

**IDENTIFYING VALID CLAIMS – IT TAKES ALL THREE LEGS FOR THE
STOOL TO STAND**

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I. INTRODUCTION

In deciding whether to accept a case, the question is not just “can you afford to take the case?” In reality, there are really two competing questions: “Is the case financially viable for my practice?” And, “If I take the case, can I afford to lose it?” Thus, this paper will approach the subject from two perspectives: One involves how can we predict the financial (i.e., fee) value of a case, including the time necessary for preparing it, and the opportunity costs a case represents; and the other involves the question of whether what appears to be a very good case should be accepted if the time and expense involved are so substantial that losing it would be catastrophic.

Although the topic of this paper clearly relates to financial considerations in the business management of our practices, we cannot forget that first and foremost we are lawyers who should, at least sometimes, take certain cases because it is the right thing to do. Additionally, because we are a profession of lawyers who represent plaintiffs, we must remember that if all we accept are perfect cases, then it is pretty hard to defend the contingent fees that are the very heart of our system.

Analyzing the financial issues involved in evaluating “Slip and Fall” and “Automobile Collision” cases is, at one level apples and oranges, as the legal liability issues in these two kinds of cases often have very little overlap. But, on the other hand, the methods that should be used in analyzing a case to see if it is viable are universal.

II. CASE SELECTION GENERAL PRINCIPLES

Just about every plaintiff’s lawyer will find himself or herself handling a slip and fall or car wreck case. These cases are usually easy to come by and are often fairly

affordable to prosecute; too often, however, they do not result in much of a financial reward.

To many plaintiffs' lawyers, slip and falls and car wrecks are their bread and butter. Unfortunately, the analogy to "bread and butter" is used more often than "meat and potatoes." Sometimes lawyers handling these kinds of cases earn incomes that only allow the purchase of bread not meat. The reason for this often starts at case selection.

Before evaluating a particular auto or slip and fall case to see if it should be accepted, we need to first determine if we even want to handle these kinds of cases. Handling slip and fall and care wreck cases can pigeon hole a lawyer as a "car wreck lawyer" as opposed to a "malpractice lawyer" or "products liability lawyer." Thus, the first rule in case selection is not to take any case if you don't want more of the same.

The second step in choosing cases, regardless of variety, is to develop a value threshold that matches the financial needs of your particular practice. In order to do this, the concept of "opportunity cost" must be understood. An opportunity cost is the value a particular activity represents measured by alternative income opportunities it replaces. For example, if an attorney has a group of cases with an average fee value of \$100,000.00, the opportunity cost of accepting a small car wreck case with a fee value of \$1,000.00 is \$99,000.00, because the time expended in working on the small car wreck could have been spent working on the more lucrative case. As Abraham Lincoln said: "A lawyer's time is his stock and trade." How we spend that valuable commodity determines our financial success or failure.

The bottom line is that no case should be selected if its value is so low that it will prevent or slow the resolution of vastly more lucrative cases.¹ That having been said, the trial skills learned and practiced in handling car wrecks and slip and falls are invaluable in ensuring that when the trial of a more complex or valuable case occurs, the lawyer will have the complete skill set necessary to maximize the value of the client's case.

While we need to ensure that a case's opportunity cost is not too high, it is also important to know that a case's expenses in time and costs are not so high that a bad result will be a financial disaster. Evaluating whether a case will take up too much time involves "opportunity cost" evaluation of a different sort than is described above. In this scenario, the question is not simply a comparison of fees, but is instead a comparison of time and what else could be accomplished with that time. The risk is that while working on a particular case, all of the other cases in the office go unworked and the fees they represent go unearned. This usually happens when a case, regardless of its value, takes an inordinate amount of time because of unusual legal issues or particularly demanding damages questions that take more than usual preparation time. The risk comes to fruition when the case is lost, and not only is there no fee from the lost case, but there was also a period of time when there were no fees earned from other cases either. This is the double-whammy of taking bad cases.

