BASICS OF CIVIL PRACTICE

Assessment of particular case types – interview and investigation

Picking the right case can be the single largest key to a successful plaintiff's practice. The core concepts behind good case selection will almost always apply regardless of the types of legal issues involved. From a complex medical malpractice to a basic motor vehicle accident, choosing the right client, legal battle and economic challenges are crucial. Each element has to be evaluated with the thought that the case will have to be tried. Entering a case with any other focus is just asking for trouble.

Picking The Right Client

Common sense will help you determine if you have picked the right client. The old axiom, you never get a second chance to make a first impression, is a wonderful guide in this regard. When trying to determine whether you wish to take on a case, consider your own initial response to the client. Did they impress you as trustworthy and legitimately hurt or did their story leave you wondering what was really going on? If you have doubts, chances are no matter how hard you work to present the case to the jury, they are going to see the same issues you did.

The first step in picking the right client is actually meeting them. I have a standing policy that I want to sit in the same room and talk with the client about their expectations and explain the process. I use this time to evaluate whether the client will be liked by a jury, whether their story is consistent and believable and whether there is something about them that helps "sell" the case. I also like to ask about their motives for bringing the case to help determine whether the goals they seek are actually attainable under the law. Often, I hear that the client is "not in it for the money" and just wants to make a point to the defendant. I have learned through hard experience that this type of client is usually misstating their desire and it is, in fact, all about the money. I do not expect the client to come in with a hard and fast amount of money that they want to recover. I do, however, want to know if they have reasonable expectations or are aware of legal or insurance policy limits that might apply to their case. I tend to avoid cases where the client expresses a desire to "destroy" the potential defendant. I have found that no matter what type of settlement or jury verdict I have obtained for these types of people, it is not enough. And nothing takes up more time than a client for whom you have done everything legally possible and they still are not satisfied.

Second, ask the client whether they have discussed the case with other attorneys. If they have, find out who the other attorneys were and why they did not hire them. I am always worried if the client has had their case rejected by other attorneys. This is especially true if the attorneys are someone I know and respect. There are occasions where your creative mind and dogged pursuit of a case will yield a result that other attorneys could have overlooked. But, just as often,

there is a substantial reason why the case won't work that the others have already identified. Sometimes, potential clients are educated about the problems with their case and omit or downplay certain facts during the intake interview. For this reason, it can be a good idea to call the prior attorney who looked at the case and ask why they declined to take it.

Third, scheduling an in-office meeting with the potential client helps answers a lot of questions. In addition to evaluating their potential appeal to a jury, the in-office meeting helps you find out whether the potential client is committed enough to their case to take the time to meet you. Some cases may be so big and potentially lucrative that you want to save the client time and offer to go meet them. Even for these clients, however, I think it is a good idea to arrange a meeting in your own offices at some point early in the representation to introduce them to your staff and make them more familiar with you and your practice.

Finally, make sure that you explain the litigation process to the client and outline the role that they will have to carry in the case. This includes answering discovery, signing documents, preparing for and attending depositions and mediations and trial. Many potential clients, in cases where they have seen other attorneys, have told me few lawyers take the time to explain the process to them. This simple gesture helps build rapport with the client and may set you apart from other attorneys who have not focused on their case. My belief in this stems from a desire to get the most mileage out of each potential client encounter. Even if you ultimately decide not to take their case, if the potential client leaves with a good impression of you and your practice it may lead them to refer a friend or relative to you in the future.

Picking the Right Legal Battle

The plaintiff's practice tends to attract people who want to make a change and are willing to fight against long odds. But picking cases just to make a point can ultimately economically ruin a practice. The simple fact is that, unless you are independently wealthy and can afford to practice at a loss, your case selection requires an evaluation of the chances to make money.

