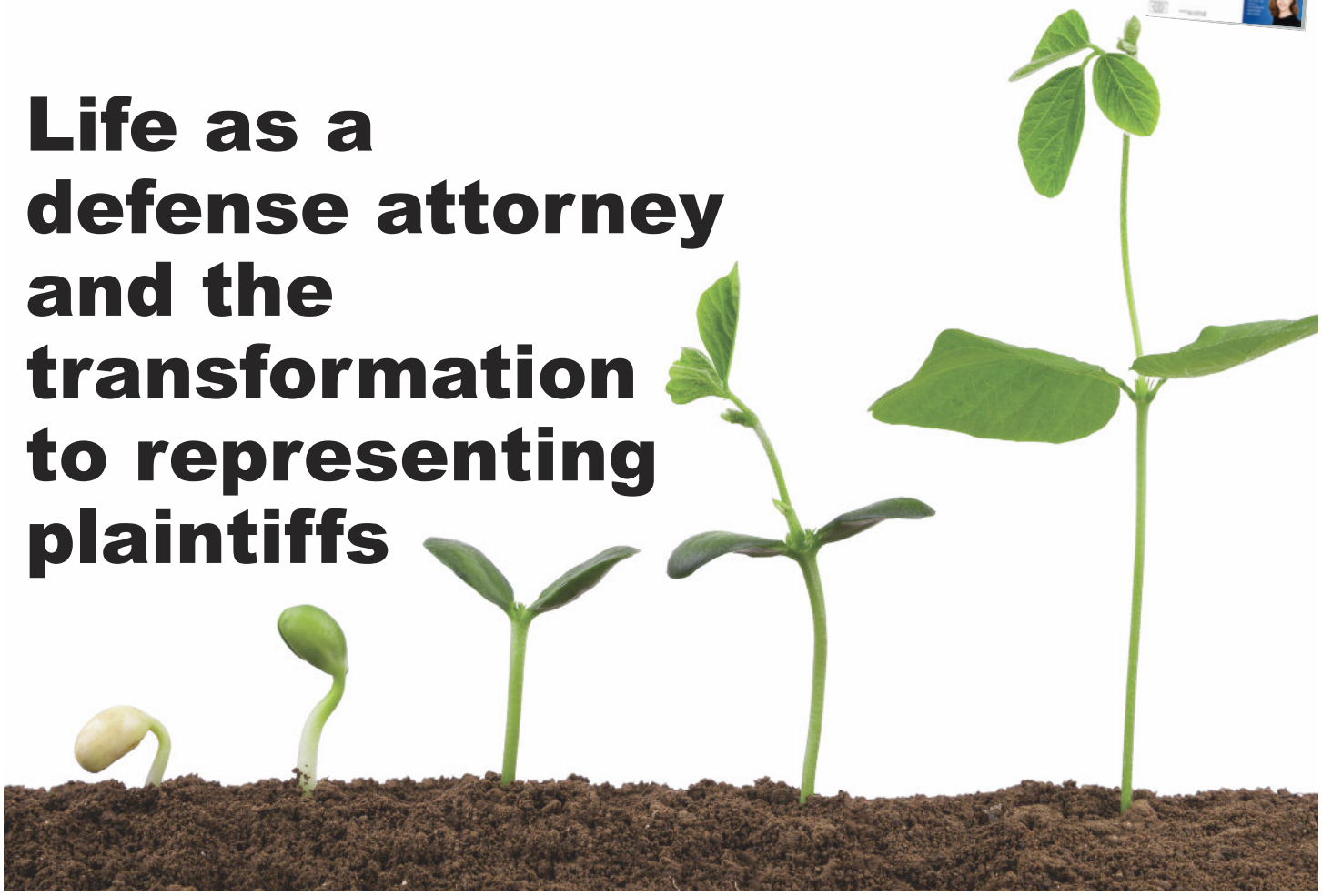
Life as a defense attorney and the transformation to representing plaintiffs



Finding the human element in the practice of tort law

By Jeremy Jessup

Who knew being a plaintiff's attorney was going to be so difficult, not only from a mental standpoint, but from an emotional one?

