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The prospective client had a previous lawyer. Red flag?

INSTEAD OF OUTRIGHT REJECTION, CONSIDER THAT THE PROBLEM WITH THE CASE MAY HAVE BEEN THE LAWYER

We are plaintiffs' employment lawyers – principled, passionate, and perhaps a little self righteous. We represent employees' rights. We fight for the little guy – David versus Goliath. In our souls, I think true plaintiff's employment attorneys like being the saviors of the down-trodden, the champion, the knight in shining armor. Some of us are motivated by that, more than anything else. More than money.

But, in doing our work, we must properly and effectively choose which cases to take and which to reject. We must choose which clients to represent, and which to avoid. It is a delicate tightrope. We have to know how to be selective. As much as we would like to, we can't just follow our feelings. Instead, we must insist on realistic expectations and make pragmatic decisions. This is probably one of the most important skills that an attorney in private practice must develop.

Common wisdom about cases with a previous lawyer

In our selection of cases, if a potential client has had a previous lawyer, we are immediately suspicious. The common wisdom is that, if a client has had prior representation, there must be something inherently "wrong" with the client. Where a potential client has had two previous lawyers, they become untouchably toxic, and most employment attorneys will instinctively run the other way. Yet, the perception that something is amiss with the client because they had prior representation is often far from the truth.

For a variety of reasons, there are times when inexperienced and/or unqualified lawyers delve headfirst into employment-law cases, without the requisite knowledge of the potential pitfalls that exist under the morass of California law that governs the employer-employee relationship. Perhaps the reality of being not only a practicing attorney, but also running a financially viable business, compels them to take almost any case that comes through the door. Maybe they believe that any employment claim will result in a quick resolution, where they can make an easy buck.

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In our experience, some of these lawyers do not adequately represent their clients, and, in some cases, violate their legal, professional, and ethical responsibilities. Sadly, underprivileged clients are often much more at risk for this kind of treatment. In many of these cases, a failed attorney-client relationship is not indicative of a problem client, but of a problem lawyer. We have taken over cases where the matter has been pending for months, or even years (seriously!), where prior counsel did next to nothing after the hoped-for settlement was not in the cards.

Personally, I love these types of cases. My "rescuer complex" is doubly satisfied by a client who has been the victim of a negligent or inept attorney, or even worse, a client who has been screwed over by their prior counsel. Usually, the little guy is in the process of losing the race, and, most often unbeknownst to the client, the race is almost over. However, we have the power to quickly change the direction of a case, and, in doing so, ultimately obtain a fantastic result for the client. But how? I hope to lay out a clear schematic on how I deal with these cases, and then conclude with three recent case studies.

Evaluating the case and previous counsel

Before taking the case, speak to the client and to previous counsel. This is obvious. However, in communicating directly with prior counsel, you can learn a huge amount about the previous attorney-client relationship and why it failed.

If the case is pre-litigation, immediately review the relevant incident or event dates to determine whether there are any problematic issues, including, for example, whether there is an upcoming statute of limitations, or any deadlines for exhaustion of administrative remedies (government tort claims, civil rights department charges, etc.). Unfortunately, on occasion, you may discover that prior counsel has actually missed an important deadline that cannot be remedied. In that event, you have an ethical obligation to disclose the potential malpractice to the client (or potential client).

If already in litigation, evaluate the status of the case: Review the docket, all prior rulings, the upcoming calendar, the assigned judge, and even defense counsel. Obviously, at this stage, you cannot evaluate everything. But do the best you can. What has been done? Does the complaint need to be amended? What is the status of discovery? Often, depositions have not been taken. Are there potential witnesses who are likely to help – or hinder – your client's claim? Any motions on calendar? When is trial? Has there been a continuance of the trial date?