Whether you are working on a straight contingency or an hourly rate, each case will require a balancing of the potential economic recovery versus the costs of litigating the case. Unfortunately, much of this balancing-test requires the lawyer to predict the future. For example, how long will it take to get the case to trial or to force a settlement? How many depositions will be required? Are there issues that will require expensive expert testimony? Are there limits to what the client can recover or limited assets or insurance held by the defendant? Each of these questions needs to be considered when making the call about whether to take the case.

If the case involves an area of law you are unfamiliar with, it may be a good idea to refer it to someone who specializes in the area. This may save you time learning an area of practice that you do not know and avoid making mistakes regarding pleading, timing and other requirements that accompany the area.

During the intake interview, ask yourself if what jury questions will be presented if the client's case goes to trial. Is the threshold inquiry one that can be done without expert testimony. If there are causation issues, who will you have to find to resolve them? If the law has recently changed, for example our current Texas Supreme Court has ruled against plaintiff's with successful jury verdicts about 87% of the time – don't just assume your old understanding of the law is still correct – can you meet the current standards (whatever they might be at the moment)? If you find yourself having to stretch, or if the list of experts and other testimony begins to get too long, the case may not be one you want to take.

Picking the Right Economic Battle

The economics of the case are sometimes the hardest to evaluate but the single most important to your decision. Some cases present significant economic investment, i.e. product liability cases with experts on the defect, causation or medical cases with expensive doctors, and may make the evaluation simple if the damages are too small to cover the necessary litigation costs. Other cases may seem less complex, but could involve significant liens for medical expenses or limited insurance coverage that may not be readily apparent. For sophisticated products cases, do not overlook the costs associated with maintaining the item involved – for example storage fees for wrecked vehicles or aircraft – and recognize that you may have to secure the wreckage for years while the case is litigated.

The economic evaluation should begin with the client's damages. What are their past and future medical expenses? If there are substantial past expenses, what portion of the case will have to be paid to lien holders or medical insurers? If a substantial portion of the damages comprise future medical treatment, how are you going to prove that they will actually be necessary and how strong is that proof. Another consideration is whether the damages you are seeking are covered by the potential defendant's insurance. Keep in mind that some intentional or criminal acts may not be covered by an insurance policy, so that you do not plead yourself out of coverage for a case.

Once the amount of damages is estimated, take a look at what the costs of litigating the case through trial will be. This includes budgeting for expert review, report drafting, deposition preparation and testimony and trial preparation, travel and testimony. Also factor in how many depositions may be necessary and what the likely cost will be. Finally, determine what evidence collection costs may be, i.e. medical record copies, securing wreckage, hiring private investigators. If the amount of likely expenses exceeds 10 to 20 percent of the total potential recovery, it may be very difficult to make the case economically attractive to the client. Better to address these issues early than to invest your time, money and effort in the case for years and wind up with a disappointed client.

Preparing and evaluating specific cases

All cases will benefit from having the client prepare an intake questionnaire. Prepare a form tailored to your office and the type of case you normally handle. If you do not have a form, develop one by using the journalistic 5 W's and 1 H approach. That is, Who, What, When, Where, Why and How.

1. Who

Your form should ask the client to provide you with enough contact information to reach them. Ask for the obvious, home address, work, cell and home phone numbers, email addresses, etc. I would also suggest asking for a secondary contact person in case you are having trouble getting the primary one to respond.

This is also a good place to ask questions about the client's injuries, past and future medical treatment, past health care providers, lost economic damages including work history and time missed.

2. What

This section of the form should ask the client to outline what they remember about what happened or what they think their case is about. This section will help you understand what issues are important to the client in handling the case.

3. When

It is important to include a section that helps you evaluate whether there are any impending statutes of limitations. For this reason, it helps to include a section of the form that specifically addresses when the actions involved occurred. Your staff can then use this to provide reminders about deadlines or help you focus on cases that need immediate attention.

4. Where

This section should outline the place the acts underlying the case took place. For motor vehicle cases, it is helpful to include a diagram of the road or intersection on the form for clients to draw in what happened. For other cases, the address of the site of injury can be helpful in determining potential defendants that might not otherwise be apparent.