The time and value opportunity costs are compounded if there are particularly high expenses involved. In essence, a "lose, lose" situation is all too probable. While banks are often happy to lend money so we can finance our cases, they do expect to be

¹ This point is not intended to imply that cases should only be accepted for financial reasons. Certainly, there are a number of reasons for accepting cases where no fee is expected or would be accepted.

paid. The “lose, lose” situation occurs when the opportunity costs of no fees earned coincides with a loss of tens of thousands of dollars of case advances. And, if the average case in the office is fairly small, there is no real way to recover from the loss. This possibility can lead to making bad decisions that are not always in the client’s best interest. Thus, in evaluating a case, these possibilities must always be at the forefront of our decision making process.

III. THE THREE RULES OF CASE SELECTION

As the title of this article If lawsuits were like other assets, we could accurately evaluate a case by calculating its present value. We would just multiply the expected fee by the expected likelihood of success. Unfortunately, lawsuits do not readily lend themselves to a particularly accurate form of that analysis. Case evaluation is certainly more of an art than a science. There is a straightforward method of deciding whether a case should be accepted. Our concept of needing three legs to make a stool stand works as well in car wreck and slip and fall cases just as it does in other types of cases.

- 1. Is it the Defendant’s Fault? (LIABILITY)**
- 2. How Badly is the Plaintiff Hurt? (DAMAGES)**
- 3. Does the Defendant Have any Money? (RECOVERY)**

A. IS IT THE DEFENDANT’S FAULT?

Simply put, you need to know if reasonable people who heard the facts would blame the situation on the defendant. The key, however, is to be reasonable and not to sell the case to yourself as if you were selling it to the jury. Be honest about the facts and the fleas on your case – every case has them. Bounce the facts off other lawyers, a spouse or a friend. Does it pass the smell test? If you don’t think it’s the defendant’s

fault, then it will be a hard sell and the case should probably be rejected. Great care must be taken to avoid being drawn into an un-winnable case by a persuasive plaintiff. Remember when all you hear is the plaintiff's story you have only heard the plaintiff's story. There is always another side of the story – you have to decide which story is better. Remember also that the case you accept today when your caseload is low is the same case that will have tremendous opportunity costs three years from now when you are trying to develop a more “high-end” practice.

With few exceptions, slip and fall and car wreck cases hinge on the ability to prove a violation of the reasonable man standard of negligence. Sometimes this is shown by a statutory violation (such as speeding in a car wreck case) or regulatory violation (a building code in a slip and fall case).

Rule One – Reject the Case if the event is not **mostly** the defendant's fault.

B. HOW BADLY IS THE PLAINTIFF HURT?

Note that this question is in the present tense. That is because there is a huge difference in value between a case in which the plaintiff WAS hurt and is now recovered and one in which the plaintiff IS hurt now. We also get a lot cases where the potential plaintiff claims – perhaps correctly – that they could have been hurt. If the plaintiff has recovered and there is any question about liability, then the case simply will not generate large damages. We often kid in catastrophic cases that if the plaintiff is the one calling you, then it is not a good case. If, on the other hand, the plaintiff is severely injured, then the case might still be financially viable because the risk/return or present value remains palatable. Case evaluation is truly a sliding scale – you can have worse

liability with high damages and lower damages with better liability (especially punitive aspects).

Multiple party car wrecks can be so complex that the time necessary to get the case ready for its ultimate resolution can prevent them from being profitable. Even scheduling a simple deposition can take twice as long to accomplish. Though not really the subject of this paper, an estimate of the time and expense of the case can be made by preparing a litigation plan at the outset. This plan will include at least the following: cost and time of investigation, number and expense of expert witnesses (fact and damages), cost of exhibits necessary to prove liability and damages, number of depositions including cost and time associated with travel to get to them (and costs of transcripts, video depositions, etc.), and the time it will take to get to trial in the venue in which the case will be filed (a question that must be answered as part of the evaluation process).

