 4:23, 9:33, 12:8
 Managing the Heavy Caseload—Staff Assignments, 1 Am. Jur. Trials 275

Case evaluation requires knowledge, including knowledge of the facts, the law, the client's objectives, and potential damages. To gather the facts,¹ the attorney needs to conduct preliminary interviews of the relevant witnesses. Key documents need to be retrieved and reviewed. In commercial cases, documents can often be the difference between winning and losing a case. Recollections can fade, testimony can change, but documents remain, often as the "most accurate" version of events.

A document that was worded poorly and may not accurately reflect what really happened or what was really intended can have a significant impact on the case, and thus how that case is evaluated. If the case turns on, for example, a single meeting, make sure when doing the initial evaluation to obtain and review any memoranda or notes of that meeting. Check to see if there is any correspondence that preceded the lawsuit that sets forth the positions of either side or the facts relating thereto. While, particularly in complex commercial cases, it is not possible to develop all the facts as part of the initial evaluation, the experienced attorney can and should identify the factual areas

²See generally § 5:62; Chapter 47, "Trial and Post-Trial Motions."

³See generally §§ 5:63 through 5:65; Chapter 53, "Appeals to the Appellate Division," and Chapter 54, "Appeals to the Court of Appeals."

[Section 5:7]

¹See generally Chapter 4, "Investigation of the Case."

and sources of documents that need to be understood upfront, and focus client interviews and document review on those areas.

Similarly, key legal issues should be identified at the outset and research conducted where necessary. Consideration should be given initially to whether there is jurisdiction² over the defendant, whether pre-trial motions can dispose of all or a portion of the case, and whether a jury trial will be available. Often, “quick” research can be done to confirm one’s understanding of well-settled legal principles that can then be applied to the particular case. At other times, research should be done to see if there are cases on point, which will help to evaluate the strength or weakness of the particular claims. In still other instances, such as where there is a significant, determinative, legal issue that is not well-settled, it may be appropriate to conduct extensive research at the outset.

As part of the initial evaluation, the attorney needs to understand what the client’s objectives are. Meet with the client at the outset to discuss this. On occasion, the client’s objectives may be unrealistic or unachievable, in which case the lawyer should properly advise the client as to what is realistic and achievable. The attorney also should begin to understand, in a damages case, what the realistic amount of damages is likely to be, assuming there were to be a finding of liability. Sometimes a careful evaluation of prospective damages shows that even if there were a finding of liability, the amount of damages that might realistically be awarded under applicable law is far short of what is being sought.³

Do not forget to discuss your initial evaluation with the client in order to formulate the appropriate strategy to achieve the client’s objective. The best litigators will properly counsel the client in this regard, so that cases worth trying are tried and those that are not are resolved by other means.

§ 5:8 How to evaluate a case at the outset—Plaintiff’s perspective

Research References

Settling the Case—Plaintiff, 4 Am. Jur. Trials 289

As counsel to a potential plaintiff, it will be your obligation to take the information obtained from your client and evaluate whether a legally sufficient complaint can be prepared, and whether and to what extent there is a case worth pursuing. This will require you to evaluate the facts, the law, potential damages,

²See generally Chapter 2, “Jurisdiction.”

³See generally Chapter 44, “Compensatory Damages.”

and the client's objectives. Plaintiffs in many commercial cases must evaluate whether instituting litigation will damage valuable commercial relationships (*e.g.*, with customers or suppliers) and whether other strategies may enable plaintiff to achieve its objectives while preserving those relationships.

An initial evaluation from the plaintiff's perspective may need to be more thorough than that undertaken from the defendant's perspective, as the plaintiff needs to evaluate whether it will be cost-effective to commence and prosecute the litigation, whether an action is likely to survive following initial motion practice, and whether in some instances it makes sense for counsel to take the case on through a contingency fee arrangement. The initial evaluation should also consider what the likelihood is of the defendant settling in a satisfactory manner and at what stage, given what can often be the extensive costs of full-blown litigation. A thorough initial evaluation from the plaintiff's perspective is also required because it is counsel's obligation to ensure that the causes of action included in the complaint have a reasonable basis in fact and law.

In evaluating a prospective case for the plaintiff, the attorney should assess the strengths and weaknesses of the case, the likelihood of success, the estimated cost of litigation through trial, and the likelihood of an early settlement or other means of achieving the prospective plaintiff's objectives. Many potential plaintiffs believe that, if they bring a lawsuit, the defendant will immediately "cave" and settle the case. Experience shows that such a belief is often wrong.

As part of the initial evaluation, the attorney should realistically assess what is likely to occur once a complaint is filed, including an evaluation as to the time and resources of the plaintiff that will need to be diverted from ordinary business operations in order to pursue the litigation. A prospective plaintiff should be made to understand how much time, effort, and stress the litigation may require from key business personnel, and should evaluate how much benefit that time, effort, and stress might produce if it was expended on other non-litigation activities. For example, a small business owner who has been damaged by a large, powerful, key supplier should be advised to consider whether she is better off bringing a lawsuit—which could end up being all-consuming—or finding another supplier and getting on with her business by devoting energies to the business rather than to a lawsuit. Which choice is best in any particular instance, of course, depends on an evaluation of the factors unique to the matter involved.

§ 5:9 How to evaluate a case at the outset—Defendant’s perspective**Research References**

Settling the Case—Defendant, 4 Am. Jur. Trials 279

In one sense, it is easier to evaluate a case from the perspective of the defendant, because the starting point is often a complaint that has been received from the other side. That will not always be the case, however, as potential defendants will also consult counsel upon notice of a threatened action or in anticipation of a suit. In addition, as counsel for a defendant, you always need to consider potential counterclaims, and will have to undertake a factual investigation similar to the type undertaken for a plaintiff before filing a complaint to determine whether any counterclaims exist.

As with plaintiff’s counsel, the initial evaluation from the defendant’s perspective needs to consider the facts, relevant law, and cost. The evaluation should also assess, to the extent possible, what the plaintiff really wants to achieve from the litigation and how much staying power the plaintiff is likely to have to achieve its goals. Based on fact-finding and legal analysis, the initial evaluation for the defendant should guide litigation strategy, on a cost-benefit basis, as well as guide when and whether to attempt a settlement of the matter. The initial evaluation should also include a realistic assessment of how long the case is likely to last, and the extent to which client resources will have to be diverted to deal with the litigation over the course of the case.

§ 5:10 Understand the client’s goals**Research References**

Successful Partnering Between Inside and Outside Counsel §§ 3:10, 6:47, 8:3, 29:4, 30:19, 63:6, 67:10

Managing Litigation, 51 Am. Jur. Trials 1

Interviewing the Client, 1 Am. Jur. Trials 1

Knowing your client and understanding the client’s objectives is essential to any case evaluation. The best way to understand your client’s objectives is to ask. In most instances, the client’s goals in a commercial dispute will be purely economic: a plaintiff wants to recover money or obtain some other remedy, and a defendant wants to defeat the claim. Business clients will ordinarily want to achieve their objective in a cost-effective manner. When dealing with corporate clients, it is important to recognize who the client actually is, *i.e.*, the corporation itself. There will be times when the corporate personnel involved in the dispute look at the matter from an emotional, rather than an

economic, perspective. You should be sure to understand the corporate objectives by speaking to in-house counsel or other appropriate corporate personnel, without relying exclusively on the personnel involved in the dispute to understand the client's objectives because any evaluation you perform is for the corporation.

Many times, legitimate business factors will determine objectives and affect how cost factors into the evaluation. For example, one defendant may not want to divert attention away from business operations to focus on a lawsuit, while another defendant may feel it is important to have a reputation for taking all cases to trial as a means of discouraging others from bringing suit. One plaintiff may be willing to accept a substantially discounted amount to achieve a quick settlement, while another wants to press for a maximum recovery. Some clients have a continuing business relationship with their adversary that they want to preserve. Some parties may have skeletons in the closet that they do not want to reveal in discovery, and may put a premium on a quick settlement, even if it is an exorbitant one. It is important to understand what interests your client wishes to vindicate in the litigation, and it will continue to be important to find out whether and how those interests may change as the case proceeds.

In this connection, it is always important to find out from your client whether it is currently involved in similar cases, or expect to be, in the future. For example, if the client is a brokerage firm being sued by a customer based on the conduct of an individual broker, find out if there are other complaints that have been made against the individual broker, and if other claims of a similar nature have been made against the firm. Is there a pattern? Is there a concern that a bad result in this cause (or a generous settlement) will lead to other cases being filed? If so, is it better to agree to a confidential settlement or fight aggressively? Much depends on the evaluation of the case: the stronger the defense, the easier it is to decide to fight aggressively. Conversely, if there is significant exposure for your client, a different strategy may be warranted. In today's litigious environment, a well-done initial case evaluation could result in saving your client from disaster. While an aggressive defense is often the right approach, there are other situations where a relatively minor dispute, if not quickly and properly resolved, can become the "tip of the iceberg," revealing to others a pattern of conduct that can lead to substantial additional litigation, and in some instances prosecutorial or regulatory proceedings.

§ 5:11 Existence of insurance coverage

Research References

New York Jurisprudence 2d, Trial § 160

Successful Partnering Between Inside and Outside Counsel § 78:3
Evaluation and Settlement of Personal Injury and Wrongful Death
Cases, 53 Am. Jur. Trials 1
Interviewing the Client, 1 Am. Jur. Trials 1

The existence of insurance coverage that may defray all or part of the costs of litigation, or provide a source of a potential recovery, is an important factor in case evaluation. Where insurance exists to cover the costs of defense of a particular claim (and potentially to also cover the amount of any judgment), the evaluation of the case needs to factor this in. Of course, in these instances, the insurance company has a vested interest in the case and may become the “client” in a practical sense, expecting the same type of case evaluation from the defendant’s attorney as would be given if no insurer was involved.

From the plaintiff’s side, the potential that the claim will be covered by the defendant’s insurance is a factor to consider in evaluating the case. What the plaintiff knows about the existence of insurance coverage or the applicability of the policy to the particular case is something that is often learned only in discovery.¹ In the recent economic climate that has seen many once-strong businesses fail, the availability of insurance to pay claims becomes even more important to the evaluation of a case where such an entity is involved. Does the failing entity have the resources to pay a judgment? If not, will insurance cover the judgment? Are there competing claims for the same insurance policy? Will your client be likely to obtain insurance payments where there are competing claims? These are among the factors to consider as part of the evaluation where insurance coverage issues are implicated.

§ 5:12 Need for a thorough factual investigation

An evaluation of a case begins with a thorough understanding of the facts. You should explain to your client what you plan to do, what help you need from him or her, and why a thorough understanding of the facts (both good and bad) is critical to your ability to evaluate and prepare the case.

The attorney should learn the identity of relevant witnesses as well as the extent of and location of relevant documents, including those that are not in your client’s possession or control. The facts of the case should then be developed from client interviews,

[Section 5:11]

¹Pursuant to N.Y. C.P.L.R. 3101(f), a party may obtain discovery of the existence and contents of relevant insurance agreements.

document reviews, and other sources.¹ Especially in complex cases, it is important to use tools such as memoranda of client interviews, with summaries of key documents and a detailed chronology of events, to help understand and analyze the facts. Getting the facts on paper is often essential to the ability to properly evaluate the case from a factual perspective.

As the case proceeds and discovery takes place, the factual analysis should be updated to incorporate what is learned from, for example, deposition testimony and the production of documents, especially information set forth by witnesses not previously interviewed or in documents that were produced by the other side and by third parties. Often, what appears to be the facts at the outset of the case become dramatically different in the course of discovery, especially as documents and other facts are disclosed that were not in your client's possession. Given the obviously critical role that facts play in case evaluation, the case evaluation must be continually revised and updated as the attorney's understanding of the facts changes over the course of the case.

**§ 5:13 Need for a thorough factual investigation—
Identify and interview witnesses**

Research References

West's Key Number Digest, Witnesses ⇔224 to 409

Business and Commercial Litigation in Federal Courts §§ 4.1 to 4.19, 20.4, 22.4, 57.6, 67.5, 70.3, 74.2

Successful Partnering Between Inside and Outside Counsel §§ 35:15, 35:16 to 35:22, 35:24, 35:30, 35:32, 58:46

Locating and Interviewing Witnesses, 2 Am. Jur. Trials 229

As key witnesses are identified, they should be interviewed. Witnesses should be interviewed separately. Initial interviews are usually conducted with a limited factual background, and most witnesses will be interviewed again as more is learned from other witnesses, documents, and discovery. While it is generally best to begin interviews by getting the witness's unrefreshed recollection of events, it is equally important during the course of the interview to show the witness key documents and otherwise seek to refresh recollections so as to get the most accurate version of the facts. In evaluating a case, it is important also to probe the witness's story and, in effect, "cross examine" your own witnesses. No case evaluation can be properly done unless the facts have been subjected to critical "testing" of the manner that will be done by the adversary. If there are factual inconsistencies

[Section 5:12]

¹See generally Chapter 4, "Investigation of the Case."

between different witnesses' recollections, the attorney should attempt to reconcile the inconsistencies through subsequent interviews.

Interviews also give the attorney an opportunity to assess each witness's potential as a trial witness by being able to judge her demeanor. Especially if the case turns on issues of "who said what," who is more likely to be believed by the trier of fact becomes a critical component of case evaluation.

Interviews should not necessarily be limited to those persons under your client's control. Remember that some third party witnesses may be willing to talk to you voluntarily. Assuming there is no ethical prohibition on contacting a particular witness,¹ it is often a good idea to seek to interview those witnesses as well as those in your client's employ.

Memoranda of interviews should be prepared, taking care to recognize that the discoverability of memos of third party interviews may be different than in the case of interviews of the client. These memoranda will be extremely valuable when trying to construct an overall factual analysis, especially in a complex case. It is helpful to incorporate a discussion of key documents into these memoranda. Often, it is useful to eventually prepare a memorandum that incorporates and blends together the various interview memos and document summaries into a single comprehensive factual analysis. To evaluate the facts, such a memorandum should include the attorney's impressions as to the inferences that can be drawn from certain witness recollections or documents, and the arguments that can be made both ways on such points.

