

Personal Injury Case Selection and Getting the Work

By Alvin Wolff Jr.

The dream case comes in to your office. Across from you sits an attractive 35-year old widow and the mother of six children. She's here to talk about a wrongful death case on behalf of the decedent, an up-and-coming neurosurgeon who was driving home a month earlier from performing some heroic life-saving surgery on behalf of a little girl who needed an immediate craniotomy. The patient was bleeding to death and the doctor's actions ensured that she would have a long and healthy life. While on the road, the decedent was tragically killed by a crack-smoking operator of an 18-wheeler that jackknifed going 85 miles per hour on I55 in the City of St. Louis. The driver had been up for 20 hours driving without rest, and had crack and alcohol in his system. There were 18 ICC violations for the trucking company. On the other hand, the decedent was active in scouting, his church, and served on the board of the Easter Seals Society. He was a little league coach in the spring and a soccer coach in the fall. During the shoulder seasons, he coached hockey for his sons. There is \$25 million in coverage.

A question pops into your mind: "Why is this client here to hire me on this case?" That's the wrong question to ask. She's there because of your talents and abilities. Do you take the case? Duh.

But here's a hard dose of reality: The chances you will ever see a case like this are rare. The personal injury cases you will be offered will involve all types of situations and all types of people -- from slip and falls to brain-

damaged infant cases. Your clients will be poor and rich, tall and short, skinny and fat, religious and atheists, smokers and non-smokers, alcoholics and teetotalers, felons and law abiding citizens, hard-working salt-of-the-earth types and lazy good-for-nothings. Get the picture? If you are a personal injury lawyer, you will represent mankind in all of its wonder and folly.

There are also different types of practice models. Do you want to be a volume lawyer without any regard to quality? Do you want to be a specialist handling one type of case? Do you want a mixed practice where you are selective with what you take? How about mass torts -- does that suit your fancy?

This article will serve as a primer of what types of cases to take and what types of cases to avoid. In short, you can make money on the cases you take as easily as you can lose money on the cases you take. In other words, sometimes you make money on the cases you refuse. Your life is a lot easier if you learn to say, "Sorry, no." early and often. It is a mistake to take a crummy case during a bad month. Business will always get better; the loser case will only get worse. It will be neglected, you will hate yourself for taking it, and you won't make your client a

fan either. Just say: "No". Plaintiff case selection is a key component of a successful practice.

The Landscape has Changed

Before discussing case selection, it is essential for the reader to realize that the whole landscape of personal injury practice has changed in the last five to ten years. While in the good old days, it was possible to win a large percentage of marginal or gray area cases, this is no longer likely. Personal responsibility is the watchword of our society and unless your client has positive attributes and was personally responsible, your case is over before it begins.

I recommend that you buy and read the following books for understanding what current themes technology and language are currently working. It is a short list, and if you drop me an email, I can provide you with a list of other books to further develop your library that will assist you in deciding whether or not to take the case:

1. *Damages*, by David Ball,
2. *Rules of the Road*, by Rick Friedman and Patrick Malone, and
3. *Polarizing the Case*, by Rick Friedman.

I think so much of the first two books that they are required read-

Alvin Wolff Jr. is an attorney in private practice in Clayton, Missouri, where he concentrates his practice in the areas of medical negligence and personal injury. He received his B.S. from Washington University in St. Louis (1975) and his J.D. from St. Louis University (1979). He has lectured nationally and internationally to various bar associations and has tried over 100 cases to jury verdict. He has recently written a consumer's guide to motorcycle and bicycle accidents and is an adjunct professor of law at St. Louis University School of Law.

ing in my Advanced Trial Advocacy Class at St. Louis University Law School.

The First Question is: What is the Liability?

Don Keenan suggests the following analysis in determining whether to take a case:

1. What did the defendant do that can impact random victims?
2. What about the case would cause the community to care about the case's outcome?
3. What happened that can happen again if the community doesn't do something about this?

Assume a client with a malpractice case comes into your office and that a test was ordered that was not performed and the failure to perform the test resulted in your client having a stroke. Further assume that the defendants find nothing wrong with their criticized behavior. The issue becomes one of failed accountability that you and your experts have to be willing to pounce on.

