# Preparing The Plaintiff's Bodily Injury Case

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## I. Prepare your Case

### A. <u>Select Cases Wisely</u>

In my early years of practice, I was so afraid that if I turned a case down then at least one of the following would happen: 1) The case would transform from a mangey flea covered dog to one of the dogs in "Best in Show;" 2) The clients that I turned away would immediately thereafter have a close family member with a career changing case; or 3) I would hit a dry spell where I would have no cases to work on and no money to live on.

After many years of running in place, I learned that the fleas rarely leave the dog. An entire law practice can be taken up with the needs of clients with bad cases. The time spent on bad cases takes away from your good cases. The clients with the bad cases are upset when, shockingly, they get bad results. Guess who gets blamed? Guess who does not get hired when Aunt Bea is tragically injured by the truck?

There are four legal elements that every successful bodily injury case must have: Liability, Damages, Causation and Collectability. Lose any one of these and you lose the case. Do not let a extremely hurt client blind you into taking a case when no one can be legally responsible for hurting them. That does not mean that you turn cases down outright when you foresee trouble in one element; you can always agree to take a case on an investigative retainer. Just make sure that when it is time to say yes or no, you are able to say no.

No case is perfect, but you must identify the "fleas" and turn down cases with bad flea infestations. Look for these fleas: 1) A client that comes in close to the statute of limitations (especially if there are prior lawyers that were consulted) is dangerous; 2) Beware of clients that just vaguely "hurt all over;" 3) Chiropractor claims are difficult cases to get fair value; 4) Doctor shopping clients and lawyer shopping clients can make

your life miserable; 5) Clients that have a delay between injury and treatment, or gaps in treatment can have serious causation problems; 6) Pre-Existing Conditions lesson the value of a case; 7) Medical record bombs, like a patient that has "motivational factors" or one that has "requested the test," are hard to overcome; and 8) In auto accident claims, minimum property damage can kill a case.

You also should be wary of cases that you cannot afford or handle. If you do not have the time to work-up a case, you lack the experience or know-how to manage the case, or you lack funds to properly prosecute it, then you are just asking for trouble. Associate another lawyer to assist you with your case if you cannot do it right.

B. Considerations in the Initial Interview

There are things that you should accomplish in the initial interview other than gathering the facts and deciding whether or not to take the case. I learned from a good friend of mine (who related to me her experience in a lawyers office) that clients are often very intimidated by lawyers and lawyers' offices. We lawyers (hopefully) do not think that lawyers are any higher or lower than everyone else. Clients, however, are already worried about their personal circumstances, wonder if you will take their case, and fear that they will not know how to talk to you "right."

You should do everything you can to make the client comfortable. Have your staff be gracious to them, offer them a soda, do not make them wait in the reception area a long time, and come yourself to get them to take them back to the conference room (or your office). Get to know your client. Ask them about their families and their background. Try and find some kind of common connection between you and them. Let them talk about whatever they want to discuss at the start. Calm the client down and let them ask questions about you or their case. Let them tell you their story.

At some point, you need to start doing more of the talking. You should identify the witnesses (fact and treating doctors) and defendants so that your staff can do a conflicts check during the conference. You should explain the whole litigation process and prepare them for the worst. Stay away from telling the client what their case is

worth.

If you want to take the case, make sure to discuss the fee agreement with the client. I always go through the fee agreement paragraph by paragraph, tell them to read it all, and inform them that they can take it home if they want to think about things. If they have brought somebody for moral support, I ask if they want to discuss the fee agreement in private before they ask more questions about it to me. I have learned that the low pressure sale works much better than the "you need to sign this now" approach. Yes, I have lost a few cases to the client's brother's friend who also is an attorney, but it appears that the clients are more trusting of me throughout the process if they do not feel pushed into the attorney-client relationship.

### C. Prepare for Settlement by Preparing for Trial

Preparing the Plaintiff's bodily injury case is hard work. The old days of gathering medical records, submitting them to the insurance company, and settling pre-lawsuit for 3 to 5 times medical bills are long gone. Most cases still settle, usually by the mediated settlement conference. If, however, you want any chance of settling a case for a decent amount, you must prepare your case for trial. No attorney can know how to evaluate a settlement figure if he has not thought about how the case might be tried.

I always start a case by pulling all possibly applicable jury instructions (even if I have pulled the same ones a hundred times). This helps me crystalize what I will have to prove. I use the jury instructions to start a brainstorm of how I will prove each element of my client's case. I make a note of what issues may need expert testimony.

