INSIDE THE MINDS

Representing Plaintiffs in Personal Injury Cases

Leading Lawyers on Managing Discovery, Preparing Witnesses, and Presenting the Plaintiff's Case

ASPATORE

First Printing, 2011
10 9 8 7 6 5 4 3 2 1

Successful Strategies for Personal Injury Representation: From Managing Expectations to Winning Over a Jury

Jeffrey M. Kimmel

Partner

Salenger, Sack, Kimmel & Bavaro LLP

ASPATORE

Introduction

My law firm represents people who have been involved in accidents. As the attorney representing the plaintiff, my role is twofold: to prove that my client is not at fault, and that he or she was injured because of the accident.

From the moment that I decide to take a case, I focus on the upcoming trial, specifically how to relate the client's case to the jury—what makes it compelling, how to connect with that jury, and how this presentation will prove my case.

Analyzing the Defendant's Motivation in Personal Injury Cases

Essentially, the key is developing a strategy that will influence a jury to believe my side is right, because there is always another side to every story. Consequently, I need to determine what will connect with a potential jury in a particular venue. A key consideration is uncovering the motivation for the other party/defendant to commit negligence. For example, if my client was involved in a car accident case, was the person who caused the accident in a rush or late for something? While I do not have to prove motive in a civil law matter such as a personal injury case, it is always helpful to elicit evidence that will help sway a jury.

Similarly, in a situation where a worker on a job site falls from a ladder or scaffold because he did not have the proper safety harness, I will look for evidence that the employer was looking to save money, and by skimping on expenses, he compromised the safety of the worker.

This is often the theme in product liability cases as well. In an accident case in which a vehicle's air bag did not inflate properly, we may discover that the car company cut corners, and failed to install the air bag correctly. Likewise, a drug that is on the market may turn out to have dangerous side effects, but was rushed to market by the manufacturer to save money on the research that might make it safer.

Proving Negligence in an Injury Scenario

The other part of the equation in a personal injury case is proving that the client is indeed injured, and that injury is a result of the defendant's negligence.

A client may seek recompense because a plastic surgery procedure has caused undue scarring. Such cases can be difficult to strategize. It may be that the client is a beautiful woman and although I may barely notice the scar, she is traumatized by the sight of it every time she looks in the mirror. In such a case, many of the members of the jury are likely to be envious of my client because she is more attractive than they are, even with the scar—and they are certainly not going to award her money, even if they find that the doctor committed malpractice. Therefore, I have to evaluate a personal injury case on that level when I am developing a trial strategy. This is an example of a case I would ordinarily reject. However, if the client were a model, the lost earnings potential could make the case worthwhile.

Success Factors for Representing Plaintiffs in Personal Injury Cases

While the important factors for success in the field of personal injury law are personal reputation and past successes, my ability to maintain continuous and meaningful contact with my clients has helped to further set me apart from my peers. When people are considering a law firm, they are also looking at other firms. Typically, they base their final decision on a referral, or a past success of which they're aware. My firm does not advertise on TV or the radio; therefore, we rely in large part on word of mouth in the form of attorney referrals, and clients who have used us in the past. A key factor to my success as a personal injury attorney has been to keep both my referring attorneys and my clients more than just satisfied with my service.

Simply put, if my clients are dissatisfied with a result or quality of the work that I have done, then they will not refer their friends to our firm, and may also express their dissatisfaction to the attorney who referred them—and that attorney is going to stop sending me business. This is a significant problem, because a law firm is a service business, not a product business. For example, if a delicatessen has incredible food, you may put up with less

than courteous service. When you are taking a case as an attorney, there is a lot more at stake than a sandwich, and if you do not provide your best service, you will not be able to stay in business for very long.

Therefore, succeeding in this practice area is largely a matter of keeping everyone happy—and we do that by being attentive to other lawyers and their needs, and by being attentive to our clients as well. The single biggest complaint that the bar association gets about lawyers is that many lawyers never call back their clients, or don't do it in a timely manner. At my firm, we have a rule that all client calls must be returned within twenty-four hours.