5. Why

This may be the most important section. Have the clients outline what it is they think their case is about. If they have been told by some medical care provider to bring suit, have them outline who that person was and exactly what they were told. If the case involves a motor vehicle collision, have the client address why the other person was at fault and why they, in turn, were not. This section also helps identify what issues are most important to the client so that you can

be sure to address whether or not you can help them. Do not rely on this section alone to determine whether you have a case or not. Many times the client overlooks the elements of a cause of action because, obviously, they are not attorneys. You must follow up to seek more information about the case to answer these questions.

6. How

This section should have the client address exactly how they think they were wrongfully injured. This will serve as a starting point for your analysis and will help focus the work to prepare the client later if they forget crucial elements of the incident. Ask them to explain in their own words how each potential defendant was negligent and how it has impacted their lives.

Case Specific Analysis

Car cases

There are many different aspects to a car wreck case that often get overlooked. For example, there may be a defect in the vehicle that caused or contributed to cause the wreck or allowed a greater injury to the occupants. This may result in a product liability case. Sometimes defects in the roadway, lighting or traffic control devices may be the primary cause of the crash and lead to more defendants than just the other driver. In other cases, the wreck may be due to drinking and driving and may provide the basis for dram shop claims.

The starting point, after getting the client's version of events, is to obtain the police report for the crash. This often contains important evidence about the identity of the other driver, witness information and a description of how the crash took place. Most police reports will also include a section that records the investigating officer's opinions about the cause of the crash. Many times, this will place the blame squarely on one driver or the other. But frequently, the report may be vague and not reach explicit conclusions. From there, it is a good idea to interview as many witnesses to the crash as possible. EMS and fire rescue personnel are good to interview when possible because they arrive at the scene early while the evidence is still fresh. Be sure to ask them about any statements made by those involved in the crash, including any made by your client, to see if those statements are consistent with those made by the witness later on.

Securing the Scene

If you get the case early enough, and it warrants and requires it, you should take steps to secure evidence about the scene. This includes photographing the location, taking measurements of damage to the road, skid marks and scrapes and pinpointing where various steps in the sequence occurred. If the case involves visibility problems, i.e. vegetation that interfered with the driver's ability to see, make sure to document these conditions before changes are made. If the case is large enough, you may wish to have an accident reconstruction expert visit the scene early to begin collecting his or her own data.

Securing the vehicle

You will need to secure the wreckage if the case potentially involves a product or design defect that contributed to the client's injuries. This should be done as early as possible to avoid problems with destruction or changes to crucial evidence. Take steps to determine where the vehicle is located and send letters to all involved indicating that the vehicle is not to be altered, sold or salvaged in any way. This may mean that you have to purchase the wreckage and move it to a secured location. There are several businesses that provide long-term storage for vehicles involved in litigation. But it will usually be your burden to get the vehicle to the storage facility and pay for the handling and care of it.

Losing key evidence to support your case is the danger of not taking steps to secure the vehicle. Once gone or altered, your products liability case may evaporate forever. Do not just rely on photographing the vehicle, since it is hard to document every potential part that might be involved in the case. Get your product expert to inspect the vehicle as soon as possible to determine first, whether you have a case and second, whether your steps to secure the vehicle are sufficient.

Many times, vehicle manufacturers will take steps to secure the vehicle soon after the crash. Cynically, this may be done to rob a plaintiff of the evidence they need to bring a cause of action. It is best not to rely on those with potentially adverse interests to protect the wreckage.

Conducting the Analysis

When looking at anything more than simple vehicle collision cases, the potential damages is a substantial part of the analysis. Put simply, products and design defect cases can be very expensive to litigate and will only be economical if the damages involved are extensive. It is not unusual for product liability cases expenses to run in the high six figures so the damages to support the case must be there. This typically rules out simple minor injury cases to support a product case. To conduct this analysis, determine the nature and extent of the client's injury. Is there a significant problem that will require extensive future care or support? Is there an injury that will prevent the client from earning a living? You may wish to have the case reviewed by a life care planner to assist in making this determination. A good life care planner will be able to review the client's medical records, meet with them and assess their current and future needs. Since this may become a substantially important part of your case, make sure that the life care planner has the credentials that will allow them to survive expert-sufficiency challenges. For example, if the case involves projections of future rehabilitation care, make sure the expert has some qualifications in that area rather than a general knowledge of the field. This will help you have a stronger expert and, ultimately, a more persuasive case.

