# Beginning an Employment Discrimination Plaintiff's Practice

**BEGINNING A PLAINTIFF'S PRACTICE**
**By Randy A. Fleischer, Esq. ©**

There are many reasons to begin a practice that includes representing people who have been denied equal employment opportunities. Discrimination in employment is illegal and representing those who have suffered workplace bias is a very noble undertaking. While there are tens of thousands of attorneys practicing in the areas of personnel injury, criminal defense, family law, real estate and the like, there are relatively few attorneys representing discrimination plaintiffs. Discrimination Lawsuits can involve age, disability, race, religion, pregnancy, workplace and military discrimination. As a solo practitioner with a thriving practice that focuses on representing plaintiffs in employment discrimination actions, I can tell you that this is a practice area that is financially rewarding and professionally satisfying.

My personal commitment to this practice area stems from my initial involvement as a pro se plaintiff. I was a victim of discrimination in employment before I started law school. Because I could not find a lawyer to represent me I filed pro se in federal court after finishing my second year of law school. By the time I graduated I had settled the case, received excellent media coverage, bought a house, took my wife to Europe and found a focus for my practice.

Having been an employment discrimination victim myself, I have found that the best insulation from workplace bias is self-employment. I usually recommend my successful clients use their awards to start their own business. My motto has been to make money and keep it. Not only have I made significant annual incomes during my years of solo practice but I work less hours, have less pressure, and see no need to work a ladder for success or impress supervisors. I am one of the happiest and most satisfied attorneys that I know and I intend to stay that way.

While I believe in the social significance of a civil rights practice it is also important to achieve financial success. Unless you can afford to pay the bills, feed your family and keep your office open, you cannot help anyone, no matter the strength of their case or the righteousness of their cause. The most important factor in becoming successful in a plaintiff's practice is case selection, That along with marketing, client interviews and getting the most out of limited resources are the focus of this article.

## I. CASE SELECTION

The most important factor in succeeding in a plaintiff's discrimination practice is case selection. Recognizing a good case when a perspective client walks in the door is impossible without a clear understanding of the relevant statutes and how the court's are currently interpreting those statutes. As a result of the great burden placed on the discrimination plaintiff and the relatively light burden

shouldered by the employer, selecting the right case will make the difference between becoming a successful plaintiff's lawyer and closing down your office and looking to become an employee yourself.

**A. Client Questionnaire**

There are many questions you need to ask to determine whether the client has a case worth pursuing. Before I ever talk to a perspective client I have them fill out a detailed questionnaire. The questionnaire I use is from the National Employment Lawyer's Association Employee Rights Litigation: Pleading & Practice, which is edited by Janice Goodman and published by Matthew Bender. The NELA manual has a whole section on case evaluation and is an excellent resource filled with legal theories, statutes, case law and forms. I strongly recommend buying this set of books and joining NELA if you are going to be representing employees.

The answers to the questionnaire will provide a wealth of information regarding the case. The number of employees, reason for termination, prior case history, theories of discrimination, damages, names, dates and other material facts are immediately discovered. Also important is the feeling you will get about the competence of the prospective client as you will see if they are detail oriented, illiterate, or somewhere in between. The questionnaire also focuses the client on what is important and prevents you from missing details which might otherwise go unrevealed in an unstructured first interview with a rambling potential client . It will also alert you to trouble spots and provide areas for more in-depth questioning. The questionnaire will also provide necessary information for drafting the complaint.

**B. Client Interview**

The initial client interview must serve at least two purposes. First it must provide you with the information necessary to make a determination as to whether you want to become involved in representation. Second, it must provide the client with information about you and the law so that they leave with an understanding of the law, how it is interpreted, their chances for success and why it is important to have you as their attorney. A third purpose for the interview is to generate revenue, which some might consider more important to accomplish than the exchange of information.

Getting information

Read the questionnaire responses before the client interview so that you will know what the case is about, who the major players are and some of the important problems and facts relevant to the employment problem. While you read the questionnaire circle answers that you have questions about or that provide the most important information. Showing that you read the questionnaire responses and understand the case will go a long way in proving your credibility to the client.

