

THE 10 BIGGEST MISTAKES MADE BY EMPLOYMENT LAWYERS ON BOTH SIDES OF THE AISLE

OR – VIEWED MORE *POSITIVELY* – 10 MUST DO'S FOR ALL EMPLOYMENT LAWYERS

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I have spent more than 20 years working on all sides of employment problems – as a litigator, legal advisor, trainer, mediator, and performance management coach. I have observed employment lawyers (including myself) make a lot of mistakes and learned a great deal from those experiences, which I would like to share.



BACKGROUND

All people, including lawyers, are colored by their experiences. Accordingly, I thought it appropriate to tell you a little about my background that causes me to comment on common "mistakes" I have seen employment lawyers make (including myself, of course).

For almost 21 years, I have been practicing labor and employment law – mostly employment law - from a variety of angles. Unlike many lawyers in larger metropolitan law firms, I have always represented both employers and employees.¹ I do both counseling (including a fair amount of training) and litigation. I serve as a mediator. And, I do one-to-one boundary coaching for executives in need of help understanding what is appropriate workplace behavior. I love employment law and my passion is client service.

How can an employment attorney both effectively counsel and litigate?

Early in my practice, I principally litigated. I now litigate less, but I still spend about half of my time dealing with litigation matters. I've come to believe successful litigators are the masters of strategy. The skills that make a great litigator are tenacity, attention to detail, persistence and a strong presence. To litigate, one has to enjoy a good fight now and again.² On the other hand, in my view, counselors are students of the law. The skills that make a great counselor are curiosity, a firm grasp of the nuances of the law, creativity and common sense. Of course, there are some skills that are key to both practice areas – such as the ability to think quickly on one's feet and communicate effectively (both orally and in writing) to folks in all walks of life. And, if an attorney possesses all these attributes, s/he has all the tools to be both a great litigator and counselor.

After several years of intense litigation, what I found was that most individuals and businesses I represented believed that, win or lose, the only "silver lining" resulting from the litigation process was learning the "lessons" that became apparent along the way about conduct to avoid prospectively. For example, an employer doesn't need to be sued too many times before it realizes the power of fair and honest communication achieved through clear documentation. Similarly, an executive doesn't need to be summarily dismissed more than once to understand that it is dangerous to expect significant life-impacting commitments (like stock option awards, equity status or future raises) to be honored based upon a handshake, no matter how long that executive has known her/his boss and business partner.

I wanted to be part of the benefits that came from that lesson-learning process. I wanted to be a piece of the silver lining. So, after the first few litigation matters I handled I tried always to remember to debrief with my client following the conclusion of the matter and assess the

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- 1 Many management side labor and employment lawyers tell me that their clients would not allow them to work on both sides of the fence. However, I have found my small to medium-sized business clients are interested in benefiting from an employment attorney who has experience on both sides. For example, when you represent employees, you learn (from firsthand experience) what makes them tick; what causes them to sue and what pressure points work to resolve disputes. Similarly, when you experience "neutrals" from both sides of the fence, you truly see how they behave when in the privacy of the "other room" dealing with the opposition. Often, those mediators and judges who have reputations of being tough on one side or the other, do not really behave as their reputations suggest they would. And, it is only when you do both sides that you can best predict how those "neutrals" act when pressuring the opposition for movement on an important issue in the case.
 - 2 Growing up the fourth of four girls in a lower-middle class family, with working parents (including a father who traveled much of the time), made me appreciate a good fight and healthy (and sometimes not so healthy) competition. In my family, you had to strongly (and uniquely) advocate your position in order to win any debate. Of course, living with my younger brother just made me appreciate injustice; as the only boy (particularly after four girls in eight years), the rules were never quite the same for him. So, sometimes I had to figure out how to "win" even when all the cards were stacked against me.

lessons learned along the way. When I could, I would help my clients draft new template agreements, tweak internal processes or otherwise improve their business or personal situation so as to avoid future litigation.

Over time, what I learned is that there can be a natural ebb and flow to doing both litigation and counseling. After a testy piece of litigation, there are a great many counseling tips that you can help your clients absorb into the way they do business (or run their personal life). Similarly, if you've been the "go-to" employment attorney for offering advice for a good stretch of time, especially if you really know your client, you are often the trusted advisor the client turns to when the "crap hits the fan" and litigation ensues. Sometimes you are the trusted advisor who helps the client strike first in litigation, e.g., to enforce its non-compete or prevent or redress some other invasion of the client's legal rights.

MY DEFINITION OF A SUCCESSFUL EMPLOYMENT LAWYER

In my view, an employment lawyer is successful if s/he helps a client cost-effectively make the right decision at the right time. Sometimes the decision is to fight; and, when you fight, you should win.³ Other times, the decision is to avoid or diffuse a problem. The key is to be proactive, knowledgeable, business savvy and forward-thinking enough that you are adding real value; and, in order to keep the phone ringing, the client has to believe that you were worth the price paid.