Often, prior counsel will drop a case and then assert a lien. You should be generally familiar with the law regarding attorney liens (see case sample below). If I have concluded that previous counsel is the problem, I do not attempt to resolve liens at this stage, primarily because it takes too long. However, you should certainly consider it in making a decision. If the attorney has done a lot of work that resulted in great settlement offers, but the client just refuses to settle, that may not be a case that you want. Often, however, the attorney has held the case for a couple of years and has done less than 20 hours of work. I am not afraid of these liens and am prepared to litigate them in a declaratory relief action if necessary.

Assuming you have decided to take the case, you have to move quickly and aggressively.

Immediately after you are retained in the case

Advise the defense of your representation

You need to promptly advise defense counsel of your representation. However, you can be strategic with this information. In one of my favorite cases, I was retained the day before what should have been a simple witness deposition being taken by the defendant. I came into the deposition room with my substitution of attorney form, personally served it on defense counsel, and, after defense counsel was done with his 10 minutes of questions, took a multi-hour deposition that established plaintiff's case through this independent third-party witness. That case was over as soon as the insurance could pay the policy limit.

Amending the complaint

It is critical to carefully evaluate the previously filed complaint to make sure it is properly pled. In almost every case where I came late into the case, the complaint needed to be amended. Most of the time these cases were far past that procedural stage. But the law is clear that the right to amend should be liberally granted. (See, e.g., *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939 [court's discretion should be exercised liberally to permit amendment of the pleadings]; *Morgan v. Sup.Ct.* (1959) 172 Cal.App.2d 527, 530 [it is an abuse of discretion to deny leave to amend where motion to amend is made timely and the amendment will not prejudice the opposing party]; *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565 [same, even when leave to amend sought on eve of trial].)

Remember, if the amendment is based on the same facts, new legal theories can be added based on those facts, and they will relate back to the filing date of the original complaint. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.4th 1157, 1199-1200.)

When new counsel is involved, the courts rarely deny these motions. In some cases (one in particular discussed below), I have amended the complaint to set forth completely new theories of recovery. However, it is critical that your amended complaint be perfect, and not subject to demurrer and/or a motion to strike.

Discovery

Often, the client has not adequately (or at all) propounded or responded to discovery. Let's analyze those scenarios one by one:

Propounding discovery

If predecessor counsel has not propounded discovery, or if what has been served is inadequate, it is critical to do so immediately. Obviously, this depends on

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the trial date, and whether you have sufficient time before any discovery cutoff to do so without seeking relief. Assuming you have adequate time, I like to serve a full set of discovery contemporaneously with the substitution of attorney. Again, it is critical that the discovery be well-crafted and thorough. This is not the time for lazy. The discovery requests should be pointed and thorough.

You should also have a comprehensive discovery plan regarding who you want to depose. The list of people should be thorough but focused. When you tell defense counsel who you want to depose, make the list complete, and lay out a proposed schedule.

Responding to discovery

Often, this has not happened. Immediately provide substantive responses to any outstanding discovery.

Motions to compel may be on calendar or may have even been granted. Almost without exception, this can all be undone.

On occasion, a motion for an order deeming requests for admission admitted has already been granted. In such a case, you can file a motion for an order granting relief from deemed admissions. (See Code Civ. Proc., § 2333.300 et seq.)

Relief available even if no response filed: Even though Code of Civil Procedure section 2033.300 refers only to withdrawal or amendment of an admission, this includes admissions deemed admitted for failure to respond. Therefore, upon a proper showing, relief may be granted even if no responses were served. (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 979.)

Trial is approaching

If a final status conference and trial are quickly approaching, and you need to reopen discovery, or need a continuance for any other reason, certainly ask for it. But if you can avoid this, instead, immediately offer to meet and confer. Attach the court's trial or case management order to your email. Acknowledge that the case has not been handled efficiently, but do not blame predecessor counsel. There is no reason to cast aspersions. Remain professional.

Usually, defense counsel is not prepared for trial. They have not been dealing with competent counsel, and consequently have not done their work. Hopefully, your strategies have them facing a quickly approaching freight train and they are now unsure of the result.

