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Commentary

Timing Is Everything

Two plaintiffs' employment attorneys offer some friendly advice to management bar

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We all know that employment cases are among the most difficult to resolve because of the strong emotions involved, the legal and factual complexity of the cases and the fee-shifting provisions of the relevant statutes.

With this in mind, as plaintiffs' employment lawyers, we'd like to offer some thoughts to the management bar about how to maximize the chances of resolving these cases, minimize the costs to their clients of such resolution and perhaps lessen the load on an overburdened court system.

At the outset, we'd like to note that this advice is intended to apply to those cases that have been brought by experienced members of the plaintiffs' employment bar and may be of little use where there is little merit to the case or where the plaintiff's attorney lacks such experience.

In a nutshell, our advice is as fol-

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lows: Don't wait until the eve of trial to get serious about settlement. That advice is based on our experience in a number of cases in which defendants will come to trial with an amount of money that might well have settled the case three months earlier, but which, when offered on the courthouse steps, is too little, too late. While this advice may seem obvious, our experience suggests that it bears reinforcing.

The price of settlement will always be higher once the plaintiff and his/her

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attorneys have fully prepared for trial. Specifically, once our clients have spent years in litigation and have gone through the process of being thoroughly prepared for trial, they want their day in court.

Likewise, once the plaintiff's attorneys have fully prepared for trial, significant additional costs and fees will have been incurred, which will neces-

sarily raise the price of settlement.

We recently prepared for a trial in which we spent in excess of \$5,000 on visual aids alone in the week beforehand. In addition, typically, we will spend virtually every hour in the two weeks before trial getting ready, which can easily add \$15,000 to \$20,000 in fees.

Moreover, after intensive immersion in the trial preparation process in the weeks just prior to trial, if the plaintiff's attorneys had lingering concerns about some of the issues in the case, they would likely have convinced themselves that these issues are surmountable and that the chances of victory are high.

Contrary to what management attorneys and their clients may want to believe, when a good trial attorney has prepared a good case for trial, he or she relishes the opportunity to get the case in front of a jury. At that point, settlement has become a much less appealing option.

In sum, the management bar and its clients should be aware that waiting until the eve of trial to get serious about settlement is not a cost-effective strategy and may often result in the trial of a case that could have been resolved through settlement.

In particular, if a case has not settled early on, there still remains a window of opportunity to settle before the trial preparation process begins in earnest. Once the plaintiffs and their attorneys have fully prepared for trial, that window will be closed or will be further out of financial reach. ■