Using the above analysis, the defendant failed to follow up on an ordered test and this could happen to anybody on the jury. The jury should care about the case outcome to make sure that this outcome wouldn't happen to one of the jurors or one of their family members. If you can make a rules violation make the juror feel threatened, you are on to something and you increase your likelihood of winning. The bigger the threat, the better the case.

The client comes into your office. There is a bad injury. As much as you want to think about case value, don't ever start looking at this backwards or you'll be suckered into making a bad business decision.

The first consideration is: How is the liability? In considering liability, ask what rules or codes of conduct did the defendant or its employees violate. In a car wreck case, if the defendant was speeding when the crash occurred, one of the rules violated was that "when the defendant got his driver's license from the state,

he made an agreement with the state that he would obey all state laws as a condition for the state's granting him a permissive drivers license." The violation of these rules makes the defendant's conduct a threat to the community. If you can make a case that the defendant's conduct was such that he presented a danger to the community, you have fulfilled the decision tree liability prong.

The Second Question is: What are the Damages?

The second consideration is: What are the damages? If your client has soft tissue injuries without an objective sign of injury, a verdict search of similar cases will demonstrate that full and fair verdicts are few and far between.

Part of your job is educating your client as to case value early in your relationship, which begins at the first meeting with the client. If your client has unrealistic expectations, you are better off finding this out earlier rather than later because there is nothing worse than a dissatisfied client. Just as a satisfied client can be a great cheerleader, an unhappy client can cause you headaches down the road. They can steer good cases away from you, file meaningless bar complaints, and be a problem that you don't need because you will have enough legitimate aggravation in your practice. Find out early if your client is going to be a problem client or has unrealistic expectations.

In a premises case, you may make your decision whether to accept a case after reviewing applicable building codes and ANSI standards. These are easy to find on the internet and you can download them for a nominal fee. I looked at a recent case involving a fall in a hotel bathtub with a serious hand injury. My client brought in pictures that showed a grab bar installed right above the soap dish. When he fell, he missed the grab bar and the soap dish shattered, severing tendons in his hand. My initial thoughts were that my client would have a lot of compara-

tive fault. After researching the standards, my mind changed. The grab bar was installed vertically and the standards called for a horizontal installation. Had the bar been put in correctly, this injury would not have occurred. A little research can make a big difference in case assessment. This is no work for a lazy lawyer.

In determining a medical malpractice case, there has to either be a rusty nail in a healthy heart for a small case or a big injury with large economic damages. These cases cost a lot. They take a lot of work, and the defense lawyers can and will work you to death. Be aware of what you're getting into. Find out the applicable practice standards early and make sure you continually communicate with your expert so that you stay focused. It's easy to get off course in a malpractice case. Stay focused.

Other Factors to Consider

How much fault did your client have in the accident? If there's a substantial amount of comparative fault, your recovery may not be large enough to cover your overhead.

On the small case, if your client is going to be cooperative and follow your advice, you may want an understanding with the client that you will handle the case for settlement only and that you will not file a lawsuit. With an understanding like this, you may even want to offer the client a discount on the fee if the circumstances call for a fee reduction.

At any rate, you need to make a business decision on a small case. What is your daily overhead? What time requirements will the case require? What expenses will you need to allocate on the case? How much staff time will be taken away from other tasks? If you figure the case will take ten hours and your overhead is \$1,000 a day, you will need to make a \$2,000 fee on the case to make a reasonable profit on the case. This example just shows one process that can be used in determining whether or not to take a small case.



Know the Insurance Company

Another factor in case selection is knowing the insurance company you are dealing with. As much as plaintiff's lawyers use rhetoric suggesting that insurance companies are greedy so-and-sos and all they want is to keep their monster profits, my experience shows that is not always the rule.

There are companies that rarely misevaluate a claim. There are other companies that never evaluate a case fairly. You may not agree with the carrier's analysis but nobody cares what you think. At the end of the day, it's the twelve strangers on the jury that will determine what your case is worth. If you're dealing with a company that does a good evaluation, why waste your time going to court to get the same amount of money from a jury? Enough cases have been tried that several services exist which can and will give you a good rule of thumb for a particular case value. These are helpful in figuring out what a case is worth if you don't know as well as being very helpful in educating your client as to case value. There are also a number of verdict reporters available by subscription that categorize case values by case type.

