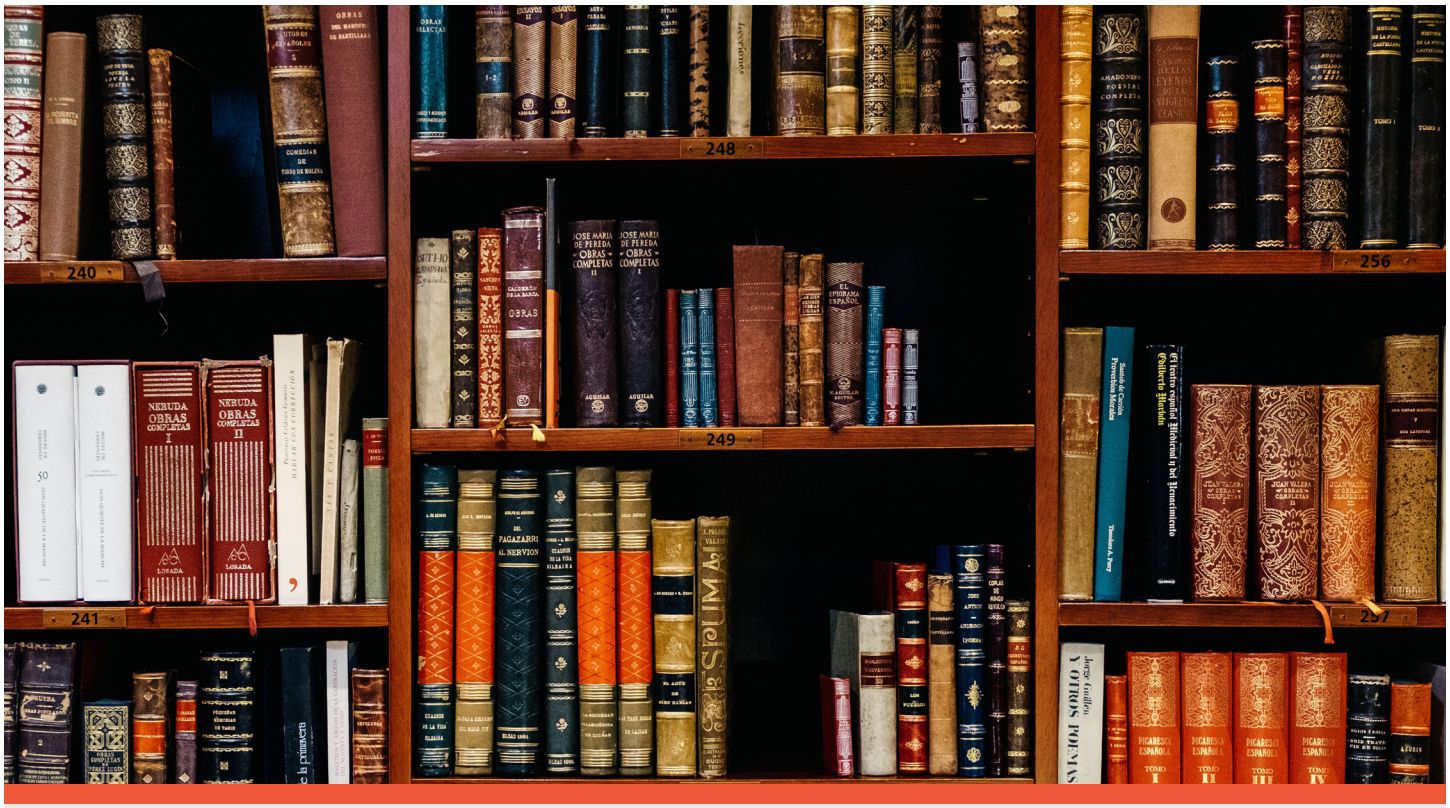
D'ORAZIO PETERSON

WHITE PAPER



DO YOU EVEN NEED A LAWYER? THE DEFINITIVE GUIDE FOR NEW YORK VICTIMS

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INTRODUCTION

We can't blame you for thinking that you need a lawyer. Everywhere you look you're constantly being reminded that you probably do. Sides of buses, television, radio, yellow pages (does anyone keep these anymore?), online. You name it and our profession has it covered. We may be second only to the auto industry in telling you how much you need us.

And, frankly, there are many times when you do, in fact, need a lawyer. Generally speaking, you probably should not buy a house, put together an estate plan, buy or start a business, file for bankruptcy, child custody or defend a criminal ticket without hiring or at least consulting with a lawyer. They (the good ones) are specially trained and often bring quite a bit of specialized knowledge and experience to the table. A good lawyer, like any good professional, can help guide you through a complex process.

But there are also situations which do not, necessarily, call for a lawyer. Handling a routine parking ticket, obtaining a passport, even filing papers for a partnership or LLC – these do not always require the services of a lawyer, and with a little bit of homework can be handled on your own.

Then there is the case where you have suffered a serious injury, or where you have been dealing with problems at work. These two situations are different, for a few reasons.

First, there's the fact that injury lawyers are the most likely to be seen on the side of a bus, on television, billboards or anywhere else where advertising is available. This is because they want you to believe that you need them if you've suffered the slightest injury and, generally, in advertising, he or she who shouts loudest, wins.

We have some news for you – you may not need them (or us).

The situation in the workplace is different. You've been treated unfairly or harassed by a boss or co-worker and often you don't know where to turn. So you look to a lawyer to answer your questions, regardless of whether you actually need one.

Truth be told, and this should come as no surprise, there are many situations in which we highly recommend hiring a lawyer for an injury or employment case. The types of cases that we handle, for example (severe injuries following car accidents, medical malpractice and employment discrimination), often involve complex legal issues, significant expert witness fees, procedural pitfalls and lengthy litigation. These are not cases in which you would want to represent yourself. In these cases, it is worth it to pay a highly focused lawyer to represent your interests (more on how to choose that lawyer later). Not only will doing so ensure that the case proceeds appropriately and correctly, it will also allow you to try and move on and focus on other things (such as getting treatment or looking for a new job).

Sometimes, however, a lawyer may not be the right answer. Don't get us wrong, many lawyers will tell you they're always the right answer. No matter how small your injury, or how minor your problem at work, you can always find a lawyer who take your case and either take one-third of your settlement or charge you several thousand dollars.

But let's say you're different. You're someone who doesn't mind doing a little bit of homework and doesn't necessarily want to pay someone a lot of money if in the end it will not be worthwhile. We get

it, and that's why we've written this book. We believe that our profession is furthered when people receive the actual help that they need and, maybe more importantly, do not receive help when they do not need it.

So, if you or your family member have suffered a serious injury (or death) because of another person's carelessness, or have been having difficulty at work, you may want to call a qualified lawyer (we're happy to help). If, however, the injury or workplace issue is not so severe, but warrants further action, you may very well find that you don't need a lawyer after all. Either way you may benefit from reading this book first.

A NOTE ON THIS BOOK

This book is not meant to be a comprehensive guide to assessing or handling your personal injury or employment discrimination case. It is intended to give you guidance into those situations where you may not even know if you need a lawyer.

This book addresses both personal injury claims and claims relating to employment discrimination because these are two areas in which individuals often have questions or problems and will frequently turn to a lawyer. Feel free to skip around and focus on those areas that apply to your own personal situation, but we encourage you to hold on to the book, because you never know when it may prove helpful.