It is with this backdrop that I offer my thoughts about the 10 biggest mistakes employment lawyers make.

THE 10 BIGGEST MISTAKES EMPLOYMENT LAWYERS MAKE

MISTAKE NO. 1: A FAILURE TO SET EXPECTATIONS EARLY AND OFTEN

When a new client comes to the door, or when a long time client brings a new matter to you, you need to **set expectations** about how much you can help in addressing the problem. There are only certain things we can accomplish as lawyers. For example, we can't make the justice system fair, swift or cheap. It simply isn't set up that way. The system in this country may be the best in world, but it doesn't always get things right and I've rarely experienced either speedy or inexpensive justice. I suspect the same is true for all of you reading this article. We can, however, use our experiences to optimize our client's chance of a fair and/or good result, to minimize the unnecessary expenses and to expedite the matter (if that serves our client) as much as possible.

All too often I see lawyers who have told their clients that they can "win" a case. Plaintiffs typically hear the word "win" from their lawyer (even when it is in a demand letter)⁴ and believe that means they have a great case and getting a large settlement will be easy.

³ Good lawyers carefully define "winning" for clients. Often, "winning" is something less than a jury's ringing endorsements of each of your positions in litigation. Sometimes, "winning" is merely surviving a piece of litigation that results from a mistake. But, "winning" never includes having a client walk away at the end of her work with you wondering, "why the heck did I do that and what did I get out of that relationship?!?" Of course, we want our clients to walk away: (a) understanding why they are in the situation they are in; (b) knowing they made the best of the situation, considering all the variables; and (c) believing that if they were in a tough spot which calls for savvy professional guidance again, they would call us.

⁴ Settlement communications, on either side, require thoughtful and realistic follow up with clients. An employee's case is never quite as good as it appears in the demand letter. Similarly, employers' defenses are not as rock solid as they appear in responsive communications. Clients need to understand the purpose for (and limitations of) settlement dialogue.

Similarly, employers hear the word "win" and they hear "slam-dunk", "frivolous lawsuit" or "inexpensive." Savvy employers might hear the word "win" and think summary judgment or, worse yet, Rule 12 dismissal, when the lawyer means to communicate that it could be a tough fight, but the case could likely be won at trial, or on appeal. So, we all need to have a checklist for that first in-person meeting with our clients. Have I:

(a) told them what I think about the merits of the case based on what I do know, identifying both case strengths and case weaknesses and emphasizing that my point of view will likely change later and this is only an *initial assessment* to be reviewed and updated frequently;

(b) explained to them that there is a lot that I don't yet know that could impact how I view the merits of the case;

(c) explained specifically what I need to see in order to develop a more informed evaluation of the case;

(d) explained, in detail, what assistance I will need from the client to fill in the holes in my knowledge;

(e) outlined the likely expenses (including attorneys' fees and costs) that will be incurred for each step of the process – including the fact-gathering process; and

(f) identified the steps in the process of the case and the timelines for each step along the way.

When I see parties in mediation, about one-half of the time, the parties are still collecting factual information at the time of the mediation. Settlement is difficult to reach when parties are still evaluating their perspectives about the matter on the day of mediation.⁵ Most people need some time to think about case difficulties and absorb them before they are ready to compromise. Similarly, often in mediations, I find parties are not prepared to compromise. Many times, lawyers are looking for the mediator to be the voice of reason (which I am happy to do) and educate their clients about their chances of success in any potential litigation. But, mediations have a much higher likelihood of success if the parties have been educated about their options prior to the mediation. (Needless to say, this requires vetting the client's position on the facts and the law well before the day of mediation.) When this type of preparation does not occur,⁶ clients often become disappointed with their lawyer. Dozens of times, when a lawyer agrees with my comments at mediation about case weaknesses or challenges in front of his/her client, I have heard clients scolding their lawyer by saying "that is not what you told me *before*", or worse yet "you *never* talked to me about *that*."

Many lawyers who deal with repeat or sophisticated clients forget to **highlight particular case challenges, possible negative consequences or risks**. Some years back, I was mediating a case involving an employee making a retaliation claim. This case provides a good illustration of the danger of forgetting to remind your client of risks.

Here is what I learned during that day. Prior to the termination decision, the employer called its lawyer for advice about an employee who had recently complained about discrimination. The employer felt termination was appropriate because, after the complaint about discrimination, it learned about two serious violations of the company policies by the

⁵ Fortunately, I have settled all but one case I have handled as a mediator; however, many cases were difficult to settle due to the parties' lack of preparation and, thus, the lack of knowledge about the nuances of their case and the process of compromise. It is impossible to effectively set a client's expectations regarding mediation without this knowledge.