Next, a Business Analysis is Necessary

Assuming that the liability looks good, a business analysis is necessary. Was the client hospitalized for a week with minimal expenses or is the client still institutionalized? How many experts will be needed to make the case? Figuring \$10,000 an expert is a good rule of thumb for what a case will cost. How much insurance is there? What are the past medical expenses? What are the future medical expenses? What are the past and future other economic harms? Regarding non-economic damages, determine your client's permanent lost independence and mobility. What is your overhead? What do you need to make on the case to turn a profit?

It's great wanting to save the world, but never forget that first you need to feed your family.

Another factor that has crept into personal injury cases concerns governmental liens and subrogation liens, which includes ERISA. With Medicare and Medicaid, the regulations provide for recovery costs so that your client won't bear the total responsibility of attorney fees and case expenses. Some of these ERISA plans don't provide for the sharing of costs and fees.

I suggest that early on in the case, you have a written agreement with the ERISA trustee that provides for sharing of fees and expenses. Many of these administrators are not brain dead and realize that from a business standpoint getting something on the lien is better than nothing. Just remember, honey attracts flies better than vinegar. In dealing with these folks, it is important to be reasonable, straightforward and respectful. Sometimes you will have to use sympathy and sometimes you will have to have the ERISA people make a business decision. On occasion, I have told uncooperative ERISA recovery people that I was going to advise my clients to walk away from the case and that nobody would get anything. This is an extreme position and it must be used sparingly. And you have to be willing to walk away from the case with your client's approval.

If you have a problem with Medicare (and who hasn't), I suggest your client contact his House or Senate Medicare liaison aide. That person can be very effective. The Garretson Law firm is also available and the firm's specialty is lien resolution. Using Garretson permits you to add an expense to the case and free up valuable resources to work on productive and income-producing jobs.

Ethics, Money Handling & Fee Sharing

Most of you reading this already know these rules, but a short refresher may be helpful and serve as a good reminder.

If you take cases on a referral basis and you are paying a referral fee, become acquainted with the ethical rules requiring a joint responsibility agreement which also requires all lawyers on the agreement to share joint responsibility.

My contract provides that my client grants me a limited power of attorney for depositing the money into my IOLTA account. This is a time saver and something that most clients appreciate. Feel free to contact me for a sample fee agreement.

When a settlement comes in, it is your ethical obligation to advise your client that you have the money. It is your obligation to put that money into your IOLTA account until the settlement proceeds have cleared and you can make the distribution. There is a new bank requirement that obligates your bank to report you if you write a bounced check on your IOLTA account. Never put client's money into your personal account. This practice has caused many lawyers to lose their law license.

Marketing

You have to spend money to make money. The year I graduated law school, legal advertising became legal. When I first advertised in the Yellow Pages, I averaged an 8 to 1 return on investment. I have been told that to reach the same audience now that I would have to advertise in 70 or more separate places! What to do? Good question.

I recommend a web site that provides someone looking for you a good overview of who you are and what services you provide. Yellow Pages, television, print, radio, and web advertisements are all a mixed bag, and different folks will tell you different success or failure stories. My best recommendation is to hire a private independent consultant.

Writing a book in your specialty area and giving it away is another effective marketing strategy. It helps establish you as an expert in your field and also provides you some instant credibility with the consumer.

Newsletters, holiday cards and birthday cards are another way to keep in touch with past clients. A good newsletter keeps your name in front of your clients every month and helps them remember that you are still around. Old clients can be the best referral and marketing source for your practice.

Again with your marketing, be careful with your case selection and be mindful of where the case is coming from. These are the places your cases will come from, and I am rating them in order of how well you'll get along with the client:

1. family: should not be a problem,
2. friends: there may be a few bumps along the way,
3. advertising locally: some clients are really good and some are not so great, and
4. the Web: it can be a pleasure and it can be the start of a very strange trip!

Conclusion

Choose your cases the way a bloodhound chooses a trail. If it smells good, follow it. If it smells bad, trust your instincts -- you are probably correct.

All in all, the personal injury practice is very rewarding. You help the helpless and give hope to the hopeless. You provide your clients the keys to the courthouse. Choose wisely, and may you win all the cases you can't settle and may you settle all the cases you can't win.

□ □ □