ADVOCATE

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Computers and the Internet
Sportsmen's Lodge, Studio City
8:00 am: Registration & Continental Breakfast • 9:00 am to 12:15 pm: Program
3.0 MCLE Law Practice Management credits

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HMO Litigation: Managing the Mis-"Managed Care" Case
Sportsmen's Lodge, Studio City
5:30 pm: Registration & Deli Buffet • 6:30 pm to 8:30 pm: Program • 2.0 MCLE credits

September 17
Education Committee Meeting • 6:00 pm
CAALA Conference Room, 3435 Wilshire Blvd., #2870, Los Angeles

Cover Art: Photograph by Greg Epstein.

Harasssment & Discrimination: Evaluation of the Case & the Client

by Carla D. Barboza

The case evaluation process necessarily begins with the initial interview. Counsel should create an environment that will encourage open and honest communication without fear of judgment. It is best to meet with the prospective client in a quiet, private place and to allow no interruptions. No third parties, including spouses, significant others, family members or friends, should be present. Regardless of how supportive third parties may be, they make it more difficult for a prospective client to be forthright and put confidential attorney client communications at risk of disclosure. This is especially true for the prospective sexual harassment plaintiff who usually suffers from an overwhelming sense of shame and self-blame. Out of fear of loss of love and of being judged, the prospective client may withhold critical information that might otherwise be disclosed in the absence of loved ones. Therefore, the security of a private, confidential interview is essential.

Before conducting the initial interview, counsel should ask the prospective plaintiff to prepare a written chronology of events and to submit it in advance of the interview. This simple request will enable counsel to conduct a more thorough and focused interview and to assess the prospective plaintiff's ability to tell her story clearly and succinctly.

A rambling, poorly written chronology may be indicative of a prospective plaintiff who does not possess the communication skills necessary for litigation. It also may be a sign that the prospective client is suffering from debilitating symptoms which affect her cognitive skills. The fact that a prospective plaintiff may not be able to communicate effectively in writing should not deter counsel from considering the case for litigation. Rather, counsel should proceed with the interview and pinpoint the underlying cause before making a final decision.

The written chronology also serves the purpose of documenting events for future use in the litigation. Counsel should instruct the client to address the chronology "to my attorney" and to not disclose it to anyone other than counsel in order to preserve the attorney-client privilege.

During the initial interview, counsel must explore facts relating both to liability and damages. In all cases counsel should obtain the following information regarding the prospective plaintiff's employment with the company in question:

(1) date and circumstances of hire;

(2) documentation regarding hiring, including employment agreement, offer and acceptance letters, job descriptions, resumes and applications;

(3) salary and salary increases;

(4) positions held;

(5) representations made by employer;

(6) witnesses to representations;

(7) employee handbooks, personnel policy manuals and affirmative action plans;

(8) performance-related documents, including evaluations, disciplinary memos, awards and commendations;

(9) facts relating to discharge, failure to hire, failure to promote, or other potential unlawful act, including dates, identity of decision-makers, reason(s) given, content of conversations, and persons present;

(10) complaints to higher management;

(11) grievances;

(12) administrative complaints and claims, such as EEOC charges and unemployment benefits, disability and worker's compensation claims;

(13) mitigation of damages; and

(14) journals, calendars and/or diaries.

If state law provides the prospective plaintiff with the right to review his personnel file, counsel should insist that the file be reviewed. If copies cannot be made, then the prospective plaintiff should be instructed to create an inventory of the documents contained in the personnel file at the time of review.

Reviewing the employee's personnel file before litigation is filed enables counsel to determine whether any relevant documents, which were not provided directly to the employee, have been included in his personnel file. It also allows counsel to create a record of the contents of the personnel file, as of a date certain, which can be helpful if additional documents show up in the file or if documents are removed.

Carla Barboza practices mainly in the area of employment law and has an expertise in sexual harassment cases in employment as well as education. She began her career at the Equal Employment Opportunity Commission.