Making a list of required liability experts is the next step if you determine that the underlying damages will support a more serious case. Since most cases will require someone to testify about how the crash occurred, you normally start with an accident reconstruction expert to answer these questions. Look for someone with experience or training in doing this work in law enforcement or government investigation jobs. This will help ensure that the methodology that they use is accepted in the field and will add to their credibility. Next, determine what type of defect is involved and focus on an expert with knowledge in that field. With *Daubert* and other expert sufficiency cases out there providing a moving target, it is best to review the current law to determine what the expert's qualifications and necessary testimony will be before retaining an expert.

An internet search can help you determine whether the vehicle involved has a history of similar accidents. This can be as simple as running your facts into a Google search and seeing what comes back. There are also government sources, like the National Transportation Safety Board at http://www.ntsb.gov/ that can be great starting points for your search. The website has areas that include reports about safety lessons learned from crashes and other problems that may give you evidence to develop in your own case.

Slip and Fall Cases

I personally think slip and fall cases are some of the most difficult to win. To be successful, you'll need evidence that the defendant knew about the dangerous condition before the fall and failed to take adequate steps to protect the public. This can be difficult if the condition contributing to cause the fall was removed or fixed after the incident. Proving these cases will require you to document, either through eye witness testimony or physical evidence, that the defect was apparent to the premises owner and not to the plaintiff. I have personally tried only a few of these cases but have had little success. The typical defense is to argue that the condition, whether it be ice, spilled fluid or something else, should have been readily apparent to the plaintiff. The defense has argued that there were countless other patrons that managed to navigate through the same area safely. I have personally found this defense to be hard to overcome even with evidence that demonstrated the premises owner knew the danger was severe and took few steps to protect against it. Of course, it may have been just poor lawyering on my part.

Product Liability Cases

Evaluating a product liability case can be a bit of a scientific endeavor. If the case involves a vehicle crash, it usually requires some familiarity with the design and performance of the vehicle in question. If the product is something more mundane, it may require some knowledge of the components involved in the case, i.e. electricity, gas, etc. I have handled a wide variety of product cases during my career, from flash-bang stun grenades used by special forces soldiers to aircraft fuel system defects. The common denominator for success resolution of each

is grounded in an effort to understand the workings of the product and why things went wrong. Internet searches can be a great starting point for this process. Look in the typical search engines for other similar incidents and see if there is anything consistent in them with your own case. Determine what areas of science are involved and see if anyone has written peer-reviewed articles on the subject. For example, I handled a case involving a hot water heater failure that seriously burned and killed an elderly woman. An internet search on the subject revealed a wealth of information about water heater safety and turned up a series of papers presented to a safety symposium on the same topics involved in my case. From there, I could begin to learn what the issues involved with this type of litigation were and evaluate my case in that light. In aviation cases, for example, the case facts should be reviewed by a pilot to help determine what issues are likely to arise. For each product expert you consult, be sure to keep the expert-sufficiency issues in mind. Ideally, you want to find someone with experience designing the same or similar product, if there is a design defect involved. Or, if the case involves a manufacturing defect, you will need to have someone with the ability to demonstrate exactly how the product failed to meet the standards involved. Since these experts, and these cases, are often expensive, it is best to make this determination early on rather than lose all the investment well into the case.

Other cases

Medical malpractice cases, at least in Texas, have become much harder to successfully litigate. Our current insurance-aligned and activist Texas Supreme Court has greatly expanded the definition of what is considered to be medical malpractice, and thus subject to its liability limits. There are numerous procedural roadblocks and limits on the client's ability to even investigate the cases before filing suit. While all this makes it very difficult to adequately evaluate a medical malpractice case, it can still be done.