Rule Two - the cases should be rejected if the plaintiff's damages are not sufficient to generate a recovery that meets a reasonable opportunity cost. It is important to note that the likelihood of recovery concerns first and foremost the client - not just your fee. Is the client's net recovery going to put him/her in a better position? Do you have to repay loans or medical bills? If you cannot better the client's situation financially, then there is no reason to pursue the claim.

C. DOES THE DEFENDANT HAVE ANY MONEY?

If the defendant does not have any money, (directly through his own insurance or considerable assets or via uninsured motorist coverage), then the case should be

rejected. Slip and fall and automobile wrecks are simply not usually the place to be “making a statement.”

Rule Three – Don’t take a case if there is no money to get. From a business perspective, Rule three is perhaps the most important. Great liability + Great Damages + No Money or Insurance = A Bad Case.

D. OTHER CONSIDERATIONS

When all is said and done, a case is about people – their actions and their demeanors. It could be the defendant’s clear fault and the plaintiff might be seriously injured. It could even be a simple case to prosecute. But, if the defendant is the most beloved person in the community, and the plaintiff is a three time convicted crack dealing child abusing pedophile there is real negative sex appeal and this must be considered in making an evaluation and case selection decision.

In considering this element the most important consideration is the plaintiff. Will a jury like the plaintiff? Will the jury want to award the plaintiff compensation? Did the plaintiff cause his own injuries? Will the jury dislike or like the defendant? Do not accept a case without thinking about the wild card issues – for and against your case.

IV. PRACTICAL INTAKE OF CASES

Now that you know in theory how to evaluate case, how do you put this knowledge into practice? One way, which we will outline below, involves a script that can be followed when a potential client calls. Here is an example:

Hello, I am (state your name), please let me ask you a few questions so I can make sure I connect you with the right lawyer for your case.

1. Do you already have a lawyer at another law firm? (If so, find out if that lawyer referred them or if they are looking to change lawyers and note that here: _____)

2. We're going to do all we can to help you. Are you calling for yourself or someone else? (Make sure you speak with the person who actually has the claim)

3. First, please let me get some Contact Information:

Please tell me your name _____

What's your

Address: _____

Phone: Home: _____ Cell: _____

Email: _____

Work: _____ Best time to reach: _____

4. How did you hear about Our Firm? _____

5. Thanks for the contact information, now let's talk about what happened.

6. When did this event occur? _____

7. Where did it happen? _____

8. Now, tell me what kind of case you have -

Med Mal _____ Product Liab. _____ Car Wreck _____ Other: _____

IF THE CASE IS CRIMINAL, DIVORCE, COLLECTION MATTER, ETC. PLEASE REFER THE CALLER TO ANOTHER LAWYER AND END THE CALL.

9. I am interested in your damages and injuries, so let's talk about them for a minute. But please keep in mind that I just need the basics right now.

If the injuries are totally trivial – the call can be politely ended here: “Gosh, that sounds serious but we might not be the right lawyers for you. Let me suggest you call(here either recommend the Atlanta Bar Referral service or a lawyer on a referral list.)

10. Who is responsible for your injuries? (list doctors, hospitals, manufacturers, other driver, truck company, etc.) _____

11. Do you have a police report?

12. Was anyone issued any tickets?

13. Was there an incident report?

14. Death case – was there an autopsy?

IMPORTANT If the caller has a MALPRACTICE CASE, ask this question: If you had received the best medical care possible, how would you be different today than you are?_

Has this case ever been reviewed by another Attorney?

Who? _____

What was the result of that review? _____

Other important

facts: _____

V. CONCLUSION

Taking bad cases has a ripple effect and can severely cripple your practice. A prudent, careful review of cases, however, can ensure that you have a successful practice and that injured victims and their families recover the full compensation they deserve.

Good luck!