

# Executive COUNSEL

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## Executive Summaries

### RETAINING SEPARATE SETTLEMENT COUNSEL IN EMPLOYMENT LITIGATION

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**Noting that all** U.S. companies are nearly certain to be drawn into employment litigation sooner or later, the authors suggest two contrasting although not mutually exclusive strategies for handling these matters. The first is to use litigators – outside counsel, attorneys from the company’s legal department, or both.

The second is to retain separate counsel that specialize in evaluating the matter for its settlement potential and then, if it’s deemed to be warranted, pursuing settlement.

The authors argue that even when litigators prevail, the result in most cases can’t really be called a “win,” and therefore

that the second track is usually far more cost-effective. While acknowledging that some cases need to be litigated to the bitter end, the authors contend that litigators by temperament and by self-interest are not fit to evaluate cases for settlement potential or pursue settlement.

They make their case by way of a list of “ten things lawyers know are true about litigation, but don’t want to admit.” (Among them: that defendants “can afford to invest more money in early settlement because they haven’t invested as much in litigation. Overall cost should be the issue, not just what is ultimately paid to the plaintiff.”)

According to the authors, even cases deemed appropriate for full-bore litigation will benefit from having been through the separate settlement evaluation process.

“Having this information,” they write, “is a significant strategic leg up for the litigator and ultimately a cost savings for the defendant.”

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# Retaining Separate Settlement Counsel for Employment Litigation

By Chad A. Shultz and M. Travis Foust

If you have employees, lawsuits are virtually inevitable. If your company has not been sued by a current or former employee, the odds are your number will soon come up. Last year the Equal Employment Opportunity Commission (EEOC), the agency responsible for investigating and enforcing federal anti-discrimination laws, processed 93,000 charges of discrimination. According to the Statistical Abstract of the United

States, 2010, there were 13,036 employment cases commenced and 15,452 cases pending in U.S. district courts in 2008. In 2009, the number of civil rights or labor related cases filed in federal courts rose to 51,480.

With increased lay-offs and reductions in force continuing across many industries, these trends are likely to continue.

Employee-related disputes at the government administrative level are also on the rise. According to the a U.S. House committee report on Labor Department funding, the Office of Federal Contract Compliance Programs has received an additional \$19 million – a funding increase of more than 20 percent – to allow the agency to conduct more than 5,000 audits per year of private company contractor practices.

The EEOC also received a \$23.3 million funding increase, which it will use to hire 140 employees, according to an agency report submitted to Congress. The total EEOC budget for 2010 was about \$367 million.

Thanks to these multi-million dollar increases, while many companies are cutting back their workforce, the agencies are on track to hire hundreds of investigators, lawyers, mediators and support staff.

A recent survey conducted by the Chubb Group of Insurance Companies found that more than one in five private companies, or 21 percent of those surveyed, experienced an employment-related charge of discrimination or a lawsuit over the past five

According to a recent survey, more than one in five private companies experienced an employment-related charge of discrimination or a lawsuit over the past five years, and their average defense cost per matter was \$51,975.

years. Among the companies that experienced a charge or a lawsuit, the average cost of defense was \$51,975. Nearly half of the companies that dealt with a charge or lawsuit reported costs ranging between \$20,000 and \$750,000.

These are costs that can be managed more effectively.

#### THE OLD-SCHOOL LITIGATION APPROACH

Companies embroiled in these conflicts may hire litigation counsel or utilize their in-house litigators. In either case, the job of a litigator is to prepare for and succeed at trial. Litigators aggressively pursue their opponents in formal written discovery, depositions and pre-trial hearings.

Employment litigators are cost centers. They do not produce revenue. They want to win at all costs.

Consider the following ten things lawyers know are true about litigation, but don't want to admit:

(1) Once your company has been sued it can't win. You may get the case dismissed, or a jury may return a verdict in your favor, but the associated costs make it impossible to view either of those outcomes as a win. A dismissal at the summary judgment level is likely to cost the company in excess of \$75,000 in attorneys' fees, and that number is likely to more than double through trial. This not a win. The real question is to what degree the company lost.

(2) Cases get resolved in one of three ways: They are dismissed, typically through costly motion practice following extensive discovery. They are settled. Or, they are tried.

Very few cases (about 4 percent) get tried, and those that do get tried most often result in a significant increase in jury awards for successful plaintiffs. It was reported by Jury Verdict Research (in "Employment Practices Liability, Jury Award Trends and Statistics," 2009 edition), that the median compen-

satory damages award for employment cases was \$326,640.

A large number of cases (about 21 percent) get dismissed, but only after significant legal costs and fees, as discussed above. Usually those costs are more than it would have cost to settle.

The remaining cases – the vast majority of those filed, about 75 percent – are settled eventually. But too often settlement isn't really explored until after discovery has closed, a dispositive motion is paid for and pending, or trial is imminent – and a company has run up substantial fees.

