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SUCCEEDING AS A YOUNG LITIGATOR

Justice Isn't Free: Consider Costs When Formulating Litigation Strategy

By Joseph Siprut

Suppose a new client meets with you about claims she wants to pursue. The facts are fairly straightforward: the client claims to have performed various services for the (future) defendant but has not been fully compensated, and the client therefore desires to pursue her available remedies to obtain the funds she is owed—approximately \$50,000. Prior to the client's meeting with you, the defendant had tendered a settlement offer of \$5,000—a meager, insulting amount, to the client's mind.

For some, the solution here may seem obvious: sue! The good guy is your client, the bad guy tried to cheat her, and now it is time for justice to be served. You assure your client that she has several causes of action available, that you will issue a multitude of discovery requests, and that you will not rest until she receives the compensation due to her from the defendant. Right?

Not so fast. Before you formulate your litigation strategy, consider the costs involved. For example, here, the client's *maximum* damages are approximately \$50,000, plus costs and fees. But in a case involving unpaid services—that is, a bona fide dispute regarding the value of those services—there is a reasonable likelihood of recovering only a portion of the claimed damages. If we "split the difference" (as many fact-finders might), all other things being equal, the client might reasonably expect to recover approximately \$25,000. To press on with the case through discovery and, ultimately, a trial, legal fees would likely range from \$10,000 to \$20,000, depending on the volume (and especially, the contentiousness) of discovery. If we assume that the client ultimately recovers \$25,000–\$30,000 but incurs legal fees of \$15,000, she stands to recover approximately \$10,000–\$15,000—after a minimum of one year to take her case to trial and actually collect on the judgment. Weighed against these factors, \$5,000 may actually be a starting point to a successful negotiation.

Put simply, thoughtful litigators must have a big-picture view of the case in mind when mapping out case management strategy or when evaluating an initial settlement offer—a maxim not adequately impressed upon law students. In law school, of course, we are trained to analyze a set of facts, spot issues and rules, and develop and defend legal theories. In problem set exercises, we might review a set of facts and advise a "hypothetical client" about the various causes of action available to her. Success or failure on the exercise depends on whether we spot each distinct legal theory or issue.

But as we have seen, one piece of the puzzle is missing from this rosy worldview: justice doesn't come free. Clients actually care about such minor matters as the amount of their bill to fight the good fight for justice. Who would have thought?

In the real world—the world that we who practice law inhabit—the strategic considerations underpinning disputes are not nearly as simple as we might have imagined in law school. Thoughtful and responsible attorneys must consider additional angles and factors beyond simply canvassing the legal theories, not least of which are the economics involved. So, when your client comes to you outraged and ready to fight to the ends of the earth to see justice done, it will be up to you to step back, inject a healthy dose of reality about the costs of litigation, and manage the client's expectations. Your client will be better served with practical advice that leads to a cost-effective resolution than with a pyrrhic victory where your bill ends up being more than the judgment.

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