

The Importance of Early Case Assessment



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The Importance of Early Case Assessment

In an earlier era of lawsuits and settlements, virtually every attorney and every law firm was committed to the art of early case assessment. The reasons for this were pretty obvious, but they bear mentioning: Early case assessment gave attorneys a way to judge whether or not a case was worth the time and effort it would take to proceed through processes like discovery, depositions, a potential trial, or settlement talks with the opposing party. The process was generally assigned to highly qualified attorneys who made it their life's work to research cases, judge their expected costs, benefits, and outcomes, and make a recommendation to the firm's superiors about whether or not to take the case, whether it might require a significant investment, or whether it was likely to be beneficial to the firm's bottom line.

This early case assessment process was, in an earlier time, considered to be one of the art forms associated with the legal profession. It was judged to be one of the most meaningful parts of any attorney's regular responsibilities, and it was a skill highly valued in the classrooms of law schools both across the country and around the world. Then, sometime after the second half of the 20th century, the art of early case assessment became far less valued. Smaller firms were replaced by law firms that more closely resembled corporations, and an emphasis was placed on taking more cases rather than picking a smarter and potentially more beneficial case load overall.

The result over the past few decades has been the rise of firms that actually take on extreme financial liabilities by defending cases that aren't necessarily in their best interest. When combined with the increasing trend toward settling virtually every case, rather than letting it proceed to trial through the traditional court system, many law firms today are in a more financially perilous situation than they have been perhaps at any other point in their history. It is this precarious financial situation, combined with the rise of high-tech tools, small firm competition, and a transforming legal industry, that has once again placed the spotlight on early case assessment. As a way to save money, pick better cases, and generate better results, there is simply no better way to run a practice, turn a profit, and pick cases beneficial to the firm and clients simultaneously.

Problems with Early Case Assessment: Why it's a Lost Art

The 21st century is a new world for the average legal practice, with new software tools and a preference for settlement talks that simply didn't exist even during the late 1990s. Settlements, while sometimes lucrative, are known to be a poor way to offset the expenses of discovery and other legal procedures, and each settlement makes it harder to justify taking similar cases or more costly cases that will likely result in relatively little benefit for the firm. Though early case assessment might seem like a natural fit for this environment, it's often relegated to just a few junior associates or a simple software program. This isn't enough manpower or computer processing power to adequately determine the case's tendency to settle, result in high costs, or produce great rewards.

Generally, law firms cite three major reasons for essentially shutting down their early case assessment departments and either relying on software or simply performing a preliminary analysis of each major case that they agree to take on. These reasons are understandable, but many of them actually don't align with the real world benefits of early assessment and case analysis by a trained group of legal scholars.

1. Extra Costs During Early Case Assessment

In what might be described as a relatively short-term view of each case taken on by the firm's attorneys, many partners confess to Lexis-Nexis in a 2007 survey of the industry that early case assessment is simply too expensive. Many firms note that the salaries needed to pay a full-size case assessment department are too high, especially in an era of skyrocketing legal costs and a race to the bottom in terms of client fees, billable hours, and other ways that law firms typically earn back the expenses that they accrue during discovery and either the defense or prosecuting of a case.

As will be discussed later, these up-front costs are real but they don't necessarily prevent engaging in this critical procedure. Often, the cost of early case assessment can be more than eliminated by the financial benefits of more astutely choosing only the most financially and procedurally beneficial cases available to the firm.

2. Early Case Assessment Takes Too Much Time

One consequence of an era characterized by lightning-fast text messages, always-on data connections and new cycles, and escalating consumer impatience, is that most people have very little tolerance for a protracted discovery procedure. That's essentially what early case assessment is, and that means law firms come under quite a bit of pressure by prolonging their acceptance or rejection of a case based on its likelihood of settlement, total costs, and overall benefits.

Even so, early case assessment does have real benefits in terms of both client satisfaction and the actual outcome of each case. Law firms that perform early case assessment are likely to pick cases that they are more qualified to defend, cases that align the firm's experience with the client's perspective, and courts that are more receptive to the firm's attorneys.

These benefits actually can prevent settlement, lead to real outcomes that change corporate policies, government procedures, or other societal wrongs, and they can have a lasting impact for the firm that go above and beyond a successful settlement's benefits. Committing this amount of time to early case assessment procedures might be initially frustrating for clients but, if they're properly informed of the procedure and its benefits, they're likely to understand and make a greater effort to wait it out.