Managing client expectations in a realistic manner is critical to achieving success in the practice of personal injury law. Initial client meetings occur shortly after the injury or accident occurred, and clients are usually traumatized and very emotional. Nearly every client believes that his or her case is the best and only case that matters. This is righteously how they should feel, and it is how I have to treat them. At the same time, however, it is important to make sure that the client is realistic about what is going to happen. They should not let their expectation for compensation exceed what is likely to happen in the real world. At the same time, you have to walk a fine line in this area, because if other lawyers are promising this potential client $10 million and I am not, then I am not going to get the case—and the client may not find out that I was right for another two or three years.

Therefore, I never mention a specific number, even though that's what everyone wants to know the minute they walk into my office. Once you state a dollar amount, it is indelibly marked in their brain, and will come up at every discussion. Setting a specific damages number is ill considered and wrong; it creates false expectations, and often sets up the client for disappointment. Yet, if I am too realistic, a client may move on to another lawyer who says that they will get them more money. Even so, I believe that if you are able to create a balance by properly managing the client's expectations, the client will be happy with the result you achieve, and refer you to their friends and family. Conversely, if the client's expectations are too high and you do not meet them, then you are out of luck, even if you win their case.

Formulating Plaintiff Strategies

There are at least ten different subsets of personal injury cases, and you have to devise your trial strategy to be specific to each particular case. It is important to note that when trial jurors evaluate a personal injury situation, they typically put themselves in the shoes of the victim or the defendant; and they will ask themselves, "What would I have done in this situation?" even though they are not supposed to do that. A trial attorney must also step into the shoes of the client and the defendant to develop a strategy that will influence the jury to side with the victim.

When trying a motor vehicle case, the assumption is that most of the people on the jury have some experience behind the wheel, and therefore, will relate to the case scenario. At the same time, it is difficult to know exactly how they are going to respond to the facts in the case, and everyone is going to have their own opinion regarding the evidence presented. You have to explore these variations during jury selection and modify your strategy accordingly. For example, jurors who are professional drivers (cabs, trucks, etc.) will have a very different view of your case than young, inexperienced drivers. Similarly, city dwellers (pedestrians and drivers) have a different interpretation of the "rules of the roads" than suburbanites. These differences and biases must be explored and considered during jury selection.

Other key considerations in strategy formation include the presence of eyewitnesses, surveillance cameras or the benefit of expert testimony—say, an engineer who will be able to testify regarding the presence of skid marks, the time of day when the sun went down, and other factors that might have affected how the accident occurred.

Different strategy formation techniques are used in premises cases—i.e., a case where the plaintiff is injured on the defendant's premises. For example, if you fell on a driveway that was in disrepair, the owner of the property, who would know about the driveway, might be liable in terms of negligence. Similarly, in Manhattan and other metropolitan areas, the city may be responsible for repairing holes and cracks in the sidewalks. However, if a business is located on a damaged sidewalk, then the business may be responsible for repairing the hole or crack, and may be accused of

negligence if someone falls in front of their store—particularly if it can be shown that the plaintiff fell as the result of a defect that the owner of the business either created or should have known about. Therefore, in order to win a premises case, we have to prove that the owner of a home or business did something wrong—i.e., they knew about a potentially hazardous situation, and they did not fix it. At the same time, one argument always presented in a "trip and fall" case is that the plaintiff should have been looking where they were going.

Almost everyone on a jury has been involved in some type of "trip and fall" situation, and can often relate to either side in the case. Therefore, the key strategy in this type of case is to differentiate the plaintiff's circumstances in order to make the jury see that the defendant's actions were egregious enough that they will vote in favor of your client. Personalize the scenario with something like, "If this condition existed in relation to your home and you were responsible for keeping your home in good repair, is this something that you would have had fixed?"

Plaintiff's strategies in medical malpractice cases are more problematic, because in general, people like and trust their doctors. There is also a strong negative public perception against people who bring these kinds of suits, because many people mistakenly believe there is a link between medical malpractice cases and the increase in health care costs and premiums. This issue is a significant factor in jury selection and case strategy. Simply stated, how do I differentiate this case to a jury and so influence their opinions that they don't think about how a big verdict is going to increase their health care premiums? To overcome this, I ask the jurors to focus on the facts of the case at hand, and to reach their decision based on the evidence produced at trial, not on a story they read in the newspaper or an advertisement seen on television.

