

## **SELECTING & THEMING A PLAINTIFF'S CASE**

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### **A. CASE SELECTION**

Carefully selecting your cases at the beginning will prevent wasted time, energy and money later. Selectively screen the cases you and your firm handles. Do not try to take cases beyond your capabilities in terms of time, experience, money and expertise. Do not take a case in an area you do not practice in if you are not going to associate an attorney that has experience in that area to help you handle the case and you are not willing to devote time to learning a new area of law. Expect that every case you take you will have to be tried. Each case you take should be given the appropriate time and money to prepare the case adequately for trial. Do not take on more than you are prepared to handle and you should expect that you will have to spend more time on preparing the case for trial than you first anticipated. If you don't have the proper training, experience, time or money to handle a case, refer the person to an attorney who does.

There is no such thing as an "easy" case. Most cases do settle, but they usually will not settle until you have spent considerable time and effort to show the other side why they should pay your client. Be prepared to take the case to trial from the start. When you screen your cases, be thinking of the jury charge and what elements you will need to prove to present your case to the jury.

You should keep in mind that in every negligence case you will have to: (1) establish a duty, (2) show that there was a breach in the duty and (3) that this breach proximately caused the plaintiff's damages. You must have all three elements present from the beginning in order to insure a case worthy of your time and money.

#### **1. INITIAL HISTORY**

##### **a. Client History**

In every case you screen, you will need to obtain a client history. Although the initial screening of a case can be done by telephone and through looking at appropriate documents and records, it is recommended that you or a trained staff member meet the client in person prior to signing up the case. (A copy of my initial intake form is attached as Exhibit A to this paper.)

A careful history of your client is essential to learn your client's version of the case facts. No case is ever as good as what the potential client will tell you. You

will need to verify what your client tells you with corroborating evidence (i.e. from medical records, the police report, seeing the product in question, speaking to witnesses, seeing the location of the incident, etc.).

b. Statute of Limitations

Be sure to check the statute of limitations for your state at the preliminary screening of a new case. If the statute of limitations has passed, immediately inform the potential client of the situation. If the statute of limitations is close, quickly determine if you are going to pursue the case and let the client know. Do not sit on a case where the statute of limitations is close. Either refuse the case and encourage the potential client to immediately seek the assistance of another attorney or take the case and file suit prior to the statute of limitations date.

c. Trust Your Instincts

Trust your instincts. They usually will be right. If your gut feeling is that there are problems with your client or the case you usually will be proven to be right. Having your client's complete health history, complete medical records and expert review will assist in successful screening of cases.

Either you or someone from your office trained to screen new cases should meet with the potential client in person prior to signing up the case. Your first impression of the appearance of the client (how they dress, their grooming habits, how they conduct themselves) is important information as to how they will appear to a jury. If the potential client is rude to you or your office staff you can be assured that their behavior won't suddenly improve when the case is filed. In speaking with the potential client, do not let them direct which facts you discover. Often, the facts that you need to know (the facts that may not be the most favorable to their cause) will not be learned unless you ask the right questions. Be sure to look ask the questions and look for the evidence that may show contributory and/or comparative negligence on the part of your client.

d. Client and Defendant Background

Before you have accepted a case or shortly after you take the case, you need to learn all you can about your client. You can be assured the defendant's attorney and insurance carrier will. As you no doubt know from experience, you can not always rely on what the client tells you about their background. Therefore, do civil and criminal searches on your client and also on the potential defendants. You may be surprised at what you can find just by checking on the courthouse computers. Additional searches for background information on your client and the defendants may be accessed by checking public records and going to various Internet web sites.

e. Some Helpful Web Sites:

1)The web site : <http://www.publicdata.com> will provide you (for a fee) with the means to check for criminal, sex offenders, driver's license, voter, civil

court, DMV – license plate and vehicle ID, and professional licensing in some states.<sup>1</sup>

2) Westlaw has access to public records for a fee from WestlawPRO Public Records in which you can access records in the following categories:

- Aircraft, watercraft & stock locator
- Adverse Filings
- Asset Locator
- Bankruptcy records
- Business Finder records
- Corporate Records & Business Registrations
- Doing Business As records
- Lawsuit records
- Litigation preparation records
- Motor Vehicle records
- People Name tracker
- Real Property Assessor's records, transfers, refinances & foreclosures
- UCC, Liens & Civil Judgments

3) LexisNexis has fee for services for skip tracing and a locator service called Batchtrace, as well as a Directory of Corporate Affiliations that provides information on parent companies, affiliations, subsidiaries worldwide.