§ 5:14 Need for a thorough factual investigation—Gather and review critical documents

Research References

West's Key Number Digest, Evidence ¶325 to 383
 New York Jurisprudence 2d, Disclosure §§ 34, 138, 154, 161, 165, 179, 242, 243, 245, 325, 349
 Business and Commercial Litigation in Federal Courts §§ 20.1 to 20.8
 Carmody-Wait 2d §§ 2:298, 42:11, 42:44, 42:171, 42:265, 42:269, 42:307, 42:346, 42:412, 42:433, 42:435, 42:437, 42:442, 42:452, 42:455, 42:456, 42:550, 42:606, 42:614, 44:51, 50:48, 152:95, 152:98

Commercial cases will often turn on information contained in documents. Documents are often the "best evidence," and while recollections can change and testimony can vary, the words in a

[Section 5:13]

¹See Chapter 58, "Ethical Issues in Commercial Cases."

document remain constant. Thus, in order to evaluate the case, it is imperative to first identify and locate relevant documents and, second, to review and analyze those documents. As with other aspects of the case, this search and review should not be limited to documents in your client's possession. The adversary's documents can be obtained in discovery.¹ Also, just as facts can sometimes be obtained from third party witnesses, documents can sometimes be obtained from third parties without the necessity of a subpoena.

Any good case evaluation needs to take account of the information, good or bad, contained in the important documents. As with witness interviews, getting information on paper is often essential to a proper analysis and evaluation. Thus, it is often useful to prepare a detailed index of documents, or at least of key documents. Summaries of key documents should also be incorporated into a chronology of events as well as into any overall factual memorandum that is prepared.

A review of documents can and usually does lead to additional areas of inquiry. For example, documents will sometimes reference other documents that have not yet been located, refer to events of which you may not have been aware, or reference individuals that could be potential witnesses. As part of the ongoing process of developing facts and evaluating the case, the attorney should follow up on these points.

On occasion, a particular document may in and of itself be critical to a disposition of a matter. In those instances, consideration should be given to the admissibility of the particular document at trial and if inadmissible how, if at all, the document may nevertheless bear on the case. Some commercial cases can turn on a single sentence or single provision in a single document. In those situations, a thorough evaluation will include a comprehensive understanding of how all relevant witnesses interpreted the particular sentence or provision, the arguments both ways for how it could be interpreted and the facts and circumstances leading up to the inclusion of the particular sentence or provision in the document.

§ 5:15 Need for a thorough factual investigation—Review of publicly available information

Research References

West's Key Number Digest, Evidence ¶325 to 349

Business and Commercial Litigation in Federal Courts §§ 4.13, 18.11,

[Section 5:14]

¹See generally Chapter 22, "Document Discovery."

19.12, 41.12, 54.11, 54.2863.8, 64.6, 80.2
 Carmody-Wait 2d §§ 42:266, 64:361, 78:60, 138:51, 145:1469, 172:696
 Locating Public Records, 2 Am. Jur. Trials 409

Significant information relevant to a proper case evaluation may be publicly available. In a corporate fraud case, for example, an evaluation would usually include a review of publicly filed annual reports, financial statements, and other documents. In a broker-dealer customer arbitration, information concerning complaints about the particular broker or firm may be publicly available. With vast amounts of information now publicly and readily available via the Internet, there are few cases where some search of publicly available information will not be warranted.¹ As part of a case evaluation, the attorney should consider what information of this type might be useful and then proceed to locate it. Getting background information on the parties involved, for example, is often useful and may lead to ideas for obtaining other publicly available information.

In this age of computer research, valuable information can also be obtained about prior litigations involving your adversary, prior cases decided by the judge assigned to your case, information about the opposing attorney, and more. In situations where a case brought against your client appears to be frivolous, for example, an appropriate search may reveal prior cases brought by the same plaintiff where sanctions were imposed. Facts such as this, if discovered, may impact the evaluation of the case as well as the litigation strategy to be pursued.

§ 5:16 Need for a thorough factual investigation— Informal versus formal discovery

Research References

Business and Commercial Litigation in Federal Courts §§ 18.11, 20.2,
 28.8, 42.4, 46.2, 61.2, 62.2, 70.1 to 70.3
 How to Conduct International Discovery, 71 Am. Jur. Trials 1
 Managing Litigation, 51 Am. Jur. Trials 1

The CPLR provides many formal discovery mechanisms that can be used to gather information about the case, including oral depositions, depositions upon written questions, interrogatories, demands for addresses, requests for inspection of documents or property, and requests for admission.¹ While the CPLR permits a party to use formal discovery devices before commencement of an

[Section 5:15]

¹See generally Chapter 4, “Investigation of the Case.”

[Section 5:16]

¹N.Y. C.P.L.R. 3102(a).

action on a court order,² as a practical matter discovery is not ordinarily used until after an action has commenced. Moreover, formal discovery is time-consuming and can often lead to motion practice before becoming a useful source of factual information. As a result, while formal discovery is an essential tool for preparing a case for trial, it is of limited value in developing your initial evaluation of the case.

At the early stages of a case, informal discovery is a far more valuable tool. Although rules of ethics prohibit you from contacting the opposing party, your client should be able to advise you if there are friendly third parties who might be willing to talk to you without a subpoena or permit you to examine their documents. In addition, at least in some instances, it may be permissible under New York law to contact former and even current employees of your adversary.³ Do not assume that you need to subpoena third party witnesses for a deposition or to obtain documents. Their recollection and documents may be available to you simply by making a phone call. Too often, lawyers forget that informal “discovery” is available and should be utilized. These approaches should be considered early in the case as a method of gathering information for an initial evaluation.

§ 5:17 Identification and research of key legal issues

A critical part of good case evaluation is to identify the key legal issues and to do research on those issues to the extent necessary. For example, in a fraud action, you may want to research the law of scienter to apply the relevant legal principles to the facts as part of your evaluation as to the chances of success or failure of the particular claim. In preparing the actual evaluation, the facts learned should be applied to the relevant law to form conclusions.

§ 5:18 How readily available is necessary proof?

Proof cannot help your client if it is not available at trial. In doing the case evaluation, you need to consider what can be proven and what cannot be proven at trial. If you have a favorable witness but that witness may not appear voluntarily at trial, consider whether the witness is likely to be as favorable in the event that you are required to subpoena him or her for trial or take a deposition to preserve testimony. Difficult access to sources of proof can also add to the expense of the case, create uncertainty regarding results, and give tactical advantages to the adversary

²N.Y. C.P.L.R. 3102(c). *See* Chapter 20, “Disclosure.”

³*See Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990); *see also* Chapter 58, “Ethical Issues in Commercial Cases.”

if you are required to present important testimony at trial through deposition, as opposed to live witnesses.

§ 5:19 Availability and likelihood of jury trial

As any trial lawyer knows, there is a vast difference between a bench trial and a jury trial. A jury is less likely to be attuned to the finer points of law, and more likely to be swayed by an abstract (and sometimes rougher) sense of justice. As a result, considering whether the case will be tried to a jury or a judge is a major consideration in evaluating the strengths or weaknesses of a case. For example, if you are proceeding on a novel legal theory or representing an individual client against a large, wealthy corporation, a jury may be a far more sympathetic fact finder than a judge. Thus, in evaluating possible outcomes, it should be considered whether a jury trial is available, and the case should be assessed in this light.

§ 5:20 Identification of strengths and weaknesses of case

The crux of any good case evaluation is to identify the strengths and weaknesses of the case. The factual and legal analysis that you are undertaking should focus on this. When preparing a written evaluation of the case, the memorandum should make arguments both ways on key factual and legal points in order to lead to the conclusion as to which side of the case is stronger and to what extent.

This evaluative process should also identify the key legal and factual hurdles you will be facing, and what needs to be done to respond to them. If there are facts or law that are bad for your client's position, a proper case evaluation needs to recognize this. Your client will not be well served if the bad facts or law are ignored. Of course, what appears at first blush to be a bad fact or troubling legal principle may on further examination turn out not to be so troubling. Identify these bad facts or troubling legal issues and then "attack" them to develop arguments or evidence that will address the concerns. Often, you will be surprised that your evaluation changes and what first appeared to be a problem is no longer one.

When faced with a "bad fact" consider, for example:

- Is there a reasonable or other explanation?
- Are there other facts that offset or minimize the harm?
- Is there a way to keep the bad fact out of evidence? For example, is it hearsay or unduly prejudicial?
- Does the bad fact really go to the core of the case, or is it more of a "cosmetic" problem?

In your evaluation, marshal the strengths of your case, identify

the weaknesses, do a critical examination of those strengths to see if they hold up, and address the weaknesses to see if they can be overcome. In this manner, you will end up with a well-reasoned evaluation of the case.

§ 5:21 Cost-benefit analysis, generally

Research References

Business and Commercial Litigation in Federal Courts §§ 24.3, 64.2
Successful Partnering Between Inside and Outside Counsel § 10:23
Managing Litigation, 51 Am. Jur. Trials 1

A cost-benefit analysis compares the range of possible results with the cost to achieve those results. To do such an analysis, the lawyer should quantify costs by making her best estimate, for the case as well as for particular tasks, of how many lawyers will be required, the number of hours expected to be spent by each, and the billable rate of each, to come to an amount.¹ Quantifying benefits is more subjective, but calls for the lawyer to use his evaluative skills to determine, often on a percentage basis, what the likelihood of success is of winning the case or a particular phase, including, for example, both the chances of success and the likelihood as to the amount of damages to be recovered.²

A cost-benefit analysis is a critical part of case evaluation at every stage of the matter. While it is possible to estimate in broad terms what a particular litigation will cost from start to finish and what the range of possible results are, cost-benefit analyses are also critical in evaluating how to approach a case at various stages. Thus, for example, the lawyer might evaluate the chances of winning a motion to dismiss at X% at a cost of \$Y. Based on that analysis, the client can make a better-informed decision as to whether to make the particular motion. Such an analysis can also compare, for example, the cost of a motion to dismiss with the cost of a discovery program that will ultimately lead to a summary judgment motion, factoring in the cost of the eventual motion and the chances of success on such a motion.³ When taking depositions in a particular case, the lawyer could say that if discovery is limited to X persons it will cost \$Y, but that if you want to spend \$Z more to take additional depositions, there is a Y% chance of uncovering something else that will be

[Section 5:21]

¹An illustrative formula would be: (Partner A: 20 hours at \$X per hour = W) + (Associate B: 60 hours at \$X per hour = Y) + (Associate C: 40 hours at \$X per hour = Z) = cost estimate. As to quantitative models for evaluating litigation risks and costs, see § 5:26.

²See § 5:26.

³See §§ 5:34, 5:40.

useful to the case. Is it worth spending another \$50,000 for a 5% chance of improving your position? What if it took \$25,000 for a 50% chance of improving your position? By doing these and other types of cost-benefit analyses, case evaluation plays a critical role in shaping litigation strategy so as to attempt to achieve the best results for the client at the least cost.

Often it is easier to do a cost-benefit analysis for discrete portions of the case (for example, whether to make a particular motion, whether to pursue a particular line of discovery, whether to review a certain category of documents, whether to conduct certain types of investigations) than it is for the case as a whole. Litigation, by its nature, is unpredictable, and while costs may be estimated with reasonable certainty for discrete tasks that are under one's own control, it is far more difficult to estimate costs for an entire case when so much of what can transpire is not within one's control. Thus, a case evaluation can conclude that the matter will cost \$X based on there being a total of 10 depositions, 5 from each side. But what if your adversary decides to take 30 depositions of your side? And what if that position can be challenged? How much will it cost to make a motion to oppose the discovery? What if there is an appeal from the determination of the motion? How much will that cost? What is the cost if the depositions are allowed? Thus, cost-benefit analyses, particularly when covering the entire case or broad portions of the case are, by definition, inexact and subject to change. A proper case evaluation builds in the flexibility needed to deal with these contingencies.

A cost-benefit analysis can be a critical part of the evaluation in trying to achieve a result at an economically viable cost. Thus, by engaging in the analysis, the lawyer can be "forced" to identify the discovery and other work that is truly essential to the prosecution or defense of the case and to factor in what the case is likely to cost with this "limited" approach compared to what it would cost with a more comprehensive approach. The evaluation should consider how much stronger the case is likely to be if the more expensive approach is used, and how strong the case will be if the less expensive methods are utilized. In addition, a cost-benefit analysis can be conducted of each incremental step which counsel is considering by comparing the likely cost of the step against the value of the benefit, which may be derived from that step and the probability that the benefit will occur. Such an analysis, as part of the overall case evaluation, can guide decisions from beginning to end.⁴

⁴See also §§ 5:34, 5:40, 5:50, 5:56, 5:62, 5:63. For a discussion from the client's standpoint of the importance of engaging in a cost-benefit analysis in

§ 5:22 Development of litigation plan based on cost-benefit analysis

Research References

Successful Partnering Between Inside and Outside Counsel § 10:23

In evaluating the case, a litigation plan based on a cost-benefit analysis should be utilized. Depending on the size of the case, the amount of money that is justifiably spent on a particular litigation may vary considerably. In evaluating the case, the attorney should consider what the litigation is likely to cost, including alternative strategic methods of litigating the case with different cost components. Whether to make pre-trial motions, whether to serve interrogatories, the extent to which documents should be obtained and reviewed, and the number of depositions to take, are among the many strategic decisions that should be planned based on a cost-benefit analysis.¹

§ 5:23 Development of litigation plan based on cost-benefit analysis—Are motions cost-effective?