Counsel must also explore the prospective plaintiff's prior employment history. The defense typically conducts a thorough investigation of plaintiff's employment record searching for evidence of a history of terminations or performance-related problems. Preparing in advance for these types of defenses by obtaining this information during the initial interview will facilitate early identification of potential vulnerabilities.

Counsel should explore any prior history of complaints of discrimination or other unlawful conduct, because the defense typically uses this type of evidence to prove that the plaintiff engages in a pattern of bringing unfounded complaints or to establish other alternative sources of emotional distress. This type of information almost always becomes the subject of discovery disputes and motions *in limine* and, therefore, its potential impact should be considered and evaluated before litigation is filed.

All prior litigation involving the prospective client must also be identified. Routine pre-trial investigations by defense counsel include a search of court files to locate other past or pending litigation involving the prospective client as a party. If the prospective plaintiff has been a party to a lawsuit, counsel should inquire as to the nature of the litigation, the time period during which the litigation was active, the manner in which the litigation was resolved and the availability of any court records related to the litigation.

Counsel should be sure to identify other litigation similar to that being contemplated, as well as any litigation that involved the disclosure of private information, such as a marital dissolution or bankruptcy proceedings. Again, by taking these precautionary measures, counsel can assess whether any evidence is available to support a defense portrayal of the plaintiff as litigious and experienced in abusing the legal system.

Once counsel has obtained these documents and information within the client's possession, she should identify those documents which are not in the client's possession that will corroborate plaintiff's claims. Also counsel should identify the documents that the defense will more likely than not obtain during discovery. These records may include: administrative agency files, i.e., EEOC or state equivalent; union grievances; unemployment benefits claim records; disability benefits applications and supporting records; and, worker's compensation files, including depositions and mental exam records. If available, counsel should obtain copies of these documents and review them before making a final decision.

In those cases involving potential claims for emotional distress damages, it is critical that counsel obtain copies of the prospective client's medical and psychological records. At the very least, all such records for treatment received during and after the prospective plaintiff's employment should be obtained. Given the frequency with which defense counsel seek to obtain medical and psychological records for substantial periods of time before the prospective plaintiff's employment began, counsel should obtain pre-employment treatment records as well.

By obtaining these records before deciding to take a case, counsel can assess the impact of any information contained therein. Medical and psychological records often contain references to the prospective clients' employment experiences which could be helpful to her case. They also typically include private, personal information which the defense will inevitably use to attempt to establish other, alternative sources of emotional distress. Obtaining these documents before the defense subpoenas them will also permit counsel to take all necessary precautions to protect from disclosure any privileged or private information which is outside the scope of permissible discovery.

Once all potentially relevant documents have been identified, counsel should focus on identifying potential third party witnesses. It is not enough to rely on the prospective plaintiff's hope that third party witnesses, especially those who remain employed by the potential defendant employer, will provide useful information. Due to the fear and risk of retaliation, third party witnesses may be reluctant to become involved. Therefore, counsel should make efforts to contact all potential third

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party witnesses and interview them as early as possible.

The prospective plaintiff should not be the one to interview or speak to the prospective witnesses other than to obtain their permission to provide their names and phone numbers to counsel. It is best for counsel, a private investigator or a paralegal to conduct the interviews. Once counsel has interviewed a third party witness who has provided useful information, counsel should attempt to obtain a sworn declaration. When conducting pre-litigation interviews of third party witnesses, counsel should carefully consider the ethical rules regarding ex parte contacts with opposing parties.

Finally, counsel must review the applicable law and assess the probability of success based on the current state of the law. One easy way to analyze and test the legal theories of a potential new case is to review the jury instructions, if available. If jury instructions are not available on a particular theory, then counsel should review the lead cases which discuss the elements of proof and possible defenses. Once all available information and documents have been obtained and reviewed and all applicable theories considered, counsel is ready to decide whether to file a lawsuit.

Because of the ever-rising costs and inherent risks of litigation, only those cases with the potential for substantial recovery of damages should be the subject of a lawsuit. Assessing the potential value of a case is one of the most difficult and challenging tasks of the case evaluation process. It involves both objective, quantifiable methods and subjective intangible elements.