⁶ See Rule No. 6 regarding preparing for mediations.

complaining employee and it felt that these violations were so serious that the employer felt it warranted termination, separate and apart from the complaint of discrimination. This lawyer and client talked often about employment issues – perhaps once a week. The recipient of the advice was a Senior VP of Human Resources who was obviously familiar with the lay of the land – that is, the minefield called employment litigation. The Company's VP of HR made the decision to fire the employee who had made a complaint of discrimination, within days after that complaint, because after consultation, he concluded that there was a legitimate non-retaliatory reason for the discharge. What I also learned that day was that the Company was not told prior to the firing that it may not win the case on summary judgment, even if it could articulate a legitimate non-retaliatory reason for discharge. And, I learned that the Company had never fired any employee before that time for the two reasons used to terminate the complaining employee. And, most alarming, I learned that the employment lawyer never even asked the Company's VP of HR, at the time the termination decision was made, whether the Company had ever fired any employee for the reasons articulated for the complaining employee's termination.

Surely, had that lawyer been asking herself about possible negative consequences and talking about those possible negative consequences with the HR-VP, she would have asked herself what kind of proof would be offered for pretext and the issue of prior terminations would have come to mind. And, one would hope that the lawyer would have reminded the HR-VP, even though they had been through battles before and was quite knowledgeable, that this is not the sort of case that has an airtight defense and could be lost on summary judgment. Instead, that client left the mediation having paid \$2,000+ for the advice about how to terminate the employee, \$80,000 for the defense of the litigation through summary judgment (undertaken by the same law firm that offered the advice) and \$50,000+ to the plaintiff to settle the case, plus mediator's fees. I suspect that HR-VP did not feel as though it received a large amount of value-added from the lawyers who participated in that case. This is particularly true since it was the considered judgment of the lawyer to encourage the employer not to offer more than \$1500 to settle the case, upon commencement of the lawsuit. I was told that the advice about offering \$1500 was made, without a caveat noting that it could cost much more than that (more than 90 times that amount, considering all of the expenses, except the costs incident to the interruption of the business, in that case) to resolve the case 1.5 years later.

Another mediation lesson comes to mind. Last year, I settled a case where the executive employee received approximately one-year's compensation. It turned out that employee had misrepresented a significant fact to his employer. Given the potential for an adverse result in any litigation, or an after-acquired evidence limitation on damages, I thought one-year's pay (nearly \$350,000) was quite an excellent result for the plaintiff's lawyer on the case. However, the plaintiff was furious throughout the mediation. He threatened to fire his lawyer in the middle of the mediation and the lawyer ultimately agreed to cut his fee by about 60% in order to get the case settled and try to salvage the relationship. What I heard over and over again during that mediation was the plaintiff complaining, "During our first meeting, you told me I had a *great* case." Apparently, the plaintiff's lawyer had never set new expectations with the client. At one point during the day, I pulled the lawyer out in the hall and asked him to retrieve from his file an email or correspondence outlining for the client the case strengths and weaknesses (including the devastating impact a written misrepresentation could have on the employee's claim). Unfortunately for him, he couldn't provide such a communication. In fact, the only communication he had in his file was the demand letter, which asked for \$7,000,000. (The letter was written prior to the plaintiff's lawyer discovering the misrepresentation made by the plaintiff.)

As an employee's lawyer, if you have the good fortune of surviving summary judgment, yet are unable to settle for a sum that you believe appropriate and you are headed for trial, setting clear expectations is key. (Your history of setting expectations will serve you well.) At this point, a client needs to be reminded of the risks that hopefully his/her lawyer has talked about repeatedly. And, of course, the client needs to be reminded about costs and expenses incident to trial. I still remember, with a grimace, the factory worker who I represented early in my career (and who recovered nearly a million dollars), but who would not speak to me for several years after the litigation was over because she felt that my fee was unfair compared to her recovery. Obviously, I had not adequately prepared her for what to expect in terms of payment to the firm and costs, and what amounts would be deducted from her recovery. One lesson I learned from that case is that following summary judgment, and prior to trial preparation, is a good time to review with your employee clients their fee arrangements and reiterate what will happen (in terms of payment to the client, including offsets therefrom, and payment to the lawyer) in the event of a series of possibilities.

The final phase of litigation – **heading to trial** - is also **an important time** for the employer's lawyer **to reflect on expectations with the client**. At this point, you may have been paid more than \$150,000 in fees for the work so far; yet there could be much work yet to be completed, with perhaps as much as \$100,000 left in attorneys' fees to get through the trial. Thus, it would be nice, after a loss on summary judgment, to be able to pull out your early correspondence outlining the budget for the case and the most recent case evaluation. Hopefully, you will be able to say something at this point about the fact that the result is disappointing, yet not totally unexpected since everyone had the understanding that there was a risk that the employer would find itself in this position. (This is a communication that needs to be handled very gracefully, because one's trusted advisor must never be heard to say, "I told you so.")