Please remember: this book is not intended to serve as legal advice, nor are we, by sending you this book, your attorneys. Retaining our firm is accomplished after a formal meeting, during which a formal written agreement is executed by the client and the firm. Please also remember, every case is different and dependent on its own unique set of facts, and our prior results do not and cannot predict any future outcomes.

Finally, if there is ever any question in your mind whether you need an attorney, contact one. While we can't speak for all firms, we will tell you quickly and (generally) free of charge whether you should hire an attorney.

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CHAPTER 1
WHAT IS A "SERIOUS INJURY"?

Let's put first things first. Despite what you see on TV, if you've been injured in an accident and have not suffered a "serious injury", the fact is that you may not need a lawyer. This is not always the case and, if you feel that you would like the help, by all means call a lawyer (just please do your homework first).

Under the New York Insurance Law (commonly known in this situation as the "No Fault" law), if you've been in a car accident your recovery is limited to no fault benefits unless you can establish that you have suffered a "serious injury".

Now, what New York defines as a serious injury and what practically constitutes a serious injury are two completely different things. We've known lots of people who have suffered severely but, because they did not fit into one of the "boxes" of "serious injury", they could not pursue a lawsuit.

So what, exactly, constitutes a serious injury under New York law?

a) Death;
b) Dismemberment;
c) Significant disfigurement;
d) Fracture (the most common);
e) Loss of a fetus;
f) Permanent loss of use of a body organ or member;
g) Permanent consequential limitation of a body organ or member;
h) Significant limitation of use of a body function or system;
i) Medically determined injury of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 out of 180 days immediately following the injury.

As you can see, this list was clearly written by lawyers or politicians and tends to make things more complicated than they likely need to be (isn't that always the case?). The bottom line is that in order to have suffered a "serious injury" in New York you must have either had a fracture of a bone or be severely limited in your ability to perform day to day tasks.

If you have a "serious injury" you are permitted to bring a lawsuit against the wrongdoer – this is important because this is how you are able to get to the wrongdoer's insurance policy to help pay for your damages and pain and suffering.

Keep in mind the "serious injury" threshold only applies to car accident cases. That being said, the thought

process behind whether you need to hire a lawyer is similar. If your injury is relatively minor you may be better off making a claim yourself or, in some cases, not at all.

If you have been in a car accident but have not sustained a "serious injury", you may not need a lawyer. The fact is that, if you did bring a lawsuit, it could potentially be dismissed and "soft tissue" cases, as they're commonly known, can often be resolved directly with the insurance company for the wrongdoer.

Now, an important point to remember here is that, in cases involving private drivers, you generally have three years to file a lawsuit in New York. This means that you should be absolutely sure that you have, in fact, suffered a soft tissue injury before settling your case. We strongly recommend talking with your doctor (even getting a second opinion in some cases) to ensure that you are not at risk for future exacerbation (or worsening) of the injury. The last thing you want is to settle your case early, sign a release (more on that later) and later realize that your injury was worse than you thought. Because at that point, you are really out of luck.

Keep in mind that if the driver who hit you is not a private person, but an employee of a municipal entity, for example, the time to file a lawsuit is much shorter and often requires that you notify the municipality of the potential claim. This is called a "Notice of Claim" and, while we will not cover it in detail here, you should be aware of its existence.

If your injury is not "serious" as defined in New York, you may want to consider whether you can handle the resolution of the claim on your own. Examples of soft tissue or non-serious injuries include: minimally sprained ankle or wrist, contusions, bruising, whiplash (in some cases), short term headaches that resolve, generalized back pain that resolves. Each of these could, of course, amount to a "serious injury" depending upon their length and treatment needed but they often do not rise to the level of "serious" under New York law.

WELL KNOWN CASE STUDIES: THE "I WANTED MORE NAPKINS" VS THE "HOT COFFEE" CASE

Sometimes you can't blame the public for disliking lawyers. In fact, lawyers routinely make the "Top Ten Disliked" list of professionals, up there with politicians, "stock traders" and, oddly, dentists. But then you see some of the stuff that lawyers are doing and you can start to understand why.

I Wanted More Napkins!

Sometimes a lawsuit makes the news that leaves you scratching your head. Like the guy in Los Angeles who sued McDonalds because he said they would not give him more than one napkin. We get it – we have kids and one napkin is nowhere near enough. But the lawsuit seems like it's probably not worth the time, and whether the man sustained a "serious injury" is probably up for debate. This is also the sort of thing that people read, roll their eyes, and continue to have the legal system and lawyers in general.

* This case should not be confused with the poor guy in Wisconsin who filed a lawsuit accusing a chef at the "Texas Roadhouse" restaurant of cutting open his steak and intentionally inserting a clump of his hair into the food." Remember, significant injuries are not only physical, but can be emotional as well.

Continued...

The Hot Coffee Case that sparked a Revolution (Sort of)

Many of us remember the McDonalds "hot coffee" lawsuit that was filed in the 1990's. If you don't you may want to stop and read about it, it has its own Wikipedia page.

The case was brought by a 79-year-old woman who suffered 3rd degree burns to her pelvic area after spilling a cup of hot coffee on her lap. After trial a New Mexico jury awarded her nearly $3 million. (The case was subsequently settled for less than $1 million).

The case sparked a national outcry against the legal system, and personal injury lawsuits in general. The outcry against "frivolous lawsuits" were significant.

But the fact in that case was that the victim suffered very severe burns when the coffee spilled, and her attorneys presented a credible argument that fast food places were simply serving the coffee too hot. As a result of the case and public fallout (HBO produced a documentary, Hot Coffee, several years later) McDonalds claimed that it did not reduce the temperature of the coffee, but did increase the number of warnings associated with order the product, and maybe saved some other from being hurt.

CHAPTER 2
THE REAL "PARTY" IN MOST POTENTIAL LAWSUITS (HINT - IT'S NOT THE WRONGDOER)

A personal injury or negligence lawsuit in New York is almost never brought against an insurance company directly. Instead, it is brought against the party who caused the accident, or the physician, hospital, facility, nursing home, etc. which is alleged to have been at fault.

In most cases, however, the party has some type of liability insurance, which is a good thing. In the United States civil justice system, monetary recovery is the primary method by which people can resolve disputes, and it is important to know that the wrongdoer has something (i.e., an insurance policy) that can pay to make you "whole" again.

This means that the first step in the legal process is often determining whether sufficient insurance coverage exists to even resolve a claim in the first place. In our practice, for example, it is very rare that we accept a case where sufficient insurance does not exist to satisfy a potential judgment. From a realistic perspective it simply does not make sense – to us or the client – to spend a year or more litigating a case and incurring costs associated with that case, if there is no one who can potentially pay at the end.

This brings us to the actual party in the case – the insurance company for the wrongdoer. If you elect to proceed on your own this is who you'll be dealing with. They may even take the first step in contacting you following the injury.

DP RULE NUMBER ONE: THE INSURANCE COMPANY IS NOT YOUR FRIEND.

Remember that. Say it to yourself again. And keep it in the forefront of your mind if you elect to move forward representing yourself, because they will try to make you think they are your friend. They will do what they can to make you feel comfortable. But make no mistake – their only goal is to pay as little money as possible to resolve your potential case.

Second, with the first rule in mind, do not give a recorded statement to someone else's insurance company. You may not recall things properly, you may be goaded into saying something that it not entirely accurate, you may downplay unknown injuries. Many, many more things can go wrong than can go right. Your own insurance company may want a statement and, under your policy, you may be required to comply. Try to find your obligations before you do anything.

