UPSCALE ACCUSATIONS
COUNSELING

Teaching Note

I developed this exercise for my interviewing and counseling course – I've referred to it as "the Client Science Course, since the 2012 publication of my book by that name (with an unconscionably long subtitle). Its business context and employment discrimination-related facts are drawn from two cases I mediated, long ago.

This case is also available on the clientsciencecourse.com website (at least as long as I or someone maintains it). Please note, an initial client interview exercise for Upscale Accusations is also on Clientsciencecourse.com, and within this cache of simulation materials. Of course, this client counseling phase takes place after suit was filed and discovery has taken place. Thus, it includes facts not yet known at the interview stage.

Now, the attorney must inform a business client of "bad news" or more precisely, "pessimistic predictions and higher risks" than the client expected, and explain their reasoning, based on the law and evidence. The client had initially hoped (perhaps assumed) the case would be quickly dismissed because they believe the claims have no legal or factual basis. However, the discovery process yielded deposition testimony and documents which, together with the client's narrative, make dismissal on preliminary motions highly unlikely, and create high risk of a plaintiff's award. Moreover, the range of potential exposure is wide, built upon an array of numbers and complex legal theories .

The lawyer will facilitate the client's (wise) consideration of reasonable settlement by understanding the client's perspective – the client's real stress and difficult decision – and also illuminating an opposing perspective. A skillful lawyer will help the lawyer find a "settlement narrative" in which settlement is not equivalent to capitulation or admission of guilt and is consistent with the client's self-identity.

I am pleased to report that we have a video of a terrific lawyer counseling the Upscale client: a "Not by the Book" and "By the Book" version. Our star, Paul Dorger, Esq., then a partner at Keating Muething & Klekamp, PLL, in Cincinnati, now GC at Belcan, LLC, is an experienced employment lawyer. He graciously agreed to read the Client Science book and to be "directed" in the videos. He also recruited a real defense client for the client role. Rest assured: Upscale Accusations was not his case. The videos are available on the clientsciencecourse.com site and also on the ABA/Suffolk ADR teaching videos site, www.adrvideo.org. (The password is adrteacher123,)

Pre-Reading assignment

Unsurprisingly, I would assign reading from *Client Science*, Chapter One, "Bad News and the Fully Informed Client", Chapter Two, "Meaning Truths," and Chapter Three, "Translating the Terrain." One could argue that all of *Client Science* is relevant to performing the

challenges of this exercise, as it requires the attorney to advise the client regarding "bad news and other legal realities." Adopters of the case but not the book are advised to assign other material treating these idea.

Acknowledging the risk of being accused of promoting my own writing (*Risk and Rigor* (DRI Press 2019), I would also plug an introduction to decision tree analysis at some point before the students work with this case. (Or, theoretically, you could use it for any decision tree lesson/course.) This case is complex, and students who have been introduced to decision trees immediately see that the twists and turns of the legal issues and particularly, possible damages awards - back pay only, front pay, punitives - would be easier to discuss with the client if arrayed on branches of a tree. In the class time allotted for the exercise, I have not asked the client counseling students to create a tree for the case, but they do see the potential benefit of using it within a client discussion of possible risks and consequences.

Précis *of the Upscale Accusations Client Counseling Exercise*

The attorney is a mid-level associate in labor and employment law at a medium sized firm. The client, Upscale Exhibits (referred by the law firm partner who handled their corporate work) is a small business that designs historical and artistic displays. Upscale Exhibits is the defendant in a federal age discrimination suit brought by a long-time former employee. The client representative in the litigation is JB Clark, co-owner and founder of Upscale, who has been its main salesman and business mind. Their co-owner, a college friend, is a graphic and interior designer - the "artiste." The plaintiff, Pat, originally a friend of Clark's spouse, was on board from the beginning as the administrative/office manager.

[The following constitutes a reprise from the initial interview.]

Pat was well-organized and efficient. As the company grew, Pat was promoted to account sales, while she continued to supervise office management.