(3) Good plaintiff lawyers see value in early settlement. Plaintiff attorneys take cases on contingency arrangements, where the attorney is not paid until the case is resolved. Wise plaintiff lawyers will settle a case for less if it can be done before they have to invest significant time and money in litigation. This is an inherent truth with contingency fee arrangements.

(4) Defendants can afford to invest more money in early settlement because they haven't invested as much in litigation. Overall cost should be the issue, not just what is ultimately paid to the plaintiff.

(5) Most discovery costs are a waste of money and rarely find a silver bullet that will significantly change the outcome of the case. Most trials end up with 30 or fewer crucial exhibits, even though most litigation results in thousands of documents being exchanged and tens of thousands of dollars being spent on attorneys after months of discovery battles.

In fact, with more electronic discovery delving into companies' computer servers and e-mail systems, plaintiff counsel are using the discovery process to substantially increase defense costs, so as to make settlement at a higher dollar amount seem more attractive. As is the case with written discovery, electronic discovery seldom changes the face of the litigation. The case rarely looks much different than it did when the answer was filed.

Litigation is a form of combat. Settlement principally requires finesse and consensus building.

(6) Litigators are most effective when they are passionate about their client's position. They see the goal (to "win"), and they go for it. This can cause them to lose their objectivity, overestimate their ability to prevail and underestimate litigation risks. Calling on a litigator/trial lawyer to objectively evaluate the case for settlement purposes may get them off point and diminish their value for the "warrior" duties they were hired to perform.

(7) Litigation is prohibitively expensive. The process is long, slow, and inefficient. The most recent statistics from U.S. courts show that the average length of litigation in federal courts, from filing through trial, is 25.3 months.

The resulting expense is not manifest in attorneys' fees alone. Employment litigation is driven by the facts and by the witnesses, and the costs discussed in this article do not take into account the time and productivity that is lost by way of preparing witnesses – employees and managers – for deposition or trial.

The courts, meanwhile, often are overburdened and give little thought to the extra expense that inefficient procedures and local rules bring to the parties.

*Defendants can afford to invest more money in early settlement because they haven't invested as much in litigation.*

(8) Litigation advocacy is not the same as settlement advocacy. Litigation is a form of combat. Settlement principally requires finesse and consensus building. Mediators, who have experience as litigation and trial lawyers, can bring that experience to the table in their role as settlement counsel. But litigators all too often shoot in the dark concerning settlement, because they view it as another battle in the litigation war they were hired to “win” – a term that, as they should, they define as total victory. Settlement counsel defines a win as a resolution their clients view as successful under the circumstances.

(9) Usually cases that can be settled can be settled much earlier than they are. Opportunities for early resolution are missed because they weren't presented and managed early enough, or because the opportunity was missed in the course of preparation geared towards the long haul.

When a case is settled late in the game, virtually all the arguments against early settlement are set aside as less important than the reasons to settle. It has been said that a trial is the result of failed negotiation, just as a war is the result of failed diplomacy.

(10) Settlement counsel hired solely to evaluate and settle disputes can get cases resolved faster and cheaper than in-house lawyers and outside litigators can. They are in a unique position to motivate plaintiffs and their counsel to settle for an acceptable sum.

#### A SETTLEMENT COUNSEL APPROACH

Companies facing potential litigation or that already have been sued should consider hiring an experienced negotiator with litigation and mediation expertise to evaluate and assess cases as early as possible.

Settlement counsel should be retained upon receipt of the first demand from a plaintiff's lawyer. If suit is filed without a prior demand, settlement counsel should be retained before the

answer is even filed and before the litigation firm is retained to defend the case.

The settlement counsel's sole job is to evaluate the case, assess it for settlement and get it resolved. If the case is not right for settlement (and some are not), or if it can't be settled within 60 days, the case should be turned over to the litigators.

In this way, the litigators need not be distracted by the “fight-settle” dance. Litigators are hired to fight because the potential for early, cost-effective settlement has already run its course. They are hired to get the case dismissed or obtain a defense verdict after trial.

The settlement counsel approaches the case from a different angle and provides the company with crucial information. First, the assessment is not a “can-we-win” question. Rather, it is: “Does it make sense to settle? Can we get it settled within the parameters the company has agreed to? What is this case worth?”

Settlement counsel gets the opposition to consider settlement in a way that the litigator is often reluctant to try, because it will be viewed as a weakness or fear of losing. With settlement counsel, the opposition is told from the beginning that counsel has been hired only to see if the case can be resolved before significant money is spent on litigators. Their involvement does not signal weakness or fear. It only represents sound business judgment and economic reality.

Where settlement counsel has been employed, as soon as it becomes evident that the case can't be settled, the litigator starts out with at least some knowledge of what prevented resolution. Having this information is a significant strategic advantage for the litigator and ultimately a cost savings for the defendant.

Most parties to lawsuits and their counsel still operate under the old model, where resolution of the suit is briefly discussed before suit is filed, and then is put on the shelf until the motion for summary judgment is pending or denied.

Our justice system is just too slow, expensive, and overburdened for this approach. For a more efficient and less expensive resolution, settlement counsel is worth considering.



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