AFTER THE INITIAL CALL

Let's say that you've made your way through the initial call with the insurance company. Now the insurance adjuster is asking you for medical authorizations. This is okay, mostly, but how far back do you go? Adjusters will often want to look deep into your medical history. This is not because they want to get you know you better. Keep in mind rule number one. This is because they want to find something in your history that they can use against you, such as a prior injury.

Once the adjuster has obtained all of the medical records, she may "want to discuss a resolution." This sounds promising! A quick result! Well, generally, there's a reason for that.
They want to "low ball" you. They want to pay you as little as possible to sign a release and go away. What's a release, you ask? We'll cover that in detail below but, in short, it's the document that the insurance company is paying you to sign. The one that says that you will never, ever, bring a lawsuit against their insured for damages arising out of the accident.

This means that if a month after signing it you realize that your headaches aren't as minor as you thought – too bad. It means that if a month later you realize that you actually do need surgery to repair your leg – too bad. You get the point.

The bottom line when it comes to dealing with an insurance company is that sure, you can handle it yourself, but in our opinion you should be very careful if you chose to do so.

It's also been our experience that often insurance companies simply do not take a situation as seriously where a) there is no lawyer involved; or b) there is a lawyer involved but it's one with a reputation for settling every

single case that they have. (Tip: if an insurance company knows that the lawyer will not file suit and, ultimately, go to trial if necessary, they will undervalue the case. It's like dealing with kids – if they know you won't follow through they'll be less likely to listen to your threats).

CASE STUDY: INSURANCE COMPANIES ACTING BADLY

- **Example 1: DP client gets low-balled, then wins at arbitration.**

We had the pleasure of representing a young woman who received very severe injuries after being kicked by a horse during grooming. She was disabled for several months after the injury, which could have been prevented if the horse's owner had simply warned her that the horse was in the habit of "barrel kicking" (kicking with both hind legs in an aggressive manner).

When the client contacted us (through another lawyer who thought we may be able to help), the insurance company had taken the position that there was no fault because the victim was a "horse woman" and should have known better.

The insurance company dug in, offering a few thousand dollars to the victim. We took over, hired a "horse expert", and a year later received a more than six figure award from an arbitrator. Needless to say the insurance company was not too happy.

- **Example 2: The Private Investigator gets caught.**

If you did not know that insurance companies will hire private investigators to follow you around, you've now been warned. Some insurance companies will do whatever they can to diminish the damages in a lawsuit, and this includes getting photo and video evidence that the victim is not as injured as they claim.

This can be very effective, unless of course the investigator is not good at his job.

We had some involvement in a case several years back that involved a 40-something man who had been injured at work. He suffered severe back pain and had difficulty carrying groceries, moving between his house and car, etc.

The insurance company thought that he was exaggerating his injuries, so they hired a private investigator to go to his house and take pictures of him. The problem was that the house sat on approximately five acres of land near the woods.

The investigator apparently did not see the private property signs, or simply ignored them, and staked himself out under a pile of leaves on the property. He had himself a good hiding spot, until that is the victim's son and his friends literally tripped over the investigator while tossing a football around.

Needless to say the investigator took off running – with his camera – upon being discovered, and the insurance company was forced to apologize to the victim for its improper conduct (that is, after all, trespassing).

CHAPTER 3
HOW DO YOU PUT A NUMBER ON PAIN?

If you or someone you care about has been injured (or worse) in an accident, the last thing you are generally thinking about is "what is the dollar amount that would fairly and reasonably compensate us for the damages."

That's normal and, frankly, if money were the first and only thing you thought about, you aren't our type of client. You should go call the lawyer that you see on TV.

The reality, though, is that we only have one system for resolving these sorts of disputes. And, in that system, the only way to make a person or family "whole" following an accident/injury is by awarding them money.

So if you plan to go at it alone you'll need to consider this – what is the amount of money that we should ask for?

Let me start with a secret that most lawyers and insurance companies won't tell you – there is no magic formula. They may try to make you think that there is, but they're wrong.

The reality is that each and every single case and injury are different. People come to the table with very different backgrounds, obligations, body types and medical histories. They heal differently. You get the picture.

So if there's no magic formula, then how does one put a number on pain?

Well, first, the number is not just on pain alone. When you are injured because of someone else's negligence, you are entitled to recover for your loss. This includes not only your physical pain and suffering, but your emotional pain and suffering, your economic loss, and potentially the loss to your family.

This is where things become a bit complicated. If John – a 20-year-old single man – suffers a broken foot that requires one surgery and a six-month recovery, this is somewhat straightforward.

If, however, John is killed in the accident and he is a 45-year-old father of two, husband, and one of two working parents, well now things have become more complicated. Now John's family has suffered in addition to his own damages. And this must be included in the calculation.

When we represent victims of accidents we consider several things in arriving at a "number" for the case value. These include the physical injuries, lost income, loss to the family, etc. But they also include our personal experience in these cases (what have similar cases resolved for?), as well as research into other settlements throughout the state and what juries have historically awarded in cases with similar injuries that went to trial. We also look at potential for future medical problems, as well as whether there are lost benefits including, for example, lost retirement benefits, based upon the lost time from work following the injury (this is particularly true in the case of state and federal government employees). In many cases, we bring in expert economics, physicians and vocational experts to help value the damages.

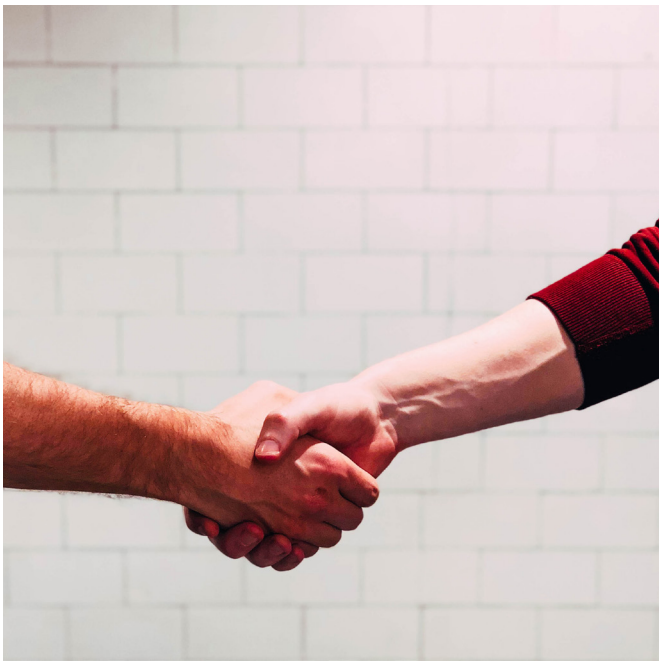
So, needless to say, while the calculation can be a simple one, often it is not. If your injury is more than "basic", it might make sense to talk with someone about valuing the potential case.

CASE STUDY:
A SEVERE INJURY GETS WORSE

We had the fortune to meet a very nice, dynamic and talented young man who came into our office a few years ago. At the time of our first meeting this young man had been suffering with a foot problem as a result of a missed diagnosis by his doctor. Assuming there was in fact a misdiagnosis, his damages were fairly straightforward.

Fast-forward one year, and the situation was infinitely worse, as the missed diagnosis had allowed a cancerous mass to progress. Needless to say this news was devastating to the family.

We help this young man's family work through this extraordinarily difficult time, and in so doing the assessment of the damages as a result of the misdiagnosis changed dramatically. This highlights the importance of working with someone with experience, rather than trying to go at it alone.