A few important questions that you must ask include: What evidence do you have that your protected status was a motivating factor in whatever decision you are complaining about?; What was the reason the employer gave for your termination? (or other adverse conduct); How can we prove that your termination was motivated by discrimination?; Were any derogatory remarks made regarding your protected class?; Were the remarks made by management or employees on the same level?; What policies exist regarding discrimination and how is the complaint procedure publicized?; Did you complain about the adverse conduct?; Who did you complain to?; What did the employer do in response to the complaint?; What are your "real" economic damages?; What do you expect of me as your legal representative

If the client does not have any evidence of discriminatory motive, then be very careful about accepting the case. If the client has doubts that the termination was motivated by bias and discusses other factors regarding performance, misconduct, personality conflicts or office politics that were more likely to be the cause, then do not take the case. The first best indicator you have of discrimination is if the client knows they were the victim of bias. If they do not have a good faith belief that they were the victims of discrimination when they're in your office, then they will probably not come through when on the witness stand in front of a jury.

On the other hand, many people are reluctant to use perceived bias as an excuse for the conduct of others. Employees who work hard and expect to be evaluated based on their performance will find it hard to admit that their minority status motivated a supervisor more than the quality of their work or their commitment to the job. Sometimes questions regarding their perceptions of workplace discrimination will bring out some facts that will lead you to believe that the protected class was a motivating factor in the adverse decision. Just because there is not enough evidence to prove discrimination by a preponderance of the evidence as determined by a federal judiciary sequestered in an ivory tower does not mean that discrimination does not exist in that workplace. Most people do not complain without a reason. For some the reason is simple: they believe they can make big easy money. However, I have found that most people who go to the trouble of filing a complaint with the government and pushing it through the administrative system do it because they have been treated unjustly. Those are the people who need representation.

The interview will also provide you with an understanding of the client and how they will perform at deposition and on the witness stand. How they respond to your questions will help you form an opinion as to how they will respond later on in the proceedings. If you don't feel they will make a good witness then you must be careful in agreeing to represent them. If you feel that they are not competent, not detail oriented or unresponsive to your questions, not only will they make a poor client but chances are they were not a very good employee. Be careful as to who you represent because a client who does not perform will bring down a case regardless of the many hours spent litigating their case.

Since the 1998 U.S. Supreme Court decision in Faragher v. Boca Raton it has become crucial to find out whether the employer has a discrimination policy, how that policy is distributed, what procedure is provided to complain about discrimination, how complaints are investigated, and what results are achieved by the employer's procedure. Whether the client complained or not, and what action was taken by the employer is now critical to the decision to take a case. If the employer has a policy, investigated and behaved appropriately, then DON"T TAKE THE CASE!

The other crucial area to explore is economic damages. If there is no real economic loss than why make a federal case out of it. A client who is terminated for a discriminatory motive and is hired elsewhere at an increased salary has no economic damages and taking that case may be a waste of your time. However, you must inquire as to whether the initial salary was appropriate, whether promotions were denied and what salaries should have been earned and if there is a loss in benefits or pay then the loss can be calculated through retirement. It is important to know what the case's economics value is before thinking about emotional distress value, which is usually what the client focuses on despite the court's view of emotional distress. If there is only emotional distress and no real economic damages be careful about taking the case. Emotion does not sway the bench on a summary judgment motion and you can end up emotionally distressed when the judge dismisses your case and you have lost the investment of your time and energy.

In most cases you will make a decision as to whether you want to represent this person during that first interview. Find out what the client expects of you. If their expectations are unrealistic, then you will be unable to satisfy them. As this decision could bind you for several years it had better be a well informed decision that you can live with. People who complain about discrimination might also be inclined to file a complaint with the bar.

