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An employee's attorney should protect a job reference procedure for the employee and try to keep the employee on the job while attempting to settle an employment case. Despite the risks to the employer and employee, an attorney should also give serious consideration to an early comprehensive settlement. Early discussions can promote a more realistic assessment of the value of the case on both sides and thus promote settlement. Moreover, some cases will only settle early. In light of their growing liability for attorney's fees, employers should also explore the possibility of early settlement. Different considerations may arise in class action cases.

I
SETTLING INDIVIDUAL CASES

A. Job Reference Procedure

By getting involved early in an employment case, an employee's attorney can protect a decent job reference procedure for the client. Without a job reference procedure, the client might be unemployable. No matter what kind of settlement or judgment counsel obtains for the client two or three years later, a career could be irretrievably damaged in the meantime. For most managers and professionals, placing only the dates of employment on an application without a reference at a prior company will render the applicant virtually unemployable. Protecting the client's career, even at the expense of vastly undercutting potential punitive damages and damages for emotional distress, is always a more important priority than the lawsuit.

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There are two types of reference procedures, and the client needs both of them. The first is a decent letter of recommendation. Typically, if the employee or the employee's counsel writes a letter describing the employee's job performance, the parties end up negotiating intensely, frequently without resolution, over every comma, word, and paragraph. Once, almost in frustration, I told the employer to write the letter. The letter that came back emphasized the positive, and did not mention negative aspects of the employee's job performance. It is difficult to force people to say something they do not want to say. But if you allow people to express themselves in their own words, often it will produce a better result for both sides. Usually the reference letter the employer writes is both a good letter for the client and one the employer can stand behind.

The second reference procedure is the oral recommendation. Most employees have friends back at the company or at least people who, for some period of time, respected the employee's job performance. One of them often will be willing to go to bat for the employee, at least to some extent. In the settlement agreement, the parties need to designate the person who will give the oral evaluation. Furthermore, this person should be committed in the agreement to giving an oral reference consistent with the letter of recommendation. Generally, the person who gives the oral evaluation will also write the letter of recommendation.

B. Keeping the Employee on the Job

Apart from securing a decent job reference procedure for the employee, counsel should try to keep the employee on the job while negotiating a settlement. It is difficult, particularly for a manager or a professional, to look for a job from a kitchen or bedroom. At the very least, the fact that the client is currently unemployed is a black mark in a job search. Having access to a receptionist and use of company letterhead which includes the employee's name enhances the employee's future job prospects. As long as the employee has a job, he or she will be in a much better position to find another job.

An employer's attorney should agree to the job reference procedure and to keeping the employee on the job for several reasons. First, it limits its potential exposure for defamation and for giving inaccurate information regarding job performance which can result in treble damages.[1] Second, it limits the company's exposure to compensatory damages. If the employee gets a new job, back pay is going to be drastically limited, and emotional distress will be much less.

Moreover, the job reference procedure helps the employee to look forward to the future of his or her career. If the employee goes into a deep depression and becomes obsessed about the case, his or her career

1. CAL. LAB. CODE §§ 1050 & 1054 (West 1971 & Supp. 1988).

and future life will suffer. This is undesirable not only for the employee but also for the employer. It is potentially expensive when that employee goes into court and talks first about the trauma of the termination and then about the deepening trauma of realizing that he or she is unemployable. Helping the employee look forward to his or her career benefits the employee and the employer.[2]

C. *Settling Early*

Attorneys for employees should also consider an early comprehensive settlement. First of all, it does not weaken the client's position to make a settlement overture. Second, there are two sides to every story. If the other side takes the opportunity to talk about why they terminated the employee and to exchange perceptions, the employee's attorney frequently obtains a more balanced perspective on the case. What the employee's attorney hears can reduce the value of the case and can promote early settlement.

Nevertheless, there are risks to the employer in entering into such discussions. First, it educates the employee's counsel about some facts of the case that they might otherwise not have learned until later. This is not such a great a risk, since discovery is quite comprehensive and, by and large, you will not learn much more in an early settlement discussion than you would in a few depositions. The risk of early settlements are minimal, and the benefit is an opportunity to get out of the case early.

There are also dangers to the employee in pursuing early settlement negotiations. First, these negotiations can provide the employer an opportunity to take corrective action, but only as long as the employee is on the way out but not yet completely out the door.