Research References

Business and Commercial Litigation in Federal Courts §§ 24.6, 70.10

Pre-trial motions, particularly motions to dismiss or for summary judgment, should be considered in almost every case.¹ Such a motion can dispose of the case at considerable savings in legal fees. However, such motions can also be expensive in and of themselves. A proper evaluation should consider whether making a particular motion is the most cost-effective way of resolving the dispute.² Motions other than dispositive ones should also be evaluated from a cost-effectiveness perspective.³ If there is a discovery dispute, for example, the evaluation should include consideration of whether it is better to make a formal motion to compel or for a protective order or whether it is better to either try to work out the dispute with your adversary or seek a conference with the court to resolve the matter informally.

the litigation context, *see* Samuel E. Bodily, “When Should You Go to Court?” 59 Harv. Bus. Rev. 103 (May–June 1981).

[Section 5:22]

¹*See also* § 5:26.

[Section 5:23]

¹*See generally* Chapter 7, “Responses to Complaints,” and Chapter 28, “Summary Judgment.”

²*See* §§ 5:34, 5:40.

³As to motions generally, *see* Chapter 27, “Motions.”

§ 5:24 Development of litigation plan based on cost-benefit analysis—What discovery approach will be most efficient?

Research References

Managing Litigation, 51 Am. Jur. Trials 1

The relative costs and benefits of the various discovery devices available should be part of the litigation plan derived from your evaluation. In some instances, the costs will not necessarily be transparent. For example, although preparing a set of interrogatories will probably be less expensive than proceeding with a series of depositions, the initial responses received to interrogatories will often be comprised more of objections and refusals to respond than useful information, and consequently it may not be cost-effective to utilize interrogatories as a discovery device.¹

Calculating the most efficient timing for using different discovery devices will also be part of any litigation plan. In most instances it will be far more efficient to obtain the other side's documents and review them before undertaking depositions. In large document cases, particularly where documents reside with multiple parties or third parties, consideration should be given as to the extent to which document requests and reviews can be tailored to the most essential categories.²

The timing of particular depositions is also something to be considered. Often, less important witnesses lower in the corporate hierarchy are deposed before proceeding to the key witnesses that have a decision-making capacity. Yet, in some instances, the case may be resolved on a more cost-effective basis if the key witnesses are deposed at the outset and the critical facts developed that much more quickly.³

When taking depositions, consider whether to spend the time to try to unravel every detail imaginable or whether to take a well-focused deposition that covers the key areas of the witness's knowledge. Which approach is the most valuable will depend on factors such as the importance and range of factual knowledge of the witness, the issues to which the witness's testimony is important, and the cost that the client is willing to incur to take the deposition.

[Section 5:24]

¹As to interrogatories generally, *see* Chapter 24, "Interrogatories."

²As to discovery of documents generally, *see* Chapter 22, "Document Discovery."

³As to depositions generally, *see* Chapter 21, "Depositions."

§ 5:25 Development of litigation plan based on cost-benefit analysis—What is the most cost-effective way of achieving the desired objective?

Research References

Managing Litigation, 51 Am. Jur. Trials 1

A key goal of case evaluation is to assist in determining the most cost-effective way of achieving the desired result. A proper evaluation of the strengths and weaknesses of the case will focus the party and his attorney on what facts need to be developed or learned in discovery and help to plan the most cost-efficient way of doing so. Always consider whether there is a more practical way of getting to the same result. Before proceeding with a series of depositions to authenticate documents obtained from your adversary, for example, you can seek to obtain a stipulation to that effect from your adversary or serve a request that your adversary admit the authenticity of the documents. Other issues may also be capable of resolution through stipulation rather than through formal discovery. Third party witnesses might be interviewed informally instead of being subpoenaed. Consider how many depositions you really need to take and how lengthy those depositions need to be. Be guided by your evaluation of the case, which will assist you in determining what really needs to be done versus what might be useful, but not essential. Discuss the various options, including the cost-benefits involved, with your client, who is the one to make these decisions based on your recommendation.

§ 5:26 Quantitative models for evaluating litigation risks and costs

Research References

Business and Commercial Litigation in Federal Courts §§ 24.3, 28.2, 28.3, 28.5

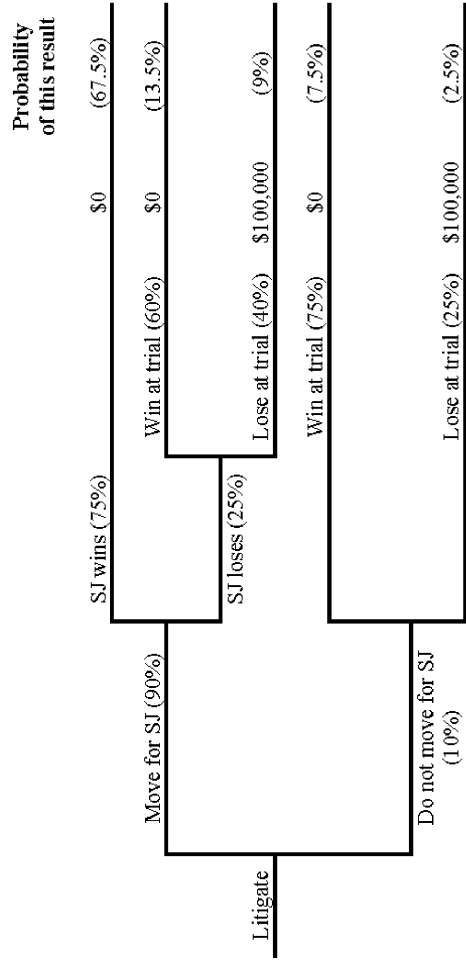
Successful Partnering Between Inside and Outside Counsel §§ 12:1 to 12:33, 65:31

Every attorney, whether consciously or not, employs a quantitative model for evaluating risk. When an attorney recommends to a client that a case be settled at \$50,000 because there is a 50-50 chance that a case will be lost at trial, resulting in a \$100,000 damage award, a rough quantitative model has been utilized. However, the more complex a case, the less reliable an informal approach to risk analysis becomes. A quantitative model, commonly known as a “decision tree” analysis, allows an attorney to plug in a number of variables to arrive at the expected value of a case. Such variables could include such things as whether a mo-

tion to dismiss or for summary judgment is likely to be granted, whether additional damages such as punitive or consequential damages may be imposed, whether a key piece of evidence will be admissible at trial, and whether a particular witness will cooperate. A decision tree analysis does not replace a lawyer's instincts, but employs them in a more systematic way. The attorney must still make informed judgments about the likelihood of the occurrence of certain events, and the model will only be as accurate as the lawyer's judgments are sound.

A simple example demonstrates how a decision tree works. Your client is being sued on a promissory note for \$100,000. Plaintiff has offered to settle for \$25,000. Your client has strong defenses, and you believe that, after discovery, you have a 75% chance of winning a summary judgment motion. Because some judges actively discourage summary judgment motions, there is a slight (10%) chance that you would not bring the motion but would go directly to trial, where you believe there is a 75% chance you would prevail (the same odds as for winning the summary judgment motion). If you were to lose the summary judgment motion, you feel that would decrease the odds of winning at trial slightly, say to 60%. Should you recommend accepting the \$25,000 offer? Putting aside the expenses of litigation, the answer, according to the decision tree analysis, is "no" based on the following:

**Decision Tree Analysis Effect of Summary Judgment
Motion**



<u>Outcome</u>	<u>Probability of this outcome</u>	Result
0	X	88.5%
\$100,000	X	11.5%
Expected Value		\$11,500

The odds on each branch of the tree must be separately multiplied to determine the probability of the events described on the branch occurring. For example, on the top branch of the tree, there is a 90% chance that a motion for summary judgment will be made, and a 75% chance that the motion will be granted leading to an award of zero. The odds of that scenario occurring are 67.5% (.9 × .75). Once each branch is multiplied out, and the odds of the occurrence of each scenario are computed (which must add up to 100%), the results must be added to obtain the expected value of the case. From the tree above, there is an 88.5% (67.5% + 13.5% + 7.5%) probability of a zero recovery with an expected value of zero (88.5% × 0), and an 11.5% probability of a \$100,000 recovery with an expected value of \$11,500. Adding the two sums equals \$11,500, the expected value of the case. Thus, putting aside attorneys' fees, a \$25,000 settlement demand is too rich.

The decision tree analysis may also be employed to help you assess whether particular litigation steps are cost-effective. For example, using the same decision tree set forth above, one can readily determine that had no summary judgment motion been made, the estimated value of the case would be \$25,000 (a 25% chance of losing \$100,000). Thus, moving for summary judgment has a value to your client of \$13,500 (it reduces the expected value of the case from \$25,000 to \$11,500). If you know it typically costs \$25,000 to brief and argue a motion for summary judgment, you may decide it is not cost-effective to move, even if the motion would probably be successful. By comparing the impact of eliminating various branches of the decision tree (known as a sensitivity analysis), you may determine that certain litigation strategies are more cost-effective than others. For example, performing a decision tree and sensitivity analysis may indicate that it is better to devote resources to finding a critical witness than to move for summary judgment.¹

[Section 5:26]

¹For a more detailed explanation of the decision tree analysis, see Mark B. Victor, et al., *Evaluating Legal Risks and Costs With Decision Tree Analysis, Successful Partnering Between Inside And Outside Counsel*, Chapter 12 (Robert L. Haig ed.) (2000); Marjorie Corman Aaron and David P. Heffer, *Decision*

To those attorneys who consider the above calculations too daunting or are otherwise mathematically challenged, there are decision tree software programs available that enable you to plug in the variables and will perform the necessary calculations for you. These programs are readily found on the Internet, and some offer trial versions of the program.

Of course, many good lawyers believe that a decision tree analysis in some cases is too complex and too theoretical to be useful. The criticism of such an approach includes, for example, that complex decision tree analysis requires too many guesses of probabilities and that one guess multiplied by another guess is an even more speculative guess. While there is merit to these criticisms, such that a complex decision tree analysis may not be the model to use in many cases, some form of cost-benefit, decision tree analysis, even if less formal and complex, should be used in every case. Such an analysis permits the lawyer and the client to examine costs and probabilities together and come to an informed mutual evaluation and plan for action, based on a common understanding of assumptions and objectives.

§ 5:27 Consideration of alternative dispute resolution procedures

Research References

Business and Commercial Litigation in Federal Courts §§ 42:1 to 42:10
Successful Partnering Between Inside and Outside Counsel §§ 57:1 to 57:52

From the outset of a matter, you should consider whether your client's interests would be served by utilizing some form of alternative dispute resolution ("ADR") procedure, such as binding arbitration or non-binding mediation. ADR procedures have the potential advantage of being a less formal and less expensive means of resolving a particular dispute.¹

Assuming there is a pre-dispute arbitration clause that could be enforced or that the parties would consider agreeing to arbitrate post-dispute, the evaluation of the case will play an important role in determining whether arbitration is a preferred course. As arbitrators in New York State are not required to follow the law, a case where legal issues are in your client's favor may not be a good choice for arbitration. Also, motions to dismiss or for summary judgment are rarely granted in arbitration, so if

Analysis as a Method of Evaluating the Trial Alternative, *Mediating Legal Disputes: Effective Strategies For Lawyers and Mediators*, Chapter 11 (Dwight Golann ed.) (1996).

[Section 5:27]

¹See generally Chapter 46, "Alternative Dispute Resolution."

the case evaluation suggests a high probability of resolution in that manner, arbitration may not be a good choice. On the other hand, if a jury trial would otherwise be involved and the evaluation suggests a risk of a bad outcome because a jury may be sympathetic to the other side, arbitration may be a good choice. There are many other factors that go into the decision whether to arbitrate or not in a particular case, including the size of the matter and the cost of litigation versus the cost of arbitration. The evaluation of the case will be a useful tool in making the decision whether to arbitrate in those situations where there is a possibility of arbitration.

§ 5:28 Consideration of alternative dispute resolution procedures—Court annexed or other form of mediation

Research References

Business and Commercial Litigation in Federal Courts §§ 28.5, 42.7, 42.9, 42.10, 70.8, 80.13
Successful Partnering Between Inside and Outside Counsel §§ 57:27, 65:32

Mediation, which is a non-binding form of ADR, has been utilized with increasing frequency in recent years.¹ Mediation is a procedure whereby a neutral third party facilitates efforts to settle the dispute by hearing arguments from both sides and then tries to fashion a compromise, in some instances offering a non-binding opinion regarding the case or aspects thereof. Many of the Commercial Divisions of the New York State Supreme Court, following that of New York County, have active mediation programs which encourage judges to refer cases to mediation at an early stage of the proceedings.² The parties, of course, can also agree on their own at any stage to engage in mediation.

The case evaluation can play an important role in determining whether mediation is a useful procedure to employ and, if mediation is utilized, to assist in determining what a proper settlement is. The parties' objectives may determine whether mediation is appropriate. Mediation often works best when there is an ongoing business relationship between the parties or some means of settling the matter other than simply the payment of money. It is in situations like this where an experienced mediator can be particularly effective. Where only money is involved, the mediator's job can be harder but many such cases do settle with

[Section 5:28]

¹See generally Chapter 46, "Alternative Dispute Resolution."

²See Chapter 31, "Practice Before the Commercial Division."

the aid of a mediator, even at an early stage of the proceeding.

An effective mediator will often perform his own case evaluation with the aid of the parties.³ Thus, the case evaluation that you have done can often be an effective tool in persuading the mediator as to the proper “value” of the case and, in turn, assisting the mediator to persuade the other side, in order to lead to a settlement.

§ 5:29 When should settlement overtures be made?

Research References

Business and Commercial Litigation in Federal Courts §§ 28:1 to 28:13
Successful Partnering Between Inside and Outside Counsel §§ 65:1 to 65:62

One of the main factors in any evaluation of a case is consideration of settlement ranges and possibilities. Obviously, the better and more comprehensive the evaluation of the case, the easier it is to advise your client as to what an acceptable settlement range is.