## **2. TYPES OF PERSONAL INJURY CASES AND PERCEPTIONS:**

### **A. Motor vehicle accidents**

1. Make sure your case facts are strong and that there are adequate damages.
2. Photograph the scene of the incident, the vehicles involved and your client's injuries early on.
3. Get a copy of the police report and speak to the police officer early.
4. Talk to the witnesses early on to find out what they saw and heard. If there are independent witnesses who are against your client's version of the facts, look long and hard before accepting the case. Juries quite often heavily weight what an independent witness says.
5. Get a detailed history from your client of prior claims, lawsuits, auto accidents, and previous injuries. Pay particular attention to a pattern in types of injuries and accidents. Nothing hurts more than to find out at deposition or trial that your client has had multiple accidents involving similar injuries. You don't want your client to be perceived as a professional plaintiff.
6. Run a criminal check on your client(s) and on the defendant(s).
7. Low impact, soft tissue damage cases usually will not return a large profit for you or your client to pursue to trial.

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<sup>1</sup> Texas information can be accessed for all of the categories. Other states vary. Unfortunately, information cannot be obtained for many states from this web database.

8. Using physicians/chiropractors/other health care providers that do a lot of “car accident” cases may hurt your client’s credibility. Avoid letters of protection if you can.
9. Be sure to find out if the defendant has liability insurance, and if not does your client have uninsured and underinsured motorist coverage?
10. If the defendant driver did not own the car are there grounds for negligent entrustment? Usually, this will require that the owner of the car knew that the driver is unlicensed, reckless or incompetent when the owner permitted the other driver to use the car.
11. Was the other driver in the course and scope of his employment at the time of the accident?

## **B. Products Liability**

1. These cases are extremely expensive to pursue if you are going to have to take multiple depositions and go to large document productions. Make sure you have the resources to pursue these cases before taking a products liability case.
2. Research the product in question. Use internet sources and the appropriate government agencies (i.e. Consumer Product Safety Commission, the Food and Drug Administration, Public Citizen).
3. Check for product recalls.
4. Confirm with an expert that the dangerous product in question caused your client’s resulting injury.
5. You will often need an expert (usually an engineer) to provide testimony that there was a safer design available and/or better warnings available for the product in question.

### Helpful Web Sites:

- Consumer Product Safety Commission: <http://www.cpsc.gov>
- Food & Drug Administration: <http://www.fda.gov/>
- Consumer Action Handbook: <http://www.consumer.gov>

## **C. Medical Malpractice**

1. Check your state’s statute of limitations, and any notice requirements.
2. Obtain all of the pertinent medical records and have a potential expert review the records. Often what your potential clients will tell you about what happened, will not be the whole story or may not be accurate.
3. Make sure you have sufficient damages to proceed as these are expensive cases to pursue.
4. Obtain all of the injured parties past and current medical records (not just the records involving the incident in question). You need to look for any non compliance by the injured person, other causes for the injury and/or damages, and information about the injured person’s past health.
5. Be sure to obtain your state’s statutes regarding medical practice and nursing practice and/or any other area that your case involves.

6. Check to see if there are written standards promulgated by the nursing and/or medicine specialty areas.
7. Do a literature review at your local medical school library or on Medline.

Some helpful websites are:

- PUBMED and Grateful Med: <http://www.nlm.nih.gov>
- JCAHO: [http:// www.jcaho.org](http://www.jcaho.org)
- National Institute of Health: <http://www.nih.gov>
- Nursing standards: <http://www.npg.com/legal/nursing.standards>
- National Center for Health Statistics: <http://www.cdc.gov/nchs>
- American Medical Association: <http://www.ama-assn.org>
- Rx-List – The Internet Drug Index: <http://www.rxlist.com>

#### **D. Premises Liability**

##### 1. Slip & Fall

1. Slip and Fall cases must be carefully screened as triers of fact are often wary of these cases. You must show that the defendant had knowledge of the dangerous condition usually in order to win these cases.
2. These days many stores and businesses have security cameras set up that may show the incident. The resulting films may hurt or assist your case. Be sure to ask for them immediately (even prior to filing suit) as often the tapes are reused and the evidence will be lost forever if it helps your client.
3. Find out if there were any independent witnesses and interview them early.
4. Find out what if there have been similar incidents at that location or at other stores/businesses owned by the defendant.
5. Comparative fault or the “why didn’t you look where you were going” defense is often a factor in whether to take a slip and fall case.
6. Having an expert testify about the safety issues in your case may help the jury understand the dangerous condition set up by the defendant.

