

**WHAT IS IT WORTH?  
HOW WE GO ABOUT ETHICALLY EVALUATING & SETTLING  
EMPLOYMENT LAW CASES**

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**The Intent Behind This Presentation**

This presentation involves “an experiment” regarding the value that we as employment lawyers assign to various situations that we all deal with in our practices. We are all called on by our clients to advise them on what their case or situation is “worth” and what a likely outcome or settlement might be. As part of this duty, we all find ourselves in our colleagues offices (or on the phone) picking people’s brains (or having ours picked) as what they view as a possible values or risk in a given situation.

Also, this exercise implicates how we all go about settling cases and how ethically discuss the settlement of cases with our clients and with the “other side.” How far may we all go in table-pounding in negotiations with our assertions that this is a "million dollar case" versus is "slam dunk summary judgment case."

So, *first*, this presentation is designed to take seven hypothetical fact-patterns and ask practitioners what they think a given situation is worth (or the risk it presents if you represent the employer).

To do this, we presented seven fairly-standard-type situations (sexual harassment, discrimination, retaliation, breach of employment contract, covenant not to compete agreements, *etc.*) to gauge what practitioners on each side of our practice thought they were “worth.” Hopefully, this may offer all of us some additional guidance.

*Second*, and just as interestingly, I hope, this experiment seek to gauge how far apart employee-side lawyers and employer-side lawyers are when evaluating a given situation. We are interested in whether, when responding *anonymously*, if established and respected employee-side lawyers and employer-side lawyers are really that far apart when asked to evaluate a situation? In other words, if we were all totally candid (and being asked

anonymously), would we have a roughly similar idea of “what something is worth,” even though we might all negotiate and table-pound for our client otherwise.

### **Our “Methodology”**

We sent out the following eleven hypotheticals to lawyers that primarily represent *employees* and to lawyers that primarily represent *employers*. We offered a variety of ways for these lawyers to send back their answers in an anonymous fashion (including by mail in plain white envelopes, which some old-school lawyers did). Also, we gave the following instruction to our participants:

I seek your *reasoned* but quick-and-dirty inclination. I know all of these could be fleshed out with many additional facts (or years of discovery) which could change all of our opinions, but the idea here is for your *reasoned-but-knee-jerk* answer. No one is holding you to anything and no one will ever know how you answered: the whole idea here is to assist us all in evaluating situations for their value/risk.

Please note that the question asked for each hypothetical is “*What is a reasonable amount for the parties to agree-upon to settle this dispute without litigation?*” In other words, we did not ask “What would *you* accept/offer to settle this case” or what would *you* “do” in this situation, as we were trying to keep people’s personal-estimations of their own abilities (if you know what I mean) out of the equation. As you can see, this so-called experiment is not intended to be truly scientific but is intended to give us all an idea of how these questions are answered by practitioners on each side of our docket.

## **THE 2018 HYPOTHETICALS (FACT PATTERNS)**

### **Sexual Harassment: Hostile Work Environment**

1. Plaintiff is a 30 year-old female and was hired the Executive Assistant to the President of a small bank with 45 employees (President is a married male in his 50s). Plaintiff was hired in January of 2017 and says that the President began constantly touching and rubbing against her almost immediately after her employment began. Plaintiff says that at least every week the President would touch or rub-up against her (including her breasts or behind) or summon her to the vault or some other place where he engaged in unwelcome sexual talk. Plaintiff reports that he constantly tried to talk to her about sexual topics, including asking if she was dating anyone,

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