Compile a witness list early and continuously update the list. Make sure to include all witnesses to the incident, all police and others that came soon after the incident, all other potential good witnesses to your client's pain, bosses, managers, co-workers, and all treating medical professionals. In addition to the large witness list, build a stockpile of physical evidence. Think about what may make good exhibits. I will sometimes dictate into my cell phone ideas about the case that pop into my head at all hours. It is a good idea early in the case to think about how the facts, witnesses, and

evidence fit into the client's story and theme. You will eventually whittle down your case, but it is always better to cut down later in the case than to try and make your case at the last minute.

Contact each witness and find out what they can add to the picture. In larger cases, consider a private investigator. Summarize in a memo what each witness will say and what physical evidence he or she can provide and/or explain/sponsor. If you are concerned that a witness may change his or her story, get them to make a written statement or affidavit.

If possible, try and find out what your treating doctors will say. One of the worst things that can happen to a plaintiff's lawyer is to first learn at the treating doctor's deposition that the doctor will torpedo your case. You have wasted everyone's time and money by letting the case get that far. If you knew early on that your treating doctor had evidence that would kill your case, then you could have settled early on or dropped the case before you were in too deep.

There will be enough times that a doctor will testify differently in a deposition than what he or she had told you earlier. Try and combat this unfortunate reality by getting the doctor's opinion in writing early. If what you need is in the notes already, then (depending on the size of the case) you may decide to just go with the notes. In larger cases, you should always follow-up the medical records with a written statement directly from the doctor to make sure that the doctor will stick by his or her words.

If experts (other than treating doctors) are necessary, then consider calling them early in the process to make sure they are available and to find out if the experts need to get to work immediately (like an accident reconstructionist).

## II. Prepare your client

### A. The Initial Interview

From the first day the client is in your office, prepare your client for what to expect throughout the entire process. I know that some plaintiff's attorneys are nothing but positive in their initial client conferences; they keep with generalities, stay away from

the details, prop-up client misconceptions about the client's case. These attorneys just want the client to sign-up. This is not how I suggest to handle the initial client conference.

Clients come into your office with unrealistic expectations of their case value, the strength of their case, and the ease of settlement. Their friend "with injuries much less than mine got $25,000.00 for one emergency room visit, and it only took two months." The "McDonald's coffee lady got $10 million dollars." "All of my friends say my case is worth a lot of money." "It is an open and shut case." "I had no medical bills, but I almost died." This is not to say that these clients are not truly injured, they almost always are. They just have no idea about the reality of their cases.

When my client inevitably asks me what their case is worth, I tell them that there is no way for me to properly evaluate their case on the first day. Do not even give a range. Your client will forget the bottom number of the range and insist that you guaranteed the top number (to some degree, we all hear what we want to hear). Sometimes I play therapist and repeat the question back to them: "How much do you think your case is worth?" Do not give them a value of the case until you really know what the value range actually is.

During your first meeting, you should enlighten your client as to what the opposing side's arguments will be. Play devil's advocate so that your client can understand what the other side may think about the case. Tell your client what to expect pre-lawsuit, during the discovery stage of litigation, at the mediated settlement conference, while preparing for trial, and at trial. Let them know what you expect of them and what they should expect of you. In my opinion, it is far better to be straight with your client from the start. You may lose a few, but the ones that stay will trust you more and you will have gone a long way toward meeting their (now) more realistic expectations of your representation.

B. Pre-lawsuit

I think it is best to make sure that the client gets at least a once a month update by

someone in your office. Much of the early part of the case is waiting on the client to complete their treatment and many times not much is really happening on the attorney's end. Even if the update is that nothing has happened, I use the phone call to have the client update their status. I also like to have projects for the client to be doing, most of which gather information which may be helpful later. For instance, I try and give them pretty long forms which request all kinds of information from them. Clients are much less inclined to complain about how long things are taking if they have not completed their part.

C. Filing the lawsuit

It is a good idea to send a copy of all of the court documents related to a client's case, but do not simply send them a copy. Clients will freak out if they read pleadings or orders that they do not understand. "Their Answer says it is my fault, those bastards, and why did you let them say that about me?" Give them a call and tell them what is coming and explain the importance (or lack thereof) of the documents. Send them the scheduling orders, along with any agreed upon changes.

D. Discovery stage

My office has handouts that explain in writing every kind of discovery. When we receive interrogatories, with the discovery, the client gets a copy of both a document that explains what interrogatories are and a document that gives instructions how to answer them. We also make sure that the client understands their deadlines for giving us their answers (always at least weeks before the actual deadline to respond). A week later, follow-up with a phone call or e-mail to confirm the client received the documents and to set up a time to go over their answers. Depending on the client, we may make an appointment for them to come in and answer them together, especially if the client has a hard time understanding the questions.

