

Banish the "barking dogs" before they take over your file cabinet

Accepting the "wrong" case can be emotionally, financially and professionally costly.

By Claude A. Wyle

We have all heard the age-old saying, "You can't make a fine silk purse out of a sow's ear." Likewise, you cannot become a great trial lawyer trying truly bad cases. Analyzing the results obtained by successful trial lawyers will demonstrate a reverence for good facts and good law. One simply cannot become a fine advocate of bad facts and bad law. One of the true advantages of being a plaintiff's lawyer is that we are not bound to represent each and every potential client who contacts us. We can choose which clients and which cases we wish to accept. Not all cases need to be brought.

We, as advocates, have an obligation to define the character and personality of our practice. We must carefully decide what our areas of practice are, develop skills and information bases for those areas and then stay the course. The day of being able to be an expert in everything is probably gone, especially if a lawyer desires to participate in extremely complex, protracted, expensive litigation founded upon technical or engineering theorems. Medical malpractice and products liability cases are the best example of this latter reference.

Speaking from experience, case selection, or de-selection, is a critical decision for every lawyer, and we do not always make this decision wisely. Accepting the "wrong" case can be emotionally, financially and professionally costly. If a lawyer has enough of the wrong type of cases, even handled on a shoestring, he or she might tie just enough shoestrings together to hang him or herself.

Several considerations are necessary in order to make a prudent decision in determining what an acceptable case is. Before you accept any case, you should analyze the following minimal considerations. My first two and most often-repeated questions are:
(1) Can I make the client happy?
(2) Can I make myself happy?

Evaluating clients

In order to avoid the wrong cases, which will make either the client unhappy or the lawyer unhappy, you must have a face-to-face interview with the client, and this is absolutely essential. At the face-to-face interview, the following guidelines should help you to decide regarding case selection/deselection:

- Consider the jury appeal of the client. Is the client likeable?
- Will the client be able to communicate his or her story?
- Is the client a chronic complainer or exaggerator?

Client records

You must also review all of the client's pertinent records at the initial interview or obtain these records as soon as possible based on information obtained in the interview. Next, before you make a final decision to accept or reject the case:

- Make sure the records are consistent with the client's story.
- Look for pre-existing or causal factors about the injury that the client did not tell you about.
- Look for smoking guns, such as comments that your client might have made to the police or to witnesses, or facts that your client neglected to mention in the interview or other case-killing information.

Red flags

There are a number of red flags that exist which should warn you to stay away from the client. These are:

- Is this client litigious?
- Does this client exaggerate injuries and damages?
- Could this client be painted as a liar or untruthful in any way?
- Is this client lawyer shopping?
- Does this client have a complicated medical history including pre-existing or prior injuries?

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• Does this client appear to be a malingerer?
• Is this client not entirely forthcoming or honest with you?
• Does this client express a willingness to lie to obtain money on their case?
• Does this client have unrealistic expectations in regard to the value of their case?
• Does the client argue with your advice or instructions, and think she or he knows better?
• Does the client want too much control of your case or the costs you are going to invest?
• Has the client been cooperative with their health-care provider?
• Is the client being treated primarily by alternative medical providers?
• Does the client expect you to drop everything you are doing at a moment's notice for their case? Is the statute of limitations next week?
• Is the client a conspiracy theorist?
• Does the client appear vengeful and/or impractical?
• Does the client ask for advances of money, such as for childcare, bus fare, etc.?
• Is the client stinky?
• *Can you make this client happy?*
• *Does this client fall into the category of "life is just too short"?*

Evaluating liability

In order to successfully litigate your case, you must evaluate liability. Here are some practical suggestions:
• Obtain liability records such as police reports, medical records, etc.
• Look up the law to refresh yourself, particularly with an eye toward immunities or defenses. Jury instructions are a great place to start.
• Visit the scene where the incident took place.
• Preserve the necessary evidence.
• Interview the witnesses before they disappear.
• Use all of the shoestring resources available to you through the various trial lawyer organizations.
• Run the case by a mentor or specialist.

