

Salmon P. Chase
Inns of Court
09/22/16
Metropolitan Club

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DO I REALLY WANT THIS CASE

A. RULES TO REMEMBER (aka Andy's 6 Rules)

RULE #1. Plaintiffs deal with their lawyer on a "need to know" basis

- getting information is often like pulling teeth

Rule 2.1. Advisor

- ***Lawyer shall exercise independent professional judgment and render candid advice, regarding not just the law; but also moral, economic, social & political factors.***
- How can you do this with 50% of the information?

RULE #2. Plaintiffs get their information from the "misinformation media" and have no concept of how insurance companies or juries evaluate cases

- ◆ Will it be possible to meet this plaintiff's expectations?
- ◆ They've all heard about the lady who "poured coffee on herself" and got millions (no Billions!!)
- ◆ Most people have a neighbor or know a guy who got \$500,000 and wasn't even hurt (suggestion: recommend that client take his case to that person's lawyer)

Rule 1.4. Communication

- ***Attorney must promptly inform the client of any decision requiring informed consent***
- ***Attorney must keep the client reasonably informed about the status of the matter.***

RULE #3. Plaintiffs want their case resolved short of suit and, if possible, in a couple of weeks - while they're still angry at somebody.

- ◆ Be very cautious of someone who wants suit filed immediately
- ◆ Avoid someone who wants to “get even”, make someone miserable, or says it’s not the money; but rather the principle.
- ◆ Can you move as fast as your client wants/expects?

Rule 1.3. Diligence

- ***Lawyer must act with reasonable diligence and promptness***

Rule 3.2. Expediting litigation

- ***Must make reasonable effort to expedite litigation consistent with the interests of the client***

RULE #4. You cannot help everybody and some people are not worth it anyway

- ◆ Never take a case for a plaintiff you don’t like

RULE #5. It's easy to decline taking a case; but very difficult to get rid of it after you've accepted it

- ◆ “Crying baby on your doorstep” principle
- ◆ Put a "withdrawal clause" in your Representation Agreement
 - Not legally required; but nice to have

Rule 1.16. Declining or Terminating Representation

- ***May withdraw if it can be accomplished without material adverse effects on client***
- ***May withdraw if client insists upon taking an action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.***

RULE #6. A Plaintiff's case is like a slot machine

- ◆ Need all three watermelons to win
 - 1) Injury
 - 2) Liability
 - 3) Source of recovery

NOTE: You may consider taking the case if you have **2 of 3**

BIG watermelons:

- #1 & #3
- #2 & #3
- But NEVER if no #3

B. INITIAL CONSIDERATIONS

1. Any Apparent Conflicts

- Office conflict check
- "The law must not only be fair; it must also look fair"

- Rule 1.7. Conflict of Interest: CURRENT CLIENTS

- A lawyer cannot represent a client whose interests will be directly adverse to a current client.

- ◆ Clients (current & former)

- Rule 1.9. Conflict of interest: former clients

"A lawyer cannot sue a former client in the same or substantially related matter, unless the former client gives informed consent".

Rule 1.7(b) Conflict of Interest

- Even though a conflict may exist, a lawyer may represent a client if:

- 1. The lawyer believes that both clients may be competently represented.***
- 2. Such representation is not prohibited by law.***
- 3. The client's claims are not against the other client regarding the same litigation issue.***
- 4. Each client gives informed consent.***

- ◆ Friends
 - Practical problems

- ◆ Partners, associates, office space sharers

- Rule 1.10. Imputed disqualification

- ◆ Who is the Defendant and what are the implications of suing him/her?

- Social implications
- Political implications
- Financial implications

2. Product Knowledge

- ◆ Expertise
- ◆ Experience

Note: If not, consider associate counsel

Rule 1.1 Competence

Requires the legal knowledge and skill reasonably necessary for the representation

3. Time Considerations

- ***Rule 1.3 ... "Reasonable diligence"***
- ***Rule 3.2 ... "Expedite litigation consistent with the client's interests"***
 - ◆ When does the statute run?
 - ◆ Do you have the time to devote to ...
 - Factual development
 - Most time consuming
 - Legal analysis
 - ◆ “No” is sometimes the hardest word
 - ◆ Sometimes your best decision is when you **didn't** take a case.