Gathering Information When Building the Plaintiff's Case

The process of gathering information typically starts with the collection of all paperwork and documents relevant to the actual incident and the medical treatment that resulted from it. Key evidence in a car accident includes the police report, which is prepared at the time of the accident. This report typically has a lot of important information that is going to be

significant throughout the case such as direction of travel, names of witnesses, statements made, citations issued, and driving conditions.

In almost every motor vehicle case, the client seeks medical treatment before consulting an attorney. Medical records must be obtained from an emergency room, or from a doctor or some other health care provider's office, along with the police report. Statements from witnesses taken by a police officer or health care provider are also very important, because the things that were said at the time of the accident are what a jury believes. When a plaintiff testifies at a trial three years after an accident occurred and tells the jury, "I might have said that to the police at the time, but I remember it differently now," it stands to reason that what was said twenty minutes after the accident—particularly if it is recorded in the police report or the hospital's medical records—is inherently more reliable than the years-later testimony of a plaintiff who is trying to get money for their injury.

The initial client meeting generally occurs about one month after the accident. I will consult the police report and medical records, and if they are not consistent with what the client has told me, I may not take the case. This information gathering determines if there is, in fact, a case to be made on the plaintiff's behalf. The earlier this is determined, the less time and money will be wasted pursuing a claim that will be judged frivolous because of a number of inconsistencies.

Timeline for Building the Plaintiff's Case

I typically tell my client at our first meeting that it will take several months before I can gather all of those pieces of the puzzle together. In fact, the information gathering process can take anywhere from one to six months, depending on how extensive the client's medical treatment has been. A significant injury will result in a profusion of medical records in relation to the case. In many instances, I may not get involved in the client's case until they are released from the hospital, and in such situations it can take as long as three to six months to obtain all of their records.

Nearly all personal injury cases are ultimately settled by an insurance company paying out a claim. This affects how the client and attorney will be

paid. In a motor vehicle case, the client's policy limit may range from $25,000 to $1 million, and that will determine how much compensation will be available for the victim. Timelines are also a consideration, as some cases will settle and others will go to trial, and how the outcome of a case is ultimately determined can mean a difference of years. For a case that will likely be settled, the plaintiff's attorney will send a claim letter to the potential defendant, which they in turn forward to their insurance company. The defendant or his/her attorney may also contact the insurance company and say, "Maybe we can settle without a lawsuit." In that case, the situation may be resolved in less than a year.

This scenario assumes that the person who is injured has started to recover. If a client is still undergoing medical treatment, the case cannot be settled, as the full extent of the injury is still unknown. It may be a disservice to the client if their condition worsens and there is no more compensation forthcoming because the case has settled.

Early settlement in a personal injury case only applies if a client is able to return to normal activities within a few weeks or months, or if there is a good liability claim to be made—i.e., the defendant ran a red light and their insurance company agrees that we should settle. Such a case may be settled within six months. However, in cases of greater significance, such as a medical malpractice case or a car accident case where the plaintiff is badly injured, it is necessary to go through all of the steps and processes of a lawsuit, which involves a timeline that can take anywhere from two to four years and sometimes more, depending on the complexity of the case.

Mistakes to Avoid

Clearly, one key mistake made in this practice area is to settle too soon. Conversely, another mistake is a failure to aggressively pursue these cases. No insurance company wants to pay readily, and any time the ball is in their court, they will likely delay. Consequently, if the plaintiff's attorney does not have a proper follow-up system, the insurance company may delay matters to the extent that a lawsuit would need to be filed to collect damages. The pressure imposed by a pending lawsuit is often necessary to bring the insurance company to the bargaining table. Without the filing of the suit, there is no such pressure.

Understand Your Limitations. Don't Overextend Your Practice.

Personal injury and medical malpractice law is a specialty area. That is why personal injury lawyers get a lot of work from attorneys who handle other legal matters, such as bankruptcy, matrimonial, or real estate work. Oftentimes, a lawyer in another practice area will have a client who gets into a car accident. They may initially say, "Oh, I can easily handle this situation; we can file the forms, send the other party a letter and settle the case." However, they often find that reaching a resolution is not so easy, and the client gets hurt the most.