There is no “stock” answer as to when settlement overtures should be made, as this depends on the particular case and involves negotiating strategies beyond the scope of this chapter.¹ However, a good case evaluation may lead the lawyer to reach sound conclusions as to what a proper settlement would be, even at an early stage of the proceedings. The evaluation could lead to the conclusion that reasonable parties on both sides should quickly come to the conclusion that the case should settle for \$X. In that instance, depending on the particular matter and the dynamics with the other side, it may be useful to initiate settlement discussions early on so as to eliminate what will otherwise be unnecessary costs of litigation. Conversely, there are times when the evaluation will lead to the conclusion that no early settlement is likely. In certain complex cases, in particular, the initial case evaluation may demonstrate that discovery will be necessary before a proper settlement evaluation can be conducted. The size of the case, as reflected in the evaluation, can also make a difference in when to initiate settlement discussions. To the extent this can be generalized, the smaller the controversy, the more likely it is that settlement should be pursued sooner rather than later.

³For an analysis of how an effective mediator can utilize case evaluation to assist the parties in resolving a matter, see Marjorie Corman Aaron, “The Value of Decision Analysis in Mediation Practice,” 11 *Negotiation J.* 123 (April 1995).

[Section 5:29]

¹As to settlement generally, see Chapter 32, “Settlements.”

III. EVALUATING LIKELIHOOD OF DISMISSAL BASED ON CPLR 3211 MOTION IN RESPONSE TO THE COMPLAINT

§ 5:30 Significance of the CPLR 3211 motion to an early evaluation of the case

An important part of the initial case evaluation is determining whether a motion to dismiss should be made, in lieu of answering the complaint.¹ CPLR 3211² provides a variety of grounds for moving to dismiss, including for lack of personal or subject matter jurisdiction. Jurisdictional issues should always be considered as part of the initial case evaluation.³

In virtually every case, the initial evaluation should also consider whether a motion should be made for failure to state a cause of action.⁴ As such a motion is addressed to the pleadings, the evaluation of whether to make such a motion can often be made without engaging in a detailed factual investigation and review. On such a motion, the issue for the court is whether the facts alleged, if true, state a legally sufficient claim. Thus, in most instances, the evaluative process on whether to make such a motion will depend primarily on a cost-benefit analysis gauging the chances of success on such a motion versus the expected cost.

In some instances, however, the evaluation of whether to make a motion to dismiss should consider what the underlying facts are, regardless of the analysis concerning whether a legally sufficient claim has been stated. There can be times where it will be more cost-efficient to forego an initial motion to dismiss and instead take at least some limited discovery for the purpose of making a summary judgment motion. There can also be times where submitting factual affidavits in connection with such a motion would be a good course to follow, as parties are permitted to introduce evidence outside the pleadings on a motion to dismiss and ask the court to convert it into one for summary judgment.⁵ The initial evaluation of the case will guide these strategic decisions.

Be creative and aggressive in your thinking. Many commercial cases are disposed of on initial motions to dismiss. From a defendant's perspective, nothing will save your client money in legal fees as much as a successful motion of this type.

[Section 5:30]

¹See generally Chapter 7, "Responses to Complaints."

²N.Y. C.P.L.R. 3211.

³See generally Chapter 2, "Jurisdiction."

⁴N.Y. C.P.L.R. 3211(a)(7).

⁵N.Y. C.P.L.R. 3211(c). See Chapter 7, "Responses to Complaints."

§ 5:31 Ability under CPLR to move on the basis of documents and other extrinsic facts

Under New York law, a motion to dismiss may be made where “a defense is founded upon documentary evidence.”¹ In evaluating the case initially, consider whether there is a document or documents that can be utilized as a basis for such a motion. As commercial cases tend to be document-intensive, there are many cases where documents can be utilized to support such a motion to dismiss, often in conjunction with a motion to dismiss for failure to state a cause of action. Where your factual investigation and case evaluation reveal agreements, correspondence or other documents that on their face appear to dispose of plaintiff’s claim, such a motion should be considered.

Apart from a CPLR 3211(a)(1) motion, on a motion to dismiss under CPLR 3211(a)(7),² there are times when it will be advantageous to submit factual affidavits or other evidence that may lead to conversion of the motion into one for summary judgment. Here, the case evaluation plays a critical role in determining what the key facts are that need to be brought to the court’s attention to resolve the case in your client’s favor. Once those facts are identified, the lawyer is in a position to make the tactical judgments required as to whether those facts are indisputable or otherwise of such a nature that they should be included in an initial motion addressed to the complaint.

§ 5:32 Possibility of automatic stay of discovery pending motion**Research References**

New York Jurisprudence 2d, Disclosure § 334

New York Jurisprudence 2d, Pleading § 279

Carmody-Wait 2d § 42:548

Service of a motion to dismiss “stays disclosure until determination of the motion unless the court orders otherwise” (unless the motion is based solely on the defense of improper service).¹ This potential stay of discovery is a factor that should be considered when evaluating whether to make a motion to dismiss. There are obvious advantages from the defendant’s perspective if the expense of discovery is avoided while a motion to dismiss is

[Section 5:31]

¹N.Y. C.P.L.R. 3211(a)(1).

²N.Y. C.P.L.R. 3211(a)(7).

[Section 5:32]

¹N.Y. C.P.L.R. 3214.

pending. Aside from the avoidance of potentially unnecessary legal fees, there are times when a stay may also be critical to the result because discovery, if it were to proceed, may reveal facts to the plaintiff that will allow it to defeat the motion to dismiss. As an “automatic” stay can be lifted by the court, a party can go to the expense of a motion to dismiss and end up engaging in extensive discovery (with its attendant cost) before the motion is even decided. In this connection, it should be noted that in New York County’s Commercial Division, most of the Judges “reverse the CPLR’s presumption” and allow discovery to proceed pending the determination of a motion to dismiss, although a stay can be ordered in a particular case.² Therefore, in evaluating whether to make a motion to dismiss, counsel needs to assess the costs and the amount and probability of the potential benefits thereof, factoring in the likelihood of whether discovery will be stayed or not pending the determination of the motion.

§ 5:33 Significance of interlocutory appeal procedures

Research References

Business and Commercial Litigation in Federal Courts §§ 25.5, 27.3, 44.3, 49.5

New York is unusual in that it permits almost unlimited appeal of interlocutory orders by the trial court,¹ including appeals from the denial of motions to dismiss. Thus, in evaluating whether to make such a motion, consideration should be given to the possibility of an interlocutory appeal. This right of appeal is particularly significant in evaluating whether to make a motion to dismiss because it provides the defendant with opportunities to persuade two courts that the motion should be granted. In contrast to the federal court system, where the denial of a motion to dismiss is generally not reviewable on appeal until after final judgment, in New York, a denial of a motion to dismiss can be appealed and potentially reversed long before a trial of the case is held.

From the defendant’s perspective, the right to interlocutory appeals can be a plus factor in the evaluation of whether to move to dismiss, because it provides the defendant with opportunities to persuade two courts that the motion should be granted. From the

²See Consolidated Rules, Rules of the Justices of the Commercial Division, Supreme Court, New York County, Rule 12, http://www.nycourts.gov/comdiv/Consolidated_Rules.htm; see generally Chapter 31, “Practice Before the Commercial Division.”

[Section 5:33]

¹N.Y. C.P.L.R. 5701(a)(1). See generally Chapter 53, “Appeals to the Appellate Division.”

plaintiff's perspective, the prospect of interlocutory appeals should be considered as part of the evaluation as to the cost-effectiveness of commencing and prosecuting a particular action. There are cost considerations for the defendant as well in that, for example, a motion to dismiss that is partially granted can be appealed (with the associated expense) while the rest of the case is proceeding.

Consideration should also be given to whether an interlocutory appeal will stay the action pending appeal. There is no automatic stay.² However, the party appealing can move for a stay before either the trial court or appellate court.³ The lack of an automatic stay minimizes the disruption to case proceedings that would otherwise result from an interlocutory appeal, and potentially limits the utility of an appeal to the appealing party. Therefore, when evaluating the possibility of an interlocutory appeal, the evaluation should consider the cost of a stay motion as well as the likelihood and potential impact of a stay being granted or denied, recognizing that such stays are granted infrequently in commercial cases.

§ 5:34 Cost-benefit analysis of moving for dismissal

As part of the evaluative process of deciding whether to file a motion to dismiss, defense counsel should engage in a cost-benefit analysis that balances the expense of preparing the motion with the likelihood of total or partial success and other possible ancillary benefits, such as obtaining information as to the theories underlying the plaintiff's claim. Before commencing an action, plaintiff's counsel should also engage in a cost-benefit analysis that balances the likelihood of having a motion to dismiss granted with the expense of prosecuting the case and any other possible disadvantages to prosecution, such as provoking a counterclaim that will not go away even if the motion to dismiss is granted.

Suppose a lawyer has a claim against a former client for fees. Does the lawyer bring the case? Will the defendant counterclaim alleging malpractice and, if so, will the potential expense and distraction of such a counterclaim outweigh the benefits of commencing a suit for fees?

²N.Y. C.P.L.R. 5519.

³N.Y. C.P.L.R. 5519(c).

IV. EVALUATING LIKELIHOOD OF DISMISSAL BASED ON MOTION FOR SUMMARY JUDGMENT

§ 5:35 Significance of summary judgment motion to evaluation of the case

Research References

Successful Partnering Between Inside and Outside Counsel §§ 11:7, 60:2

Lender Liability Litigation: Undue Control, 42 Am. Jur. Trials 419

The CPLR grants the parties broad rights to seek summary judgment at virtually any stage of the proceedings.¹ If a plaintiff is seeking only to enforce a judgment or recover on an instrument for the payment of money, she is entitled to file a motion for summary judgment in lieu of a complaint.² If a defendant believes that a complaint is factually without merit from the outset, it may submit evidence outside the pleadings on its motion to dismiss and may also ask the court to treat the motion as one for summary judgment. Either possibility means that consideration whether to make a motion for summary judgment should be a part of the initial case evaluation.

Summary judgment motions can be filed after issue is joined.³ Thus, aside from whether a summary judgment motion should be made at the outset, the case evaluation should also consider whether the particular case is one that will lend itself to summary judgment at some point in the proceedings. The answer to that question can impact the decision-making process, including in terms of whether to prosecute or defend the action, whether and how to settle the action and to guide strategic litigation decisions. From the perspective of both parties, a case that is likely to go to trial, as opposed to being one susceptible of summary disposition, is likely to have greater settlement value.

When representing the plaintiff, consider whether the defendant will be able to successfully move for summary judgment based on evidence in its possession even if a viable cause of action is adequately pleaded. In drafting a complaint, take into account all of the evidence of which you are aware, and craft the claims so that they can survive the introduction of any such evidence. At the same time, knowledge of the existence of dispositive evidence that cannot be explained away should be a significant factor in deciding whether to proceed with a claim in

[Section 5:35]

¹See generally Chapter 28, “Summary Judgment.”

²N.Y. C.P.L.R. 3213.

³N.Y. C.P.L.R. 3212(a).

the first place.

As an example, assume that your client has contacted you about the possibility of filing a breach of contract action. Your client's written contract provides that, for certain services provided to the potential defendant, that party would pay \$200,000. Your client tells you that the services were provided and no payment was received but, in reviewing your client's records, you see a letter from the potential defendant that purports to enclose a check for \$200,000 for the services provided. In this situation, you need to consider whether the defendant will submit the letter in support of a summary judgment motion. However, assume your client tells you that no check was received with the letter, and your client wrote a follow-up letter to the potential defendant noting that no payment was received. Under these circumstances, the evaluation may well conclude that a genuine triable issue of material fact exists,—that is, was the check actually received?—and a summary judgment motion therefore is unlikely to succeed (but what if the defendant submits a copy of the cancelled check?).

As a case proceeds through discovery, there is inevitably further factual development of the case. While an evaluation of the possibility of summary judgment should be done at the outset, that analysis will need to be updated as the case proceeds. As part of this continuing process, be alert to possible arguments by either side that there are undisputed facts that could dispose of some or all aspects of the case. The likelihood of a summary judgment motion being granted should be factored into the case evaluation right up to the time of trial. Indeed, New York law permits summary judgment motions to be made even after the filing of a note of issue to place the case on the trial docket.⁴

Think summary judgment from the start of the case. Trials are expensive. Gear your evaluative thinking and strategy to whether a successful summary judgment motion can be made at some point.

§ 5:36 Does the case lend itself to summary judgment prior to discovery?

Considering the potential expense of discovery, the initial case evaluation should consider whether there are indisputable facts that can be presented to obtain summary judgment. If the case evaluation leads to the conclusion that an early summary judgment motion has merit, the filing of one should be considered, utilizing a cost-benefit analysis and considering the various tactical ramifications of making such a motion. Part of that consider-

⁴N.Y. C.P.L.R. 3212(a).

ation, however, should be whether the adversary will have a compelling argument to defeat summary judgment by demonstrating that there may be facts essential to justify opposition in existence but not then available to that party.¹ At the outset of a case, a summary judgment motion can often be defeated in this manner. For example, assume plaintiff sues claiming that defendant breached an exclusive supply contract with plaintiff by using a different supplier. Defendant moves for summary judgment stating it did not use a different supplier. Plaintiff opposes by claiming it needs discovery to find out whether in fact the defendant did not use a different supplier. Evaluate what the likely outcome is in this scenario.

Evaluating whether to file an early summary judgment motion should take into consideration factors such as the likelihood of total or partial success, the possibility of denial based on the need to give the other side an opportunity to take discovery, the expense of the motion, the potential expense avoided by a successful motion, and the extent to which such a motion would give you further insight as to the facts and legal theories being relied upon by the other side.

§ 5:37 Does the case lend itself to summary judgment following discovery?

The possibility of moving for summary judgment during or at the close of discovery should always be considered. The case evaluation should always focus on what the critical facts are that will support your client's position and should consider, in this connection, whether there is any genuine dispute as to those facts. When the evaluation shows that the material facts are not genuinely in dispute, summary judgment can be sought. Further, when summary judgment is sought following the completion of all discovery, the other side is hard pressed to argue that it needs additional discovery to defeat the motion.