As with other cases, the analysis of a medical malpractice suit must start with an evaluation of the damages involved. The current law de-values the worth of an injury to the elderly, children and stay-at-home parents. By limiting recovery for non-economic damages to $250,000 in most cases, without a substantial economic component to the case it may be very difficult for you to handle a medical malpractice case. So, the first effort should be to determine if there is any significant future expenses, erosion of earnings capacity or future care needs. If this exists, it may be economical for you and the client to go forward with the case. If it does not exist, it may be better to reject the case even if there is clear evidence of malpractice. Under current Texas law, doctors and other health care providers are entitled protections that no other class of citizen enjoys. Many courts, including the Supreme Court, have increased those protections to make it almost impossible to bring suit against them.

Keeping a tight reign on your expenses is the best way to go forward if you do choose to proceed with a medical malpractice case. Sit your clients down early and make them aware of the impact of the liability limits. Most people do not know that the law was changed to reduce

what they could recover. If anything, each case you turn down because of the new law may lead to another Texas citizen who finally appreciates the extent to which the special interest insurance-backed lobbyists in Austin went to. Once the client knows and understands that their recovery may be limited, look for ways to reduce the costs of the case. For example, see if subsequent treating doctors will agree to testify about the standard of care violations. Most doctors are unwilling to stand up in their community and speak out when they see other doctors acting negligently, but a few will. Maybe you will find the rare exception that believes speaking out against the negligence of others in their profession. If you hire an outside expert, make sure that person meets the ever-changing definition of who is qualified to speak to all the issues in your case. Under the current motion practice games utilized by the defense, that initial expert report – made before you have conducted any discovery, been allowed to talk to any witnesses or allowed to investigate your case – will be used to limit what you can do or plead later in the case.

If these words sound harsh, it is because the state of medical malpractice law in Texas is currently severely against plaintiffs. This is from someone who has practiced in this area for years. If you do choose to go forward, make sure that you have closely reviewed the statutes to ensure compliance with notice and report deadlines. Miss one, and your client's case can be gone forever.

The discovery process

The discovery process should begin when the client first walks in the door. Start making notes about the materials you will need to prove the liability and damages. Do not wait until after the suit is filed to begin requesting the evidence you need. Obviously, the busy litigator will not have the chance to do everything right. But waiting until after filing suit to collect the evidence underlying the case is not a good idea.

Most cases involve the same core issues. First, what happened and second, what was the damage. Since most defense lawyers ask for the same general types of information and documents, I have begun asking my clients to provide the same type of materials early on. One way to do this is to grab a copy of a recent discovery request sent to you by opposing counsel. For example, most car wreck defendants ask for the same things so save time and send your new client's the discovery requests early and have them produce the materials before the request is made. That way, you and your staff will have the materials and information ready when the actual request finally comes in. This helps avoid the last minute hustle to answer discovery and prevents you from needing to ask for extensions.

The same is true for discovery to the other side. I always try to include a set of written discovery with the initial filing of the petition along with a formal request for disclosures. The first set of discovery should cover the areas of the case you are concerned about. For example, if there is a concern that your client did something to contribute to cause the injury, ask interrogatories and request for production in an effort to flesh this out. You can also use the

discovery requests to help educate the other side to why they should consider a settlement. For example, if you know there are documents or witnesses that support your case, ask for them early on so that the other side will start to realize just how bad their defense is.

The most basic goal of discovery is to ensure that you are not surprised by anything at trial For that reason, make sure to ask questions designed to supplement the information you get in answers to disclosure. In the end, you want to be able to determine who will testify in the case against you, what they will say and what evidence they will rely upon.