What You Don't Know Can Hurt You, and Your Client

In the hands of an attorney with little experience in personal injury matters, the biggest mistakes are often made at the very beginning of a case. Unfortunately, many young lawyers think that they can do everything in every practice area, and wind up making mistake after mistake. Cases that could have been settled wind up going to trial. If you get a call from someone who's been injured, talk to the client in order to get as much information as you can. Then with this information, refer them to another attorney and offer to help set up a meeting.

Venue Selection in Personal Injury Cases

Oftentimes you do not have a choice with respect to venue selection in personal injury cases, as there are rules that govern which venue is appropriate. Among the factors that have to be considered are: where did the accident happen and where do the parties reside, and does the incident involve an individual or corporation? Each of these is a proper basis for choosing a particular venue. For corporations, the principal place of business determines the proper venue. If the location of all the above is the same—i.e., Manhattan—then you do not have a choice of venue; it must be Manhattan.

In some cases, however, you may have a choice with respect to venue selection. For example, an accident may have happened in Manhattan, but my client lives in the Bronx and the defendant driver lives in Queens. In such cases, I have three choices of venue, so I need to consider which

venue will be most sympathetic to my client. In addition, there are venues in which we are more familiar with the courtroom procedures. That level of acquaintance would make me more inclined to bring my case in that jurisdiction, simply because it will be easier to usher my case through the system.

The Role of Experts in Presenting the Plaintiff's Case

With respect to motor vehicle cases, there are always two drivers involved—each claiming to be in the right. In such cases, an expert's testimony can be particularly helpful. An expert might say, for example, "Given that the skid marks left at the scene were this long, the road was constructed in a certain way, and the person said that they were driving at this speed, it can be scientifically proved that the accident was the defendant's fault." An expert can win or lose a motor vehicle case for you, and there is often a battle of the experts in these cases.

This battle of the experts plays a critical role in medical malpractice cases, as only a doctor is qualified to criticize or measure the work of another physician. While an attorney can give a speech about what was done wrong in a certain case, in all likelihood he or she did not go to medical school and is therefore not qualified to judge that the surgery to remove the client's tumor mass was done improperly. Medical malpractice cases demand the services of qualified experts for both plaintiff and defendant—one of whom will report that the doctor screwed up, and the other who will state that the doctor acted properly. In the end, it is up to the jury to believe one expert or the other.

Labor law cases concerning construction site accidents employ a similar game plan. When the parties involved employ technical terms to relate what they did and the tools they used, it is often like hearing another language. An expert must have the education and work experience in the field, and a familiarity with the applicable safety standards, to be able to comment knowledgably on the scenario and conclude that the worksite was dangerous, and lacking in certain safeguards.

The Role of Experts in Discovery

The importance of experts often comes into play following discovery, which is the exchange of information between the parties during litigation. During discovery, each side is supposed to share every relevant document with respect to the case with the opposing side. At the same time, depositions are held, which is when the attorneys question the potential witnesses about what they know about the incident. Once all of that information is exchanged, a note of issue must be filed with the court, which states that discovery has concluded and you are prepared for trial. At this point, the parties are permitted to make a motion to the judge—and in the defendant's case, they are likely to make a motion stating, "Discovery is complete; and based on all of the information that was exchanged, the plaintiff does not have a case and we ask that this case be dismissed before trial." With that motion, they can attach an affidavit from an expert who supports their position that there is no case. However, the plaintiff side will also want to respond with an affidavit from an expert saying in effect, "Wait a second—I looked at all of the same evidence, and there *is* a case." It is important to note that recent case law suggests that if you do not tell the other side that you have an expert working on your client's behalf *before* you file that note of issue, then you cannot use that expert to testify to your motion—which can be devastating to the case. If the court does not consider the expert's affidavit in the motion, then your case may be dismissed.

Similarly, you have to exchange certain witness lists before filing a motion. If, for example, you have conducted depositions and discovery in a car accident case, and then file a note of issue, the other side may then file a motion saying that the case should be dismissed. If you have a witness to support your side, but the name of that witness was not exchanged before the note of issue was filed, then you cannot use that witness to oppose the motion or at trial.

Preparing Witnesses for a Personal Injury Case

Deposition

Preparing a witness for a personal injury case deposition is very different than preparing a witness for a trial. A deposition is a pre-trial examination

attended by the lawyers, the witness, and a court reporter. The opposing lawyer gets to question the witness about the incident. The process is typically very informal, held in a conference room rather than a courtroom, and the rules are very relaxed. As the deposition is still a part of discovery, the questioning attorney has a lot of latitude in terms of what they may ask in what is essentially a fishing expedition that probes the witness to find out if they know something that may actually benefit the opposing side.