4. Financial Considerations

- ◆ Can I finance this case
- ◆ Medical malpractice; \$50,000 to \$200,000
- ◆ Products liability; \$25,000 to \$100,000
- ◆ Automobile to trial; \$5,000 to \$10,000
- ◆ Workers' compensation; \$1,000 to \$3,000

Rule 1.16(b)(6) A lawyer may withdraw if representation will result in an unreasonable burden

5. Can my other practice take the strain?

- ◆ Remember existing clients are people to whom you've already made a commitment.

6. Venue

- ◆ Community
- ◆ Judge

C. BEFORE ACCEPTING THE CASE

Rule 3.1. Meritorious claims and contentions
Must be a basis in law and fact for bringing a proceeding that is not frivolous

- ***Also remember CR 11***

1. In-depth interview
 - ◆ Biggest mistake lawyers make is failure to thoroughly explore **ALL facts** at the outset.
2. Visit the scene
3. Obtain selected medical records
 - ◆ Emergency room record
 - ◆ Ambulance run sheet
 - ◆ Family doctors complete office record
 - * Helps discover “pre-existing problems”
4. Some preliminary legal research

Rule 1.2. Scope of Representation

Must abide by client's decisions concerning the objectives of representation

5. Determine what client wants
 - ◆ Bills paid; lost wages and a “little bit” for “*all I've been through*”
 - Define “little bit”
 - ◆ Enough to get out of debt?
 - ◆ Enough to retire?
 - ◆ To punish the defendant?
 - ◆ Can you achieve client expectations (make a note of it)
 - ◆ Most people will say
 - We’ve never done this before
 - We’re not the kind of people who sue
 - We’re not trying to get rich here
 - We only want what’s fair

- We just don't want this to happen to anyone else
- ◆ Explain current public attitudes on litigation, litigants and lawyers

* Defendant is the victim

- 61% of people think trial lawyers are causing serious damages to the economy
- 52% think trial lawyers are responsible for increased cost of health care
- 46% think lawyers make products more expensive
- 72% blame lawyers for the "litigation explosion"

LITIGATION Magazine Summer, 1996; Vol. 22; No. 4

6. Important to have spouse; parent; significant other or influential friends' input early on (**you'll get it someday anyway**)

Rule 1.14. Client with Diminished Capacity

If minor or mentally impaired, must still maintain normal client-lawyer relationship

7. Can I really get any money for this person?

Rule 2.1(lawyer as advisor)

- ◆ Getting the money is only half the battle ... keeping it is the other half
- ◆ The subrogation monster

- ERISA?
 - Health carrier
 - Workers' compensation
 - Medicare/Medicaid
 - Short term and / or long term disability
 - Consider outsourcing subrogation issues

D. ACCEPTANCE OF CASE

Rule 1.5. Fees

1. Written contingency agreement specifically stating ...
 - A. Percentage of recovery
 - B. Expenses for which the client will be responsible, regardless of the outcome*
 - C. Attorney's right to withdraw
 - D. Other
 - ◆ How to calculate fee on a structured settlement
 - ◆ Fee on No-Fault benefits?
 - ◆ Fee for negotiation of subrogation lien?

* **Rule 1.8 (c) provides that an attorney may make repayment of expenses contingent upon recovery.**

- *NOTE: This is a relatively recent rule change*

2. Explain the Rules of Injury Evaluation

- A. The value of the case is directly related to the seriousness of the injury
 - B. The seriousness of the injury bears a relationship to the nature, extent and duration of treatment
 - C. Injured people go to the doctor
 - D. Injured people can't work
 - E. You can't have been injured if the damage to the cars is minimal
 - F. You probably aren't injured if you weren't taken from the scene by ambulance to the hospital
 - G. If there is a gap in your treatment, that's evidence that you recovered and then decided to "build a case"
 - H. Injured people are not supposed to go on vacation or enjoy themselves in any way (the "Trip to Disney World" defense).
3. Explain the importance of:
- A. Following medical advice
 - B. Keeping all appointments with doctors, P/T, etc.
 - C. Accumulating all medical bills
 - D. Documenting all wage loss
4. Explain the unwritten rules by which insurance adjusters evaluate cases
- A. 3 times "medical bills" is a myth
 - B. 2014 Kentucky Trial Court Review: / Pg. 332
 - (Back & neck - soft tissue, "injury multipliers")