For the first 15 years of my legal career I provided a defense for those insured by State Farm, Farmers, Allied/Nationwide and many others. For nearly 14 years I thought I was fighting the good fight, for those who were being unduly persecuted for a simple lapse in judgment, or an accident.

"We will pay what we owe." Those were the words that were uttered to me repeatedly. I would make it a personal mission, sometimes a challenge with colleagues, to see how much off the authority I could save a carrier. A $500 savings on a case worth $12,000 was a notch in my belt. Plaintiffs were not seen as victims; they were seen as opportunistic individuals who must have thought they hit the lottery once they got rear-ended in a parking lot. Sure, my client was at fault, but we would "pay what we owed" and maybe a little less.

I remember one day going into the office of my mentor and asking him why these cases all seemed to have little quirks, and nothing was straightforward. He responded, "If they were straightforward, they would have settled and never made it to our office."

The work was not the same, as plaintiffs' attorneys were building up their case like a Jenga puzzle, all I had to do was pull a piece or two out. Pull the right one, and the whole case came crashing down. Did I win because my client was not liable? Sometimes yes; most times, no. I was just able to pull the right piece at the right time.

As I progressed in my career as a defense attorney, the types of cases I defended changed. No longer was I defending the classic MIST cases, I was defending high-exposure, catastrophic-loss cases. I was no longer satisfied with saving a carrier a few nickels, I began to celebrate obtaining six-figure judgments against plaintiffs who took their case too

far, i.e., trial, and ensuring that neither them, nor their attorney would get more than what was owed.

In 2014 things began to change. I now had two young boys at home, and cases became personal. How do you put a value on human life? How do you come back after telling a mother who lost her 12-year-old son that he was at fault, and she was negligent for not watching him? How can one sit across from a mother, who lost her six-year-old in a car accident, and try to make a straight-face argument that your client was not responsible? It hit me hard; these were real people, real tragedies, and real losses. At that point, my mindset was "yes, we will pay what we owe, and not a dime less."

I remember sitting through the closing argument of a wrongful-death case and hearing counsel for the plaintiffs address the jury, saying, "We all know the value of a human life is priceless, but if you were to award what the defense has suggested, you would be saying that this life was worthless."

Things begin to change – for the worse

It was also about that time that things really began to change in the insurance industry, and not for the better. The new motto of the insurance companies became, "We would rather put your kids through college than theirs." Billing increased and settlement of claims diminished. I was trying cases that had no business being tried. Why? Because the carriers wanted to see what they could get away with.

By now I just felt like, on the defense side, I wasn't really practicing law. The insurance companies were not only focused on saving money in the form of settlements, but from panel counsel. Keeping track of billing was compounded with the issue of not being able to produce your own work. Discovery had to be done by staff; motions had to be done by staff and the carriers could not understand why we would bill to review and revise. Just sign and file.

The case that changed me

It wasn't until one particular case presented itself that I really questioned whether I was ready for a change, and the magnitude of carriers' desire to avoid paying what it owed really sunk in. I knew it was time to leave. Working for insurance companies was more about being a cog in a corporate wheel, helping them look out for investors and the bottom line. Their goal was to pay out 97 cents for every dollar they brought in. My decision to begin representing plaintiffs ultimately came down to my desire to help individuals rather than corporations.

In 2013, I represented a driver who ran a red light, struck a vehicle in the intersection, then a pedestrian in the cross walk, before taking out a fire hydrant. The pedestrian, who was a high-functioning developmentally disabled individual, struck her head so hard she sustained a skull fracture in addition to other injuries. This case actually went to trial, not because the plaintiff was being unreasonable, but because the carrier could not grasp the concept that she could be injured. One of the claimed injuries was to her hip, and the need for surgery. The medical records revealed that she had one isolated hip complaint sometime prior to the accident, and the carrier used that to claim that though she was struck by a car, it was not a substantial factor in the injury.