The introductory email

When I serve my substitution-of-attorney form, I address all the foregoing issues in my first email. The goal is to immediately deal with all the outstanding issues, but to be super reasonable and responsible. Remember that this email will almost certainly be an exhibit in various motions. The judge has to agree with your position in order to side with you. Make that easy by maintaining an efficient but courteous tone. Take reasonable positions. Where appropriate, immediately cite relevant law. Offer to buy lunch or coffee for defense counsel, or invite to a call, while providing available dates and times. No one will take you up on it, but you will be the reasonable actor.

Clearly, the above strategies require a significant and focused investment of time at the very outset of your involvement in the case. It also depends on having fantastic support staff. A potential plaintiff's counsel needs to decide whether the case is worth it, so a double analysis needs to be done:

First, is the case meritorious? Second, is the work involved in resurrecting or rehabilitating the case worth the result? Often, the defense has congratulated itself on almost winning, until competent counsel throws them for a loop and precipitating a settlement because the defense is not ready to go to trial.

Having discussed potential strategies and some applicable law, it is interesting to examine how these situations resolve on a practical level. Below are summaries of three case studies of what actually happened.

Case 1. Always thoroughly review prior discovery and pleadings

Nature of the case: FEHA claims (on the basis of disability resulting from work-related physical injuries and emotional distress), wrongful termination in violation of public policy, and various Labor Code violations.

I came into this case after requests for admission had already been deemed admitted. Defendants had gone one step further and brought a successful motion for summary judgment based upon the deemed admissions of fact. They also had a pending unlawful-detainer case (where, while employed, the client resided on-premises). Because I am not a landlord-tenant attorney, we found her an attorney who assisted pro bono in the unlawful-detainer action.

The client had been dropped by prior counsel but had appeared at every hearing and indicated to the court that she wanted to retain counsel. We filed a motion for relief from deemed admissions, as described, and a motion for reconsideration of the summary judgment ruling.

Never underestimate the importance of thoroughly reviewing prior discovery and pleadings. As it turned out, the requests for admission, which had been deemed admitted (set number two) were almost identical to prior requests for admission (set number one), which, while represented by counsel, the client had previously denied. Once the client was in pro per, defense counsel had made very slight modifications to the requests, changing a word here and there, and then served this second set on the pro per plaintiff (who of course did not answer). It was this second set of requests that were deemed admitted. We were able to clearly demonstrate to the court how the [unanswered] second set of requests were almost identical to the prior [denied] requests, basically amounting to a "setup" of the in pro per plaintiff. This almost certainly played a role in the court's ruling. The court granted our motion for relief from deemed admissions. As a result of the court's ruling, the summary judgment, predicated entirely on the deemed admissions of fact, was unsupported and moot.

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Following these successful motions, the case quickly settled, including dismissal of the unlawful detainer case, and forgiveness of many tens of thousands of dollars of unpaid rent. This was not a huge settlement, but it made a significant difference in the life of this client (and it was fun!).

Case 2. A settlement and prior counsel's lien

Nature of the case: The second-amended complaint that was on file when I substituted in asserted claims for FEHA and Labor Code violations, wrongful termination, and retaliation.

This case was several years old when it came to me. A much older and more experienced attorney had been handling this case; however, no depositions had been taken, and no significant discovery had been done. There was not even an operative complaint.

The second-amended complaint was unclear in its recitation of the facts, and asserted irrelevant causes of action. There was a pending hearing on a motion to strike and demurrer. There was also a motion for summary judgment, various discovery motions, and a trial date on calendar. In sum, the case had been so obviously and thoroughly mishandled that it seemed a hopeless task to remedy all of the issues.

I immediately sought and obtained a stipulation to continue the MSJ and trial. I agreed to produce the plaintiff for deposition. I met and conferred, agreeing to all reasonable requests, and thereby resolving other pending discovery disputes.