CHAPTER 4
THE PROCESS OF GETTING TO A SETTLEMENT

If you watch television (and in particular the commercials), you might think that getting to a settlement is easy. And, frankly, in some cases it is.

If, for example, you've been hurt in a car accident, have a couple of bruised ribs and no other major injuries, you might be able to resolve your case in one or two phone calls with the insurance company.

You might even get a "good" result. Depending on the insurance company, they may offer you $5,000, $7,500, even $10,000 based upon the severity of your injuries. In some cases – remembering that this is generally tax free – this is a good result.

The sticky part comes when you have either 1) sustained more severe injuries; 2) you have sustained injuries which could lead to further complications down the road; or 3) you have sustained injuries that have limited your ability to work and have, as a result, caused you to suffer economic loss (including lost retirement benefits). If you fall into any of these categories and you settle your case quickly or for a low amount of money, you are doing yourself and your family a disservice.

Our advice, without hesitation, is that if you fall within any of the three scenarios above, you strongly consider hiring a lawyer to handle your case. Assuming you hire the right lawyer, it will generally work out to your benefit in the end.

If you do not fall within one of those scenarios, you may very well wish to negotiate on your own. If this is the case, there are a few points to remember.

- **FIRST**, as we've said before, the insurance adjuster is not your friend. Keep that in mind throughout the negotiation. His/her job is to pay you as little as possible to settle your case.

- **SECOND** – and this is generally the case in any negotiation – start higher than you want to end up. If you think you'd like to end up with $15,000 in your pocket, don't start your negotiation by demanding $15,000 (or even $17,500). This will ensure that you don't get to where you want to be because the adjuster will take this starting demand as an indication that you will settle for somewhere around 50% or less.

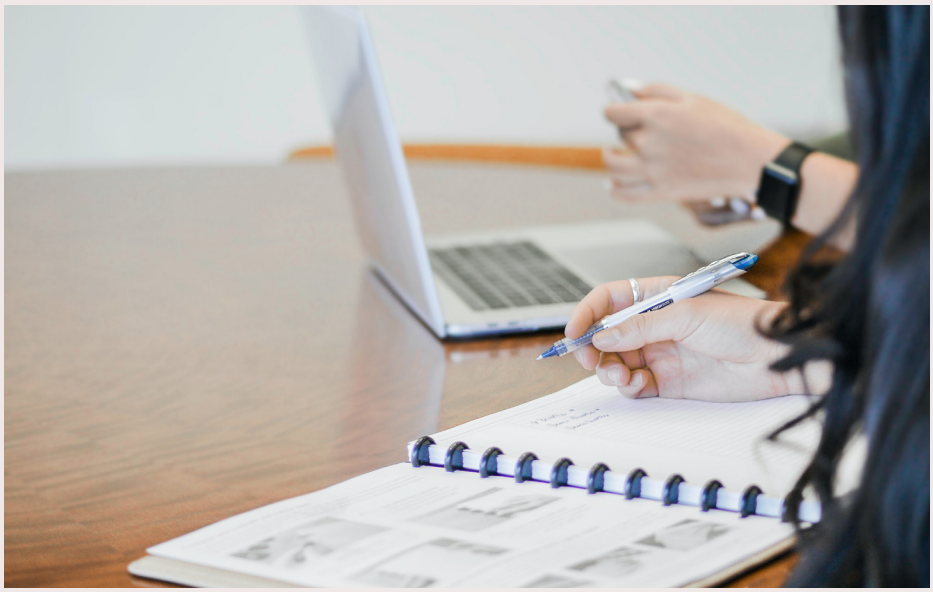
- **THIRD** – go into the negotiation with an idea of your "bottom line." Now this is, of course, where it's helpful to have some experience negotiating these sorts of things, but if you don't have a realistic bottom line expectation you'll be less likely to get the case settled.

- **FOURTH** – never accept the first offer. That is, unless, they offer you what you've demanded, in which case you probably did not demanded enough. (Hindsight is always 20/20).

- **FIFTH** – Be prepared to argue about the severity and extent of your injuries. They will try to downplay them – this is what they do.

If you follow these five concepts, you'll be in a much better position out of the gate than most. And, worst case, if you cannot reach an adequate settlement you can contact an attorney for help.

CASE STUDY:
LOW FIRST OFFER TURNS INTO GREAT CLIENT RESULT



A DP client had been victimized by severe sexual harassment at work. She made complaints, and dealt with the bad behavior until she simply could not take it any longer.

When the client came to us she was out of work and dealing with the fallout of the harassment. Her former employer claimed that the conduct was not significant, was "locker room talk." They refused to pay her a dime.

We were hired and shortly after the former employer made a "take it or leave it" offer to the client of a few thousand dollars. We declined, and moved forward with a lawsuit, where we fought tooth and nail with the employer to get internal documents, and threatened to take depositions of numerous current and former employees.

Fast forward eight months and the client received a settlement in excess of half-a-million dollars.

The point here is not to brag about a client recovery. It's to illustrate that many times a victim will not be adequately compensated unless and until she shows the other side that she (and her lawyers) are willing to go the distance in a lawsuit. In these situations the choice between going it alone or going it with a lawyer is simply not a choice at all.

CHAPTER 5
SIGNING THE RELEASE

When you negotiate on your own one of the most critical factors to keep in mind is that if you reach a settlement you will be asked to sign a release in exchange for payment. This release is a "general" release, which in effect means that you are releasing the wrongdoer (and, often, the insurance company) from any and all claims whatsoever that you had or may have had against them. Ever. Up until the date that you sign.

If you're going to sign this release without an attorney be sure that it limits itself to any claims occurring up to the date that you sign it – and not after. The last thing that you want is to sign a release that prohibits you from ever pursuing a claim in the future (if, for example, the same person hit you again with their car).

You'll also want to be sure that you are aware of and have addressed any liens that may exist, as the release will likely include some language stating that you will indemnify the insurance company if Medicare, Medicaid, or anyone else should come after them down the road claiming that you failed to pay off your liens.

CASE STUDY:
THE MINOR INJURY THAT WASN'T

Generally speaking, if you're hurt as a result of the actions of a private individual there are three years to start a lawsuit. Now, in most cases we would not recommend waiting that long. There is, however, some benefit to waiting a least long enough to determine the extent of the actual injury before resolving the claim.

We have seen too many instances of an injury victim who comes to us after having signed a release against the insurance company and wrongdoer. Some injuries simply take longer to manifest, such as a traumatic brain injury, for example, and if you settle the case within a month or two after the accident you will be stuck with the result even if you end up having a very severe injury in the end. Don't make this mistake.

CHAPTER 6
WHAT MAKES AN ISSUE AT WORK "ILLEGAL"?