To prepare a witness for a deposition, instruct him or her to listen carefully to the lawyer's question, and succinctly answer *only* the question that is being asked, without further pontification. Again, the purpose of the deposition is for the other side to get information, and if they do not ask the right questions, then tough luck.

Trial Testimony

A deposition is a very different process from trial testimony. Once you go to trial, it is "show time"— the witness tells his or her version of the events in a sympathetic way that will influence the jury to award money to the plaintiff. Therefore, when preparing a witness for trial, first review the deposition testimony. Be careful not to have clients or witnesses actually memorize their deposition and simply recite it in court. It's more effective if the testimony is perceived by the jury as unrehearsed, other than painstakingly prepared with a staged response to a staged question. Testimony should appear natural and believable.

Over-rehearsal also tends to wring the emotion out of a witness before the trial, when emotion on the witness stand is something the jury should see. Try to avoid exposing the client or other witness to repeated questioning so that they ultimately become numb to the whole situation.

When preparing a witness for trial, encourage eye contact with the jury. Not everyone is comfortable with that, however, and it can be difficult to make eye contact with jurors while relating the intimate details of some traumatic event. In addition, most witnesses are not professional speakers, and tend to be nervous. However, if a witness can be convinced to look at the jury, it often goes a long way toward creating sympathy for the plaintiff.

Overcoming Defense Arguments

The attorney for the defendant in a personal injury case will generally try to defend the case on liability grounds. The plaintiff's attorney, on the other hand, will look to prove that there was negligence involved that caused her client's accident—i.e., that the other party did something wrong and the plaintiff was injured as a result. The defense attorney often does not even want to address negligence or plaintiff injuries, as that is a very sympathetic subject, and the plaintiff's injuries are usually evident. There are some instances where the defense attorney will question a plaintiff's injury, but in general, they look to defend the liability portion of the case and hope that the injury component does not even come into play. If the jury finds that the accident was not the defendant's fault, they will never have to deal with the question of how much money would compensate the plaintiff for the injury.

Proximate Cause

The toughest concept for plaintiffs to deal with in terms of defense arguments is the issue of proximate cause. Essentially, you have to prove that the defendant did something wrong, and the injury was caused by that wrongful action. However, the notion of proximate cause can be very convoluted, and the way in which the charge is presented to the jury often makes it even more confusing. Here's an example of a case lost because of the issue of proximate cause: a bicycle rider lost her balance while crossing a bridge, and injured herself when she hit a metal piece that was sticking out of the bridge—a piece that was obviously broken and rusted, and had been so for years. The defense argued that there was no proof that she fell on top of the metal piece, or that it was what caused her to lose her balance; it may be that she fell somewhere else. In the end, the jury found that the city of New York was negligent with respect to the piece of the bridge that was sticking out, but they also ruled that the metal piece itself did not cause the client's injury or contribute to her spill and was not a proximate cause in this personal injury case.

Not only can it be very difficult for a jury to differentiate between negligence and the cause of an injury, it is a significant challenge to

convince them that the negligence was related to the injury. In a case of a bus hitting a pedestrian, the question may be whether the bus driver hit the pedestrian and caused the injury, or whether the pedestrian accidentally walked into the path of the bus. In some such cases, the jury found that the driver may have been negligent, but the negligence itself did not cause the accident. Such scenarios can be confusing. Defense arguments that focus on these proximate cause questions are typically the hardest to overcome, and different rulings have been handed down on either side of these cases.

The Role of ADR in Personal Injury Cases

Alternative dispute resolution (ADR) methods including mediation and arbitration are often utilized in personal injury cases. If you agree to arbitration, you forego a jury trial and consent to abide by whatever the arbitrator decides the outcome to be; the decision is binding. Arbitration is often the dispute resolution method of choice with respect to motor vehicle cases because there is just so much money to be handed out due to the limitations of insurance policies; therefore, ongoing litigation is a waste of time and the money that is available.