MISTAKE NO. 2: TAKING YOUR CLIENTS AT THEIR WORD

I believe **employment cases are won and lost based** not on what the truth is, but rather **on what the parties can prove**. The party with the better proof of their point of view wins. So, when my business client tells me that the company did not fire an employee because of his age, I always ask, "well, is there any person or document that might paint a different picture" than what the company knows the truth to be? For example, in a "reverse"⁷ age discrimination case, if one of the managing directors of the employer had sent an e-mail to another one of the managing directors, noting that the candidate "simply didn't know enough; he is just too young," that would be a pretty damning e-mail. Of course, what the managing director *meant* when he sent such an e-mail was that the candidate lacked experience. Nonetheless, regardless what was "meant" by the communication, we (as lawyers advocating the clients' positions) need to know: (i) the obstacles to our success in the case early in the case; and (ii) what might come up in the pile of proof offered by the opposition. The only way to get that information is to ask for it. And, my suggestion is to ask for it repeatedly. Sometimes, the person from whom you are requesting information does not know where all of the "proof" lies. Thus, as lawyers we need to ask a lot of questions about "who, what, where, when, why, and how do we prove that is true."

I always ask my clients – regardless which side of the fence I sit on – to provide any and all documentation bearing on the subject matter of the dispute or potential dispute. I ask for

⁷ In Minnesota, for example, age discrimination is prohibited against any employee who is 18 years or older. Thus, an employee who is told that he cannot be hired for a position because he is too young may have a cause of action if the applicant is 18 years or age or older.

journals, notes, day-timers, calendars, etc. And, I ask my clients to image their computers (and the opponents' computer, if they have access to it). Early in the case, I might perform some relevant key word searches of that imaged computer data. I want to know not only what my clients' view of the truth is, but I also want to see what the proof is, both in support of my client's truth and adverse to that position.

Similarly, I always ask my clients to allow me to perform my own investigation into the situation. When I'm representing the employee, generally I tell my clients that I have a Rule 11 obligation to ensure that their case has merit. Thus, I need to talk to potential witnesses to see if there is support for their point of view. When I'm representing the employer, I tell my client that I need to be able to look at the information that will be sought in discovery, so I can make an informed decision about what to advise as to the appropriate course of action early on. So, I need to look at the relevant notes, e-mails and documents and talk with a sampling of the relevant witnesses. While the business (and sometimes individual) client might view this as an imposition, it is much better than being surprised by the bad evidence, after the dispute has gone on for one year or more, and you have offered advice assuming there is no proof out there to support your opponent's point of view.

MISTAKE NO. 3: START THE MATTER AGGRESSIVELY, TO SHOW THE OTHER SIDE WHO IS BOSS

Sometimes, when you come out swinging, you land a few punches on your own jaw, or on the jaw of your clients. From an employee-lawyer's perspective, how you approach the company is particularly important. I know a number of plaintiff's employment lawyers who say, "Why mess around with demand letters, just put the case in suit." As an employment lawyer who visits both sides of the fence, I say, when I'm representing the employee, "why not try to approach the company and see if a respectful resolution is possible?" So, I generally don't draft demand letters telling the employer how I am going to embarrass it, bring the company to its knees or "kick the ass" of the other (inferior) lawyer because I am so good at getting money for plaintiffs. Rather, I simply state what the picture looks like from our side of the fence and note my client's desire, if possible, to reach an amicable resolution, so long as it can be swift and fair, given the circumstances.

This is the sort of approach to which most of my employer clients respond most favorably. Many of my employer clients don't like being sued and will not visit the issue of settlement for many months (if at all) after a lawsuit is commenced; and some employers deduct from the available settlement pool the amount that has already been paid to defend a matter. So, it is worth considering whether starting a lawsuit first actually gets less money for your employee client.

Your strategy, as an employee's lawyer, depends on the business and the culture of the employer.⁸ You need to understand how the employer has responded to prior claims by employees; you need to understand the company's litigation history, pending litigation, whether

⁸ Virtually every employee I have ever represented has shared with me his/her belief that if I, as the lawyer would, merely write a letter to the employer threatening to sue it and make the allegations public, the employer will settle the case. This is rarely true. Employers do not often fall to their knees following a threat of publicity or a lawsuit. And, most employment lawsuits are simply not that newsworthy. Of course, as the employee's lawyer you have to be careful not to threaten that which you are not willing to undertake. If you are going to threaten publicity, you better be willing (at the appropriate time) to make the matter public. While generally a threat of media attention is better than the actual media attention itself (since typically the "gloves are off" once the case becomes public), there are some cases that are appropriate for a carefully considered media strategy. The media opportunities are rife with possibilities for counterclaims – such as defamation or breach of fiduciary duty – so they need to be undertaken after much planning.

there are any leverage points (e.g., an upcoming initial placement offering), and the prior strategy used by the employer's lawyer in similar kinds of cases. There are many sources of public information you can access regarding the employer's lawyer and the employer itself. Sometimes, in those public communications, you find pearls of wisdom. For example, in some cases, it may be effective to use a company's motto to support your claim; e.g., "work hard; play hard" might be used very effectively in the right sexual harassment case, or a company whose motto is "do the right thing, quickly and safely" might be a great resource for a medical device whistle-blower case.