Providing information

After you get the necessary information from the client you need to provide information in return. It is important to explain the law that relates to the case and how that law is interpreted by the courts. Explain how discrimination is proved at trial. Explain to the client at-will employment, direct evidence, statistical evidence and the McDonnell Douglas test in which the plaintiff maintains the burden of proving discrimination was the motivating factor, in contrast to the employer's responsibility to merely articulate a legitimate nondiscriminatory reason for its actions.M

The entire process must be explained to the potential client. The administrative procedure and the time that it takes to get a right to sue letter must be reviewed. Provide the address of the EEOC and explain the intake and investigative process. Be sure the client is prepared to file the charge and understands the prima facie case, provide a list of witnesses and copies of supporting documents. The administrative investigation will be ineffective unless those are provided at intake. The client must also understand the chances of success at trial, the potential damages available under the law, and the value of the case for settlement purposes. If the client does not have a good understanding

of those factors then they will probably have unrealistic expectations of the probability of success and the value of their case.

Most people who come into my office initially believe that they have the most egregious case of discrimination that anyone has ever heard, that it is worth millions of dollars and they expect to be on several television talk shows and all over the news. No one leaves my office believing that. If a client leaves your office with unrealistic expectations then you may have lost control over that client for all time. You will regret that when you discover the problems the employer had with them and a reasonable settlement offer is on the table. Even if you decide not to take the case, be sure to provide accurate information on filing administrative charges so that if the person believes they are victims of discrimination they know what the next step is. This can prevent malpractice problems later when the statute of limitations to file has run and the potential client becomes a potential lawsuit against you.

Getting money

The final item you probably need to accomplish at this interview is cash flow. First, charge a fee for the initial consultation. I charge one-half of my regular hourly rate for the appointment regardless of the time I spend with the client. I try not to talk to perspective clients on the telephone, nor do I allow them in my office until they have paid the consultation fee. My receptionist takes all the telephone calls, gets information, schedules an appointment and explains the consultation fee. If they do not feel it is worth $75.00 to see me, then it is not worth one minute of my time. If the person claims to have a multimillion dollar case but can't afford the initial consult, consider the possibility of waiving the fee, but be skeptical. Charging for the initial consultation will provide some cash flow and will make you feel like you are not wasting your time just talking to people with no case.

If you believe in the case and want to represent the client, then you need to have them sign a retainer agreement. I explain the basis of my representation and provide a written contract. Generally people who have been wrongfully terminated cannot pay hourly for representation. While I usually work on a contingent fee basis I charge a non-refundable retainer of several thousand dollars. I often allow the client several months to pay the retainer as there is little work to do until you get a right to sue from the EEOC. However, I rarely will file a lawsuit unless the retainer is fully paid. Once you file a suit in federal court, it can be difficult to withdraw.

There are several justifications for the non-refundable retainer. First you may be working on this case for several years without seeing any money from the client. Your time is valuable and you must be able to pay your expenses. You are taking the case based primarily on what the client tells you, therefore the client must be able to put their money where their mouth is. The client needs to have some financial stake in the litigation as you are going to be spending hundreds of hours on their behalf.

This is not a personal injury action where there is an accident, witnesses to the event, hospital bills, objective injury and insurance. Proving discrimination is difficult. There is usually no witness to testify to a discriminatory motive. Most witnesses are employed by the defendant and do not want to testify against their employer. The injury is usually subjective and there is rarely insurance to pay a claim. Therefore the risk that you will not prevail in court is great and it is important that the client understands what a tremendous undertaking this is for you and what the costs would be if you were to take the case on an hourly basis. As long as the client knows that their costs are limited they will be open to paying several thousand dollars as a retainer in conjunction with a contingent fee.

The client should also be made aware of what the court costs and other expenses will be. Identify the costs that are involved: filing fee, service of process, court reporters, deposition transcripts, experts, investigators, etc. Lay out the time frame that these expenses can be expected to be incurred and the arrangement for the client to pay those expenses. This should all be part of the written representation agreement which you and your client must enter. Always provide the client with a signed copy of the agreement and be sure the client reads and understands the agreement before they leave your office.

If you do not want to accept the case then give the client some direction as to their next step. Provide the name and address of the EEOC and explain how to file a charge. Ask them to contact you if mediation is scheduled and offer to enter a contingent agreement if they want an attorney at mediation. Let them know that you would be interested in reevaluating their case after the EEOC investigates and that you would be happy to review the EEOC investigative file so that you can determine the employer's position. While some people may not be happy if you do not believe they have a viable cause of action, if you explained the law and the difficulty they will have proving discriminatory intent they will understand your decision. As long as you point them in the right direction as to their next step, filing an administrative complaint, you will have provided some service and they will have received their money's worth for the consultation fee.