The recession hit Upscale hard; its business declined sharply. Upscale initially avoided lay-offs. However, two years ago, faced with continued business decline, Upscale's owners retained a consultant to recommend changes to promote growth. That consultant recommended that Jen, a youngish (32) fairly new but talented employee, join management, freeing the owners for more sales and design. These changes were made when Pat was on a medical leave for heart surgery. When informed, Pat wasn't happy but said she did "not have the energy to make a fuss."

As Upscale Exhibits' revenues continued to be abysmally low, the owners assigned Jan responsibility for evaluating which staff person to lay off. Jen argued persuasively that it should be Pat. "With a heavy heart," the client ultimately terminated Pat. He recognized her seniority and key role in the founding, but also knew some of Pat's account clients were unsatisfied. Pat's responsibilities were divided among other employees.

Pat declined the three months' severance offer and a month later filed an age

discrimination claim with the EEOC. The client (foolishly) opted not to retain an attorney for the EEOC proceedings. The EEOC found cause and set up a conciliation session, at which Pat demanded $500,000. No negotiation progress was made.

The client was surprised and outraged by the lawsuit. He sees it as extortion, intended to bankrupt the business, and "hates the idea of paying Pat a penny."

[The unfortunate yield from discovery and counsel's research and analysis is below.]

Pat's testimony stated her theory that her earlier, partial promotion to sales had been part of a long-term plan to get rid of her while Jen was being promoted. She testified that Jen frequently commented about Pat's being a "dinosaur" and emailing her clippings of cartoon dinosaurs. (Jen admitted this but said she was joking.) Pat's office management responsibilities were reassigned to Jen, and her accounts to younger salespeople.

Pat's deposition also raised questions regarding the need for her termination as "reduction in force" because the partners made significant other expenditures at that time and also gave raises to other employees upon her termination. JB Clark countered these accusations by noting the importance of purchasing certain technology to remain competitive, and testified that he and his partner made personal loans to cover this. He characterized the others' raises as very small and necessary to maintain their motivation.

Pat now has a half-time job making $15,000 per year with no benefits.

After the initial interview, the attorney had (unwisely) told Clark there was a good chance of a dismissal on a summary judgment motion. Post discovery, the lawyer puts their chances of losing summary judgment at 75%, recognizing that Jen's dinosaur comments and e-mails support Pat's prima facie case.

Trial is risky too. Although Clark may not have intended to discriminate when making this business decision, a sympathetic jury might see it Pat's way. Jen's age and dinosaur comments and emails are not funny now. Clark and his partner approved Jen's recommendation to terminate Pat. The lawyer puts the chance of a liability at 50%.

The various potential damages and costs listed below are explained in greater detail in the *Attorney's Instruction document.*[1]

- Backpay (required by statute): $105,000 -- $150,000 (range depends on findings on mitigation)
- Attorney's fees (Pat's): $60,000 (recoverable by statue on Plaintiff's verdict).
- Front pay: ranges of $245,000 -- $350,000 (7 years) or $70,000 -- $100,000 (2 years). reasonable to expect a two-year award which would equal damages of $70,000 (with full-time

[1] Pat's state claim, which would have permitted compensatory and unlimited punitive damages, is barred because she failed to file the claim within 180 days of her termination.

pay mitigation) or $100,000 with part-time pay mitigation.

- Reinstatement: would obviously take front pay out, but not backpay.
- Liquidated damages: $210,000 -- $300,000. If the jury finds age discrimination and also feels that Upscale Exhibits' conduct was *willful.*
- Punitive damages -- $420,000 -- $600,000 (if malicious conduct is found) Under Federal statute punitive damages cannot exceed the doubling of liquidated damages which would total $420,000-$600,000.
- The worst-case scenario based on the damages numbers is astronomical at $1.4 million. Even taking out the punitive and liquidated damages, Upscale Exhibits could still be faced with a liability of approximately $300,000 to $500,000 if Pat won.

Sometime after depositions, Pat's attorney suggested $150,000 to $200,000, as "reasonable" range he would discuss with his Pat. The Upscale attorney said $125,000 to $100,000 or close might be reasonable but that they had not discussed it with Upscale.