Summary judgment can also be a useful tool to resolve portions of a case, even if not the entire case. Thus, particularly in complex commercial cases, the possibility of narrowing the issues for trial is a significant factor to consider in evaluating whether to make a motion for summary judgment at the conclusion of discovery. This stands in contrast to the evaluation of whether to make an early summary judgment motion where the advantages of eliminating some but not all of the claims at the outset, without disposing of the entire case, may not be worth the expense at that stage of the proceeding because the claims most likely to be

[Section 5:36]

¹N.Y. C.P.L.R. 3211(d), 3212(f).

dismissed are also not likely to add to the expense or scope of discovery.

The evaluation of the possibility of filing a summary judgment motion at the conclusion of discovery should take into consideration factors similar to those considered when deciding whether to file a summary judgment motion before discovery. The additional factors discussed above should also be considered, including the difficulty that the other side will have at this point in arguing that discovery is needed in order to respond to the motion and recognizing that at this late stage of the case, there are significant advantages to seeking to at least narrow the issues for trial, even if not disposing of the entire case.

§ 5:38 How extensive is the discovery needed to get to the point of having summary judgment motions considered by the court?

A summary judgment motion made at the outset of the case can often be met with a successful opposition based on the need to take discovery in order to be able to respond to the motion.¹ Conversely, a motion made at the conclusion of discovery is unlikely to be met with successful opposition on this ground. Between these two extremes, the attorney should evaluate when a summary judgment motion can be successful after some, but not all, discovery has been taken.

From a defendant's perspective, the plaintiff's discovery may result in admissions that will create undisputed facts needed for a successful motion. Thus, for example, if a case turns on a claim by the plaintiff that the defendant acted in bad faith, and the plaintiff gives a deposition and states that no bad faith was involved, a motion for summary judgment could then be made without significant risk that the other side can successfully argue that it needs discovery to oppose the motion. Further, as the basis of opposition is "[f]acts unavailable to opposing party,"² take the example of a fraud claim where the defendant moves for summary judgment and submits an affidavit stating that it did not act fraudulently, and demonstrating why. Plaintiff opposes, contending that it needs discovery to show that defendant acted with fraudulent intent because the facts of defendant's intent are in the defendant's possession. The motion for summary judgment is denied without prejudice to its renewal. Plaintiff deposes five top officers of defendant's company, at which point defendant again moves for summary judgment. Plaintiff, in opposition,

[Section 5:38]

¹See § 5:36.

²N.Y. C.P.L.R. 3212(f).

acknowledges that there is no evidence of fraudulent intent based on the five depositions of the top officers, but says that it needs to take 15 more depositions of lower level employees. Will the court allow the additional discovery in that circumstance? When is enough enough? In evaluating whether and when to move for summary judgment, during the discovery process, factors such as these should be considered.

§ 5:39 Significance of interlocutory appeal procedures

As with CPLR 3211 motions, the possibility of an interlocutory appeal should be factored into the evaluation as to whether to make a summary judgment motion.¹ In contrast to federal procedure, the denial of a summary judgment motion can be immediately appealed. This can be a significant factor weighing in favor of making the motion when the evaluation suggests that the motion is a strong one.

§ 5:40 Cost-benefit analysis of moving for summary judgment

In evaluating the possibility of making a summary judgment motion, you should engage in a cost-benefit analysis similar to the type conducted when evaluating whether to make a motion to dismiss.¹ The factors to be weighed include the likelihood of success, the expense of making the motion, the prospect of an interlocutory appeal, the expense that can be avoided by a successful summary judgment motion and other ancillary pros or cons to making the motion. Summary judgment motions, more so than motions to dismiss, have the added benefit (even if they are unsuccessful) of showing the court the strengths of your case and gaining “discovery” of the other side’s case. Conversely, just as you can learn about the other side’s case by making such a motion, the briefing of the motion can reveal to your adversary and to the court weaknesses in your case. All of these factors should be considered in evaluating whether and when to make such a motion.

V. EVALUATING THE CASE FOR SETTLEMENT

§ 5:41 Ongoing process from commencement of the case

Research References

Successful Partnering Between Inside and Outside Counsel §§ 12:1 to

[Section 5:39]

¹See § 5:33.

[Section 5:40]

¹See § 5:34.

12:33, 10:23, 65:31

Managing Litigation, 51 Am. Jur. Trials 1

Settling the Case—Defendant, 4 Am. Jur. Trials 379

Settling the Case—Plaintiff, 4 Am. Jur. Trials 289

From the outset, settlement possibilities should be part of the case evaluation. The evaluation should seek to identify the settlement “value” of the case based on the various methods discussed in this chapter. This includes a cost-benefit analysis,¹ either a formal or informal “decision tree” analysis² and consideration of the client’s objectives and likelihood of success. A well-done initial evaluation can go a long way towards assessing the settlement “value” of the case. The evaluation should realistically evaluate the case’s weaknesses as well as strengths so that if, for example in the case of a defendant, the client is likely to be held liable in whole or in part, an early settlement can be considered before substantial legal fees are incurred in what will prove to be an ultimately losing battle. Conversely, if the evaluation shows the case to be without merit but not susceptible to summary disposition, the defendant/client may want to consider whether the case can be settled for “nuisance value,” assuming that a settlement of that nature is not at odds with the client’s attitudes and objectives.

Do not be afraid to raise settlement with your client even if the client and the other side have not. Commercial cases can be very expensive to litigate. As you evaluate the case, you do your client a service if you bring to its attention, at appropriate junctures, issues relating to a possible settlement where your evaluation indicates that such a result would best serve the client’s objectives.

§ 5:42 Ongoing process from commencement of the case—Changing evaluation as the case progresses

Research References

Settling the Case—Plaintiff, 4 Am. Jur. Trials 289

While you should evaluate the settlement possibilities of the case from the outset, the settlement value of the case is likely to change over the course of the litigation. Discovery will result in a greater understanding of the evidence in favor of and opposed to your client’s position, some theories may be rejected or accepted by the court in ruling on various motions, and expenses will mount as the case continues. As the factors that go into evaluat-

[Section 5:41]

¹See § 5:21.

²See § 5:26.

ing the case change, the settlement “value” of the case will usually change with them.

§ 5:43 Ongoing process from commencement of the case—What do documents reveal?

Just as deposition testimony can reveal facts that change the settlement evaluation, documents that are revealed in discovery can have a significant impact as well. If, for example, your adversary contends that your client’s breach of contract claim for \$200,000 for services provided should be no more than \$100,000 because a cover letter states that a \$100,000 check was already sent to your client, an internal memo discovered in your adversary’s files stating that no payment had been made will not only strengthen your hand in preparing a dispositive motion or at trial, it should also affect the evaluation of what a proper settlement “value” is for the case.

§ 5:44 Ongoing process from commencement of the case—What is the impact of deposition testimony?

Research References

The Use of Videotape in Civil Trial Preparation and Discovery, 23 Am. Jur. Trials 95

Depositions of witnesses may significantly impact settlement evaluation. No matter how the lawyer evaluates the case based on her understanding of the facts, unexpected testimony can occur at a deposition that will change the prior assessment. Also, no matter how the case has been evaluated and what your initial impression was of the witnesses, depositions will tell more about the demeanor and credibility under oath of the witnesses on both sides. While initial face-to-face interviews will help you to assess the demeanor of your client’s witnesses, and perhaps the witnesses of friendly third parties, your initial assessment should be tested against how such witnesses react under hostile questioning while under oath. A witness who appears cool, collected and credible during an interview could appear angry, indecisive or self-serving under hostile interrogation. Conversely, a witness who appeared indecisive or uncertain during an interview could appear highly credible at a deposition. Seeing your own witnesses at deposition could affect your willingness to rely on a particular witness, and that should lead you to reassess the settlement value of the case.

More importantly, the deposition process will provide you with your first opportunity to assess the credibility and demeanor of your opponent’s witnesses. In an initial settlement evaluation, the strength or weakness of your opponent’s witnesses will usu-

ally be a non-factor, as you will rarely have any reliable information to assess them at that time. The deposition process will enable you to fill in this blank and provide a much stronger indication as to the quality of the evidence upon which your adversary will rely. This needs to be factored in to the settlement evaluation.

§ 5:45 Ongoing process from commencement of the case—How are the issues being framed?

The ongoing development of the case will also affect your initial settlement evaluation. Factual development during discovery, for example, may eliminate certain defenses that you initially hoped to assert, while at the same time raising other defenses that you had not considered. The issues, or at least the emphasis on particular issues, may change in the course of discovery or during pre-trial motion practice. As with everything else, these changes need to be considered as part of the ongoing evaluation of settlement possibilities.

On occasion, there can be developments in the applicable law that will change the dynamics of the case and consequently the settlement analysis. Court decisions in other cases could potentially eliminate or affect legal theories upon which you or your adversary hoped to rely, or make those theories more difficult to prove. If, for example, your adversary has made a claim for fraud, cases discussing the type of facts needed to establish scienter may change the evaluation of the case and with it the settlement evaluation.

§ 5:46 Ongoing process from commencement of the case—Impact of court orders and decisions

Another factor shaping the direction of and ongoing evaluation of a case is the court's orders and decisions. Examples of how orders and decisions can affect the settlement process are myriad. Assume there is a claim for \$100,000. As defendant's counsel, you believe you have a 50% chance of winning a motion to dismiss. Based on this evaluation, plus factoring in the cost of the motion, you are prepared to settle the case for \$50,000. The adversary is not interested. The motion is argued and is denied. Has the settlement value of the case increased, now that the motion has been made and failed? What if a motion to dismiss is made to dismiss five causes of action and four of them are dismissed: Has the settlement value changed? What if at a conference before the court, the court indicates to the parties that it is likely to grant summary judgment for the defendants: Has the settlement value changed? What if there is a discovery dispute and the court rules that discovery can be expanded well beyond what you initially

expected would occur, thereby substantially increasing the cost of defending the case: Has the settlement value changed? What if defendant has fought tooth and nail to avoid producing certain sensitive financial documents and now the court orders their production: Has the settlement value changed (either before or after the documents are actually produced)?

Even where a court's order does not change the scope of a case, the reasoning expressed in the court's decision could also affect the settlement evaluation. If, for example, the court denies a motion to dismiss but brands the theory of the case speculative and unlikely to succeed, the settlement value needs to be reassessed in this light. The signals provided by the court as to how it evaluates the case can and should be a factor in the continuing evaluation of settlement by the parties.

§ 5:47 Formulas and other models for settlement evaluation

Research References

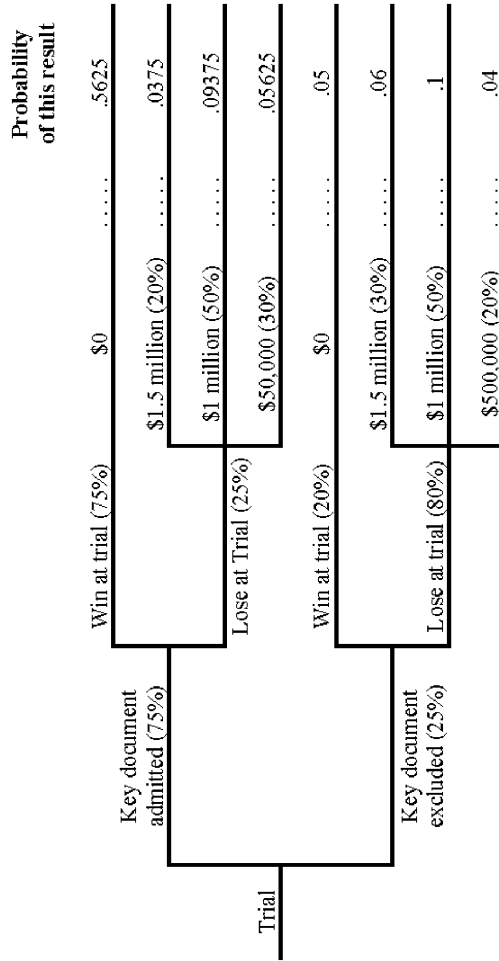
Settling the Case—Defendant, 4 Am. Jur. Trials 379

The decision tree analysis discussed previously¹ can readily be employed in determining the settlement value of a case. Assume the following facts: You hold a key piece of evidence, but because of recent case law, there is only a 75% likelihood that the evidence will be admissible. If the evidence is allowed in, you have a 75% chance of winning the case by defeating plaintiff's claim. If the evidence is let in, but you lose anyway, the odds are 50% that the recovery would be for \$1 million, with a 20% chance it could go as high as \$1.5 million and a 30% chance it could go as low as \$500,000. However, if the evidence is excluded (a 25% chance), the odds of winning drop to 20%, with an estimated recovery of \$1 million (50% chance), \$1.5 million (30% chance) or \$500,000 (20% chance). Before checking the decision tree analysis below, and disregarding trial costs, what do you think is the settlement value of the case?

Decision Tree Analysis Effect of Exclusion of Key Evidence

[Section 5:47]

¹See § 5:26.



<u>Outcome</u>		<u>Probability of this outcome</u>	=	<u>Result</u>
0	X	.6125	=	\$0
500,000	X	.09625	=	48.125
1 mm	X	.19375	=	\$193,750
1.590	X	.0975	=	<u>\$146,250</u>
				\$388,125

Did your gut tell you that \$388,125 is the expected value of the case? If not, do not be resistant to the idea of a decision tree analysis.

A decision tree analysis can also be useful in settlement negotiations, not only to enable you to judge the “value” of your case, but also as a guide to how your adversary values the case. Explore with your adversary the key issues of the case and what he feels the odds are of each one going his way. Also explore what he believes to be the dollar range of possible outcomes. Even allowing for the hyperbole with which opposing counsel typically presents this data, you can still use it to prepare a decision tree which could result in a number significantly lower than your adversary’s demand. If the analysis is helpful, you can take your adversary through it to show that even if things break plaintiff’s way, the eventual recovery will not approach the offer on the table.