From the employer's side, you need to understand that **flexing your muscle is not always a good move**. When an employer explains, loudly, to an employee and his lawyer that it will spend every dollar in its possession to fight this frivolous litigation before it would give either of them a penny, this tactic may not have the desired result. Such a move may engage the ego of the other lawyer and the employee and, the fight may be "on" for years and years. Even if the employer ultimately wins, the battle may be very distracting from the core business of the company for a long time and, needless to say, costly. Folks don't generally walk away from a fight where they have been called "stupid" or "worthless", but they might give up a fight where they are given a graceful exit.

My philosophy is: why start with an employment dispute with a swift kick in the shin?⁹ You can always get nasty. But, once the fight has gotten nasty, there is often no way to go back to civil. So, start as civilly as you can, no matter how the other side behaves. And, move into the realm of "mean" only when you have to do so.

MISTAKE NO. 4: USE YOUR STANDARD FORMS TO SAVE YOUR CLIENTS' MONEY

While we all have templates that we use to help us efficiently practice law, my advice is: constantly **challenge your standard operating procedure**. For example, before you use the same intake form you've always used for executives (to be implemented by your paralegal), read the form to make sure it is not missing any questions for this particular fact pattern.

Perhaps the best advice I can give you in this area is **reread your retainer letters (and other forms)**. That is the first letter that you send to clients, and it sets the tone for the relationship and establishes expectations. You are describing what you are going to do for the client and what you are not going to do. So, those letters should be drafted with great care. For example, when you are retained to try to negotiate a severance for an executive (from either side), be prepared for the possibility that you may not be able to achieve a settlement. Then, what happens? What does your fee agreement say? Have you clearly communicated about what the next steps will be after a failed negotiation and what the charge will be for those next steps? If you fail to communicate that you are "trying" to negotiate a settlement, but you are making no guarantees about achieving a resolution, you are setting yourself up to be viewed as a failure by your client. This could have unfortunate consequences for you when marketing the client for handling the litigation that ensues when the attempt at an amicable resolution is not successful.

Of course, from the employee-lawyer's perspective, there may be some cases that you are willing to take a crack at the negotiation of a settlement but you do not assess enough to assess whether you are willing to litigate the case, in the event negotiation fails. Even employee's cases that are hourly payment matters can turn into effective contingent cases because the employee (even high-powered executives) run out of money or cash flow

⁹ This was not always my philosophy. I kicked a lot of shins before figuring out it did not work as well as I had hoped.

somewhere short of trial. So, undertaking litigation of employment disputes should be taken from the employee's side advisedly, only after careful consideration of all the facts.

From the employer's lawyer's point of view, you do not want to over-promise. Whenever you enter into negotiations, the company needs to be mindful that they may not be successful. And, of course, it is the lawyer's job to be forward thinking. Well before the failed negotiations, the employer's lawyer needs to have discussed with his/her client the next steps and how s/he will optimize the client's position in whatever comes to pass.

The idea of carefully considering a template document, in each and every case,¹⁰ will serve you well throughout any employment matter. For example, the other day I reread one of my electronic document preservation letters, which I typically send out prior to litigation, when I'm not certain that negotiations in a dispute will be successful. After rereading my template letter, I thought to myself, "why is this sentence in here?" If I can't easily remember why the sentence is there, it likely will be less than clear to my opponent. So, I decided to: (a) go back to the creation of the document to see what I was thinking at the time; perhaps I attended a seminar that suggested the language (and I could look at the materials and recall why I included it); and (b) until I figured out what the purpose of the suspect sentence was, I rephrased the sentence to provide clarification.

MISTAKE NO. 5: MEET WITH YOUR CLIENT THE MORNING OF A DEPOSITION OR UNEMPLOYMENT COMPENSATION HEARING TO EXPLAIN WHAT THE PROCESS IS LIKE AND TAKE HEART IN THE FACT THAT THE "TRUTH" WILL CARRY THE DAY

Employment law cases are essentially a divorce in the business world. Many people are more attached to their jobs than they are to their family.

