

# Top 10 Mistakes a Plaintiff

By John Shea

## 1. TAKING THE CASE IN THE FIRST PLACE

The reasons for this are multiple: we believe the client; we sympathize with the client; we misunderstood the facts; we misunderstood the law; we need the business; we are afraid we will never get another client; it is a good referral source. My advice—resist the temptation as much as possible. If a case does not sound good, if there are statute of limitations issues, if the client's story does not make sense—leave the case alone. Before embarking on the expensive and iffy road of litigation, get as many facts as possible. Do your own research. If you hesitate, do not take the case. The only people who make money on questionable cases are the experts and the defense attorneys. Why make their lives easier at your expense?

## 2. NOT ENLISTING THE COOPERATION OF THE TREATING DOCTOR

Get off on the right foot with the medical-legal relationship and establish contact with the treating doctor by scheduling an in-person meeting with him or her. Schedule an appointment with the doctor for at least 30 to 60 minutes. Come prepared for the meeting with appropriate questions, diagrams and an agenda of the items that you wish to cover. Start off by making sure the doctor understands that you expect to be billed for the time spent with you, and that you will promptly pay the bill. Many doctors have had no experience with the legal system and are generally filled with anxiety at the prospect of a deposition or a court appearance. You do both the physician and your client a great service by spending the time necessary to explain the process, the issues in conflict and the role that particular physician plays in the total presentation of the case. Your job is to provide the treating doctor the highest possible level of comfort with

his or her involvement in your case. Stress to the doctor that he or she does not have to be an advocate for the patient, only an advocate for his or her opinion about the patient's injuries, impairments and prognosis. The only way you can do this is by taking the necessary time. Many times you will have to make yourself available early, or on weekends, in order to meet with the doctor. The key is to make sure that you have assured the treating doctor that you will not let anyone make him or her look foolish in the deposition or the courtroom. This is generally a doctor's biggest fear.

## 3. FAILURE TO RECOGNIZE THE DIFFERENCE BETWEEN A PLAINTIFF'S LAWYER AND A DEFENSE LAWYER

William Shakespeare said, "All the world's a stage." The presentation of a claim in settlement negotiations or in jury trial is much like the production of a play. The plaintiff's attorney is the casting director, in that he or she has to identify and select the various witnesses (the actors). The plaintiff's lawyer has to be the budget office and an investor. He or she has to be the set designer and prop manager when working with physical and demonstrative evidence. The plaintiff's lawyer has to be the wardrobe manager in making sure that the witnesses appear appropriately dressed. The plaintiff's lawyer has to be the playwright in that he or she has to tell the client's story through the mouth of the various witnesses and decide which witnesses deliver which lines. The plaintiff's lawyer has to make all the scheduling arrangements for the court and the witnesses and often has to take care of the mundane logistical matters such as housing for out-of-town witnesses, transportation, and lunch. So the plaintiff's lawyer is actually the author, the director, the producer, the set manager, the finance manager, and so forth. What

is the defense lawyer? Answer: The critic. Think about it.

## 4. FAILURE TO OBTAIN A CLIENT'S MEDICAL HISTORY

It is important to have all of your client's medical records for at least ten years before the accident, in addition to everything since the accident. We abstract the records in a form that we call the medical chronology with the date of treatment, the name of the doctor, the purpose of the visit, the tests that were administered and the advice or treatment that was given. This is a very handy reference and is used throughout the handling of the case. We frequently give it to the treating doctors to help them summarize their records at a glance, and it is a particular help during deposition or trial to keep the order of medical treatment available in a single place. Any gaps in treatment, "transitions," or changes in treating doctors become graphically apparent.

## 5. MONEY REALLY IS THE ROOT OF ALL EVIL

Personal injury litigation can be like a land war in Asia—once you get in, you may never get out alive. Unfortunately, the defense knows a weak case when they see it—they will be more aggressive than ever, which will drive the costs up even more. With all of these costs invested, settlement for what was once a reasonable sum becomes impossible. The client gets virtually nothing. A trial with more costs becomes the only alternative. More costs, more disappointment. The defense attorney makes money, gets another notch on the briefcase and gets more business. The motto here: Know when to say when. Throwing good money after a bad case does not usually make the case better. Keep close track of the costs. Set a limit. Re-evaluate the case at every juncture. Level with your client and be prepared to dismiss the case if necessary.