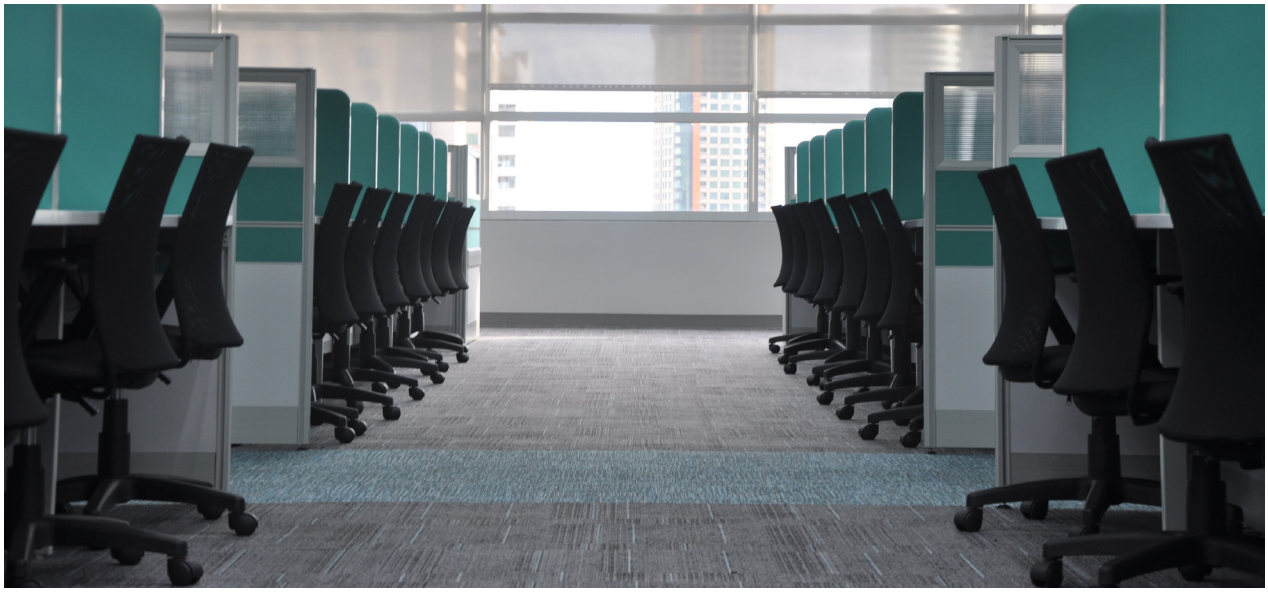
Anyone who has ever worked for a company knows that there are good people and bad people. This generally applies equally across the work/life spectrum, but unfortunately can be amplified in the workplace. Unlike in our personal lives, at work we are often required to associate with people whom we don't particularly like or want to be around. This is reality.

Toxic people are everywhere and chances are there is at least one toxic person in your workplace. The problem is when that toxic person comes down on you.

There are numerous scenarios that can lead to problems at work. A few examples include:

a) Harassment/bullying by the boss;
b) Abusive treatment by a co-worker;
c) Unequal pay or treatment;
d) Sexual harassment;
e) Physical intimidation;
f) Workplace politics.

Some of these scenarios arise out of illegal conduct and some don't. What's important to remember is that not all bad behavior at work is illegal. In fact, the large majority of workplace conduct is not illegal.



THE AT-WILL DOCTRINE

New York is what is known as an "at-will" employment state. This means that generally speaking, without a contract your employment is likely at-will. You can decide, for example, that you simply cannot stand looking at your boss for one more second, and you can walk out the door. Similarly, your boss can decide that she does not like your sweater and can fire you on the spot.

The at-will doctrine protects employers from claims of wrongful termination where an employee is not given a reason for the termination. Unfortunately, it also protects the employer in most cases where a boss or colleague is abusive, bullying or otherwise disrespectful towards an employee or co-worker.

The exception to this rule is where the conduct is based upon some underlying illegal reason. For example, where a boss constantly belittles the only female employee in the department, and holds her to a different standard, this may not be legal because the boss may be targeting the employee based upon her gender, which is a legally protected status. Other protected classes include race, age, national origin, disability and religion, among others.

The important first step in looking at a problem at work is trying to get to the bottom of why it's happening. Are there signs that it is happening because of a protected status, a recent medical leave, or perhaps some perception by the employer that the employee has a disability? Or is it more of a personality conflict. Or, perhaps, is the boss just a miserable human being? This is actually one of the more common problems in the workplace, and quite often the boss is, in fact, a miserable human being who treats everyone poorly. This is not illegal.

So the first question you have to ask yourself is whether the problems you're having at work are because of something illegal, or some other reason. If it's the latter, you may not need a lawyer at all. If you suspect it is because of some illegal or protected reason, you may want to consult an employment lawyer.

REAL WORLD EXAMPLE

To say that we receive a lot of calls from employees complaining about their bosses would be an understatement. Unfortunately, as we've mentioned, in New York there is no law against a boss being a jerk or treating his or her employees poorly – as long as it is not for illegal reasons. Employers and defense lawyers know this, and often employ the tactic as a defense to a claim of employment discrimination. So how do you, the employee, combat this?

First, if you are still employed, try to figure out why the boss is treating you poorly. Does he treat everyone this way? Is it just you? Does it coincide with some event (i.e. a leave, birth, etc.)? If the boss is only horrible to you, then there is typically a reason, and often an illegal one, behind the animosity. Getting to that reason is the key, and if you are still employed one approach is to either file an internal complaint or a complaint with the EEOC or DHR. This puts the employer on "notice" of the conduct, and, to some extent, provides you with an added layer of protection (you may have a retaliation lawsuit if you are fired after complaining of discrimination). If you feel that you are the victim of a "hostile work environment" because your boss is abusive to you, it is important to document this and to find out if your company has internal reporting procedures you should take advantage of. (Another common defense in these types of cases is

Continued...

REAL WORLD EXAMPLE (CONT.)

that an employee never took advantage of available opportunities to report and remedy the situation. We will discuss that further below.)

Practically we often find that "horrible bosses" are also horrible and bigoted people, who choose to pick on certain employees because of a particular – again, often illegal – reason. Once this animus is discovered – whether through interviews with other employees, exploration of the personnel file, Facebook or otherwise – the "horrible boss" defense tactic often loses steam.

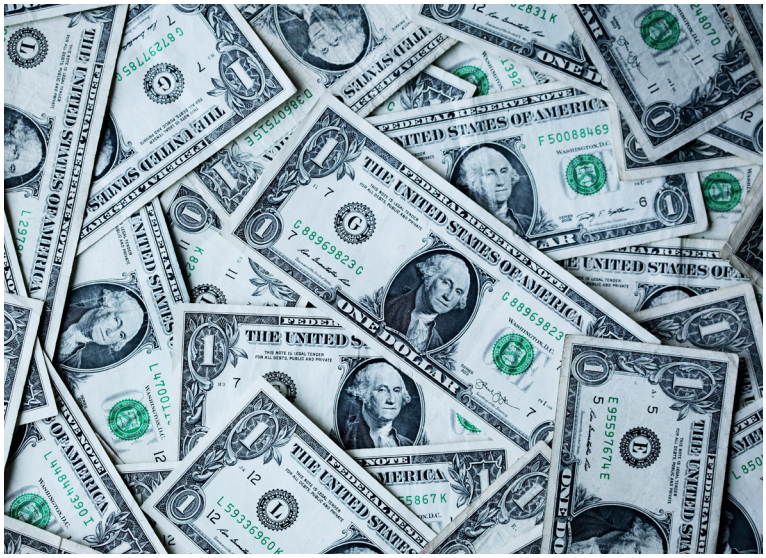
CHAPTER 7
ASSESSING DAMAGES

Now that you've gone through an analysis and have decided that there may be something illegal behind the problems that you're having at work. The next piece that you'll want to think about in deciding a) whether this is something you wish to pursue; and b) whether you want to hire a lawyer to pursue it, is what your damages are or may be.

Assessing damages in an employment discrimination case can be fairly straightforward, or very complicated, depending upon the scenario. Generally speaking, victims of employment discrimination are entitled to damages including economic loss (lost income, benefits, retirement, etc.), attorneys' fees (recoverable in some but not all cases), emotional distress benefits (recoverable in some but not all cases) and, on occasion, punitive damages.