The logical starting place for any damages evaluation in an employment case is lost earnings. Tangible hard dollar economic damages such as past and future lost earnings and benefits offer one method of objective quantification of the plaintiff's damages. Even this seemingly objective method, however, also has its subjective elements. Counsel should begin by exploring all possible sources of lost earnings and benefits including salary/wages, periodic raises, car allowances, merit increases, stock options, pension contributions, medical, disability and life insurance. Ordinarily, the amount plaintiff earned and the benefits received are not disputed. The controversial and more difficult question is the length of time before the plaintiff becomes re-employed in a comparable position and at a comparable salary.

The prospective plaintiff will be able to provide much of the information necessary to assist counsel in making a sound and reasonable estimate of the future lost earnings at stake. A prospective plaintiff's work history is one of the key factors to be considered. The length of employment at each job, the financial health of the industry and the economic climate will all have an impact on a prospective plaintiff's ability to find new employment. Each case must be valued on its own particular facts, taking into account age, education, experience and the state of the industry and the economy. If finances permit, an economist

can assist in evaluating the past and future lost earnings and benefits. By investing in a lost earnings analysis early on, counsel can take the guesswork out of the process.

To assist in defending against a claim that the plaintiff failed to mitigate his/her damages, it is a good idea to instruct the client early on to be meticulous in his/her record-keeping of efforts at re-employment. All classified newspaper advertisements and correspondence sent to or received from prospective employers should be maintained. A journal or diary of leads and contacts made will go a long way in substantiating the plaintiff's testimony regarding her diligence in pursuing other employment. Juries are often suspicious of plaintiffs who remain unemployed for any significant period of time. Any doubts or suspicions about the plaintiff's diligence may be confirmed if the plaintiff has no record of efforts to find work.

Once past and future lost earnings have been estimated, counsel must decide on a preliminary value of the emotional distress damages claim. No formula exists for assigning a value to this illusive component of damages. Counsel should not underestimate the value of emotional distress damages. A number of factors must be considered when determining whether a prospective plaintiff has a viable claim for emotional distress damages. Counsel must evaluate the incidents giving rise to the claim for emotional distress to determine whether they are of the type which one would ordinarily expect to cause substantial emotional and mental suffering. For example, few would dispute the fact that a rape causes substantial emotional distress. Similarly, if a sexual harassment case involves physical touching of intimate body parts over an extended period of time, then it is highly likely, assuming the finder of fact determines that such incidents actually occurred, that mental suffering resulted. On the other hand, if the alleged incidents of sexual conduct involve only comments over a short period of time, it will be much more difficult to persuade a trier of fact that such conduct caused severe emotional distress.

Similarly, if a prospective client is a long-term employee who invested a substantial portion of his worklife to a company, only to be fired for discriminatory reasons, one would expect that client to suffer substantial pain and suffering. A short-term prospective plaintiff may not have as strong a claim, depending on the circumstances of the termination.

Assuming the facts lend themselves to developing a substantial emotional distress claim, then counsel must determine what evidence is available to prove the claim. One obvious and material consideration is the plaintiff herself. Often employees who have suffered deep emotional trauma are not able to articulate their painful experiences, particularly in a public forum. It is critical to assess carefully a prospective client's ability and willingness to be vulnerable and to expose their wounds. The ability to express such pain must be evident at the initial interview. A tight-lipped plaintiff will inhibit counsel's ability to recover for deep unexpressed wounds.

Third party witnesses, particularly family, friends and co-workers who were close to the prospective plaintiff before and after the precipitating trauma, should be interviewed. They often can be quite helpful in corroborating the plaintiff's experiences as well as emotional suffering. Often it is more effective to have third party witnesses testify regarding a plaintiff's emotional distress rather than a forensic mental health expert. Given a jury's inherent suspicion of mental health professionals, third party lay witnesses who can effectively describe a plaintiff's suffering are invaluable.

The fact that a plaintiff sought psychological treatment lends necessary credibility to an emotional distress claim. Opposing counsel, judges and juries all expect that a person will seek treatment if the psychological injury occurred is portrayed as a serious one. If a prospective plaintiff has received psychological counseling, counsel should obtain all treatment records and speak directly to the treating therapist to explore any possible alternative sources of emotional distress.