When a manager is accused of discrimination or an employee believes s/he has been mistreated, emotions are high. Any employment lawyer who does not **go over with their clients and witnesses, in advance, each and every question that could come up at a deposition or any other testimony under oath** does so at his/her own peril. Of course, you can't tell your clients and witnesses what to say, but you can prepare them for what is coming to try to diffuse the emotion surrounding the situation. You can also remind them of the statements they have made to you previously about what their "truth" is about the situation. This will help the deponents focus and make testimony under oath much more predictable. In important cases, I often tape-record key witnesses in advance, asking them the questions I anticipate they will be asked, so they can look at themselves on tape and see if they are communicating what they intend to communicate about the "truth" of the situation.

Similarly, as employment lawyers, you need to be involved in the administrative matters that surround the employment dispute. For example, in any litigation involving claimed wrongful discharge, both the employer and the employee will likely be stuck with the information that was provided in the termination letter, the submission to the unemployment compensation division, the social security or disability application paperwork or other communications that relate to the

¹⁰ You may be surprised at the typographical errors you will find in your own and your opposing counsel's interrogatory definitions section, if you read it carefully. Or, you may find something that is not clear in an executive employment agreement in the section that defines "confidential" or "proprietary" information. Of course, when it comes to non-compete agreements, those written for service organizations often look a bit different than those written for companies that produce goods. And, the law varies greatly state-to-state on the enforceability of non-competition agreements. An agreement noting that another state's law governs the application of the agreement may not suffice, since those provisions are not enforceable in some jurisdictions. This, we should be careful to ensure that the non-compete agreement directly fits for the context in which we are using it.

specifics of the termination process. Therefore, you do not want to delegate those tasks to the client to handle without any guidance from you. It is only the most sophisticated client that is mindful that each piece of paper completed in connection with the employment situation can and will come back to the surface in a dispute. For example, I recall a case involving a former employee who was a sexual predator being marked by a payroll assistant as "eligible for rehire" on the employee benefits termination paperwork. This notation made it difficult for the employer to establish that it took prompt remedial action to address the harassment perpetrated by that employee prior to his separation from employment.

MISTAKE NO. 6: GO TO MEDIATION WITH AN OPEN MIND – ONE NEVER KNOWS WHAT WILL HAPPEN

My advice is to **prepare for mediation**, as you would prepare for a court appearance and/or a deposition. The point of mediation is to settle the case, so why not prepare your client for the issue of settlement and why not prepare for trying to get the upper hand in negotiations that day? After all, mediations aren't cheap, so why not make the best of them? Specifically, with regard to mediation preparation, I would:

(a) prepare your clients to compromise; compromise does not come naturally, especially in "divorce" matters;¹¹

(b) prepare your clients to be upset; if a mediator is doing his/her job, s/he will make the party feel heard, but will also ask difficult questions about case weaknesses that makes the client feel uncomfortable and worried that the mediator is not on his/her "side";

(c) prepare your clients for potentially a long day; mediations are successful when the parties believe they have a stake in the process; if the expectation is that the process will be expeditious, the parties will likely be disappointed; in order for a mediator to be successful s/he has to develop a rapport with each of the parties, so his/her opinion will count for something; this process takes time; compromise takes time;

(d) consider telling your clients to bring something else to do at mediation so the mediator's time spent in the opponents' room passes more quickly; also consider bringing other work you can do at mediation, if you do not have enough work on your client's case to fill the downtime in a mediation (sometimes up to one-half of the day); you will gain major points with your client if you spend some of the downtime in the day either: (i) working on another matter for which you do not bill this client; or (ii) getting to know the client's business, at no charge;

(e) make sure you (and your clients) know your case strengths and prepare for them; oftentimes, mediations turn into contests about which party possesses the better proof; if you and/or your client have proof to support your position, bring it; it will help the mediator achieve compromise in the other room; and

(f) make sure you (and your clients) know your case weaknesses and prepare to rebut them; when the opposition raises the points that should be raised, you should be prepared, with case law, affidavits or other evidence to rebut the arguments attacking your case. And, your clients should be prepared to compromise in light of the weaknesses of the case.

Why not bring the whole file with you to mediation, as well as the client's documents? After all, the client has paid for that work. If you really want to settle the case, you should have access to whatever may help you resolve the matter, in the most favorable way to your client.

¹¹ Often, parties come to mediation believing that the mediator will "decide" who is right and wrong and force a settlement upon the parties accordingly. This process would violate the ethical rules governing mediators in most jurisdictions.

Sometimes the weapons in your arsenal are evidence, the pleadings in the case, or research. When I am a participant in mediation, I have everything available for use. You never know what you might need. I prepare folders for the key arguments that we anticipate the opposition will raise, which contain our factual and legal arguments rebutting the opposition's point of view.

Of course, if you reach a settlement, document it right then and there, while everyone is motivated to settle. Even where there are rescission periods, once a deal is "inked" there is some sense of closure that will be difficult for folks to unwind following the end of the mediation. If the agreement executed at the mediation is merely a term sheet, make sure there are deadlines for formally closing the deal.