§ 5:48 Assessment of settlement overtures from one’s adversary

Over time, you will develop certain opinions of your adversary as you observe her handling of her case. Is your adversary trustworthy or unreliable? Does she appear to have a detailed understanding of the facts of the case, or appear indifferent to those facts? Does she have a realistic assessment of the possible outcome, or does her assessment appear overblown and unrealistic? Your answers to these questions will inevitably affect how you receive a settlement proposal from your adversary.

When you receive a settlement proposal from your adversary, it is usually best not to take it at face value, even if you have concluded that your adversary is a skilled attorney and straightforward person. Certainly any settlement proposal from your adversary should be carefully compared to your own assessment of the case’s value. In addition, whether or not you get a reasoned explanation from your adversary as to how she arrived at the number, you should go back to your evaluation of settlement to determine whether the settlement offer is in the range of what, according to your evaluation, should be an acceptable settlement

that can be recommended to your client.

§ 5:49 Factoring in settlement initiatives by the court

Some judges, even in non-jury trials (but usually with the parties' consent in that instance), are willing to take an active role in settlement. In that situation, depending on the judge, the judge may act like a mediator (trying to facilitate an agreement between the parties) or act like a judge (offering opinions and trying to cajole one side into accepting a particular settlement). On occasion, the judge will offer a "recommendation" as to what she thinks the case is worth. The tactics of how to negotiate a settlement when the judge is playing an active role in settlement is beyond the scope of this chapter.¹ However, in terms of your own case evaluation, the evaluation needs to be reconsidered in light of the views being expressed by the judge. Part of that evaluation needs to consider whether the judge is really expressing an opinion on the merits or whether the judge is simply trying to push both sides to get to a common ground, with the merits really not making a difference. If you believe the judge is expressing a legitimate opinion on the merits, and that opinion differs from your evaluation, you should reassess your evaluation in that light, recognizing that if it is a jury trial, the judge's opinion may not matter as significantly as if it were a bench trial. On the other hand, the judge's expressed, or even unexpressed but implied, opinion may telegraph how she is likely to rule on pre-trial motions or instruct the jury. These factors, if inconsistent with the predictions contained in your evaluation, should be considered as part of a revised settlement evaluation.

VI. EVALUATING THE CASE IN THE CONTEXT OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

§ 5:50 Cost-benefit and other considerations

Research References

Successful Partnering Between Inside and Outside Counsel §§ 9:33, 11:34

Many ADR procedures are available to litigants today, including binding arbitration, non-binding arbitration, non-binding mediation, "baseball style" arbitration, mock jury trials and other

[Section 5:49]

¹See Chapter 32, "Settlements."

devices, some customized for a particular case.¹ Litigation can be a lengthy, expensive process. And while arbitration today can often be expensive in and of itself, consideration of arbitration or other ADR procedures should be part of any case evaluation. Factors such as the amount in dispute, the projected cost of full-blown litigation, the nature of the case in terms of whether it is particularly suitable for ADR and the willingness of the parties to cooperate with each other in an ADR setting are among the many factors that need to be considered in evaluating whether to go the ADR route.

In terms of cost-benefit, binding arbitration can be a substitute for litigation and a cost-benefit analysis can be applied to determine whether this form of ADR is in the interest of the particular client. Other forms of ADR such as mediation are not a substitute for litigation, but rather a supplement designed to settle the case in an expeditious, less expensive fashion. Thus, the cost-benefit analysis for mediation, mock jury trials and other non-binding forms of ADR is different than when arbitration or some other binding form of ADR is being considered.

As with settlement, do not be afraid to raise the possibility of ADR procedures with your clients. Many clients are unfamiliar with these procedures and need to be educated. Your client will appreciate that you are thinking of ways to resolve the dispute, cost-effectively, irrespective of whether a decision is made to employ ADR.

§ 5:51 Cost-benefit and other considerations—Mediation, including court ordered mediation

Research References

Successful Partnering Between Inside and Outside Counsel §§ 57:11 to 57:28.1, 57:32, 57:48

In mediation, both sides will agree to the appointment of a neutral who typically will meet with the attorneys and their clients as a group, then meet with each side without the other present, and back and forth, trying to help the parties find common ground. The mediation process is a valuable tool in achieving settlements, although it will usually work only when both sides enter the process with a willingness to settle.

In evaluating whether to mediate or not, the attorney should consider the cost of mediation (usually easy to quantify) versus the benefit (possible resolution of the case). Other factors need to be considered as well, including:

[Section 5:50]

¹See generally Chapter 46, “Alternative Dispute Resolution.”

- whether the client is willing to settle
- whether there is a reasonable belief that the other side is willing to settle
- whether having the mediation (especially with clients present) will “give away” information to the other side that can be used for tactical advantage
- whether it is a “sign of weakness” to suggest mediation
- whether the process will result in making settlement offers that tactically should not be made if the matter is not going to settle
- whether it is worthwhile to start the process even if it will be unsuccessful for now
- whether it will be useful for the client to hear directly from a neutral what the weaknesses are in the particular case

There are many ways to deal with some of the concerns that parties may have about the mediation process, although that discussion is beyond the scope of this chapter.¹ That said, there is often no real downside to the process other than cost and time. But an assessment of the other factors is critical to whether mediation should be employed. If the client is not willing to settle, the mediator is not going to convince the other side to drop the case. That is not the purpose of the process, although many clients have difficulty understanding that.

The substantive evaluation of the case as well as the evaluation of the case for settlement purposes can be valuable in connection with a consideration of mediation. The logic that leads to the assessment of settlement value may guide the client as to whether mediation is likely to be successful, and the same evaluation and how it leads to settlement can be presented during the context of the mediation. If that evaluation is sound, and the other side is prepared to approach mediation in a constructive fashion, the evaluation can form the basis for a settlement of the case. Just as a good legal brief can guide a judge’s opinion, a good case evaluation can guide a mediator towards facilitating a settlement.

Even an unsuccessful mediation can have benefits. It may aid both sides to revise their evaluation of the case and, as a result, often leads to a settlement down the road with or without the aid of the mediator.

Although traditionally mediation occurs only when both parties agree to it, in recent years New York courts have been increas-

[Section 5:51]

¹See Chapter 46, “Alternative Dispute Resolution.”

ingly willing to compel the parties to use mediation to resolve disputes. The most significant such programs of which commercial litigators should be aware are the ADR procedures set forth in the rules of the Commercial Divisions of the Supreme Court that have been established in a number of counties throughout New York State.² In the Commercial Division in New York County, for example, the justice to whom a case is assigned or the Administrative Judge can require the parties to submit to mandatory ADR procedures, *that is*, mediation, although arbitration is available to the parties if they so choose.³ Under these procedures, the parties and their counsel are obligated to participate in at least one mediation session with a neutral appointed by the court.⁴

**§ 5:52 Cost-benefit and other considerations—
Arbitration, including non-binding arbitration**

Research References

West's Key Number Digest, Arbitration ⇨1 to 89

New York Jurisprudence 2d, Arbitration and Award § 1

Business and Commercial Litigation in Federal Courts §§ 9:1 to 9:4

Successful Partnering Between Inside and Outside Counsel §§ 57:29 to 57:31, 57:33 to 57:47

Binding arbitration leads to a different evaluation than whether to mediate. While mediation supplements the litigation process, arbitration replaces it. An entire chapter could be written about the pros and cons of arbitrating a particular case versus litigating the same.¹ In sum, to evaluate whether an arbitration should be agreed to in lieu of litigation, a multitude of factors should be considered, including:

- the relative cost of the two proceedings
- the nature of the claims and whether they are suitable for arbitration
- whether there is some form of specialized arbitrator

²See, e.g., Consolidated Rules, Rules of the Justices of the Commercial Division, Supreme Court, New York County, http://www.nycourts.gov/comdiv/Consolidated_Rules.htm; see Chapter 31, "Practice Before the Commercial Division."

³Rules of the Alternative Dispute Resolution Program, Commercial Division, Supreme Court, New York County, Rule 3, http://www.nycourts.gov/comdiv/ADR_Rules.htm.

⁴Rules of the Alternative Dispute Resolution Program, Commercial Division, Supreme Court, New York County, Rule 7(e), http://www.nycourts.gov/comdiv/ADR_Rules.htm.

[Section 5:52]

¹See generally Chapter 46, "Alternative Dispute Resolution."

- expertise that would be helpful
- whether the case is one in which it is appropriate to forego discovery (particularly depositions)
- whether the case should be entrusted to arbitrators who are not judges
- whether giving up (as a practical matter) any right of appeal is warranted

In order to evaluate whether to arbitrate, it is necessary to evaluate the case itself. A case with strong legal defenses, particularly one susceptible to disposition by pre-trial motion, is probably not a good candidate for arbitration. On the other hand, a relatively small case in a specialized industry that is not likely to be disposed of on legal grounds may be a good candidate for arbitration. The parties can also agree on whatever particular arbitration procedures they want, such that a customized proceeding can potentially be set up that will serve the objectives of both sides. Of course, as the parties are in litigation, efforts to agree on such procedures often turn into protracted negotiations that in and of themselves become expensive and a negative factor in pursuing arbitration as a form of ADR.

While, traditionally, binding arbitration has been viewed as less expensive than litigation that assumption needs to be examined in a particular case. Today, arbitrations can be protracted and complex. And when arbitration goes into multiple sessions, they are (unlike most trials) often not held on consecutive days, forcing repeated rounds of trial preparation, which increases rather than reduces costs. These factors need to be considered as part of the evaluation of whether to arbitrate.

Another form of ADR that could be considered is non-binding arbitration. Non-binding arbitration is what the words entail. The parties go through a regular arbitration proceeding and the arbitrator makes his ruling, but it is not binding. The idea is to show the parties what a neutral person thinks of the case. Non-binding arbitration is more expensive than mediation and as it does not have the finality of binding arbitration, the cost-benefit analysis of engaging in it is different than it would be for binding arbitration. It usually makes sense only in small cases. As a practical matter, in such cases, once the parties have gone to the expense of non-binding arbitration, it is unusual for the losing side to then insist on a trial.

Bear in mind that any arbitration procedure selected during the dispute will require agreement with your adversary. So even if your own evaluation suggests that arbitration is a good way to proceed, the other side will need to be convinced as well.

§ 5:53 Cost-benefit and other considerations—Baseball style or other forms of binding arbitration

Research References

West's Key Number Digest, Arbitration ⇨31
 New York Jurisprudence 2d, Arbitration and Award § 1
 Business and Commercial Litigation in Federal Courts § 42.4
 Successful Partnering Between Inside and Outside Counsel § 57:5

There are variants of traditional binding arbitration that the parties can consider and agree to. The options are as varied as the creativity that one can bring to bear on the process. In evaluating the case, the nature of the dispute may lend itself to a particular form of binding arbitration.

In “baseball” arbitration, for example, each side picks a dollar amount that it thinks should be awarded. The arbitrator, after hearing the case, then picks one of the two numbers and cannot pick anything in between. For example, suppose there is a fraud claim for \$1 million. The plaintiff may submit to the arbitrator a \$750,000 demand, while the defendant submits \$250,000 as what he thinks the case is worth. Following the hearing, the arbitrator then picks the number that he thinks is more appropriate. This style of arbitration encourages settlement because, when the parties learn each other’s numbers, the “gap” may be close enough to be bridged by negotiation rather than arbitration. This form of ADR also allows each party to feel that it will get some benefit from the proceeding as neither side will get a complete win, as they would if the case went to trial or traditional arbitration. All the factors that go into case evaluation, including the assessment of the likelihood of winning the case and the settlement value, enter into a determination of whether to pursue “baseball style” arbitration. And, if such arbitration is agreed to, the settlement evaluation that has been conducted will be critical to determining what the proper “number” is to submit to the arbitrator.

§ 5:54 Cost-benefit and other considerations—Non-binding mini-trials

Research References

Successful Partnering Between Inside and Outside Counsel § 78:12
 The Use Of Alternative Dispute Resolution In Intellectual Property, Technology-Related Or Innovation-Based Disputes, 55 Am. Jur. Trials 483

A mini-trial can take different forms, but essentially is an ADR procedure whereby both parties present their respective cases in truncated fashion, either to a “judge” or a panel of “jurors.” While non-binding, the mini-trial gives both parties an opportunity to see how their cases will play out before a fact finder and perhaps

most importantly, see how the fact finder reacts to the case. That reaction can result in a settlement that would otherwise not occur.

In evaluating whether to agree to a mini-trial, the lawyer should consider many of the same factors that determine whether to utilize other forms of non-binding ADR, including mediation. A mini-trial is more likely to be used as a device following discovery, both because discovery is needed to make a complete presentation, and because otherwise parties might be reluctant to reveal their case in the course of the proceeding. A mini-trial will be more expensive than mediation and this should be factored in as well.

If the mini-trial does not result in settlement, the procedure itself as well as the outcome should result in revisions to case evaluation, including as to settlement, based on what transpired during the course of the mini-trial.

§ 5:55 Use of alternative dispute resolution procedures to better evaluate the case

Even if non-binding or unsuccessful, ADR procedures can provide useful insight into your and your adversary's respective positions and, therefore, can potentially advance your evaluation of the case. Any ADR procedure will require you to hone your arguments and test their persuasiveness on a third party. Any ADR procedure will also provide you with an opportunity to witness your adversary doing the same thing. Finally, participation in an ADR procedure will require both sides to engage in a careful evaluation of what they think the case is worth and, if in the course of the proceeding, you learn the other side's views on the subject, it can color your own, assuming that the case does not settle as a result.

VII. EVALUATING THE CASE BEFORE AND AFTER TRIAL

§ 5:56 Cost-benefit analysis of going to trial

Once discovery is completed and dispositive motions decided, if the case has not been completely resolved by motion, a trial will ensue.¹ Usually, there is an effort (often urged by the court) to see if the case can be settled prior to the trial.

