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WHAT IS MY CASE WORTH – EVALUATING EMPLOYMENT CASES

Evaluating what an employment case is worth is a challenging task because each case has unique facts, concerns, and legal issues. You must consider many competing factors in deciding how to advise plaintiffs and defendants about the value of a case. How a case is valued ultimately impacts how the lawyer and client approach the case including whether and how vigorously to proceed or defend the case and whether to negotiate a settlement and the settlement strategy making early case assessment a high priority. Evaluating each case should include an economic analysis as well as careful consideration of non-monetary factors such as the client's motivation and willingness to bear risk. This paper discusses how to value a case and the factors that should be considered in determining a case's worth.

What are the client's expectations?

The first step in evaluating any case is meeting with your client or prospective client and developing an understanding of the client's objectives. An initial client meeting or discussion should focus on the client's concerns and any unique issues associated with the case. Exploring your client's objectives should include considering the following factors:

- Is it an emotionally charged case?
- Are the goals primarily monetary or is the plaintiff seeking injunctive relief or other corrective action?

- Does the case have precedent setting value?
- Is publicity a factor?
- Are there unique consequences to the client of settling or litigating the case?
- Is the client comfortable taking risks?
- How will the case impact the client's business?
- Does the client want you to take an aggressive approach?

It is imperative to understand your client's expectations and to ascertain how to best manage them. A plaintiff may begin with a goal that is more than the plaintiff realistically could obtain if everything in the case goes the plaintiff's way. For example, a plaintiff in a wrongful termination action wants substantial back pay damages despite the fact the plaintiff obtained comparable employment shortly after the termination, or a plaintiff wants to prevent a former employee from soliciting its clients without having a non-solicitation agreement. In both instances, the plaintiff should understand that although you will be a zealous advocate, the legal remedies would be limited. Similarly, the defendant may underestimate defense costs or what the defendant will have to pay if everything in the case goes the defendant's way. Part of managing your client's expectations and determining a case's worth must include explaining the process to your client and a tentative roadmap of your next steps. Your discussion should include a review of the following:

- Projected attorneys' fees and costs and who will bear the financial responsibility;
- Whether to consider negotiating a settlement and settlement strategy;
- Procedural issues such as filing requirements, motions, discovery, and trial preparation; and

- Time commitment and duration for possible conclusion.

The client's reaction to the steps involved in the process and your plan for handling the matter likely will impact the case's value, and how it should be approached.

What happened?

The most important aspect of evaluating a case is conducting a thorough investigation of the facts. The manner of conducting the investigation will vary depending upon the nature of the case and your client. Your first step should be to obtain a detailed account of the allegations and relevant facts. A decision should be made regarding who should handle the investigation – in-house or outside counsel, human resources, or business managers. The investigation should include the following:

- Interviewing potential witnesses; and
- Reviewing any relevant documentation such as personnel files, manager's notes and files, investigatory notes, agreements, and policies and procedures.

Based on the investigation, you should assess whether the witnesses are credible, whether the documents support your theory, whether there are any factual gaps or inconsistencies, and whether there is any merit to the other side's contentions. The quality of the evidence will help you formulate your theory of the case, the case's worth, and your strategy.

What is the state of the law?

In addition to knowing the facts, understanding the law is another important aspect of assessing the case's strengths and weaknesses. To advise a client about a case's worth and effectively manage the client's expectations or to negotiate effectively with opposing counsel, a lawyer must have an understanding of the current state of the law.

Statutes, regulations, and recent case law that may impact the case should be reviewed.

The following should be considered:

- Plaintiff's ability to state or establish a claim;
- Defenses and affirmative defenses;
- Factual or legal precedent;
- Whether the jury would be more sympathetic to either party;
- Other verdicts including jury awards;
- Possibility and range of damages; and
- Injunctive relief.

Once you have reviewed and understand the law, you should explain it to the client so that the client has at least a basic understanding of the benefits and risks of proceeding with or defending the case.

What is your opponent's perspective?

In most cases, learning the other side's theory and evidence will impact how the case is valued. Do not underestimate the benefit of discussing the case with opposing counsel. By establishing an early dialog you may be able to develop an understanding of the other side's motivations for pursuing or defending a case and how opposing counsel values the case, which ultimately will impact the case's worth especially if your client is considering settlement options.

You should consider whether to share information with opposing counsel. Early discussions with opposing counsel provide excellent opportunities to educate opposing counsel regarding your case's strengths while at the same time learning actual and perceived weaknesses without yet incurring the time and expense of discovery. Finally,

you may be able to learn whether there are any misunderstandings of the facts impacting how opposing counsel values the case and evaluate whether trying to correct them might benefit the client. For example, a plaintiff believes that she is underpaid based on her gender but is unaware of the fact that she is one of the highest paid employees in the area.

At what stage is the case?

At each stage in a case, the client's willingness to bear risk and the case's value may change.

- Has an administrative complaint or lawsuit been filed?
- Have the parties tried mediation?
- Have the parties incurred the time and expense of discovery?
- How did the witnesses handle themselves during depositions, and will they be good witnesses at trial?
- Has a summary judgment motion been prepared, and what are the case's chances of surviving summary judgment?
- Is an arbitration or trial approaching?
- Has a judgment been entered and will either party appeal?

Conclusion

A myriad of factors impact a case's value. Ultimately you will determine a case's worth based on your experience and best judgment. However, by developing a complete understanding of the case and considering the factors above and others unique to your case, you will be able to develop a reasonable value of the case and advise your client regarding settlement and litigation strategy.