Damages

Of course, the primary questions of "Can I make this client happy?" and "Can I make myself happy?" cannot be answered unless you can ballpark potential damages, the potential fee and the potential net recovery to the client. To do this, you need to consider the following:
• Injuries.
• Liens on recovery.
• Insurance coverage.
• Deep pockets or the ability to collect a judgment.
• Jurisdiction.
• Caps on damages (such as MICRA.)

Analyze anticipated defenses

You cannot accurately assess your case unless you consider what your opposition's defenses will be. Be sure to consider:
• Comparative negligence.
• Degree of the defendant's culpability.
• Immunities.
• Legal defenses.
• Legislative bars to your client's claim.

Economic and resource consideration

Serious thought must be given to the resources that you will need to commit to each and every case. You may be able to invest thousands of dollars and hundreds of hours into a certain case and win that case. However, will the fee earned after this large investment of money and time make you happy? Winning at all costs generally costs you the client's happiness with respect to their net recovery. Think about the following:
• Avoid making the wrong decision by evaluating all possible costs up front and make sure you have the necessary money available to commit to this case.
• Consider how long it will take you to recover your costs invested, and ask if you can or wish to wait to be paid.
• Will your financial return on the case justify the costs invested?
• Will you have to absorb the costs yourself because of liens, subrogation or other competitors for the recovery of your client?
• If you obtain a recovery, will you be able to collect on it?
• Do you have the time to invest in this case to make it successful?
• If this case is too expensive for you, should you refer the case out or associate with another firm?
• Make sure you have the time based on your current caseload, family obligations and enjoyment of life to handle this case.

Ethical considerations

Before you decide to take a particular case, you must consider the ethical issues involved.

Be aware of:
• Conflicts of interest.
• Competence – Do you have the experience and ability to handle the subject matter of the case?
• How well do you know the local rules and/or the law in each jurisdiction in which you wish to prosecute a case?

Other considerations

I do not mean by any of my comments to discourage anyone from taking pro-bono work or from weighing other factors, such as the relationship of the client with the firm, preserving a referral source or the public relations value of the case. You may feel compelled to undertake a claim just because the cause is righteous.

Still, you must be very cautious with these types of considerations. Remember, the practice of law is costly. Unless you are careful, you may be sucked into a case where the expenses and the demands on your time will be enormous,

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but the likelihood of collection, even in the event of a successful verdict, is extremely low. If you cannot answer the two questions ("Will I make this client happy?" and "Will I make myself happy?") in the affirmative, reject the case. Otherwise, after a period of time you will become weary. When you become weary, frustrated and lose interest in the case, malpractice is a very short distance away.

Case evaluation is a process that begins when you receive the very first information about the case and finally ends when the case is over. It is a continuous and evolving process, but the first step is always the most important: Is this client someone whom you trust and someone whom you think will follow your advice?

Accepting or rejecting a case once you have made a decision

If you do decide to take the case, you should discuss and review, in person with the client, all of the written documentation concerning your fee agreement. If you accept or reject the case, do so in writing. You should know how to decline a case without committing malpractice. You should know the requisite elements of a rejection letter. Clearly state the fact that the representation has been declined. Always mention the applicable statute of limitations concerning the client's case. Express no opinion on the merits of the case or the matter you are declining. If you reject the case, urge the client to consult with another attorney immediately.

If you decide to work with other counsel, either by referring the client to that counsel or by associating that counsel in on your case, remember that ethical requirements dictate that the division of the fee is supposed to be in proportion to the services performed by each lawyer, or by written agreement with the client, and that each lawyer involved assumes joint responsibility for representation. The tort of wrongful referral is alive and well. The client must be advised of and must not object to the participation of all the lawyers involved, and the total fee must ultimately be reasonable.

Conclusion

If you cannot make the client happy, he or she may speak badly of your office to other potential clients in the future. If you cannot make the client happy, you cannot make yourself happy. Even if you feel you must reject a potential client, if you do so pleasantly, and with sensitivity, you may still be making this person happy. If you can make the client happy without sacrificing your happiness, you will have made a new friend and created another referral source.

If you recognize the dogs before they start barking from your file cabinet, you can practice on a shoestring, confident that your all too precious resources are being well invested.


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