



HOW TO CONDUCT AN EARLY CASE EVALUATION

It's clear to the participants in the civil justice system that most cases settle somewhere short of trial. It's less clear whether the investment in time and money to advance a case through the entire litigation process produces a demonstrably better settlement than could have been obtained much sooner. A more systematic approach to early case resolution provides the best opportunity to decide which cases can be settled early and at what price.

EVALUATION ANALYSIS

1. **Understand publicity concerns.** Although not an issue in most cases, publicity in an employment case can be driven by the nature of the allegations themselves as well as by the media style of the plaintiff's lawyer. In each case it's important to evaluate the likelihood of a publicity effort and its potential for traction. Association with public relations professionals should be considered.
2. **Determine the viability of claims and defenses.** A lawyer should carefully review the complaint and relevant statutory, regulatory and case law. Understand the plaintiff's apparent and potential arguments and determine applicable defenses and how they can be advanced (legal or factual).
3. **Know the type of case.** Determine whether subject matter expertise will be required and the cost of obtaining it. Consider the cost of staffing an abnormally large case, including data management.
4. **Know the court.** Understand the court's tendency to grant or deny summary judgment. Know the court's habit of attempting to leverage settlement by setting early trial dates, requiring judicial settlement conferences, holding summary judgment motions hostage as the trial period approaches, etc. Develop an understanding of the potential jury pool.
5. **Know the adversary.** Learn about the opposing lawyer's litigation history, pattern of taking cases to trial, firm support, financial stability, business model and reputation for reasonableness.
6. **Know the plaintiff.** Learn the plaintiff's prior litigation and bankruptcy history. Gather information from public social media sites. Consider whether surveillance of the plaintiff would be useful when compared to associated costs and risks.

7. **Identify, collect and verify pertinent facts.** Accumulate and evaluate documentary evidence, taking a realistic view of how certain documents (or their absence) will look in the context of a summary judgment motion or trial. Interview key witnesses and realistically assess the factual substance of their testimony as well as their apparent credibility in giving it. Consider the amount of time necessary to prepare witnesses for depositions.
8. **Set the economic value of the case.** Take a formulaic approach by first setting various damages scenarios, including attorneys' fees and costs (e.g., true nightmare scenario, realistic worst case scenario). Factor in the likelihood of success at trial or summary judgment and compute the different scenarios. They should come to about the same place, creating an economic settlement value. Nightmare Scenario Example: 5% chance of damages in the amount of \$1,000,000 yields a \$50,000 settlement number. Realistic Worst Case Scenario Example: 20% chance of damages in the amount of \$300,000 yields a \$60,000 settlement number. An economic range of \$50-60,000 is thereby created. This can, of course, be discounted by other non-economic factors.

Using this systematic approach allows a litigant to finally decide how to balance reward and risk associated with further litigation. The actual amount of a settlement might tick up or down depending on the willingness of the plaintiff's lawyer to engage early in a case. Voluntary mediation provides an opportunity to move a reluctant plaintiff (or lawyer) into the process. Most plaintiff's lawyers are very familiar with early mediation and welcome the chance to resolve cases without the expenditure of additional time and effort.

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