3. Lack of Proper Tools or Data Sources

In addition to a lack of staff members dedicated to early case assessment, most law firms identify "lack of tools" as a reason that they've either abandoned or significantly reduced their early case assessment operation. In some respects, this is actually understandable. Many early case assessment departments have been downsized, with attorneys assigned to other matters. Law schools, meanwhile, spend less time on discovery and case assessment and more time on trial law and procedure within the hallowed halls of their law schools as a result. Finding qualified staff can be a problem, though dedicating a bit of time to training can overcome these hurdles quite effectively.

Beyond finding attorneys who are either qualified to perform the procedure or receptive to on-the-job training, law firms do have more tools available to them than ever before. In fact, many companies have spent the past few decades working on software tools that can analyze cases and automatically place holds on key legal documents so that attorneys can see a snapshot of case information, costs, benefits, and settlement considerations. These software tools have gotten increasingly sophisticated over time, and they're likely only to increase in sophistication and features as they continue to be actively developed by some of the biggest names in legal software and law firm logistics.

Furthermore, software tools for early case assessment represent a virtually fixed cost on the case assessment procedure. They can often relieve the problems associated with a shortage of qualified legal staff dedicated to assessment, providing key information without requiring training, a salary or other perks often required by traditional attorneys.

Returning to Early Case Assessment: Benefits of Regaining Insight into Each Case

The negative aspects of early case assessment presented above are often legitimate drawbacks to performing the process in many law firms. Even so, many of these considerations and drawbacks are simply outdated in a world that is more efficient and electronic than ever before. Performing early case assessment is actually easy and affordable in many firms, based largely on the different costs and outcomes that early case assessment produces, many legal practices will find that they can mitigate costs, produce better outcomes for their clients, and reduce the financial sting of the typical settlement procedure. The benefits, listed here, are among the best justifications for resuming strong case assessment at every level.

1. Better Case Outcomes that Work for Clients and Reject Settlements

In an effort to revive debate about the merits of early case assessment in 2007, Lexis-Nexis studied the process and came to a few conclusions about its benefits for today's modern law firms. Perhaps one of the most persuasive benefits the organization found during their study was that case outcomes were better in nearly three out of four cases. This is attributable to a few key aspects of early case assessment:

- The process makes discovery easier to pursue, locking down key documents and making sure that attorneys have almost every document they need to start the case sooner and present it more strongly to the judge.
- Software tools, when paired with qualified attorneys, were able to more quickly and accurately filter out the most important details from each information source analyzed. This created a stronger case from the moment it was filed.
- Opposing parties were more likely to comply with requests for information, rather than prolonging the legal process and virtually requiring one party to agree to settle the matter.

Thanks to early case assessment, law firms were able to pick cases that they were more qualified to defend. Additionally, the information presented to the firm at the conclusion of the early case assessment process led to the attorney in charge of the case filing the case earlier, with better supporting information and a better overall case than would be permitted by the rushed research and discovery performed without assessment.

2. The Cost of Litigation Can Be Significantly Reduced

Lexis-Nexis was concerned not only with the strength of the case being presented, but also with the cost of each case when it was taken on by a law firm that performed early case assessment versus the costs incurred by a firm that did not participate in this process. After a considerable amount of study, the organization found that simply engaging in early case assessment could reduce the cost of a typical case by as much as 50 percent when compared to taking on a case with either limited or no early case assessment at all.

As with the stronger case outcomes mentioned above, the tendency of cases to cost less overall was due to several key factors that are unique early case assessment. Because the process typically secures many of the documents needed to support and defend or prosecute a case before the firm officially takes it on, the discovery process was significantly shortened. Opposing counsel generally had very little opportunity or incentive to make discovery difficult, thereby quickening the decision in the case. Shorter case times mean lesser overall costs to the firm. It also means that clients get to forego a significant amount of legal fees, making them more likely to stick with a single firm throughout the entire proceeding.

Early case assessment's increasing use of software tools and electronic discovery was also partially responsible for the overall reduction in case cost at firms that performed robust early assessment. These tools, as mentioned earlier, benefit firms by offering them a fixed cost for case research. Without annual salaries, benefits or other expenses, it's possible to perform excellent case assessment and discovery without the expenses associated with paying a team of junior associates.

3. Reduced Chances of Minimally Beneficial Settlements

As is widely known in the legal profession, the vast majority of new cases today simply do not proceed through trial, where a decision would be made by a judge or mediator instead of by a settlement procedure. Typically, less than 10 percent of cases proceed to trial, and an even smaller percentage of cases proceed through the entire trial process until a decision is handed down by a judge. This remains true with cases that are handled via early case assessment before more traditional discovery procedures, but with one caveat: Lexis-Nexis found that more cases were likely to proceed through to the conclusion of a trial if they were subject to early case assessment beforehand.

