

Do You Use a Conflict Assessment? 10 Considerations before You File that Complaint

“Do not be driven only by your client’s perspective — even the most business- and economic-centered conflicts are driven greatly by emotion. As legal counsel, your value is to provide objectivity.”

BY JOSEPH MCMAHON

There are many tasks to accomplish and rules to consider before you file a complaint. Among those could be your duties of client counseling, document review, checking applicable court rules, and determining how to serve the complaint. However, the core issues of whether to file, what claims to assert, and how to best address the conflict could be aided by conducting a conflict assessment and thoroughly reviewing and revising it with your client — before filing a complaint.

Why use a conflict assessment?

As legal counsel for a plaintiff (in court) or claimant (in arbitration), you have substantial influence over how the conflict eventually will be resolved. You determine who is initially in the case and how your client’s problems and disputes are translated into claims and demands for relief. Because the filing of the complaint itself greatly changes the conflict, whether, when, and where to do so is an important and, to some extent, irreversible decision. These decisions therefore should be made thoughtfully.

How to conduct a conflict assessment

Begin the conflict assessment as soon as the matter is brought to you — and continue to refine the assessment as you learn more about the case and underlying conflict. Initially through client and witness interviews and documents, you can begin to complete the assessment. An assessment can give answers to the questions below. Write it

up. Share and discuss it with your client.

Assess what happened and what is happening now

1. What is the nature and context of this conflict? Among whom? What are root causes? What are the apparent interests and needs of each participant in the conflict?

The answers to these questions should give a broad view of the conflict. Do not be driven only by your client’s perspective — even the most business- and economic-centered conflicts are driven greatly by emotion. As legal counsel, your value is to provide objectivity.

2. What has triggered this conflict? What other conflict triggers are likely?

Did this conflict slowly emerge or did an event trigger it? If there are other potential triggers, it may be possible to take steps to stop the conflict from intensifying. Where suitable, efforts to contain the conflict may improve options for resolving it before litigation or trial.

3. What behaviors and actions sustain the conflict? Can the negative behaviors be mitigated?

Conflicts include not only competing interests but also attitudes and behaviors. You may be able to discourage behaviors that will intensify the conflict. Prompt counseling on this issue could save your client time and money in resolution.

4. What issues need resolution and, for those, what relief is appropriate?

Beyond the emotional issues of the conflict, what business and personal issues need a legal resolution? These

would be the foundation of the complaint. Ask yourself and your client what relief the legal system can provide. For matters beyond the legal system (such as relationship issues), are there other ways to find relief? This question requires you to counsel your client beyond what is frustrating or angering to the issue of what can we seek in the legal system?

Can we respond to the conflict other than with litigation?

5. If we seek to resolve this without litigation, what is a realistic scope of conflict to address in a negotiation or mediation process?

Your task as legal counsel includes determining the appropriate scope of the conflict. If you raise too few issues, the conflict may reemerge. If too many, resolution is much more difficult. In addition, early decisions by the prospective plaintiff give the conflict an early course toward resolution. Many litigated and arbitrated cases could have avoided going to hearing if early decisions had been more thoughtful. There can be a point or decision in a conflict that makes early or simple resolution impossible, such as contract termination, refusal to make a payment, declaration of default, dismissal of the employee, or rejection of tendered goods.

6. What settlement process could be used to address this conflict?

Counseling topics include consideration of whether to start direct negotiations or, alternatively, consider mediation, a neutral convening, or other approaches. As counsel, consider what you can do to make the process more

effective. The core of alternative dispute resolution is effective client counseling.

7. If undertaken, how should we prepare for the settlement process?

Consider asking yourself and your client, what do we need to understand about this conflict before approaching the other party or parties? What are their interests, and do they always compete with your client's bona fide interests?

Where you can find some alignment in interests, a door to resolution may open. However, this will not happen without consideration of the interests and needs of all parties to the conflict. Steer your counseling away from, "How do we prevail?" toward, "What does my client really need?"

8. If we begin a settlement process, who should participate? Are participants willing to engage in a collaborative process? What is their attitude? What is the process?

Care should be used when initiating settlement discussions. Early overtures send important messages. One would hope that in this century, we need not worry about whether initiating settle-

ment talks "shows weakness." In a multiparty suit, you will need to consider how to proceed if less than all parties agree to settlement discussions.

What should that process include and how will it be designed? Consider whether you should engage in direct negotiations or use a mediator or facilitator.

If the conflict cannot be moved to early resolution, what are your client's choices?

9. If not resolved, can conflict be reduced? Can the adverse effects be minimized?

If your client must proceed to litigation, what steps would lessen the effects on your client and, if applicable, your client's business interests? If your client has an ongoing business relationship with an opposing party (such as with a payment dispute over services or goods delivered), you can consider and propose methods and stipulations to resolve the dispute while minimizing the impact on all parties to the conflict.

10. If we must litigate, how should we approach it?

This includes the customary discus-

sion of what claims to make, where to file, and who to include as parties. Do not include claims that do not meaningfully improve your client's position. Makeweight claims, serving as weak bargaining chips, cause the conflict to become unnecessarily complex. Even if you must litigate, you can consider methods to simplify the conflict and reduce client costs and time for resolution. Consider whether a focused arbitration with agreements on arbitrator selection, discovery limits, and reduced hearing time could obtain a speedier resolution for all parties. **D**

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