# Plaintiff's Lawyer Makes

## 6. IF YOU HAVE GOOD LIABILITY AND GOOD DAMAGES, YOU HAVE A GOOD CASE, RIGHT?

Unfortunately, many plaintiffs' attorneys overlook the element that in a personal injury case is often the most difficult to overcome: proximate causation. We get a case with good liability and good damages and essentially forget about proximate cause or assume that with two good elements the jury will just give on the third. This is simply not so.

## 7. FAILURE TO DETERMINE COVERAGE

Quite often the insurance stats of a particular defendant are not adequately investigated. This information is crucial to many issues ranging from the obvious—"How much can we likely expect to settle for?"—to more tactical considerations: "Is an excess carrier involved? How much leverage can be brought to bear on the primary carrier? Can a "bad faith" situation be created? Who is really controlling the settlement negotiations? How can this information be utilized to maximum advantage?"

Aggressive pursuit of the information may also help to uncover other layers of coverage and even determine additional defendants who can/should be added to the case. This practical information should be obtained early and routinely. In addition, insist on verification (the face sheet of the policy, signed affidavits), particularly in situations where relatively low limits are disclosed.

## 8. FAILURE TO PREPARE PROPER DISCOVERY RESPONSES

When the plaintiff starts a case, certain things can be anticipated: names of witnesses, names of physician,

and names of treating doctors and hospitals. Most of this, obviously can, and should, be gathered at the time of the initial interview or shortly thereafter; certainly as of the time the complaint is filed. Thus, discovery from the standpoint of the plaintiff should be a fairly easy task. From the defense standpoint, it can be a nightmare and one which should be exploited aggressively.

This is particularly true in cases involving corporate defendants. In many instances the claims person is a beleaguered, overworked individual who could not possibly respond to pointed, well-thought-out discovery requests on anything resembling a timely basis. Pursuing these requests can only benefit the plaintiff.

In cases in which specific, factually based questions are asked, the defense attorney can provide little, if any, assistance in response. Therefore, only two basic things can happen—either you will get valuable information or the defense will be put in a position of having to back off their own requests or perhaps be subject to certain sanctions for the failure to properly and timely respond.

This takes effort and discipline. You not only have to ask the questions, but also be prepared to compel the defendants to answer. Trust me, the effort is worth it.

## 9. NO TIME FOR THE LAW LIBRARY

The most successful plaintiff's attorneys are not only the ones who get the "good cases." They are also the good lawyers. They know the law. They know where the nearest library is, and they actually read the materials in it. This includes the basics, such as the applicable statutes, the case law regarding all of the elements necessary to establish a prima facie case, the law concerning the potential defenses available and the law regarding the necessary pleadings. Let's face it. Motion practice is primarily directed by the defendant in one of three areas:



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Failure to comply with discovery (to be discussed later) inadequate pleading; and inadequate factual development.

With over a modicum of research, standard jury instructions are a great place to start. The attorney would know from the outset what he or she must be prepared to plead (e.g., is specificity of fact required, as in cases alleging fraud?) and prove. The knowledge of what is needed for proving negligence seems like silly, unnecessary advice, but it never ceased to amaze me how ill-prepared witnesses—expert and lay alike—were regarding the basic elements of a particular case.

## 10. ASSUMING A CASE WILL SETTLE

All too often, this is a mistake made by both sides. Often, we assume that with a case that looks good and has a reasonable settlement demand, the case will go away at the appropriate time. With this attitude comes a certain amount of laziness and reluctance to put in the time (and money) necessary to properly try the case. The defense attorney (and/or adjuster) may very well sense this lack of preparedness, and there may be a change in attitude in the front office or simply a feeling that a defense verdict can be achieved. The plaintiff's lawyer is now left scrambling, with predictable results. The solution: If a case is good enough to file, it is good enough to prepare properly. <