The discovery responses may also highlight defense positions that you can attack with motions for summary judgment. I have had success moving for no-evidence motions for summary judgment on affirmative defenses that the defendants have failed to produce evidence to support. Many plaintiff attorneys forget that the no-evidence rule also applies to some defenses and can be used to eliminate positions that might confuse the jury. For example, in car wreck cases act of god or other defenses may be asserted but there may be nothing to support them. Be careful using a no-evidence summary judgment motion as the rules require you to specifically identify the element of the defense that is unsupported by evidence, i.e. don't just file one without thinking it through. But, if you can identify a specific area, attack it with the lack of support.

Taking and Defending Depositions

Many cases are won or lost in how the depositions are conducted. If your client comes in looking disreputable and gets caught lying, it will adversely impact the settlement value of your case and your chances for success at trial.

I think it is a good idea to review the discovery process with the client well before the date of the deposition. I am always encouraged when I show up to a deposition of an opposing party to find that they do not even know who their lawyer is. This is usually a pretty good sign that the other side has no idea what is about to happen to them.

For clients, you should conduct a pre-deposition meeting at least a week before the deposition. I want the clients to come to my office, so they know exactly how to get to where the deposition is, and to meet with me in person, so they are reassured that they will be adequately protected at the deposition. Most clients fear the process because they do not understand it. Outlining what is about to take place helps reduce their anxiety and improve their deposition performance. I begin every pre-deposition meeting with the same statement to the client – Just Tell The Truth. Starting here re-affirms the importance of the proceeding and lets the client know that they can get through it without having to memorize any facts or way of saying something. Besides, I do not want to represent someone that is not telling the truth. After this, I normally cover how the deposition process works, i.e. who will be there, if the deposition will be videotaped, how the questioning process works, what it means when there are objections, how to request a break. After the basics, I review any concerns the client may have about the process.

Often this question will bring up things you have never thought about before, i.e. something that they did wrong many years ago, some concern about what they need to say or do. Alleviating this concern usually arms the client with the calm necessary to endure the process.

I conduct this meeting about a week before the deposition to make sure that anything new revealed during it has time to be followed up. For example, if the client shows for the pre-deposition meeting and identifies materials responsive to a duces tecum that you never knew about, there is time to get them before the deposition. The same would not be true if you held the meeting a few minutes before the deposition. Another lesson I learned the hard way was to review what the client should wear at the deposition. In my youth, I had a client come in for deposition, that I prepared over the phone and not in person, wearing a short sleeved black t-shirt revealing his extensive and scary tattoos and numerous body piercings. The client was the father of an injured child but I did not want the public face of the case to be this severe. The old saying, "You never have a second chance to make a first impression" is true in depositions.

The key to preparing for non-client depositions is to know pretty much what the deponent is going to say before you ask the question. Where ever possible, I try to speak with witnesses before they are deposed to find out the extent of their knowledge and anything that might challenge them. This way, I can be prepared to address issues that might arise during the deposition. I am surprised at how many times opposing counsel has failed to make any effort to find out what the witness is going to say before the testimony starts. I frequently hear the other side ask about whether the witness has spoken to me before the deposition. As a younger attorney, I used to worry that this line of questioning would be used to impeach the witness at trial. In my practice, I have never seen this done with any real impact. I think jurors would believe that discussing the facts with the witness before the deposition is nothing more than being a thorough litigant. You'd be amazed at what you can learn about the case by speaking to the witnesses early. You may find that they have little recall of the events and that taking their deposition is a waste of time and effort. Or, you may find that they have important evidence that can improve your case. True story, I once called a witness whose number I finally found late on a Saturday morning in a serious medical malpractice death case. The witness, whom I'd considered to be a minor player in the whole ordeal, started the conversation by saying how glad she was that someone had finally called her about the case. She proceeded to lay out the numerous warnings she had made about the dangerous issues she had seen at the clinic involved and how she had quit over the failure of the staff to make the changes. The kicker was that she had kept a box full of emails and warnings that she had written and was just about to throw them out the day that I had called. To my knowledge, the other side did not speak to her before the deposition and it became a powerful weapon in my case.