MISTAKE NO. 7: ASSUME KNOWLEDGE FROM SMART PEOPLE; KNOW WHEN TO SPOT THOSE LAWYERS WHO DON'T KNOW WHAT THEY ARE TALKING ABOUT

The longer we practice, the more we assume we know, no matter how hard we fight this urge. How many times have you heard, as an employment lawyer, "in my 30 years in the business, I never" As lawyers we attribute experience with skill; sometimes they run hand-in-hand and sometimes they do not. We need to be prepared for both possibilities.

When you see a lawyer that you've never heard of before, do you assume that lawyer is not as knowledgeable as you? There is no greater chance to be upstaged than by the opposition who you underestimate.

Put yourself in your opponent's shoes and ask yourself, "if I were on that side of the fence, what are the 10 best arguments I would make and what would I be worried about the other side doing?" Then, prepare the responses to those 10 arguments and go about considering whether it is appropriate to take those steps that you identified as worrisome.

Another huge assumption we make is that we assume smart regular people (non-lawyers) understand the employment law process and know why we are doing what we are doing.¹² Consequently, when your clients are signing important documents, explain the documents to them in detail, in business and layperson's terms. This is especially true for releases. Many lawyers are so thrilled to have a matter completed that they do not take the time to go through a release document, line-by-line, to ensure that the clients understand exactly what is expected of them going forward.

The importance of real understanding becomes clear with non-competition and non-solicitation agreements, stock option agreements, executive compensation documents, benefits plan documents and other of the more mundane documents that are processed in the employment law world all the time. For example, have you ever stopped to think about how your employer client's affirmative action quarterly reports could impact a potential discrimination claim? Or, when you are helping your client respond to a request for information about an employee, do you *study* the documents before they are sent to see if there is some lesson to be learned about how to better craft those template documents or organize those files to more aptly comply with the employment laws or communicate with employees? Or, on the other hand, do you assume the documents are in order because your employer client is savvy and the human resources personnel seem particularly sharp? These are opportunities to provide real value to your clients. Take them.

¹² A good test for how far you have distanced yourself from real humans is to ask yourself, honestly, whether you could explain a research project to a first or second year law student. If you have difficulty doing so, you also may not be communicating with your clients as clearly as you had hoped.

From the employee side, do you assume that your client who is negotiating to become the next CEO of a publicly-traded company knows that all the prior executives' employment contracts are likely available via the Securities and Exchange Commission ("SEC")? Do you take the time to explain to your client what an 8K disclosure is and what kind of information is available through the SEC? Do you assume your client understands the non-competition agreement that s/he is being asked to execute? Similarly, do you assume that your client is getting tax or financial planning advice from someone else, or do you try to educate them (or tell them to get advice from others) about the implications of 409A on their stock option portfolio and suggest a good financial planner? When your client seems forceful, smart and educated, and tells you exactly what s/he wants in his/her compensation package, do you pull out the other CEO agreements that you've seen recently so you can tell the employee what might be a term that s/he could consider for negotiation as well? Once again, these are great opportunities to be a value-add to your client.¹³

MISTAKE NO. 8: LEAVE THE TAX ISSUES TO THE TAX LAWYERS, AT THE END OF THE CASE, OR BETTER YET, AT TAX TIME THE NEXT YEAR

With how difficult employment cases are to settle, employment law practitioners have to use all of the available resources to make a settlement workable. **The tax law**, in this instance, **can provide some assistance**. In a sexual harassment case involving touching, for example, the employment lawyers should be thinking about the implications of I.R.C. Section 104(a)(2) right from the beginning of the dispute. All communications about the case should discuss the possibility of resolving a personal physical injury arising from a claimed (and hotly disputed) assault and battery, as well as a claim for sexual harassment.¹⁴ As claims that arise under 104(a)(2) are not subject to taxation, a lower settlement may be appropriate for the employer while bringing greater value to the employee. When you are dealing with nontaxable settlement payments, you could consider an annuity, which allows a larger payment over time, without taxes on either the principal amount, or the interest earned on that amount.¹⁵ When you reach such a settlement, your settlement documents need to contain the right language acknowledging the 104(a)(2) nature of the claim and/or the irreversible structured settlement payments. Absent the appropriate language, there will be tax consequences for both sides.

Similarly, emotional distress damages for discrimination and other employment claims are taxable only as income, rather than as wages, thereby reducing the tax exposure for such a settlement. (This is true for both employers and employees; paying an employee \$20,000 in a wage settlement, generally costs the employer thousands more than \$20,000 due the employers' share of FICA and FUTA contributions on that payment.) Consequently, the correspondence in the case should never talk about simply severance, when there could be an emotional distress component to the case. And, when the case is settled there should be an appropriate apportionment for the amount that can be properly allocated as and for claimed emotional distress damages.