However, in the medical malpractice world, mediation is the preferred ADR form because mediation is non-binding. The parties present their case to a designated mediator in hopes of negotiating a settlement. Typically, the mediator goes back and forth between the parties and makes recommendations. A settlement offer is made, and the plaintiff decides whether to accept that particular offer. As mediation is not binding, if the case does not settle, all bets are off and nobody is the worse for it—it is as if the process never happened, and all statements are stricken from the record. The case can then proceed to trial.

Looking to the Future

Whether New York State will impose caps on damages awarded in medical malpractice cases has been the source of major debate, as evidenced most recently in New York State budget talks. If that law is ever passed, a cap on the amount of the pain and suffering awards to victims in personal injury cases could follow. The trend toward tort reform is always present, fueled

by the impression in the media and even in the federal government that personal injury lawsuits are out of control.

The current award system provides safeguards to keep awards fair and appropriate so that victims can get on with their lives with reasonable accommodation. Excessive awards are appealed and, when appropriate, reduced to more reasonable compensation amounts. Unfortunately, lobbyists for the insurance industry and major corporations unduly influence the public discussion about the effects of these cases, distorting the fact that most personal injury cases are filed in order to protect victims against deep-pocketed and powerful corporations.

Final Thoughts

Reputation is the single most valuable asset a lawyer can have. Personal injury litigators provide a valuable service, and because we work on a contingency fee, we need to preserve our reputation throughout each case and over the course of our career. One way to cultivate reputation is to be selective when picking cases to represent. Simply put, take only the good cases. All too often lawyers do not put in the time, effort, and energy early on to analyze a case. Taking any case that walks through the door can become a mistake that just keeps growing.

Most prospective clients come through attorney referrals. It is important to maintain a reputation of being ethical, hardworking, and reliable. Initial labels—as a lazy or a hard worker, smart or stupid—whether earned or exaggerated, tend to stick.

To achieve success in personal injury litigation, carefully preserve your good name and reputation—and always return phone calls.

Key Takeaways

- Find the compelling story, motivation, and evidence that proves your case to the jury.
- Always do the best work possible. Client and attorney referrals are a key to success.

- Cultivate and maintain a reputation for ethical, hardworking, and reliable representation.
- Manage client expectations in a realistic manner; never mention a specific damages number. Doing so creates false expectations, and often leads to disappointment.
- Early stage and thorough information gathering determines if there is a case to be made on the plaintiff's behalf.
- A key mistake is to settle too soon.
- Pursue aggressive follow-up with insurance companies so they do not delay justice for your client.

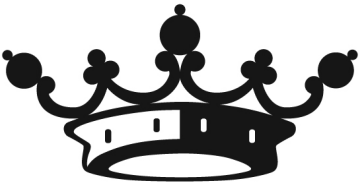
Jeffrey M. Kimmel, a partner at Salenger, Sack, Kimmel & Bavaro LLP, is a proven, experienced trial attorney and heads his firm's medical malpractice department. A frequent lecturer on trial preparation, strategy, and courtroom techniques, Mr. Kimmel also contributes his expertise to the New York Law Journal*'s Smart Litigator, a subscription legal research service for trial preparation. A member of the Medical Malpractice Committee of the Association of the Bar of the City of New York and former chairman of the New York County Lawyers Association's Young Lawyers Section, he has earned the AV rating from Martindale-Hubbell and has been named to the New York Super Lawyers list since 2009.*

Mr. Kimmel graduated from the Wharton School, University of Pennsylvania with a BS degree and Brooklyn Law School, where he received the coveted American Jurisprudence Awards in both Legal Writing and Appellate Advocacy.

ASPATORE

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives and partners from the world's most respected companies and law firms. Each publication provides professionals of all levels with proven business and legal intelligence from industry insiders—direct and unfiltered insight from those who know it best. Aspatore Books is committed to publishing an innovative line of business and legal books that lay forth principles and offer insights that can have a direct financial impact on the reader's business objectives.

Each chapter in the *Inside the Minds* series offers thought leadership and expert analysis on an industry, profession, or topic, providing a future-oriented perspective and proven strategies for success. Each author has been selected based on their experience and C-Level standing within the professional community. *Inside the Minds* was conceived to give a first-hand look into the leading minds of top business executives and lawyers worldwide, presenting an unprecedented collection of views on various industries and professions.



ASPATORE