As with earlier stages of the case, the evaluation of whether to go to trial requires a cost-benefit analysis that would balance the

[Section 5:56]

¹See generally Chapters 33 to 47 on various aspects of trials in commercial cases.

factors, including the expense of conducting a trial, the likelihood of success, the risk of an adverse result, the benefit of a favorable outcome, and what a potential settlement might be in lieu of trial. Of course, at this stage of the proceeding, your case evaluation should be considerably fine-tuned. Discovery will have been completed. Trial witnesses will have been observed in person. Key documents will be known. Many of the legal issues have now been briefed and possibly determined by the court. The issues in the case may have been narrowed. All these factors should make the evaluation more precise in terms of the attorney's ability to assess the likelihood of success at trial, including the likely amount of damages or other relief to be awarded.

Of course, there is still more work to do and new uncertainties that come into the mix as one prepares for trial, including preparation of motions *in limine*,² jury charges or, in a bench trial, legal memoranda that will present legal (and factual) issues to the court. How the court will rule on motions made during the trial or how a court will word a particularly critical charge can have a significant impact on the result. These types of issues need to be considered as part of the pre-trial evaluation of the case with the expected outcome assessed as accurately as possible.

A trial in a complex commercial case can be very expensive. Estimating that expense, however, may be more readily quantifiable than the litigation itself, in that there may be less uncertainty to the process. While there will be significant pre-trial preparation that needs to be estimated, that preparatory work should be largely under your own control and not subject to the variances that occur during litigation, where the other side takes action that requires a reaction. The length of the trial needs to be estimated and, of course, the court will probably have some say in that. Once it is known how long the trial will take, the cost of the trial can become relatively easy to estimate by counting the number of lawyers and paralegals who will attend the trial (or be involved in support work back in the office) and calculating what their time charges will be on a per day basis for the number of trial days expected. Of course, as with other aspects of the litigation, things will occur during a trial that are unexpected—and that will require unanticipated work to be done—and the estimate of costs needs to consider this as well. Out-of-pocket expenses at trial will also need to be considered, including fees for expert witnesses and jury consultants and the cost of trial graphics and other presentation materials.

To properly evaluate whether trial versus possible settlement

²See generally Chapter 34, "Motions In Limine."

is the preferred course, the expense of trial should be compared to the expense of a possible settlement and the likely outcome at trial. Consideration of certain forms of ADR procedures, particularly mediation, should be part of the evaluative mix right up until the beginning of the trial. In commercial cases, another judge of the court or a retired judge serving as a judicial hearing officer may be available to mediate or otherwise assist the parties in attempting to reach a settlement.

Discuss the many factors with your client. Get his or her input. A proper evaluation can only be made after factoring in the client's particular objectives and considerations respecting the matter at hand.

§ 5:57 Cost-benefit analysis of going to trial—Jury versus non-jury trial

A significant factor in evaluating the outcome of the trial will be whether it will be tried to a jury or a judge. In commercial cases in the New York State courts, whether there will or will not be a jury trial may not be known until the note of issue is filed. A jury demand must be included in the note of issue or, if the party other than the one filing the note of issue wants a jury trial, a demand for jury trial should be filed within fifteen days of service of the note of issue.¹ If a demand for jury trial is not filed in this manner, the right to jury trial is deemed waived.² Once a demand for jury trial has been filed, it may not be withdrawn without the consent of the other parties to the action.

In jury trials, there will be certain expenses that will not be incurred in a bench trial, including in connection with preparation for voir dire, preparation of jury charges and motions *in limine*, and preparation of graphics for trial presentation. Depending on the nature of the case, and whether sympathies may lie with one side or the other, having a jury as the fact finder may significantly influence the case evaluation as to the likely outcome. The evaluative process will also need to consider whether there will be particularly critical jury charges or evidentiary rulings that are subject to debate and that could affect the outcome. Those need to be identified and the likely outcome evaluated.

§ 5:58 Cost-benefit analysis of going to trial—Jury pool

Research References

Business and Commercial Litigation in Federal Courts §§ 29.1 to 29.13

[Section 5:57]

¹N.Y. C.P.L.R. 4102(a). See Chapter 29, "Calendar Practice."

²N.Y. C.P.L.R. 4102(a).

Your ongoing evaluation of the case should be affected by the jury pool from which the jury will be selected.¹ Moreover, commercial cases often raise complex, highly specialized issues that one side or the other will have an interest in presenting to a more educated jury. Even before you are confronted with the individuals from which you will select a jury, you should analyze the likely jury pool in the venue in which the case will be tried, and take into consideration the type of jury you are likely to get in providing your recommendations to your client. Ask yourself: is the case being presented one that is difficult for someone outside the industry to understand? How sympathetic will my client appear to an average person not familiar with my client or her type of work? How sympathetic will the defendant appear? These types of issues should be part of the case evaluation from the outset, if a jury trial is in fact anticipated.

§ 5:59 Cost-benefit analysis of going to trial—Jury consultants

Research References

West's Key Number Digest, Jury ◊1 to 150
 Business and Commercial Litigation in Federal Courts §§ 3.3, 18.9, 29.5, 26.5, 29.10, 31.2, 31.5, 35.5, 80.2
 Successful Partnering Between Inside and Outside Counsel §§ 2:40, 23:50, 63:50, 64:1 to 64:27
 Use of Jury Consultant in Civil Cases, 49 Am. Jur. Trials 407

Parties have been increasingly attracted to the use of jury consultants in recent years. A jury consultant is a person who will analyze the jury pool and, when taking into consideration the issues to be tried, assist you in selecting a jury that, based on each juror's individual background, will be more likely to find in favor of your client. Jury consultants will be used in many cases where significant amounts are at issue and the parties have substantial resources to devote to the case. However, a jury consultant will add to the expense of the trial and the benefit of having the consultant versus that expense should be considered. The advice from a jury consultant, compared to what is realistically to be expected from the jury pool in the particular venue, can also impact the evaluation of the outcome of the case. If the jury consultant advises that the best jury is one of all white males with graduate school degrees and you are in a venue where the jury pool is largely minorities with high school educations, the evaluation as to the outcome of the case should be adjusted to take this into account.

[Section 5:58]

¹See generally Chapter 33, "Jury Selection."

§ 5:60 Cost-benefit analysis of going to trial—Mock trial**Research References**

Business and Commercial Litigation in Federal Courts §§ 29.6, 31.3, 33.8, 42.4, 47.5, 80.2

Successful Partnering Between Inside and Outside Counsel §§ 2:24, 2:40, 21:5, 21:9, 21:24, 23:5, 63:50, 63:56, 64:1, 64:2, 64:10, 64:12, 64:14, 64:18, 64:20, 64:21, 64:22, 64:22.1, 65:22, 66:27

Another tool that can be used to assist in trial preparation and to evaluate the case is undergoing a mock trial. A mock trial is, in effect, a test trial conducted before a group of individuals selected from the venue in which the trial will take place. Unlike a “mini-trial,” the adversary is not present. Some mock trials are more elaborate than others, but all will involve some form of presentation of both sides of the case to the mock jury. Counsel can then watch the jury deliberate, and see what arguments from both sides influence, or fail to influence, the mock jury.

Aside from allowing the trial lawyer to adjust his strategy based on the results of the mock jury’s deliberations, the mock trial can play a significant role in how you evaluate the likely outcome of the case. As it is a “test” run of what will happen before a real jury at trial, it is a “predictor” of the outcome and should be factored into your evaluation.

§ 5:61 Cost-benefit analysis of going to trial—Where the judge is the trier of fact

The evaluation of the case will be different in some respects where a bench trial is involved. If the case is to be tried to the judge, without a jury, certain expenses will be reduced. There will be no time spent on picking a jury, preparing for voir dire, or hiring jury consultants to assist with this process. Jury charges will not have to be prepared. The trial itself should move more rapidly and thus be less expensive, as there is no need for “side bars” outside the presence of the jury, there are likely to be fewer evidentiary objections, and scheduling can be made more convenient because there is no need to accommodate jurors. The evaluation of the outcome of the case will be affected also in that, in a bench trial, there may be better “predictors” (based on legal research) as to how the particular judge is likely to come out, whereas it is harder to predict what a jury will do.

Where you have a choice whether to seek a jury trial or not, the case evaluation should consider the pros and cons of each. Aside from the difference in expense, a bench trial may be beneficial to your case. For example, if you believe that your client has a complex argument to make or a strong case on legal grounds, a trial before a judge may be advantageous. In addition,

a judge's background and decisions in prior cases can be researched whereas there is no comparable predictor of what the jurors will do. As part of the evaluation, the judge's prior decisions should be researched and information obtained about the judge's practices and biases, if any. These factors should be part of the ongoing evaluation of the case, including the determination as to whether to seek a jury or non-jury trial. As noted above, New York practice (unlike federal) does not require that decision to be made until the filing of the note of issue (after the completion of discovery), the decision can be made at a point when more is known about the particular judge and the judge's attitude towards the case, recognizing that, in the New York State courts, the trial of the case may be re-assigned to a judge other than the one who has handled the case up to trial.

§ 5:62 Cost-benefit analysis of post-trial motions

The trial is the primary focus of any case, but it is not necessarily the end of a case. After the jury has rendered its verdict, the losing party may file a motion for judgment notwithstanding the verdict or for a new trial.¹ Post-trial motions present a limited possibility of success, but may present another opportunity to vindicate your client's position, especially in a case that was decided based on a unique or untested legal theory. After a verdict, therefore, you should evaluate the potential impact of post-trial motions and discuss this with your client.

If you are the prevailing party, you should examine the trial record carefully to identify the issues that could be raised by the other side in a post-trial motion so that you can evaluate whether any such motion would be of such significance that your client should consider some type of compromise to the verdict in order to end the proceedings. If your client does not prevail at trial, you should evaluate the pros and cons of making a post-trial motion, including consideration of factors such as the cost involved in making the motion, the likelihood of success on the motion, how the making of such a motion may affect an ultimate appeal, and whether the making of a motion will create leverage for an "eleventh hour" settlement even if the settlement is to be only a slight reduction in the amount of the judgment against your client. The evaluation should also consider, in the context of whether to make post-trial motions, what the chances of success will be on appeal and whether tactics and resources are best served by making only post-trial motions, going straight to an appeal without post-trial motions, or doing both.

[Section 5:62]

¹N.Y. C.P.L.R. 4404(a),(b). See Chapter 47, "Trial and Post-Trial Motions."

§ 5:63 Cost-benefit analysis of appeal after trial to verdict**Research References**

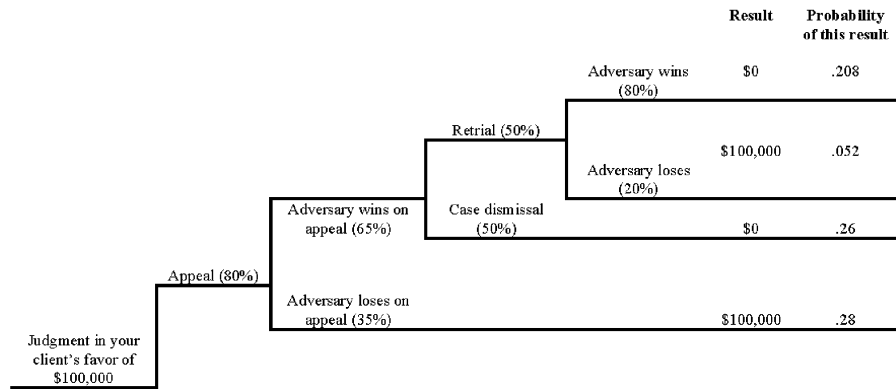
Successful Partnering Between Inside and Outside Counsel §§ 66:17, 66:18

Following a verdict, it is common for the attorney for the losing party to announce her intention to appeal. Many times, even where there is little chance of a successful appeal, the prospect of one is used in an effort to secure a “discount” on the judgment in exchange for immediate payment. Thus, both sides should evaluate, following a verdict, what the likelihood of success is on an appeal as well as the costs involved. Estimating the costs of an appeal is much easier than estimating costs of pre-trial and trial proceedings as there are far fewer variables that affect cost. Depending on the length of the trial and the size of the record that needs to be reviewed, the experienced appellate practitioner should be able to reasonably estimate how much time it will take to prepare the briefs on appeal.

Depending on the verdict, and the post-trial evaluations of both sides, there may be a window of opportunity to settle the case before an appeal is actually prosecuted with its attendant expense. In some cases, the cost of the appeal itself, particularly if there is a reasonable chance of reversal or a new trial, may be sufficient incentive for the parties to settle. Of course, the evaluative mix to determine settlement “value” changes once a verdict has been rendered, with the settlement value now being set as a practical matter at the amount of the verdict minus some form of discount to reflect the possibility of reversal or a new trial.

Consider these factors when making the evaluation: is your adversary serious about taking the appeal; what are the odds of success; what has been the result in similar cases; is your client willing and able to bear the costs of the appeal; is your adversary willing and able to bear the costs; will a successful appeal result in a reversal or a retrial? Once again, these questions can be answered through the creation of a decision tree analysis:

Appeal Evaluation



CASE EVALUATION

§ 5:63

No appeal (20%)	\$100,000	.2
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<u>\$ Result</u>		<u>Probability of result</u>		<u>Outcome</u>
0	X	.468	=	\$0
\$100,000	X	.532	=	<u>53,200</u>
		Expected Value		\$53,200

In the example above, plaintiff won a \$100,000 judgment at trial, but recognizes that a significant error was made below which results in a significant chance (65%) that if an appeal is taken, the judgment will be reversed, with a 50-50 chance of a retrial as opposed to an outright dismissal. If the case is retried, a second victory is a long shot (20%). Given these uncertainties, a significantly discounted settlement would be in order.

If you also factor in the costs of an appeal and a possible retrial, which you should, the argument for settling becomes stronger, but bear in mind that both sides will bear these costs, and a rational adversary will also keep them in mind in his case evaluation.