ECONOMIC LOSS

The calculation of economic loss can be simple or complicated. If, for example, you believe that you were denied employment because of your race at a job that was going to pay you $20 per hour for 40 hours per week, your primary element of damages would be your lost wages. So in this example your damages would be $800 per week ($20 x 40 hours), for a recoverable period of time.



The calculation becomes more complicated where you are terminated from a position in which you received benefits, including pension

or in the case of a government employee, a State or Federal retirement. In these cases, your economic damages will include both your lost wages and a calculation of your lost benefits. Unfortunately, the calculation with respect to loss of retirement benefits is often not straightforward and in many instances requires the assistance of an expert economist, who can run calculations of the actual losses. This may seem like overkill, but it can make a large difference in terms of calculation of economic loss.

When thinking about what your damages may be, you will want to consider a few things:

a) whether you are still employed (in which case economic loss will be limited);

b) if not employed, whether you have found a new job (in which case economic loss will be limited);

c) if you have not found a new job, what your prospects are of finding another job. Generally speaking, courts will not look beyond a few years for economic damages so, unless you are at an age nearing retirement, it is somewhat unlikely that your recoverable economic loss would exceed a few years at the most.

The amount of economic loss will typically determine whether it makes sense to pursue your case in the litigation process – meaning, with an eye to a lawsuit. If your economic loss is very small (because, say, you got a new job the next day), it may not be worth your while (these cases are often lengthy and emotionally draining) to pursue a lawsuit and you should just cut your losses and move on. Sometimes, if your damages are small but the claim for discrimination is very strong, it may be appropriate to keep your case in the administrative process where an agency like the EEOC will investigate and possibly pursue your case for you. More on that later.

CASE STUDY: THE MUNICIPAL EMPLOYEE

D'Orazio Peterson had the pleasure to meet and represent a young woman who was the victim of discrimination in the workplace.

On paper this young woman – who was no longer working for the employer – had straightforward damages. She had been out of work for six months and would likely be out for another six or so months.

By doing some extra legwork, however, we were able to establish a much more significant claim for this young woman's economic loss. In this situation we hired an expert economist, and in conjunction with him obtained relevant statements from the State retirement department. We then had the economist prepare some economic projections (or forecasts) as to the actual impact that losing a certain number of years from her State retirement would have on this young woman down the road.

The result was significant. Our client went from having sustained losses of under $100,000 to having sustained losses of well over $500,000 in the long run. Making these calculations is important, particularly where retirement savings/contributions are involved, and it is absolutely critical that you have a full picture of your economic loss before you consider resolving a claim or a case.

ATTORNEYS' FEES

Many, but not all, of the laws protecting employees from discrimination or retaliation in the workplace provide that if successful, you would be entitled to recovery your attorneys' fees from the defendant.

Now, practically you may be asking yourself how this all works, so here's a quick breakdown of how lawyers get paid for representing victims of employment discrimination. Lawyers in these cases generally charge one of two ways: by the hour or on contingency. By the hour is exactly as it sounds – the lawyer charges you an hourly rate (generally in excess of $200 per hour) to work on your case. Lawyers in these situations often require that you pay a fairly large retainer (often in excess of $5000) to get started on the work.

The other fee structure is called contingency and it is also as it sounds – the lawyer's fee is contingent upon a successful result for the client. Typically, the lawyer will not be paid until a successful conclusion of the case and, in those scenarios, the lawyer's fee will generally be one-third of the total recovery. This approach takes the burden away from the client to pay a lawyer when they are often out of work.

In cases where courts can award attorneys' fees the prevailing plaintiff may submit a request for fees at the end of the case. The court will decide upon a "fair" hourly rate for the attorney's services, and will approve or disapprove the hours that the attorney has submitted for payment.

CASE STUDY: WHISTLEBLOWER GETS ATTORNEY FEES

Sometimes victims of discrimination or retaliation have a difficult time finding a lawyer because their damages are simply "insufficient" to allow the lawyer to handle the case. Fortunately, sometimes attorney fee awards can help.

One such client of ours (we'll call him John) was a hard worker. He worked in the asbestos business, where he helped remove asbestos from various projects including schools.
The business is highly regulated, and the regulations make it illegal to improperly remove asbestos from sites.

John started working for a new company, and fairly soon after realized that some of the employees were not following the rules. John had been around the business long enough to know this, and complained to the owner. Shortly after John received a nasty and threatening phone call from the employer, warning him not to complain.

Continued...

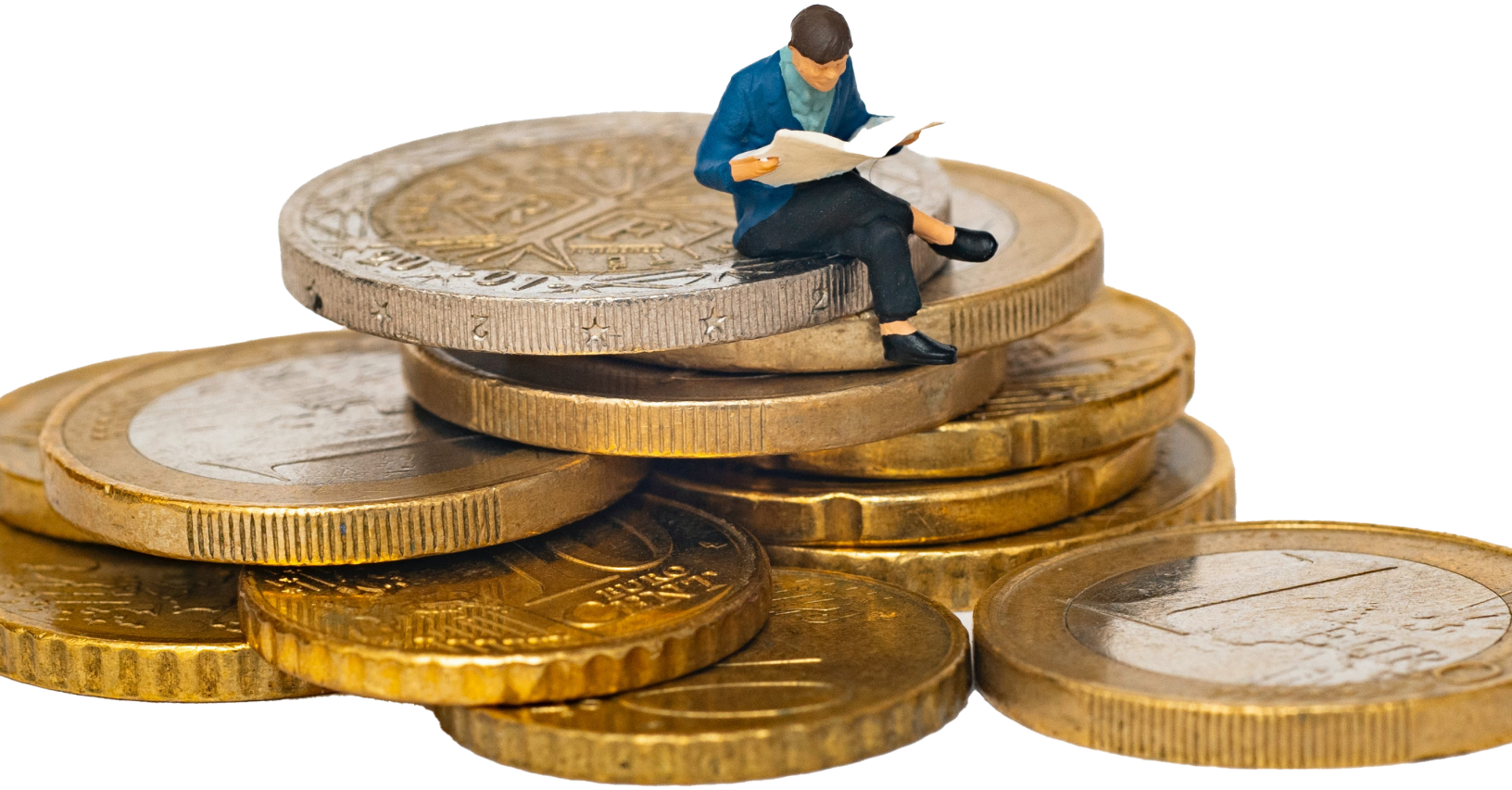
CASE STUDY (CONT.)