##### 2. Negligent Security

1. Find out what the criminal activity was in the area for the 12-24 months prior to your incident. (Check with your local police department)
2. Do most of the businesses in the area surrounding the location in question have additional security procedures (i.e guards, fences, alarms, cameras)?
3. Are their industry standards for security procedures and were they met in the facts of your case?
4. Hire an expert experienced in negligent security issues.
5. Juries often are willing to let the property owner/occupier off the hook for an act of violence that occurs on their property if the violence could not have been predicted.

## Summary on Case Selection

The most important determiner in handling a personal injury case involve the facts of your case. The plaintiff attorney screening the potential case must make sure that the factual basis for his/her case is strong before filing suit and make sure that he or she has adequate resources to see the case through trial.

### **B. THEMING A CASE**

Themes of a case focus the jury on key issues and sets the tone for your case. Themes in your lawsuit also help to create continuity between events, witnesses, and facts in the case. The theme should be used throughout the case, from voir dire through closing statements.

Selecting themes for your case will be based upon the unique facts of your case. You cannot force fit a theme used in another case to your lawsuit if the facts do not support it.

Places to Look for Themes:

#### 1. Everyone you know and trust

It is helpful to have the input of outside people to give guidance on case themes. Polling your coworkers, colleagues, friends and family after a brief run down of the important case facts is helpful and may reveal case themes that can be utilized at trial.

#### 2. Focus Groups

In addition, having a focus group where impartial people outside of the legal arena give you themes that you would never have come up with on your own is often very helpful. It is invaluable to have other fresh approaches to your case. You most likely have been working on your case for months or years. Having the assistance of impartial people who are hearing your case facts (the good and the bad facts) will help you focus on what you can do to minimize your case weaknesses and maximize your case strengths. Quite often the best case themes will come from your focus group participants.

#### 3. The Media

Look at what is going on in the news, in magazines, on television, and at the movies. You may be able to borrow ideas and themes from the media that will strengthen your jury's ability to recall important issues in your case. For example, in a case with large damages, you may use a natural disaster as a theme to show how your injured plaintiffs were "hit by a tornado/hurricane" when this catastrophic event happened in their lives that has completely uprooted their existence and forever changed their lives.

### Examples of Themes:

Outlined below are some case themes that you may be able to adopt to your unique case facts:

- The Hippocratic Oath says to do “No Harm.” Yet, the doctors here did not live up to their oath.
- Do unto others as you would have them do unto you (i.e. The Golden Rule)
- People do not like to accept responsibility for their actions. Have you heard the doctor, hospital, or nurses accept responsibility for what they have done to Mr. P and his family?
- Look at who profits from their actions.
- Being in a hurry will cost you in the long run. Look what happened here.
- Why didn’t they warn that the wires were there? Why didn’t they care?
- There was nothing there to obstruct their view and yet they did not look where they were going and plowed into Mrs. P.
- The lake didn’t cause the accident, the wires over the lake put there by X corporation caused the accident.
- Everyone had a chance to correct the situation before it happened.
- The defendant was reactive instead of being proactive.
- It was a disaster waiting to happen.
- If the Boy Scouts should be prepared, why couldn’t “X corporation” be prepared.
- It only takes a moment to ruin someone’s life.
- Inattention kills (or maims).
- An unknown, unnamed and undiagnosed condition is what the defendants are claiming Mrs. P. had.
- She had no brain damage going into the hospital but she came out with brain damage.
- If only he had not gone to the hospital he would be walking around today.
- Good care is what you are supposed to get in a hospital.
- A doctor is supposed to help you, not hurt you.
- A toaster is supposed to toast bread, not electrocute you.
- Products are expected to be safe to use.
- Adequate staffing (or training) would have prevented this exact situation from occurring.
- If you get behind the wheel, you should be competent to drive.
- A car in the wrong hands can be a lethal weapon.

### Summary of Theming Your Case:

If the jury was an arresting officer, they would tell you, “You have the right to a theme. If you do not provide a theme, one will be provided for you. Any theme you provide, or one that is provided for you, can and will be used for or against you in court.”

In other words, don't be naïve enough to think that the jury won't come up with their own theme if you don't provide one for them. Why leave the theme to chance? Give the jury the theme you want them to have, instead of allowing them to force one upon you and your client.