It is best to evaluate as soon as possible what other possible sources of alternative distress may arise during discovery. It is critical that counsel prepare the prospective plaintiff for the inevitable intrusion into her private life during discovery. Few employees anticipate that their medical and psychological histories will be the subject of discovery during litigation.

Assuming all the necessary ingredients for proving an emotional distress claim are present, counsel should determine the preliminary value on the claim. Each case must be assessed on its individual facts. Some practitioners prefer to use a percentage of the potential lost earnings as a guide. This approach may result in underestimating the value of the claim, however, especially for a low wage earner.

It is always difficult at the case selection phase to make a judgment on the potential for a punitive damage award in a case. Given the heavy burden which plaintiffs

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must meet in order to be entitled to a punitive damage award, counsel should carefully review the applicable law in the area and refrain from making any early judgements about the value of any potential punitive damage claim.

Determining how good a witness a prospective plaintiff will make is one of the most critical assessments counsel must make when evaluating a potential new case for litigation. Counsel must assess whether a prospective client will make an appealing witness based on a limited amount of face to face interaction. Strong facts alone will not assure that a prospective client will make an appealing witness. Nor does the fact that a prospective client is highly educated and sophisticated necessarily mean that he will make an appealing witness.

Because counsel must evaluate a client's appeal and character for honesty early on in the attorney-client relationship, it is essential to pay close attention to gut feelings and instincts. Often, counsel's first impressions prove to be one of the most accurate measures of a client's appeal. A judge or a jury may have the very same first impressions of your prospective client which will inevitably affect the outcome of the case.

Regardless of the type of case or damages sought, a plaintiff must possess the basic qualities of a good storyteller. Ideally, those qualities include a likeable personality, an ability to fully describe events, thoughts and feelings accurately in an intelligent and emotionally compelling fashion and the capacity to maintain a sense of humor, regardless of the circumstances. Given the primary role of the plaintiff in the litigation process and the substantial amount of information which must be digested by the trier of fact in a relatively short period of time, a good plaintiff must also be able to tell her story with sufficient detail without being long-winded.

These qualities must also be coupled with a willingness and capacity to be emotionally vulnerable in a public forum. Regardless of whether damages for pain and suffering are sought, a plaintiff must be able to expose her emotional and psychological wounds while describing the underlying events. Presenting a vulnerable and emotionally expressive plaintiff will contribute to a greater sense of understanding, compassion and empathy from the trier of fact.

If damages for pain and suffering are sought, then it is absolutely critical that a plaintiff possess the ability to fully describe his emotional trauma. This is a particularly difficult task when any of the alleged wrongdoers are present. Therefore, if the plaintiff has difficult showing his emotions in the privacy of counsel's office, then it is highly unlikely that he could do so in a public forum in the presence of the alleged wrongdoers. Without compelling testimony from the plaintiff concerning the emotional and psychological harm he has suffered, it is virtually impossible to obtain a significant emotional distress award.

The plaintiff also must be intelligent enough to understand legal theories and to withstand a vigorous cross-examination. A plaintiff's educational level is not necessarily indicative of her intelligence. An intelligent, well-spoken, uneducated plaintiff may make as good, and sometimes a better witness than the highly educated, sophisticated plaintiff, who may appear arrogant or distant. As long as the plaintiff is intelligent enough to understand the basic theories of the case and your instructions, that will suffice.

An appealing plaintiff is one who appears honest, reliable, confident and open. Plaintiffs who are prone to express anger, bitterness and hostility will rarely make a good impression in any context.

Confidence and assertiveness are qualities which must be assessed along with the plaintiff's other personality characteristics. If the plaintiff's confidence is coupled with arrogance and a sense of entitlement, then it is not likely that a trier of fact will empathize or be willing to award substantial damages. On the other hand, if a plaintiff cannot hold her own during cross-examination by being appropriately assertive and confident, then she will not make a good witness and will be easily manipulated by opposing counsel. ■