A few weeks later John was working at a school and noticed a co-worker improperly removing the asbestos. He stopped and complained. The next day he was fired, but the company tried to say that it was because of "poor performance."

When John hired us he had found some work, and unfortunately under the particular law his damages were effectively limited to his lost earnings. This made it a tough case for us to pursue.

But John had really been wronged here. His company had put the public and school children at risk by its behavior, and he was fired for doing the right thing. This is where attorneys' fees helped save the day.

We decided to take on John's case. After more than a year the case ended up in trial before six jurors. After a week of trial the jury found for John, and agreed that he had been fired in retaliation for having complained about the conduct. John's damages were limited, but after winning the case we were able to put in a request with the Judge for our attorney fees. The judge agreed and added nearly $100,000 to the award to reimburse for attorney fees.



EMOTIONAL DISTRESS

Damages for emotional distress are not recoverable in every situation. In those cases, where they are recoverable, however, there are generally two types of these damages. The first is what are commonly known as "garden variety" emotional distress damages. These are damages that an "average" person would experience following a traumatic event at work and arise most often in cases where the victim has not sought medical treatment for the emotional distress (in other words, has not seen a therapist, etc). It varies from place to place, but generally courts are hesitant to allow awards of more than $10,000-$20,000 for garden variety emotional distress.

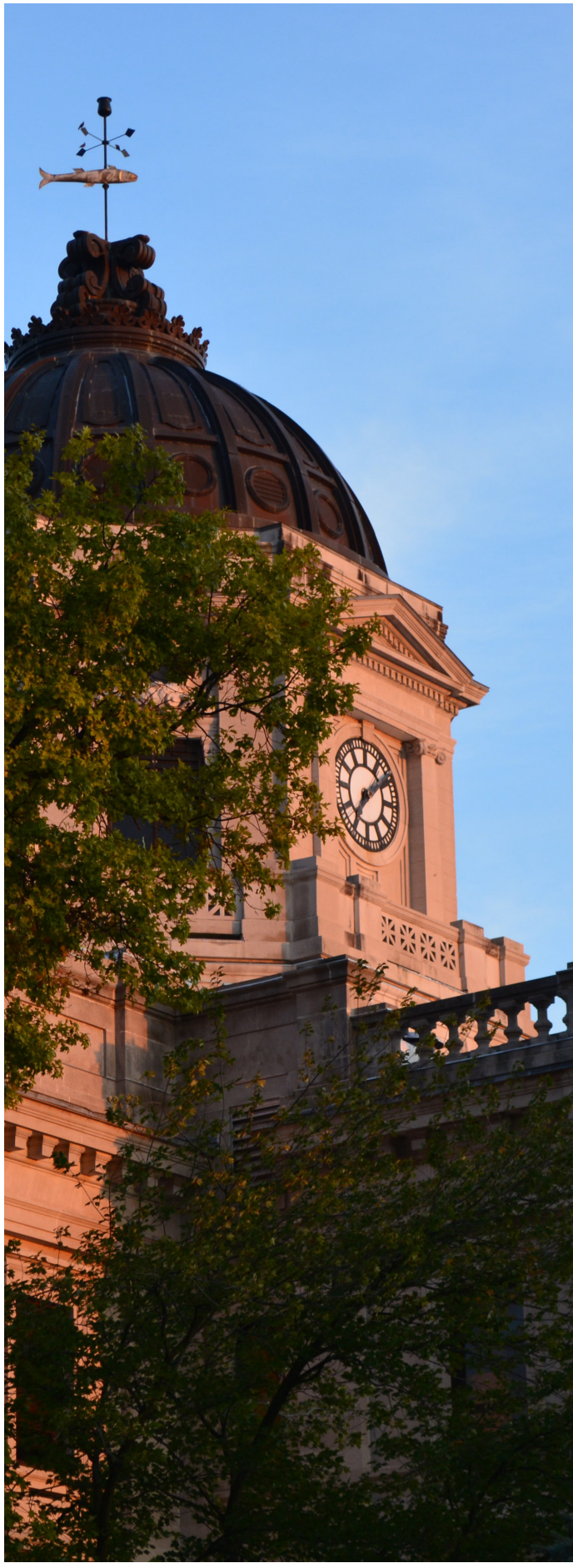
The second category of emotional distress damages are in situations where the victim has sought and received counseling or other medical treatment. These situations allow generally for a larger recovery.

PUNITIVE DAMAGES

You read a lot about punitive damages on television and potential clients often come to use asking about the ability to recover punitive damages. Punitive damages are intended to "punish" a wrongdoer and that punishment can be severe. That being said punitive damages are generally subject to the discretion of a judge, and in many cases courts find that the wrongdoing simply does not rise to the level necessary to allow for such an award. Punitive damages are not available in all cases (for example, the New York Human Rights Law does not allow for punitive damages) or against all defendants (for example, they are not available in New York against municipalities).

SUMMING UP

There are several things to think about when you're looking at what your damages might be and whether you a) need an attorney or b) want to take action. Being prepared and having thought about damages right at the beginning will help you make a smart decision about your course of action.



CHAPTER 8
THE ADMINISTRATIVE PROCESS

You've now thought about whether the wrongdoing at work was because an illegal reason, and also what damages you may have suffered. The next thing to think about is where you go from here.

Generally this is the point at which people decide to speak with a lawyer. And that's often the appropriate decision. If, however, you continue to feel that either you don't need a lawyer, or you've met with one who was not helpful, you should be aware of your options. One of these is the administrative process.

When you watch a legal show on television you typically see lawyers making arguments in a courtroom at trial. This is lens through which most people see lawyers and lawsuits. Practically most lawyers never see the inside of a courtroom (we actually do, but that's for another day). The other reality is that while a jury trial is the ultimate conclusion in some cases, the first step in many employment discrimination cases is the administrative process. These claims typically proceed through one of two forums: the United States Equal Employment Opportunity Commission ("EEOC") or the New York State Division of Human Rights ("DHR").

Both the EEOC and DHR handle employee complaints of discrimination and retaliation. In fact, in many cases filing a complaint with the EEOC is required prior to filing a lawsuit against a current or former employer.