The attorney is instructed to seek JB Clark's settlement authority at $100,000 and explain "it would be great" to get authority at $125,000. The lawyer anticipates resistance, remembering that Clark had thought the lawsuit was a "kick in the teeth" after the three-month severance package offer and commented "I'll be darned if I reward that." Also, the lawyer ruefully remembers that, when they thought summary judgment looked strong, they told Clark this type of case often settles for "3 to 6 months' salary TOPS!"

The exercise setup is that the lawyer has asked JB to come to his office to discuss the case and its possible settlement.

Debriefing Discussion

Particular aspects of the case replicate what happens in practice at a more "granular" level and are worthy of highlighting in discussion:

- The difference between the case as described in the client's initial narrative, and the way it looks after discovery. This reinforces the notion that rosy predictions based upon an initial interview are unwise.

- Also, discovery has yielded emails and other documents the client representative simply could not have known of and, in part, different meanings or ambiguities that were unclear or omitted in the client representative's initial narrative. (For example, the client wanted to suggest that he had no responsibility for the termination decision, and that's not clearly, legally true.)

- The client will more easily accept the idea that a jury might NOT rule in his favor if that does NOT require him to accept that jury would disbelieve him. It will be far easier to acknowledge concerns about credibility flaws in another corporate witness or bias against the entity.

- When legal issues are complex and uncertainties many, this leads to a wide range of possible damages, with clusters of damages estimates linked to findings and rulings. It's worth considering how much detail the attorney owes to the client. Is it okay (for best practice), just to say: the damages could be anywhere between $x and $y? Or do the risk percentages associated with different categories of damages require more care? An attorney should not merely highlight extremes to induce fear or minimize the intolerable and emphasize the less extreme for the client's comfort (if reality is not comfortable).

  My view here is that, despite the complexity of the issues and time required to discuss them thoroughly, lawyers owe their clients the opportunity to do so. If the client says, "Cut to the chase, I don't want to know about the theories," that's fine. Nevertheless, I believe failure to communicate the full range of possible outcomes would be unwise and would constitute a breach of the obligation to fully inform your client, in my view. After all, the worst end of the range is still possible. If it becomes real, the client will pay the price. So, "cutting to the chase" might edit out the legal analysis, but it should include the full range of exposure, based on that analysis. I make that point strongly in class.

  An important question to ask, and to think about is: what does settling *mean* to the client? (See Client Science, Chapter 2, "Meaning Truths.") If the client takes settling to mean that he is rewarding or capitulating to Pat, admitting discrimination, or frightened of risk, resistance will be strong. Those meanings conflict with the client's identity. ("I refuse to be frightened by risk, I'm a fighter.") They tell a story he wants no part of. It's legitimate (also wise and helpful) for the lawyer to suggest alternative meanings consistent with the client's identity.

  In this case, for example, one might say: How many people does Upscale employ? Are they longtime employees? If the company does get hit with the worst verdict, and the company cannot survive, I assume you'll land on your feet. You are known in the industry. You can afford the risk. But what about the employees, what would happen to them? Now, the decision to settle is a protective and generous act for his employees. That story fits the client's identity. I confess, most students don't come up with that approach to shifting meaning, but they inevitably recognize its power.

  Equally important, and more often recognized, is the wisdom of characterizing the trial risk as resulting from someone else's mistakes or less likeable or credible persona. It's hard, not to mention unpalatable, for most of us to acknowledge a jury might find us other than credible, noble, or likeable. The client is convinced a jury will listen to him, believe him, understand what a tough decision this was, etc. It will be easier to accept that a jury might not feel the same way about Jen (or whoever in a different case). Also, for a defense client – large corporation or even a small business owner – it is less difficult to recognize that a jury of people on a lower end the income scale might turn against a corporation or business owner.

That too makes settlement less "a betrayal of my principles" than a business judgment recognizing verdicts reflect 12 people's biases. In my experience, many students do think to shift responsibility for risk to Jen and raise concerns about jury perspectives.

I view this exercise as providing useful strategies for lawyers and clients to work with the consequences and the meanings of their decisions.