Second, damages are uncertain. Emotional distress does not deepen until later. Early on in the case, an employee can describe the trauma of the termination, but he or she does not realize how badly termination will affect his or her career. Usually employees have been successful and think they were well respected. They believe that simply sending out resumes will result in employers beating down the door to offer positions that are comparable if not better than the position previously held. Unfortunately that rarely happens. If the employee finds employment, frequently it will be a much lower position, and his or her depression

2. Subsequent to this Symposium, the California Supreme Court decided Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988). It held that, absent a violation of public policy by the employer, an employee may only recover contractual damages for a breach of the covenant of good faith and fair dealing. *Id.* at 701, 765 P.2d at 402, 254 Cal. Rptr. at 240 (Broussard, J., dissenting from this holding). Of course, terminated employees retain the right to seek emotional distress damages on other tort theories, such as intentional or negligent infliction of emotional distress, defamation, and fraud and deceit.

deepens. Since the extent of the emotional distress and the length of unemployment are unknown, settling early can mean settling too cheaply.

Third, it is often difficult to evaluate liability during early settlement negotiations. The employee's counsel should ask the employer for preliminary discovery of at least the major documents, such as the personnel file, as well as the reasons and the documentation for the termination, if it is a termination case. If it is a promotion case or a nonhire case, counsel should request the qualifications of the other people who were either promoted or hired. Since the employer's counsel will have to give up these items in the first request for documents, they might as well do so voluntarily.

Both the employee's and the employer's counsel should also recognize that some cases must be settled early if at all. A number of years ago, I represented one of America's most famous feminists, who was being accused of sex discrimination in a business that carried her name. Plaintiff's counsel approached me early on in the case. I told him he had some leverage with public exposure and embarrassment. There was, however, no case on liability. A settlement attempt was made for probably ten times the true value of the case. In the middle of negotiations, a newspaper reported on its front page that the plaintiff had filed a complaint. At that point, settlement became impossible. The defendant had to prove her virtue by trying the case.

A similar phenomenon occurs with highly placed corporate executives. If plaintiffs file or make a public commotion, these executives and their counsel are backed into a corner and cannot settle. The defendant's only alternative is to push the case through to trial. In such cases defendants will settle only if faced with strong evidence of liability.

D. Attorney's Fees

Another reason for defendants to explore the possibility of early settlement is the growth in their liability for attorneys' fees, which can occasionally outstrip the value of the underlying case. In California there are at least three ways plaintiffs can pursue their rights to attorneys' fees. First, there are statutes that directly apply to employment cases: Title VII[3]; the Civil Rights Attorneys' Fees Act of 1976[4]; and the Fair Employment and Housing Act.[5] Second, there is a general fees provision for public interest attorneys[6] that applies to many California Labor Code sections.[7] Third, there is a new and as yet undeveloped theory based on

3. 42 U.S.C. § 2000e-5(k) (1982).

4. 42 U.S.C. § 1988 (1982).

5. CAL. GOV'T CODE § 12965(b) (West 1980 & Supp. 1988).

6. CAL. CIV. PROC. CODE § 1021.5 (West 1980 & Supp. 1988).

7. *See, e.g.*, AFL-CIO v. Employment Dev. Dep't, 88 Cal. App. 3d 811, 821-22, 152 Cal. Rptr. 193, 200 (1979).

the California Supreme Court's holding in *Brandt v. Superior Court*[8] that a plaintiff who hires an attorney to enforce an insurance contract is entitled to those attorneys' fees necessary to enforce the contract. Although *Brandt* is an insurance bad faith case, courts have willingly adopted doctrines, cases, and theories that have been generally accepted in the insurance bad faith arena in wrongful termination cases.[9]

Attorney's fees can be substantial.[10] They include a normal hourly rate, which can be augmented by a variety of factors: the contingent risk of the litigation, the results achieved in litigation, the delay in receipt of payment, and the economic undesirability of some types of litigation. Many courts have doubled the normal hourly rate as a result of those factors.[11]

II
CLASS ACTION CASES

Different considerations arise in settling class action cases. A class action settlement is public. Furthermore, the court must approve the settlement, and counsel must notify the class of the proposed settlement.[12] Counsel must show that there was no collusion or conflict in settling and must provide a substantial record for the basis of the settlement.[13] If counsel fails to do so or does so inadequately, class members may challenge.[14] Class notice of the pendency of the class action and of any subsequent damage proceedings is critical. If class members are not notified of their rights under the class action settlement, the best consent decree in the world might be worthless.[15]

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8. 37 Cal. 3d 813, 210 Cal. Rptr. 211 (1985).