## II. MARKETING

The ability to select good cases depends on being able to get people in the door. The vast majority of new clients come from three sources, advertising, referrals and the EEOC. Maintaining a high profile and being visible in the area are essential to maintaining a steady stream of new clients. Without constant advertising and referrals you will not be able to select the good cases from the bad ones and you may end up taking cases because you have nothing else to do. While good marketing is not part of the law school curriculum, without it you will not be able to maintain a practice.

### A. Advertising

Effective advertisements can be the largest source of new business. As there are relatively few attorneys representing discrimination plaintiffs your advertisement will not be lost among dozens of

other attorneys as they might be in personal injury or D.U.I. practice areas. One of the best places to advertise is the yellow pages. Even in large metropolitan areas where there are thousands of attorneys listed, a small in-column ad in the labor law subsection will bring many telephone calls every week. Try smaller alternative yellow pages geared to local markets as they are less expensive and will bring you local business. While the yellow pages may be expensive there is no better way to have your name in every home and office and available when someone is looking for a discrimination attorney.

A less expensive place to advertise is in small local papers. Getting your name before the public is essential and many people read through local papers. Some newspapers have issues and answers columns where you can provide information regarding discrimination law. You can actually write a question like – I believe I was fired because my boss is a bigot, what can I do? Then write a response that gives a basic synopsis of the law and explain that they should seek legal counsel – you!.

Radio and television ads may also work depending on your area and the costs involved. Many people will respond to an ad on television or radio. Be cautious when you get into a long term contract for advertising because it may not get the results necessary to fund the expenditure. Another factor is the marketing area you are trying to reach. Some people will not travel a long distance to see an attorney and a radio or television ad may be wasted on people outside your area.

There are many other places to advertise. The Internet is the new frontier for advertising. Setting up a web site or being listed on CD-ROM directories from Westlaw and Martindale Hubbell will bring in new clients and referrals as the century comes to a close. While this may not be your primary source of new clients today, having a web page or an E-mail address is becoming a necessity and should not be overlooked as more people are being connected to the Internet every day.

Be sure to check the rules of your local bar regarding advertising. Some state bars require you provide copies of your advertisement in advance of its publication. The ad may be regulated as to content, manner of distribution, or timing. Attorney advertising has become an important issue that state bars are trying to regulate and attorneys are challenging. Be aware of the requirements in states where you intend to advertise.

**B. Referrals** Getting referrals is one of the best sources for new clients. Since there are few attorneys practicing in this area the opportunity for referrals from other attorneys is great. Networking in your local bar association is crucial to getting referrals. Most attorneys do not handle discrimination cases and don't know what to do with them when one walks in the door. If other attorneys know you are accepting discrimination cases they will be happy to be able to refer people to you. The worst answer any attorney can give a client is I don't know what to tell you. If they can tell someone to go see you then everyone benefits.

Non-lawyer referrals are good as past clients and friends can refer you new clients. The best part of referred clients is that whoever referred you must think highly of you and so the client already has a positive preconception of you as an attorney. If you are marketing yourself well and treat people with respect they will appreciate you and recommend you to others. There can be no better compliment than someone explaining that they were referred by another client who thinks highly of you. In an age when lawyers are the brunt of many jokes and the legal profession is typically cast in the role of the greedy villain, it is always gratifying to be thought of as being above the crowd. Maintain your professionalism and treat everyone with respect and referrals will be plentiful.

**C. E.E.O.C. Referral List**

Most regional EEOC offices have attorney referral lists. When a complainant is at the EEOC office they often request information on attorneys. When information on attorneys is requested, the EEOC usually provides a list of attorneys in the area who represent plaintiffs. It is important to get on the referral list as those are clients who need your services immediately.