§ 5:64 Cost-benefit analysis of appeal after trial to verdict—Chances of success on appeal to the Appellate Division

Following a verdict and judgment in the Supreme Court, there is an appeal as of right to the Appellate Division.¹ Thus, in evaluating whether to settle in connection with a prospective appeal, it should be recognized that the appeal will be heard if the prospective appellant does in fact perfect an appeal.

The evaluation process should be ongoing during the appeals process, just as it is during proceedings in the lower court. While the filing of the notice of appeal and pre-argument statement is not likely to add much substance to the mix, in some instances it may shed light on what the adversary believes are the reversible errors made by the trial court. Conversations with your adversary can also lead to obtaining this information prior to appellate briefs being filed. In order to evaluate whether to consider a “discounted” settlement from the winning side’s perspective, you need to learn what issues your adversary intends to brief on appeal. Remember that it costs virtually nothing to file a notice of appeal. As a result, the filing of the notice, which is of course necessary to protect the appellant’s rights, does not necessarily mean that the appellant will actually go ahead and perfect the appeal by filing the record and briefs.

[Section 5:64]

¹See generally Chapter 53, “Appeals to the Appellate Division.”

Counsel should bear in mind that the Rules of the Appellate Divisions for the First and Second Departments provide for a pre-argument conference where settlement may be discussed, if not actively encouraged.² An evaluation of the likelihood of success on the appeal is often the principal topic of discussion at the conference. Thus, the conference may provide an opportunity, somewhat akin to mediation, to attempt to resolve the case short of a full appeal. The post-trial case evaluation will be critical at this stage in making a determination whether to even consider settlement and, if so, what the settlement amount should be in the post-judgment environment.

§ 5:65 Cost-benefit analysis of appeal after trial to verdict—Chances of having a successful appeal to the court of appeals

If the trial judgment has been affirmed by the Appellate Division, the CPLR provides for appeals to the Court of Appeals.¹ However, these appeals are rarely as “of right.” To be able to appeal to the Court of Appeals as “of right” from a final order of the Appellate Division, at least two justices will have had to dissent on a question of law.² Otherwise, appeals to the Court of Appeals may be taken only by permission.³

As it is not easy to obtain leave to appeal to the Court of Appeals, the evaluation of the case following an affirmance in the Appellate Division should factor in the difficulty of having leave to appeal to the Court of Appeals granted, even putting aside what the result would be if such permission were granted. The case evaluation at this stage needs to consider the rules and legal principles that govern whether permission to appeal should be granted, and factor in what the likelihood is of leave being granted and, if granted, what the likelihood is of a reversal on appeal. Statistics for 2002 show that the Court took only 109 civil appeals that year, but that 48 of them resulted in a reversal or modification.⁴ Thus, if the evaluation were to conclude that there is a reasonable likelihood that leave will be granted, it may fol-

²N.Y. Comp. Codes R. & Regs. tit. 22, §§ 600.17 (Rules of the Supreme Court, Appellate Division, First Department), 670.4 (Rules of the Supreme Court, Appellate Division, Second Department).

[Section 5:65]

¹See generally Chapter 54, “Appeals to the Court of Appeals.”

²N.Y. C.P.L.R. 5601(a). Other limited grounds also exist for an appeal as of right. N.Y. C.P.L.R. 5601(b).

³N.Y. C.P.L.R. 5602.

⁴2002 Annual Report of the Clerk of the Court to the Judges of the Court of Appeals of the State of New York, <http://www.courts.state.ny.us/ctapps/2002AnnRep.pdf>.

low in many cases that reversal is also a distinct possibility.

VIII. PRACTICE AIDS

§ 5:66 Case evaluation checklist

What are the client's objectives and goals?

- What does client want to achieve by prosecuting or defending case? (See §§ 5:8–5:10)
- Does the client have the resources (including time and money) for a full-blown litigation?
- Is the expenditure of time and money for a full-blown litigation economically sensible in relation to the amount realistically at stake?
- Does the client have an ongoing business relationship with the adversary, which it would like to preserve, if possible?
- If your client is the plaintiff, will a judgment, if obtained, be collectible?
- If your client is the defendant, are there others out there similarly situated to the plaintiff who will be watching the results of the litigation with interest?
- Are there potential counterclaims that may have a greater economic impact than the initial claim?
- Will prosecuting or defending the claim require the ongoing attention of key personnel whose time would be better devoted to your client's business?
- Is it important to fight, no matter the cost, to establish a reputation as a business that vindicates its position or does not settle meritless cases?
- Is there a legal principle that can affect the business that is worth vindicating, and is the particular case an appropriate one in which to seek vindication of that principle?

Initial evaluation

- Design evaluation to assess strengths and weaknesses of case, likelihood of success, estimated cost through trial and likelihood of early settlement or other means of achieving client's objectives. (See §§ 5:8–5:9)
- Is the case one that can be disposed of on a pretrial motion or are there disputed factual issues that will require a trial? (See § 5:7)
- Consider existence of insurance coverage. (See § 5:11)
- Identify and interview key witnesses. (See § 5:13)

- ✓ Get unrefreshed recollection of events.
- ✓ Show documents and otherwise refresh recollections.
- ✓ “Probe” witnesses and subject facts to “critical testing.”
- ✓ Reconcile factual inconsistencies.
- ✓ Evaluate demeanor.
- ✓ Prepare memoranda of witness interviews.
- Gather and review key documents. (*See* § 5:14)
 - ✓ Where do document depositories exist, either for paper or electronic documents that are likely to contain documents relating to this dispute?
 - ✓ Prepare index of documents.
 - ✓ Prepare memoranda analyzing documents.
 - ✓ Consider admissibility of key documents. (*See* § 5:18)
- Are there any former employees who may have information or documents pertaining to this litigation? (*See* §§ 5:7, 5:12–5:13)
 - ✓ Will they consent to an interview?
 - ✓ Prepare memoranda of any interview or documents obtained.
- Are there any third parties who may have information or documents pertaining to this litigation? (*See* §§ 5:7, 5:12–5:13)
 - ✓ Will they consent to an interview?
 - ✓ Prepare memoranda of any interview or documents obtained.
- Which personnel at your adversary are likely to have information relating to this dispute? (*See* § 5:3)
 - ✓ What information is likely to be in your adversary’s possession relating to this dispute?
- Identify and research key legal issues. (*See* § 5:17)
- Review publicly available information. (*See* § 5:15)
 - ✓ Background information on parties, lawyers and judge.
- Consider availability of witnesses for trial. (*See* § 5:18)
- Jury or non-jury trial. (*See* § 5:19)
- Prepare overall memorandum summarizing facts and relevant documents. (*See* §§ 5:13–5:14)
 - ✓ Prepare chronology of relevant events and documents.
 - ✓ Consider preparing written evaluation of strengths and weaknesses of case.
- Perform cost-benefit analysis for case and various aspects of case. (*See* §§ 5:21–5:26)
- Assess potential usefulness of ADR procedures. (*See* §§ 5:27–5:28)
- Assess possibility of settlement. (*See* § 5:29)

Evaluating possibility of CPLR 3211 motion to dismiss

- Is the complaint susceptible to being dismissed on a pre-answer motion, or will the focus be on factual development in discovery for an eventual summary judgment motion? (*See* § 5:30)
- Are there extrinsic facts or documents outside the pleadings that can be brought to the court's attention in connection with a pre-answer motion to dismiss? (*See* § 5:31)
- What is the likelihood of and impact of a possible stay of discovery pending determination of a motion to dismiss? (*See* § 5:32)
- What is the significance of the right of interlocutory appeal in evaluating the efficacy of making a pre-answer motion to dismiss? (*See* § 5:33)
- What is the cost-benefit of a pre-answer motion to dismiss being made? (*See* § 5:34)

Evaluating possibility of a successful summary judgment motion

- Are there indisputable facts that will result in summary judgment at some point? (*See* § 5:35)
 - ✓ Even before discovery, is the case one that includes indisputable facts likely to result in summary judgment? (*See* § 5:36)
 - ✓ What is likelihood that summary judgment motion made before discovery will be denied on the ground that facts exist not available to opposing party? (*See* § 5:36)
- Can facts learned in discovery be utilized to support a summary judgment motion? (*See* §§ 5:37–5:38)
- Is it useful to make the motion to eliminate some but not all claims? (*See* § 5:37)
- What is the significance of the right of interlocutory appeal in evaluating the efficacy of making a summary judgment motion? (*See* § 5:39)
- What is the cost-benefit of a summary judgment motion being made? (*See* §§ 5:36–5:40)

Evaluating settlement possibilities

- Evaluate settlement “value” at the beginning of the case. (*See* § 5:41)
 - ✓ Can the case be settled at the outset on the same basis

as is likely months and thousands of dollars later?

- As facts develop during discovery, revise evaluation of settlement “value.” (See §§ 5:42–5:44)
- As the court makes decisions, revise evaluation of settlement “value.”
- (See §§ 5:45–5:46)
- Determine settlement “value” based on decision tree analysis. (See § 5:47)
- Consider how adversary “values” the case. (See § 5:48)
- Consider court’s suggestions regarding settlement. (See § 5:49)

Evaluating possibility of alternative dispute resolution procedures

- Mediation. (See § 5:51)
- Binding arbitration. (See § 5:52)
- Non-binding arbitration. (See § 5:52)
- “Baseball” arbitration. (See § 5:53)
- Non-binding mini-trials. (See § 5:54)

Evaluating possibility of mediation

- Is there a willingness on both sides to consider settlement? (See § 5:28)
- Is there a possible “business” solution that will lend itself to mediation? (See § 5:51)
- Is there a “downside” to mediation? (See § 5:51)
- Consider when in the course of the litigation is mediation most appropriate. (See § 5:51)
- How expensive will mediation be? (See § 5:50)
- Will parties benefit from obtaining input directly from neutral third party as to the strengths and weaknesses of its case? (See § 5:51)
- What are the pros and cons of mediation giving a preview of potential arguments and positions at trial? (See § 5:51)

Evaluating possibility of arbitration

- Is there a contractual provision that arguably requires proceeding through binding arbitration? (See § 5:27)
- Will parties consider agreeing to binding arbitration? (See § 5:52)

- Consider pros and cons of arbitrating.
 - ✓ Is case factually complex and more likely to be understood by experts or those familiar with the particular industry involved? (*See* § 5:52)
 - ✓ Are there legal arguments that might have more appeal to a court than an arbitrator? (*See* § 5:52)
 - ✓ Is it worth giving up judicial procedures, such as dispositive motions, discovery and appeal? (*See* § 5:52)
 - ✓ Is client likely to appear sympathetic or unsympathetic to a jury? (*See* § 5:52)
 - ✓ Is client likely to benefit or be harmed from more limited access to other side's information through discovery? (*See* § 5:52)
 - ✓ Is proceeding through arbitration likely to save expense? (*See* § 5:52)
- Should non-binding arbitration be considered as a device to achieve settlement? (*See* § 5:52)

Evaluating case prior to trial

- Is it cost-effective to go to trial? (*See* § 5:56)
- Evaluate impact of a jury trial versus a bench trial. (*See* § 5:57)
- If a jury trial:
 - ✓ What is composition of jury pool? (*See* § 5:58)
 - ✓ Is it cost-effective to use a jury consultant? (*See* § 5:59)
 - ✓ Is it cost-effective to conduct a mock trial? (*See* § 5:60)
- If a bench trial, evaluate the particular judge's record in cases of the same type. (*See* § 5:61)
 - ✓ What has been experience with judge in pretrial proceedings in the case?

Evaluating chances of success on post-trial motion or appeal

- Engage in cost-benefit analysis as to the relative advantages and disadvantages of filing a post-trial motion to set aside the verdict before seeking an appeal. (*See* § 5:62)
- What evidentiary rulings did court make during trial that are potentially open to challenge on appeal? (*See* § 5:63)
- If a jury trial, what objections to jury instructions are available that could support an appeal? (*See* § 5:63)
- What is record of appellate court on types of issues in ques-

tion, *i.e.*, is appellate court more likely to reverse or affirm on these issues? (*See* § 5:63)

- Engage in cost-benefit analysis to determine chances of success on appeal. (*See* § 5:63)
- Does the case raise unique issues of law such that the Court of Appeals may be interested in hearing an appeal? (*See* § 5:65)

§ 5:67 Case evaluation timeline

Likely Information Available For Evaluation ¹	Time of Evaluation	Likely Uncertainties To Consider In Evaluation ²
Initial client interviews; client documents; interviews and documents of available third parties; publicly available documents; preliminary legal research	Initial evaluation: first meetings with client (<i>See</i> §§ 5:3, 5:7–5:29)	Adverse party's witnesses, documents; unavailable third party witnesses and documents possessed by unavailable third parties
Analysis of potential value of initial motions, including to dismiss or for summary judgment; cost-benefit analysis	Initial motion practice evaluation (<i>See</i> §§ 5:4, 5:23, 5:30–5:34)	Judge who will decide motion; opponent arguments and strategies, including possibility of previously unknown factual information used in opposition to motion
Results of initial motion practice; legal and factual developments since commencement of case	Evaluation as to type of discovery to conduct (<i>See</i> §§ 5:16, 5:22, 5:24–5:25)	Significance of information to be obtained in discovery

[Section 5:67]

¹Information is cumulative, so that information available at prior stages is added to new information at current stage.

²Uncertainties are not cumulative, and uncertainties in prior stages should be resolved as case proceeds.

Likely Information Available For Evaluation¹	Time of Evaluation	Likely Uncertainties To Consider In Evaluation²
Documents and testimony obtained during discovery	Evaluation as to when to make summary judgment motion (See §§ 5:4, 5:35–5:40)	Reaction of judge to arguments
Results of summary judgment motions; research on judge or jury pool; information regarding demeanor and credibility of witnesses obtained during discovery	Trial evaluation (See §§ 5:6, 5:56–5:61)	Reaction of fact finder (judge or jury) to evidence and argument
Outcome at trial, including trial record	Post-trial and appeal evaluation (See §§ 5:6, 5:62–5:65)	Reaction of appellate court