9. Subsequent to this Symposium, the California Supreme Court reconsidered whether insurance law was an appropriate source for analogies to employment law. *See* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 684-92, 765 P.2d 373, 390-95, 254 Cal. Rptr. 211, 228-33 (1988). After reviewing the historical development and current academic criticism, the court disavowed the use of the insurance analogy in employment cases. *Id.* at 692, 765 P.2d at 395, 254 Cal. Rptr. at 234.

10. *See, e.g.*, City of Riverside v. Rivera, 477 U.S. 561 (1986) (eight individual Chicanos from East Los Angeles who suffered false arrest recovered a total of $33,350; counsel received $245,456 in fees); Fadhl v. City & County of San Francisco, 804 F.2d 1097 (9th Cir. 1986) (in Title VII suit court awarded approximately $114,000 to the plaintiff for full back pay and two years of front pay and approximately $290,000 to plaintiff's counsel).

11. *E.g.*, Richardson v. Restaurant Mktg. Assocs., 527 F. Supp. 690, 702 (N.D. Cal. 1981) (plaintiff recovered full back pay and compensatory damages totalling approximately $61,000 and attorneys' fees and costs of approximately $171,000, including a 2.25 multiplier).

12. FED. R. CIV. P. 23(e); CAL. CIV. PROC. CODE § 581(j) (West Supp. 1988); *see, e.g.*, Marcarelli v. Cabell, 58 Cal. App. 3d 51, 129 Cal. Rptr. 509 (1976).

13. *See* Ficalora v. Lockheed Cal. Co., 751 F.2d 995 (9th Cir. 1985); Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); Plummer v. Chemical Bank, 668 F.2d 654, 658 (2d Cir. 1982); Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).

14. *See* Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 836-37 (9th Cir. 1976).

15. In Kraszewski v. State Farm General Insurance Co., 38 Fair Empl. Prac. Cas. (BNA) 197 (N.D. Cal. 1985), which I currently have in progress, we have allocated approximately $1,000,000

The timing of a class action settlement frequently differs from that of an individual settlement. It is difficult to settle the class action early. The major dispute in most class actions is the definition of the class. Frequently both sides will litigate the class certification motion before knowing the contours of the case. Once the court provides a class definition, then realistic settlement discussions can take place. However, if plaintiffs and defendants want to settle the case comprehensively, wrapping up all potential liability into one class-wide settlement insulating them from future litigation over the same issues, that is easier to do before class certification.

The dominant form of relief is injunctive: prohibiting certain practices, affirmatively putting people to work, and ordering their promotion. Such broad injunctive relief requires an accurate definition of what relief is going to be granted in the consent decree. It also requires an effective enforcement mechanism, which frequently includes appointment of a monitor to enforce the decree. Of course, counsel has to provide compensation for whoever takes over that responsibility.

A class settlement usually begins with a statement of purposes. It is not uncommon over the five- to ten-year life of a consent decree for disagreements to arise concerning the obligations under that decree. The stated purposes will help define and interpret the obligations.

While individual damages in many employment discrimination class actions might not be large, the aggregate damages can amount to tens of millions of dollars. Plaintiffs' attorneys have frequently walked away from a case without knowing its true value. They should estimate closely the full value of the case by hiring an econometrician and, in some cases, a labor market economist and a statistician. Their work will prove indispensable in bringing reasonable people on the defense side to the bargaining table by supporting plaintiffs' damage estimates.

Using special masters or labor arbitrators to resolve individual disputes in enforcing a class settlement is much more effective than running back to court for resolution of these disagreements. Counsel can also select special masters for special topics. They will develop an expertise in the case and a knowledge of opposing counsel that is absent if the matters treated were brought in a state court law and motion department or in a federal court on a busy law and motion calendar.

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just to tracing class member names and notification of class members through individual mailed notices and published notice. That notice will be the linchpin of the success of that consent decree.