The EEOC is promoting alternative dispute resolution. Charging parties are being called for mediation and the ability to settle cases at the administrative level has never been greater. Call the EEOC and volunteer to represent a charging party pro bono. If the case does not settle, then you might have found a new client. As charging parties are disadvantaged by going to mediation without legal counsel, it is important to volunteer your services.

III. MAKING DO WITH LIMITED RESOURCES

One of the first things you realize when starting to represent people who have discriminated against is that you are the underdog in a battle of David and Goliath. Defendant's are usually deep pocket corporate employers who have large law firms on retainer. In contrast your client may have no job, no savings and very little documentary evidence. The burden of proof is on the plaintiff while the defendant employs most of the witnesses and has most of the documentary evidence in its possession and control.

Those are reasons case selection is important. While you can have a decent short term cash flow from client interviews there are three strategies which can make the difference between being successful and becoming someone's employee yourself. Attempt to settle the case early without bluffing, use the years of procedure to your advantage, and spend your money on efficient, effective resources. The use of those strategies on a reasonable case load will allow you to maintain cash flow in the short term and make big money in the long run.

**A. Attempts at settlement**

Once the client has signed a representation agreement you should make an attempt to settle the case. I truly believe that it is in everyone's best interest to settle the case as soon as possible. From a client's perspective there is an incredible emotional cost in moving forward and reliving the nightmare of employment discrimination. If you can settle the case quickly it provides closure for the client who can put some money in their pocket and move on with their life.

From your point of view, if you can settle the case with a telephone call or a demand letter and some negotiation that leads to a reasonable settlement, then you have made many times your hourly fee for the time you worked on the case. Certainly your contingent agreement will provide a smaller percentage if you settle before filing suit, but its hard to beat making thousands of dollars for a couple of hours work.

For the employer, it makes great sense to settle early at a reasonable figure. If an employer can settle a plaintiff's claim for $50,000.00 or so, they are way ahead of the game. In my discussions with management counsel it appears that it will cost an employer from $60,000.00 in attorney fees up to $200,000.00 if the case goes to trial, assuming the employer wins. If the employer loses at trial the downside runs into the millions of dollars as the employer pays the jury award, plaintiff's attorney fees plus their own attorney fees.

It makes no sense to fight where the best you can hope for is to spend $60,000.00 in attorney fees and the worst is several million in liability plus the bad public relations of the lawsuit. I therefore make it a point to send a demand letter and let the employer know my client is represented, explain the facts of the case, the employer's downside and my client's reasonable demand for settlement. I further inform the employer that if they refuse to negotiate settlement within the next ten days that my client will file EEOC charges. If the employer does not make a good faith effort to negotiate, then the EEOC charges are filed. Never make a threat that you do not intend to carry out. Explain your intentions and then carry them out!

**B. Time Is On Your Side**

Understand and inform your client that the lengthy administrative and judicial processes can work to your advantage. While the EEOC is investigating the claim and the subsequent pretrial litigation can last two years or more, many of the employees the defendant counts on as witnesses may leave the defendant company. While it may be difficult or ethically questionable to contact present employees and get open, honest information, it is easier and less questionable to contact former employees who will be much more forthcoming once they no longer depend on the defendant for their livelihood.

It is also important to let the EEOC move forward with its investigation. While some attorneys immediately request a right to sue letter at intake, I think that is a strategic error. Let the EEOC do its investigation and get a position statement from the employer. Stay in contact with the investigator

and see if more information is going to be requested from the employer. Be sure to provide a list of witnesses and relevant documents to the investigator. The rate of cause findings has been increasing over the last decade and investigators will follow-up if they get good information. As the EEOC is no longer making "no cause" findings, it is no longer dangerous to allow them to complete its process.

By allowing the EEOC to investigate you have forced the employer to state its position and provide information you might only get after a long discovery battle. The employer should provide the EEOC its reasons for the adverse action and you can make them stick to that reason and substantiate it in court. Without the EEOC investigation the employer's attorneys can provide new legitimate reasons for its actions which you will have to discover either in discovery or at trial. By allowing the EEOC time to get a position statement from the employer you are effectively precluding other reasons to come out at trial for the first time. Allowing the EEOC to investigate can make the difference between facing the vast unknown and forcing the employer to substantiate its position.