E. Mediation

Let your client know the personalities of the individuals involved (to the extent that you know), where the mediated settlement conference will take place, what a

mediated settlement conference is for, what the mediator's role is, the procedure and order of presentation, what the mediator will tell them in the opening statement, what will happen after the group meeting, and everything else you anticipate may happen at the mediation.

I find it useful to cross examine my client so they will not be surprised at what their opponent may say. They will never agree with their opponent, but they may understand how their opponent (wrongly, of course) came up with divergent positions. Do everything you can to help your client resist letting anger take over their reasoning ability at the mediated settlement conference.

Prepare your client for when and how often they will be required to speak, especially in the opening session. If you are going to let your client give a statement, refine their comments and rehearse them over and over. Explain to them to always maintain their cool (avoid anger and bad body language) and to always think about what they are saying (especially during mediation small talk). Let them know that loose lips sink ships and good settlements.

### F. Trial

For information regarding preparing your case for trial, please see Edward G. Connette III's presentation and material included in the seminar materials as "Effective Trial Strategies for the Plaintiff."

## III. Prepare Yourself

### A. Gather your Facts and Know your Law

Try to review and organize all of the relevant evidence early in the case and continue to review the evidence again throughout the litigation process. Know your facts backwards and forwards. By the time you are ready to negotiate a settlement, you have completed most, if not all, basic preparation of the facts and law of your case (as described above). Before you begin negotiation of your client's case, you should compile all of your factual and legal investigation into some digestible form (whatever works best for you). After compiling the information regarding the case, learn it. There is really no

excuse for an attorney not being well versed in all known material facts of a case by the time of the mediated settlement conference.

When first presenting your case to your opponent, hone in on just a few pieces of evidence that will help prove your version of the facts and will help win the legal issues for your side. You do not need to present each fact to your opponents outright, but, instead, keep those facts in your quiver, ready to use as additional arrows for your bow throughout the negotiation process.

Ideally, most of the major legal issues crystalize before you file a lawsuit. Make sure that you have thought about the claims and defenses of your opponent AND have all pertinent legal research completed well before negotiating a settlement. Be ready to produce key statutes and case law to your opponents when necessary.

Know who your best witness are and be prepared to reveal what they have to say and how they will present themselves. In the best world, you will have interviewed your witnesses (and possibly even videotaped the interview). I have never tried this myself, but some attorneys will bring key lay or expert witnesses to the mediation settlement conference. At the very least, be prepared to summarize what key witnesses would testify to at trial.

Properly evaluating your case is imperative to fruitful negotiations. You should first identify each element of damages and give values for each element, and then add the total amount together. Next, try to make an educated guess as to a realistic range of probable jury awards. Compare your numbers with other jury verdicts and settlements in similar cases in your jurisdiction. Evaluate the worst case and best case scenarios at trial regarding damage awards. Use this analysis to come up with a reasonable range of probable jury verdicts if the plaintiff wins on liability. Do not forget to have your analysis include aggravating factors which will motivate a jury to "punish" the defendant (for driving drunk, punching the foreman as defendant walked off the job, etc.).

After estimating your damages' range, try and identify what weaknesses exist in the plaintiff's case. Try and establish a probability of success for the plaintiff on liability.

Discount your damages' range by the likelihood that the plaintiff may lose liability so that you can come up with your suggested reasonable settlement range.

B. Establish Your Recommended Bargaining Strategy

If you ask one thousand lawyers how they bargain, you will probably get one thousand different answers. I usually try to come up with the highest number that I can say with a straight face to a jury. This is usually the number I suggest my client offer first at the mediated settlement conference. Ultimately, I know that my client will pressure me to increase that first offer. Regardless of what the number is, you should have some rational reason for how you came up with the number no matter what the client says. You should also have in mind what your client's "walk away number" should be as well as a strategy for working from your initial offer toward your final number. No matter how you choose to bargain, make sure you have a plan.

A person who is able to clearly recognize what he or she wants and needs will do better in negotiation than a person who does not know what he or she wants. I like to play a game with my clients to ascertain their gut reactions to settlement amounts. I tell the client that I will tell them settlement offers and ask them to quickly say whether they will accept the number. I start real high and real low until I have reached the amounts that are hard for the client. Then I have an idea where their true initial expectations are. In my experience, clients are reluctant to tell you their true expectations as to the amount of money they think should settle the case. The clients want to wait for you to tell them. This does not mean that they will like what you have to say. Once they hear you start with numbers that do not match theirs, they will tune out everything you say regarding how you arrived at your numbers.