The numbers aren't staggeringly disparate, but the difference matters. A few percentage points in either direction can result in either a financial boon to the typical law firm or a major loss on its balance sheet. By increasing the number of cases that proceed through trial without settlement, early case assessment helps law firms maximize their earnings and avoid flat-rate settlement fees and percentages. This can help the firm retain more of its existing employees, attract top talent graduating from law schools, and maintain a robust number of attorneys at all levels that can handle the challenges of today's toughest cases.

A Word of Caution: Software is Not a Substitute for Legal Talent

Software has a real benefit for today's firms, especially when it comes to reviving early case assessment procedures. With the help of software, a fixed cost allows for a stronger financial position while analyzing cases and determining those with the best outcomes overall. The problem with software, however, is that it takes a slightly different approach to case assessment than the typically attorney would. Typically, that's because even case assessment software is more discovery-minded than it is strategy-focused. That means software will perform a lot of great research, finding documents and placing legal holds on the most important pieces of information that create a strong case.

Where the software cannot replace a qualified group of attorneys, however, is in its ability to determine whether or not a case can be successfully pursued through the courts. It cannot typically analyze documents and make a recommendation about the case based on the nature of those documents. Early case assessment software is not concerned at all with legal strategy, since this is so far beyond the scope of today's computing power and the bounds of artificial intelligence.

Firms that are looking to reduce their expenses without reducing case assessment need to make sure that they have at least a few attorneys dedicated to pursuing legal strategy and turning case assessment software results into real recommendations. The market for attorneys who can turn this automated discovery procedure into a recommendation for either taking or rejecting a case is a strong one, and it will only grow stronger as more people understand the value of pairing electronic discovery with realistic case assessment and seasoned legal expertise.

It's Time to Acknowledge the Power and Importance of Early Case Assessment

One of the most revealing results of a recent Lexis-Nexis study was that a large number of legal professionals simply weren't aware of the benefits of this key procedure. Many people came of age in the profession at a time when early case assessment was being cut out of law firms, and the attorneys assigned to this task were placed on matters of simply discovery instead. In fact, many law firms reassigned paralegals to perform basic case assessment without a focus on overall savings, likelihood of savings, or the merit of a trial. The fact that many firms aren't aware of the benefits of this process likely explains why it's still making only a very slow comeback.

The truth is that early case assessment has more benefits than it has drawbacks. Among those benefits:

- Better Cases. Most law firms are looking to specialize in a given niche, with strong cases that build the firm's reputation in that area and drive new clients to the firm so that they, too, can experience the professional approach and successful trial results offered by its attorneys. Only early case assessment allows firms to pick cases that conform to its expertise, its goals as a corporation, and its desire to attract new clients in the future.
- Better Results. Failing to perform case assessment means that the firm will take on virtually every case that comes through its doors. While that can be good when building the firm's name and turning a fledgling operation into a hotbed of legal activity, it isn't good for established firms that need to be discerning when picking cases. Early case assessment allows a combination of computer research and attorney analysis to yield cases that will be able to proceed through trial, without settlement, and with a successful outcome at the end.

- **Reduced Costs.** Shorter trials are cheaper to pursue, while the combination of early case assessment software tools with professional legal minds can result in more fixed costs and less variables when determining the full expense of a legal matter. Today's firms are competing on cost more than ever before, with an industry that faces the prospect of contraction for the first time in decades. Case assessment gives firms a way to shore up their fiscal position, taking strong cases that close quickly and pay robustly.

- **Fewer Settlements.** Every firm likes to have a few big settlements to brag about, but no firm wants to routinely settle every single case that it takes because it has largely been forced into a tough position by opposing counsel. Early case assessment reduces the likelihood of this being the case, and that means the firm itself will become more desirable and marketable over time.

A Final Note: Clients Benefit from Early Case Assessment, Too

While the vast majority of the benefits associated with early case assessment apply to law firms, at least one benefit is delivered directly to clients. Instead of giving clients misleading or inaccurate information about their expenses and the likely course their case will take with the courts, firms that perform this process can much more accurately tell clients what to expect. They'll know more about opposing counsel, more about the facts of the case, and they'll have a better understanding about whether or not the case is likely to settle, proceed through trial, and produce the results that the client is most likely looking for.

Thanks to this better approach to client relations, as well as the many procedural and financial benefits to major law firms, early case assessment is an absolute necessity in the 21st century. With new ways to reduce its cost and elevate its outcomes, there is no reason not to embrace this procedure and make it as prominent as it once was in an earlier era of litigation.

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