Finally, for claims arising on or after October 22, 2004, it is clear that attorneys' fees and costs paid for any discrimination or discrimination-type claim¹⁶ are taxable to the employee, but

¹³ If you are concerned about expenses, ask first before you perform the service.

¹⁴ Of course, we also have to be mindful of insurance. We do not want to be creating a paper trail that suggests that the claim we are trying to negotiate falls outside of an Employers Practices Liability Insurance policy.

¹⁵ In the event the recovery of the principal amount is taxable, the interest thereon is also taxable income to the recipient.

¹⁶ A "discrimination-type claim" is defined quite broadly for this purpose, including FMLA claims, wrongful discharge claims, etc.

the employee is entitled to an above-the-line deduction for the attorneys' fees and costs paid, to the extent of the amount claimed as income in the year that the attorneys' fees and costs are claimed as a deduction. Otherwise, attorneys' fees and costs paid by the employee in employment-related claims are generally a miscellaneous itemized deduction, reportable on the employee's Schedule A. This is an important benefit an employee should be apprised of at the time of settlement and reminded of thereafter.

MISTAKE NO. 9: DO ALL THE WORK FOR YOUR CLIENT

Many lawyers want to please their clients. So, they offer to do *everything* to handle an employment matter for them. But, this is a strategy that could backfire. There is great benefit to **asking your clients to assist in their cases**. For example, your clients will have more stake in the outcome because they have some sweat-equity in the case. In addition, your clients will have a greater appreciation of how hard it is to answer a set of interrogatories and discovery requests, if you ask them to take the first crack at the job. Then, your clients may be more understanding when you were forced to handle a temporary restraining order and, as a result, cannot get to your assigned tasks until a couple of days after the time you thought you would complete them.

From the counseling side, ask your clients to draft talking points for a disciplinary meeting, outlining all the potential questions that could come up and the answers to those questions. The next time you perform that task for your clients, they will not wonder why it took several hours to be thorough and clever in preparing for the important employment meeting. Furthermore, your client may teach you a thing or two and you will have the opportunity to tell your clients how smart and insightful they are. Everyone likes a sincere compliment now and again and everyone likes to be appreciated and involved.

Finally, when you share the work with your clients, your bills will be more reasonable. Moreover, those clients will want to come back to you to work *together* on the next project.

MISTAKE NO. 10: USE YOUR STANDARD FORM RELEASE; IT HAS ALL OF THE GREAT STUFF YOU KNOW THAT IS BETTER THAN EVERYONE ELSE'S AND LET YOUR CLIENT OFF THE HOOK FOR ANY FEES INCURRED AFTER THE SETTLEMENT AGREEMENT IS REACHED

It goes without saying that the EEOC is taking an aggressive look at release documents and so should employment law practitioners.¹⁷ I still see settlement agreements that have attorneys' fees provisions, promises not to file a charge and no reapplication provisions, even though the EEOC has criticized them. (Of course, it is something different if we are knowingly choosing to take aggressive positions at odds with what the EEOC, than if we are doing so unknowingly.) So, we need to **carefully study our** old friend – our 10-year old **template release document**. And, we need to study it for each case. For example, consider:

(a) whether a nondisparagement provision is really appropriate in each case, especially if it may trigger a request for mutuality;

(b) as an employer, if the employee is not going to agree to liquidated damages, what is going to be the next step? Are you willing to use prevailing party attorneys' fees language?

(c) do you want confidentiality as to the terms of the settlement, or the underlying allegations as well?

¹⁷ I am sure there is another whole section of this conference dedicated to bringing us up to speed on the latest and greatest developments in the law regarding the EEOC's position on the enforceability of settlement agreements.

(d) do you need an agreed upon statement about what the parties can say about the dispute if asked?

(e) do you want the entire agreement to be void if the employee rescinds, or just the claim that is rescindable?

Similarly, as an employee's lawyer, you might consider for example:

(a) do you need a mutual release in every case, or will asking for such a release raise more suspicions than it is worth?

(b) do you need mutuality with respect to every term?

(c) should there be separate checks to the attorney and the employee?

(d) what tax language do you need?

(e) do you need an agreement with regard to how the employee and/or employer should respond to an unemployment compensation claim?

As noted above, it is also important to explain the significance of the documents to your clients. Don't assume your client knows what the terms of the release means. Take the time to explain the release document after it is executed. Set your client's expectation that, even after a settlement is reached in principle, there may be more work to be done. I once had a case that went on for a year after we "reached settlement" at mediation. Had I offered to undertake the rest of the case for free, I would probably have lost my job (even though I was a partner at the time)!

AND AN EXTRA MISTAKE – NEVER HAVE ANY FUN!

Since it is hard work to keep all the employment law nuances top of mind, learn to laugh with your clients and, even at yourself. When you make a mistake, just add it to the list, so that it is less likely you will do so again. Someday, when you are "older and grayer" as an employment lawyer, you will be laughing about that mistake.