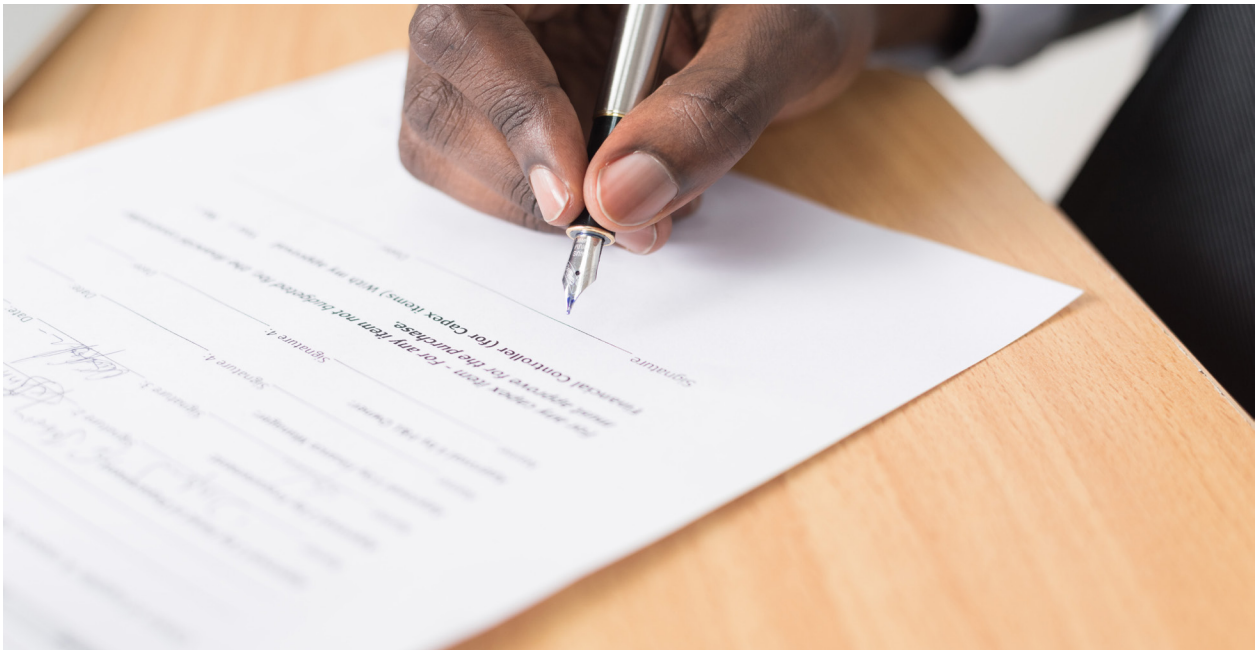
We often recommend the EEOC or DHR to individuals who have concerns about the workplace but whose case we cannot accept because it simply does not meet our criteria (termination from employment and significant damages). Each of these agencies will take a complaint, request a response from the employer, and perform an investigation into the allegations. Often they will attempt to engage the parties in settlement discussions (this is why it's important to assess your damages early), and on occasion the EEOC will formally pursue claims in court on behalf of an individual.

So if these agencies are so great, why does anyone ever need a lawyer?

Not all employment claims are within the jurisdiction of these agencies. For example, you do not need to go to the EEOC before you file a lawsuit based on violations of the Family and Medical Leave Act ("FMLA") or the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Additionally, although the agency will investigate your claim, if its ultimate decision is not in your favor or the agency cannot pursue litigation on its own, you will need to hire an attorney to keep your claim alive by filing a lawsuit. Finally, strategically, it might be in your best interest for your case to get into the litigation process (a/k/a "into court") as soon as possible, and an experienced employment attorney will know how to comply with the administrative requirements but still get you into court sooner rather than later.

We highly recommend that if you have a strong case, or significant damages, you consult with a lawyer in this situation prior to filing with any agency. The DHR and EEOC can be very good options, however, for those with questionable cases, limited damages (including people who are still employed), or those who simply do not want to hire a lawyer.

CHAPTER 9
THE SEVERANCE AGREEMENT OR RELEASE



When you negotiate on your own in an employment case, one of the most critical factors to keep in mind is that, if you reach a settlement, you will be asked to sign a release in exchange for payment. This release is a "general" release, which in effect means that you are releasing the wrongdoer from any and all claims whatsoever that you had or may have had against them related to your employment. Ever. Up until the date that you sign.

If you are going to sign this release without an attorney, be sure that it limits itself to any claims occurring up to the date that you sign it – and not after. The last thing that you want is to sign a release that prohibits you from ever pursuing a claim in the future.

There are numerous other pitfalls to be aware of in employment settlements.

For one, employers nearly always include what is known as a confidentiality agreement, which requires the employee to keep the terms of the settlement strictly confidential. These are often backed by a threat that if the employee violates the agreement he or she will have to pay back the funds received from the settlement.

Employers also often include non-compete or non-solicitation clauses in the agreements. At their most basic, these clauses either prohibit the employee from working for a competing company for a specified period of time, or prohibit the employee from soliciting customers/clients/employees of the employer for a specified period of time.

These are just a sample of the potential pitfalls in the employment release or severance agreement and it is important to remember that if you choose to proceed without an attorney you consider these documents very carefully before signing. Indeed, this is one of those instances where we would highly suggest consulting with an attorney and potentially hiring one on the limited basis of reviewing and possibly negotiating the agreement.

CHAPTER 10
THE LAWSUIT: WHEN YOU NEED A LAWYER

You have now been equipped with enough information to allow you to consider whether you need a lawyer for your employment discrimination claim. And, up to this point, you may have decided that it was not necessary. You may even be right. What if, however, you have concluded that you do need an attorney – or just are not sure in which case, err on the side of contacting one.

The majority of employment discrimination lawsuits take place in Federal Court. In our opinion, it is very difficult for an untrained individual to navigate their way through this process without spending an inordinate amount of time doing so. The procedural laws governing cases in Federal Court are chock full of pitfalls and while Courts can in some instances be lenient towards pro se individuals (those representing themselves), the reality is that the risks often severely outweigh the benefits.

If your case is headed towards litigation – either because it is finished in the administrative process or you are ready to file a lawsuit – we believe that hiring an experienced trial attorney is in your best interest.

BONUS SECTION
HOW TO SELECT A LAWYER

We hope that you have found some of this information helpful in guiding you towards the decision of whether to hire a lawyer. This is not an easy decision and it's one that you should not take lightly.

If you decide to hire a lawyer, do your homework. While there are still some "general practitioners" left out there, the law has increasingly become more specialized. And with all of the advertising and "ranking" sites out there, it has become more difficult for the consumer to filter through the noise.

Ask the potential lawyer/firm questions:

- Have they handled these or similar type cases before?
- Do they have associates or paralegals who will work on the case? If so, how much work will they do?
- Will the lawyer that you hire be the lawyer to take depositions, appear in court, and conduct the trial?
- What do their peers think of them?

- Do they have any ratings? Are they listed in Super Lawyers?
- Do they represent both plaintiffs and defendants in negligence cases? Do they see this as an issue? Are they really sympathetic to your situation, or is this just a way for them to make some money?
- Are they a small firm or a big firm? This matters. Do they have a high volume practice, or do they focus on a small number of cases? There may not be a "right" answer here, but there is certainly a difference, and you should find this out early.

CONCLUSION

If you read this book and decide that you need a lawyer, do yourself a favor and ask the questions above. Too often lawyers try to be too many things to too many people, and while some are very good at wearing multiple hats, others are not. Our personal firm philosophy on this point is simple – we wear one hat, the plaintiff's. We fight for plaintiffs because we believe that victims are often further victimized by large companies and facilities whose primary purpose is too often their own bottom line. We are not a "volume" practice and, in fact, we limit the number of cases that we handle at any time. Again, this is not the only way, but it is the way that we have decided to practice.

Good luck in your decision making process.
Please let us know if we can help.

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