That case just really made me feel bad. And while I was mulling over the outcome of that trial, and how we ended up where we did, I saw that a prominent personal-injury attorney, Christopher Dolan, was looking for an associate. I seized the opportunity to reinvent my career.

Putting my defense knowledge to work

In working for the various insurance carriers, I had more than just a peek behind the curtain; I was blanketed in their shroud. Not only did I learn what the carriers were looking for, their wants and needs, but also the traps they would set for plaintiffs' attorneys. Most importantly, I knew what it is was like to be a defense attorney, who they answer to and what they needed to do to get their job done. Here then, are my suggestions on what the plaintiff 's attorney can do to move the matter along.

Make it easier for the adjuster

Help the adjuster out pre-litigation. I am sure like most, a pre-litigation demand package will be sent. But give them everything. If they are going to be entitled to it during discovery, why wait for them to ask? Produce it. The more information they have, the more likely they will get the authority to resolve the case. However, there are those carriers where this will never happen and a lawsuit will be needed.

The thing to remember is that insurance carriers are more akin to a government entity than a business. They employ a number of unnecessary people, they do not communicate with each other, and they will make you jump through hoop after hoop. It is not because they want to see you jump, it is because they do not have the authority to avoid having you jump. There are adjusters at each level of the claims process, each with their own set of skills, knowledge and most importantly, authority. Your basic line adjuster may have up to $7,500 in authority to resolve a case without having to consult a supervisor. A litigation adjuster may only have $25,000 of autonomy. Anything more may require the input of a supervisor or committee.

In addition to authority, some adjusters just know more and can value a case more easily. This is true of your litigation adjuster, and if you have already provided them all the necessary documents to evaluate a case pre-litigation, you may be able to wrap it up sooner, rather than later once suit is filed.

Recently I had a case where the line adjuster and I reached an impasse. I asked her directly, "are you really going to make me file a lawsuit to resolve this case? We both know that it will never see the desk of a defense attorney." Her response was a firm low-ball offer. I filed suit and served a section 998 demand for more than what I had sought prelitigation, with the complaint. It was accepted within a week and the case was resolved.

Let defense counsel set the tone

Defense attorneys can be just as obnoxious as adjusters, but most times they are not the enemy. During my days of defense work I learned early on to sleep in the beds that my adjusters made. Once again, I am not saying every defense attorney is easy to work with, or is a good person, but there are steps that can be taken to help your client and yourself.

First, let them set the tone of the litigation. Even though this is an adversarial system, it doesn't necessarily have to be. Once again, there are exceptions to every rule. Most defense attorneys are sitting with way too many files on their desk; the quicker they can resolve them, the quicker they can move on. Most are not looking for a fight, but they have to make sure their "i"s are dotted and the "t"s are crossed. I was always more willing to go to bat for a plaintiff's attorney I enjoyed working with than for one I did not. Again, let them set the tone. If they decide to make it adversarial, then take it to them.

Second, pick your battles. There are going to be legitimate disagreements in litigation; that is why the case is most likely in litigation. But don't make it personal. Making someone file motions or respond to motions just for the sake of doing motion practices is not going to win anyone over. At the end of the day you want the defense attorney on your side, to see things the same way you do.

Finally, though we all think it, do not bring up the issue of "cost of defense" in trying to settle a case. Remember, insurance companies are like the government: In their mind settlement cost and defense costs are not from the same checkbook. Nor do those two accounts speak to one another. That is why they would rather put the kids of a defense attorney through college instead of plaintiff attorney's child. It is only when system-wide costs start rising that the settlements become a little easier.

Job satisfaction

As a defense attorney, my success at the firm was measured by my billables. The carriers were only interested in what I had done for them lately. It did not matter how successful I was in the past, they were only concerned about the present.

Working with plaintiffs is different. These are real people, real lives and real problems. I quickly realized how much $500 meant to them. Most people live paycheck to paycheck, and if one, two or more of those checks are missed, it can be devastating. I now think back on those times that I fought hard to save the insurance carrier something off their authority; the only person affected by the savings was the plaintiff and my ego. It wasn't the carrier and it wasn't the attorneys – it was the plaintiff.