Finding the demurrer and motion to strike were, at least in part, well taken, in lieu of filing oppositions, I submitted a declaration acknowledging the shortcomings, indicating that defense counsel had refused to stipulate to a third-amended complaint, and notifying the court that plaintiff had reserved a hearing date for a motion for leave to amend (including for leave to add a cause of action for fraud based on defendants' clear manipulation of the basis for plaintiff's commissions).

The hearing on our motion for leave to amend did not go forward. Instead, the parties participated in private mediation, where the case settled for almost seven figures.

This, however, is not the end of the story. After we filed a notice of settlement with the court, prior counsel asserted a lien for more than 55% of the total settlement amount. Because there was a notice of lien, when it came time for payment, the defendant issued a separate check for the full amount of the lien, including former counsel as a payee. Those significant funds were effectively put on hold until the lien could be resolved.

I sent an email to prior counsel citing relevant caselaw relative to attorney liens after a voluntary withdrawal: *Hensel v. Cohen* (1984) 155 Cal.3d 563, 567-568; *Rus, Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal.4th 656, 672; *Duchrow v. Forrest* (2013) 215 Cal.4th 1359, 1382-1383; *Estate of Falco v. Decker* (1987) 188 Cal.3d 1004, 1014.

The lien was eventually resolved for less than 25% of the original amount after I filed an action for declaratory relief (which was resolved in a court-ordered mediation). Don't be afraid of these actions. They are necessary to make sure that the right people get paid.

Case 3: Six years old and a 15-page docket

I came into this case in spring of 2021. The case was initially filed in 2015! The docket was 15 pages long. A cursory review of this case would have undoubtedly dissuaded many employment attorneys from even considering taking on representation. Sometimes, however, you just have to get into the weeds, go down the rabbit hole – whatever metaphor you prefer – and just do the hard work. It will not always pay off, but it is enormously satisfying when it does.

The client worked for an investment-advisory firm and, throughout her employment, she generated an enormous amount of income for the firm. The controversy began when the employer attempted to withhold the client's commissions after she had committed an error and retaliated against her, terminating her employment, when she objected about illegal deduction of wages.

Initially, defendants' motion to compel arbitration was denied. On appeal, the case was remanded with instructions that certain of the causes of action were not arbitratable for various reasons, but that others were. The case, stayed in the Superior Court, proceeded in arbitration (as to some of the claims) before the Financial Industry Regulatory Authority. The arbitratable claims resulted in a complete defense victory.

When the Superior Court stay was lifted, there remained viable causes of action for wrongful termination in violation of public policy, violation of Labor Code sections 221, 224, 2802, 1102.5, willful failure to pay wages at termination, and for civil penalties under the Private Attorneys General Act of 2004. There was also a pending cross-complaint for grossly and culpably negligent performance of duties (Lab. Code, § 2865) and common count (for the return of ostensibly overpaid commissions). A significant amount of money was at issue, putting the client in harm's way.

At the time I substituted in, a response to the cross-complaint was due within a couple of weeks. There was also a question about the five-year deadline to bring the case to trial (excluding the time periods when the matter was stayed under appellate and arbitration proceedings, and because of extensions provided due to the Covid pandemic). After conferring with defense counsel, we stipulated to the time periods excluded from the five-year calculation.

We immediately filed an answer to the cross-complaint and served an avalanche of discovery: our standard discovery requests on the operative complaint, and voluminous discovery on the cross-complaint. In short, we moved aggressively on all claims.

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Shortly after we came into the case, the court set a trial date and ordered the parties to participate in a mandatory settlement conference. The case resolved at the MSC.

Conclusion

Each of these cases is representative of circumstances that many attorneys would shy away from. Sometimes it is the client who is causing problems, but I find that when fully advised of the actual facts – sometimes for the first time – "difficult" clients will often reverse course.

In my experience, it has been both personally and financially rewarding to take on "problem" cases. And when you achieve a successful outcome, you will almost certainly have a loyal fan forever, and defense counsel who will remember your name.

Marina Kats Fraigun is the founder of Fraigun Law Group. *She is a plaintiff's employment attorney. She has been practicing for over 26 years.*