

You're Hired: Now What?

A Checklist Approach to Getting Your Hands Around Initial Considerations in Litigation

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Why Use a Checklist?

Checklists are a great way to ensure quality control and reduce errors – the healthcare and aviation industries provide well-known examples

No. 1: Clear Conflicts

Clear conflicts before doing anything.

- **Failure to clear conflicts might require you to withdraw from your existing client relationship**
- **Unscrupulous clients may use consultations to conflict out potential counsel so be wary of unsolicited requests for advice**
- **Conflicts are imputed to your entire firm if any lawyer in the firm works on the new matter**
- **Attorneys (at least in California) who are conflicted cannot collect fees for any work performed**

No. 2: Check Business / Positional / Reputational Conflicts

Will the litigation create a business conflict, or a positional conflict with other clients? Any reputational conflict to be aware of/considered by management?

- **Much broader than the consideration of pure legal conflicts on interest**
- **Your review should extend to consideration of issues, positions, claims that have been or may be asserted to assess involving the new client and your other clients to assess whether your firm is comfortable taking on the new matter**

No. 3: Ability to Pay / Clear Understanding of Client Goals

Ability to pay and clear communication and understanding of client goals and expectations.

- **Don't forget about "Local Rule 1" – getting paid is always important**
- **Cost, discovery, length, expectations as to potential outcomes are all key topics to cover at the outset with a new client**

Nos. 4-6: Service / Court Docket Review / Local Rules / Calendaring

Confirm dates of service on all parties, review docket and court's packet, get all existing dates and deadlines calendared ASAP.

- **Confirm that all parties have been served (and whether or not to accept service), and that the proper parties are named**
- **Consider where to file if you are a plaintiff – usually there are several options**

Go on relevant court website and obtain, read and calendar all standing orders – both of the court, and the individual judge. Be sure to advise client of deadlines.

Provide all special rules of particular judge regarding manner, location and timing of filings to support staff

Nos. 7-9: Jurisdiction (Subject Matter and Personal) / Removal

Existence of subject matter jurisdiction.

- **Cannot be waived, and lack of it renders all litigation a nullity, except any admissions you made**

Existence of personal jurisdiction.

- **Can be waived, so be sure to consider whether to challenge it at the outset**

Removability (including under CAFA and super-preemption) and, if so, is it preferential to your client to do so.

- **Removal deadline cannot be extended, even by the agreement of the parties, and requires informed client consent**

No. 10: Arbitration

Determine whether there is an arbitration agreement to invoke, and client preference if so.

- **Motion to compel arbitration can result in stay or dismissal of an action, and failure to move to compel arbitration can be considered a waiver of arbitration**
- **Denial of motion to compel arbitration (in California) is immediately appealable, while a grant is not**
- **Consider whether your client is a third-party beneficiary of an agreement that includes an arbitration provision**

Nos. 11-12: Pendente Lite Relief / Related Litigation

Consider possible pendente lite relief: TRO, injunction, writ of attachment, receivership, involuntary bankruptcy.

- **Requires informed client consent to seek pendente lite relief**
- **Grant of mandatory relief may be immediately appealable (and stayed while on appeal) versus grant of prohibitory relief may not be appealed immediately and/or stayed**

Any related litigation, and possibility of consolidation, coordination, low-numbering, abatement under exclusive concurrent jurisdiction or other doctrines.

- **Existence of another matters may allow you to pick a forum and/or judge that is more favorable**

No. 13 Attorney Admission(s)

Confirm admission of you and team to jurisdiction in question. Consider whether local counsel is needed; pro hac vice applications if needed.

- **Need to check rules of the local jurisdiction at the outset of the matter**
- **Don't forget to consider admission in the specific District of the federal court in which you plan to practice**

Nos. 14-15: Necessary Parties / Legal Status of Plaintiff

Confirm presence of all necessary parties (joinder needed?) and possible existence of sham defendants.

Legal status of plaintiff: capacity, standing, absence of loss of claim through bankruptcy filing.

- **Consider whether plaintiffs have filed bankruptcy and what effect that may have on their ability to assert their claims**

Nos. 16-17: Transfer / Complex Designation

Consider seeking transfer under forum non conveniens; consider MDL if appropriate.

Consider seeking complex designation (LA, SF, Alameda, OC, others). Or counter-designate.

No. 18 Attorneys' Fees

Are attorneys' fees available, under contract or statute?

- **Prevailing party may be entitled to fees, and need to plead for them as a plaintiff**
- **Ensure that you get your client's informed consent before proceeding with litigation that could require payment of the other side's attorneys' fee in the event the case is lost**

No. 19 Judge / Opposing Counsel / Key Witnesses

Background on judge, opposing counsel, key witnesses. Consider 170.6 if appropriate. Poll colleagues re prior experiences with these people/entities.

- **Survey your colleagues about the judge, and consider peremptory challenges (if available)**
- **Research on your opposing counsel can dictate how you deal with them during the case**

No. 20 Experts

Consider early retention of consulting expert(s), and seek client input on any preferences.

- **Need to start the process early in case your preferred expert is not available or other issues arise**
- **Testifying experts -- including materials provided to them – must be disclosed, the same is not true for consulting experts**

No. 21 Regulatory Agencies

Consider whether any regulatory or policing agency can/should be involved, and on what grounds and how to approach.

- **Might the agency want to intervene and if so, what might be the consequence of intervention?**
- **Involvement of agencies could be a double-edged sword – for example, triggering an investigation of your client but also potentially staying the civil litigation**
- **Don't forget: it is a violation of the legal ethics rules to threaten to involve agencies in an effort to secure an advantage in a civil matter**

Nos. 22-24: Preclusion / Cause of Action / Other Claims

Potential application of claim or issue preclusion; claim splitting.

Assess whether causes of action alleged are actually disguised, to avoid other causes of action with a higher barrier to pleading

Consider whether cross-claims and/or counterclaims exist and whether to file.

Nos. 25-27: Insurance Coverage / Indemnity / Immunity

Consider and advise client re possibility of available insurance coverage. In writing to document we raised the issue. If so, obtain all potentially applicable insurance policies and ensure that notice is quickly provided to the insurers.

- **Failure to invoke insurance coverage that is available could be malpractice – on the flipside, finding insurance coverage the client didn't know it had could make you a hero**

Consider and advise client re possibility of contractual or equitable indemnity, such as from a prior owner or other source.

Consider immunities, such as governmental and others.

Nos. 28-32: Document Hold / Tasks / Plans / Budget / Documents

Document hold. Learn and understand client's document/data retention practices.

Outline task list for all these issues, and any others.

Present client with short-term proposed plan for managing the litigation.

Prepare budget for client and/or carrier, if required or requested.

Discuss with client the world of potentially relevant documents and where such documents are located.

The End

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