**C. Effective Use of Resources**

A solo practitioner must use time, money and resources efficiently to stay in business. Wasting time on cases with little chance of success will be your demise in the long run. Spending money on court costs, expert witness fees and the maintenance of an extensive law library can drain your financial reserves. Maintaining a low overhead and knowing what you can do cost effectively will keep you in business.

Know When To Settle

Sometimes after taking a case based on the client's original story, you will later discover that the client did not tell you the whole truth or that the witnesses are not backing up the client's story. If after discovery you make a determination that you cannot prove discriminatory intent at trial you must take a long hard look at going to trial. If you are not convinced that there is discriminatory intent, chances are you will not be able to convince a jury either.

At this point you must review the admissible evidence with your client and make them understand the slim chance you have of prevailing at trial. If you have prepared your client from the beginning and included them in your discovery preparation and review, then the client will understand the necessity of settlement. If you have kept the lines of communication open with opposing counsel you should be able to settle the case for a reasonable amount. Taking a case to trial that you cannot win is a waste of your time and resources and does no good for your client.

Have the Client Pay the Costs

Another important section that must be in your representation agreement regards the payment of costs. My agreement specifies that the client is responsible for all costs. I try never pay costs in advance for my clients. While many personal injury attorneys front costs for doctors, investigators, depositions, etc. it is important that your client have a continuing stake and financial obligation in the litigation.

Payment of costs is also a factor in persuading the client to settle. The client will be more willing to settle the case knowing that it will cost them several thousand dollars to go to trial. No client will settle if you are doing the work, you are paying the costs and they have nothing to lose. You cannot waste your resources paying for expert witnesses, deposition transcripts and the like unless prevailing at trial is a sure thing. I have my clients pay for expenses as they are incurred so that they do not have to pay a cost retainer up front and so they are involved in the decision making of how to use their resources.

Keep a Low Overhead

Keeping a low overhead is crucial to maintaining your practice. While office space, a receptionist, computer equipment, telephones and advertising are necessary expenditures, many other costs can be kept low. If you are computer literate and know how to type, you do not need a legal secretary. If there is a library at the courthouse or a nearby law school, you don't have to maintain a library of your own. You can share office space, a receptionist, copier, fax, etc. and buy them when the cash flow has improved or buy used equipment, books and office furniture until you can afford to buy them new.

Some resources are relatively inexpensive. Lexis has an MVP program that allows you unlimited access to one library for less than $150.00 per month. With my subscription to the labor law library I have access to cases, statutes, administrative laws and rules that have been invaluable. While I usually spend enough time every month to have bills of $5,000.00 to $6,000.00, I only pay the flat rate. National Employment Lawyer's Association Employee Rights Litigation: Pleading & Practice is a great reference set to have in your library that can answer many questions you will have. Joining NELA is also a great resource and will put you in touch with many like-minded attorneys who have faced many of the problems that you will face in practice. NELA attorneys are always ready to help a fellow member, their help is invaluable.

IV. CONCLUSION

There are few things as rewarding as making a difference and helping others, except maybe making money and keeping it. I feel very fortunate to be able to do both. Representing people who have been discriminated against is a calling which few attorneys respond to. More attorneys are needed as most people with discrimination problems have no where to turn and no one to help them.

While few attorneys can empathize with victims of discrimination, as a former victim myself I understand how personally victimized my clients feel. My clients have great emotional stakes in their cases, I share that emotional stake. The feeling that comes from providing closure and financial gain to a victim of discrimination is incredible. Helping people and right wrongs is a big part of what this practice is all about.

Finally being self-employed guarantees that you will never be a victim of employment discrimination and that you have job security. In the face of firm mergers, layoffs, at-will employment and government shutdowns, no one has job security except the successfully self-employed. If you feel like you are stuck in a rut, performing the same routine duties for an unappreciative firm, then it may be time to take that step and represent plaintiffs as a solo practitioner. While it is dangerous to work without the safetynet that a paycheck provides, there is nothing as sweet as making it on your own and taking it home. You can even go home early!