For instance, with a defendant in a $50,000.00 +/- case, you may ask how they would feel about paying $1,000,000.00 to settle the claim. They will be offended and say some cuss word and "no." Then you say, "how about settling for $1.00?" They jump out of their seat to say "yes." You continue until you put out a number like $30,000.00. The defendant will say "well... I might be able to pay that much." When you get to the "I

don't know numbers" (like $35,000.00 in our example), you will know you have hit your clients gut range. This number is not usually a realistic number. It just shows you how much work you have to do to help your client arrive at a more realistic number.

Manage your clients expectations. Use the client's gut settlement amount and work backwards from their number, using the case value analysis in IV(A)(5) above in reverse. With plaintiffs, there is usually money left over after you have subtracted all other damage element values. With defendants the number ends up negative. Both plaintiffs and defendants tend to view the case values unrealistically. It is your job to work with them to have them come up with a reasonable settlement range.

After your "cross examination" of the client to bring them to the real world, educate them about how you analyzed their case's worth as well as your proposed negotiating strategy. Make sure that your client is on board with your negotiating strategy before the day of the mediated settlement conference. Do not wait until the mediation to let "the process" decide where your client wants to go in negotiations and how long it will take to get there.

## IV. Prepare your opponents

As with your client, managing your opponents expectations is key. If a plaintiff walks into a mediated settlement conference and demands two times a reasonable amount and ten times what the defendant expected, then the defendant may shut down, ruining any chances for meaningful negotiations. Prior to the mediated settlement conference, try to give opposing counsel a clue as to which settlement universe you will be located. After the gasps and righteous indignation, rationally explain your positions on the issues, give your adversaries what they need to properly evaluate the case, and, if possible, give your first offer before the day of the mediated settlement conference. It is especially important to let insurance or corporate opponents have the time (and ammunition) to set their reserves and to obtain the proper authority to resolve the case somewhere in your settlement universe.

## V. Prepare for your Mediation Presentation

As most cases settle at, or soon after, mediation, in addition to thinking about how your client's case will be tried, it is important to think about how you will present your client's case at mediation. Make sure that you match your presentation to the size and complexity of the case. In small cases, we usually put together a small notebook of key evidence, exhibits and charts with a table of contents with tabs for quick access to each exhibit. This helps the attorney stay organized and focused on a short but efficient presentation of the case. A well prepared client may wish to make a short statement as well.

In larger cases, we sift through every possible way of presenting our clients cases, using anything that will make our positions real to our adversaries. In wrongful death cases, it is essential to watch all of the home movies for clips which will illustrate the plaintiff's relationships with his or her family. Even more powerful can be an audiotape of the voice of someone who has died. In one wrongful death mediation, I dumped on the conference table the contents of a "Santa Bag," which had been stuffed with hundreds of condolence letters and cards. After we settled, the insurance adjuster told us that she read the cards during the down time of the conference (sometimes it make sense to leave your exhibits in your opponents' conference room during closed sessions).

"Day in the life videos" which show how a plaintiff's life has been complicated by their injuries are also effective if well thought out and not too long. Blow-up copies of key documents or pictures work well as long as there are not too many of them. Some attorneys make very good Powerpoint presentations and project everything from their computer onto a large screen. I have made extensive use of videos which integrate (hopefully into a story) pictures, videos of the parties, video clips of witness statements, deposition segments (video and/or transcripts), television or radio coverage, 911 tapes, and anything else which helps communicate our case. One of our clients was unable to play the saxophone due to injuries from a chair collapsing at a restaurant. We used clips from when he performed, including a take from The Tonight Show with Johnny Carson. A few minutes of his performances on videotape meant much more than a few hours of

us telling the defendants how good a musician he was. In another case, we took the audio from a minister's sermon which ended with him singing with the choir and played it while footage from the wreck showed on the screen (music can work if there is a reason for playing it– I am not a big fan of having music there just for music's sake).

An effective presentation takes planning, preparation and hard work. One that is thrown together and not thought out is worse than no presentation at all. Take the time to ensure that nothing is included in your presentation that is not necessary. Treat it like you are supposed to pack for vacation: Start with everything you might want to include, cut it in half, then cut it in half again. Keep it interesting and short. Once you have lost your audience, you are harming, not helping your chances of settling. It does not need to be slick; in fact, avoid slick like the plague.