1998 - 1.519 x medicals accepted by jury (121 cases)
 1999 - 2.018 x medicals accepted by jury (102 cases)
 2000 - 1.596 x medicals accepted by jury (96 cases)
 2001 - 1.556 x medicals accepted by jury (69 cases)
 2002 - 1.600 x medicals accepted by jury (56 cases)

2003 - 1.3999 x medicals accepted by jury (47 cases)
2004 - 1.137 x medicals accepted by jury (42 cases)*
2005 - 1.026 x medicals accepted by jury (39 cases)
2006 - .958 x medicals accepted by jury (36 cases)
2007 - 1.206 x medicals accepted by jury (81 cases)
2008 - 1.994 x medicals accepted by jury (22 cases)
2009 - 1.997 x medicals accepted by jury (19 cases)
2011 - .244 x medicals accepted by jury (9 cases)
2012 - 1.032 x medicals accepted by jury (8 cases)
2013 - .420 x medicals accepted by jury (15 cases)**
2014 - .950 x medicals accepted by jury (12 cases)
735 CASES

- **17 year average 1.710**

* This figure is EXCLUSIVE of a \$1,000,000 verdict from Paducah which skewed the yearly multiplier to be 4.118

** This figure is EXCLUSIVE of a \$764,250 verdict from McCracken County (\$114,250 in medicals and \$650,000 in pain & suffering) which skewed the yearly multiplier to be 2.722

- C. Your case will rarely settle outside those parameters unless:
- ◆ Catastrophic injury
 - ◆ Aggravated circumstances
 - ◆ Target defendant

Therefore, on average, if medical expenses are \$10,000 you have a statistical probability of getting \$17,100 ($1.710 \times \$10,000$) in pain & suffering, **if the jury accepts all your medicals as related and doesn't apportion damages.**

This would equate to a \$27,100 jury verdict (less \$10,000 No-Fault lien) or approximately a \$17,100 gross recovery (less trial case expenses) for your client. How does that compare with a \$12,500 settlement offer when you

consider the time value of money and at least \$5,000 in case expenses???

5. Explain how juries evaluate cases

A. How things look

- Sometimes more important than the way they are
- Perception is reality (damage to automobiles).

B. Do they like plaintiff/dislike plaintiff or defendant?

- The “likeability factor” affects liability and damages
- Has the plaintiff returned to work?
- Is plaintiff trying to retrain?
- Is plaintiff a complainer? (R.L.S.)
- Is plaintiff sorry, young or pitiful?
- **A case will never rise above the quality of the plaintiff**

C. Is injury permanent?

- ◆ Future damages
 - * Medicals
 - * Wages
 - * Loss of enjoyment of life
 - * Increased likelihood of future complications

- ◆ Juries are skeptical of future damages and will scrutinize them.
 - They need very strong proof.

D. Liability factor

- ◆ Aggravated or **accidental**
 - *“Just an accident” ... “Didn’t mean to do it”*

E. Apportionment

- ◆ Will there be non-recoverable damages
- ◆ **Seat belt defense is effective 80% of the time**
 - **(35.25% is the average reduction, 1999-2014),**

See Kentucky Trial Court Review (10th Edition) Pgs. 41 & 47 attached, pages 61 & 62

- ◆ **In other words, statistically you should discount the value of your case by 28.2% / (35.25% x 80% = 28.20%) if your client wasn’t wearing a seat belt!**

Also remember that over the last 16 years (1999 – 2014) juries have awarded zero in damages in 29.1% of automobile cases even where fault was found on the part of, or directed against, the defendant; and in the year 2014 have found threshold verdicts; fault but no damages; or medicals but no pain & suffering in 31.5% of all automobile cases!

..... (KTCR 2014 Edition Pg. 440 - 442)

E. MAKING THE DEMAND

Rule 1.2(a): clients decision whether or not to settle the matter

1. Settlement brochure
2. Demand within accepted parameters or not too far outside
3. Set a deadline
4. Most cases now go Mediation or Arbitration

F. EVALUATING THE OFFER / MOST IMPORTANT

1. What will it take from a jury to beat the **net** amount to the plaintiff from this offer?
2. Cost of Presentation?
3. Time value of money?
4. Probability of success?
5. How much is your time worth?