Being a plaintiff's attorney has been much more rewarding because I actually have a human being for a client, one who is depending on me to help them – somebody who's never been through this process, who doesn't know what to do, who's injured, has bills mounting – so that's much more rewarding, but it's also more demanding.

Not only are we attorneys, we are advocates, therapists and problem solvers; most importantly, we are friends. From the first meeting to the settlement distribution, I now make it a point to treat all my clients as if they are my only client. I want them to know that their case is as important as any other case I may have and that I will be with them every step of the way.

Representing plaintiffs

When I was a defense attorney, I very rarely handled cases that were prelitigation. By the time they ended on my desk, the complaints were filed and discovery was being served. I started the process, the same routine; either filed an answer or demurrer. Then served discovery and noticed a deposition. Obtained the responses and noticed an IME. Along the way I would summarize everything that came in and report to the carrier. The only time I met with my client was after their deposition was scheduled.

It wasn't until I became a plaintiff's attorney that I realized the amount of work that goes into getting a case just to the point of filing suit. I do miss having the subpoena power to obtain all the records that I want and/or need. Trying to deal with physicians and hospitals when only armed with an authorization can be a logistical nightmare. No court to back you up, no California Code of Civil Procedure to turn to, only the promise that they may get some money at the end of the day (I will save the issues of liens for another article).

The personal interaction with clients has been a blessing and a curse. The carriers provided a detailed list of when they wanted to hear from you; the initial case evaluation, every 90 days thereafter and 60 days before trial. It was simple and it was easy.

When you have that personal interaction with your clients, you find that everyone's wants and needs are different. Some want to be kept informed about everything and others just want to be told when and where to be. There are no litigation guidelines in dealing with people, and I wouldn't want it any other way. Because the uniqueness of the clients is a reminder of the uniqueness of their case; everyone is different, everyone just as important as the next, and everyone deserves to have someone on their side.

One of the first times I went to Christopher Dolan and asked a favor for a client, he turned to me and said,

"Of course, because at the end of the day we are still human and it is the right thing to do." Being human and doing what was right for the sake of doing right, was something that I had lost as a defense attorney, something I have since rediscovered, and something I shall never misplace.

Peer reaction

Despite the occasional adversarial nature of trials, I haven't experienced any significant criticism of my decision to switch sides. In fact, within a few weeks of starting my new position, I was presented with multiple offers, from both defense and plaintiffs firms.

I remember attending my first CAOC conference. As I began the process of checking in and walking through the lobby, I initially felt like a cat at a dog convention. I felt really out of place, especially as I began to see attorneys that I had cases against and went to trial against. I ran into one attorney that I handled many cases with over the years. He was one of the scariest plaintiff's attorneys I had come across; he was a bulldog and could back it up. He took one look at me, gave me a big smile and said, "It's about time." At that time, I knew I was going to be just fine.

The professional relationships I built as a defender have endured, despite the fact that I may be representing different parties nowadays. I still get together with my friends, regardless of which side they are representing. We still reach out and ask questions about particular experts or value on cases. Of course, my values are much higher now, in more ways than one.


Jessup

Jeremy M. Jessup is a senior trial attorney with the Dolan Law Firm *in San Francisco. He represents individuals who have suffered catastrophic losses in personal injury and wrongufl death cases. Jessup graduated from Cal Poly, San Luis Obispo with a B.S. in Social Science in 1997. He received his J.D. from University of Pacific McGeorge School of Law in 2000. Jessup has experience handling all aspects of civil litigation. He has successfully tried cases in courthouses across Northern California and the Central Valley.*

Jessup was selected as a Northern California Super Lawyers Rising Star each year from 2009 to 2014, 2010, 2011, 2012, 2013 and 2014. He has been recognized by San Francisco Magazine as one of Northern California's Outstanding Young Lawyers and selected by Top Attorneys – Sacramento's Outstanding Young Lawyers.