

Trial News

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Practice Tips...

Waive Your Warts—Dealing With Problem Cases

Recently my partner dared me to write a column called "Waive Your Warts." So, Chris, here it is.

Every case has weaknesses. Liability, impact, causation, damages, the client, the experts, and so on. Sometimes the weaknesses in the case need not be disclosed. Perhaps the case where a client will not come across well to a jury should be settled without filing the case or before having the client's deposition taken.



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However, in most significant cases, the discovery done by the defense will find the obvious weaknesses in your case. I am convinced that you will generally obtain a better result for your client by disclosing obvious weaknesses and dealing with them. It's called "Waiving Your Warts!"

Find Out the Weaknesses in Your Case

Part of your case evaluation should include finding the weaknesses in your case. You do this by analyzing the facts, researching the law, looking at the Washington Pattern Jury Instructions, and looking at jury verdicts. You find out weaknesses by talking about your case

with other lawyers, by running the facts by lay people, and by putting yourself in a juror's position and thinking, "What would I do if I had to decide this case?"

Once you have found the weaknesses, then it is possible to deal with them. The question is, what do you do once you have found the weaknesses?

Disclose the Weaknesses to Your Clients

It's fun to learn the strength of your client's case. Fun to think about the strategies you will use. It's fun to think about the big verdict you will obtain. It is

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Waive Your Warts

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not fun to tell the client the weaknesses in their case.

There is an art to telling a client about the weaknesses in their case. If you start listing all the weaknesses then the client may begin to wonder whose side you are on. You can get into an unproductive discussion where your client is arguing with you, where the client is "rebutting" each of the weaknesses you describe.

Once the factual investigation is complete I like to sit down with the client and tell them about the strong points in their case. Hopefully, there will be many strong points that you can discuss. Then, I tell the client, "It is part of my job to think like the other lawyer. I'm going to try to spot the things that the other lawyer will use against you at trial." Then I will tell the client I am going to ask them a number of questions that I think the other lawyer might ask. After 15 or 20 probing questions the client is looking to you for help. "How are we going to handle this," clients often say. This method shows the client what the weaknesses are, but lets you work together to solve them.

Disclose Weaknesses During Settlement Discussions

I have talked with a number of plaintiff's attorneys who hope that the defense will not find out the weaknesses in their case. These counsel believe that they can obtain a larger settlement for their client if the case settles before the weaknesses are disclosed. I believe this is a mistake.

In most cases, effective discovery will reveal the weaknesses in the plaintiff's case. If you don't disclose a weakness, and the insurer finds it during discovery, there is a natural reaction on the part of

the insurer to feel that your case has been substantially devalued because they found a weakness you appeared to be hiding.

If you disclose the weaknesses in your case, and do so in your demand letter, you can take some of the sting out of the disclosure.

One of the common weaknesses in a case is a client's prior treatment to the same part of the body. By obtaining those prior medical records and putting them in your demand letter you can take some of the sting out of the disclosure of this information. Where prior treatment is an issue, I will commonly insert in the demand letter a sentence that reads, "This client's prior injury has made it so that this collision caused a more serious injury and more pain than it normally would have." Occasionally an adjuster will respond, "We don't think the prior injury has anything to do with this case."

You can obtain better settlements if you build a reputation for carefully evaluating cases and sending all of the records to the adjuster. Sending prior records will also speed up the settlement because usually these are requested by the defense at some point anyway.

In your settlement discussions it costs you nothing to acknowledge the weaknesses of your case. However, it's one thing to acknowledge that there is a weakness, it is quite different to acknowledge that the weakness will substantially lower the value of the case. Keep bringing the adjuster back to the idea that you are valuing an injury to a human being, that you will recognize the weaknesses in the case but that the adjuster must recognize the strengths of the case, and pay fair

value under all the facts.

Disclose Your Weaknesses at Trial

You must disclose the weaknesses of your case to the jury before the defense does so.

Melvin Belli calls it the race to disclosure. It's important to get your weaknesses in front of the jury during *voir dire*, before the defense has a chance to question any of the jurors.

Where prior treatment to the same part of the body is an issue in a case, you might try asking jurors the following questions.

Which of you jurors has a perfect body and has never been to a doctor?

Which of you has never felt pain?

Which of you has never been sore?

Which of you has never had a sprain?

You can then follow up with questions that will help determine if a juror will award fair value where the collision aggravates a pre-existing injury to the body.

There are many other types of weaknesses you could have in a case. For each weakness you should have a *voir dire* strategy. Perhaps your client had

been drinking and the court has ruled that this evidence will come before the jury.

If so, then you might want to refer to some of the trial materials available for defending drunk driving cases. You must get the jury to separate their feelings about drunk drivers from those who drive after having consumed alcohol, but are not under the influence.

If a person has not reported income on their tax returns, or told somebody shortly after the collision that they felt fine, or the case has any number of other weaknesses, you must find a way to let the jury know that this was reasonable under the circumstances and that your client should receive a fair recovery for the harm caused to them.

Lastly, keep a positive mental attitude. It is amazing what can be accomplished by keeping a positive attitude and digging hard to come up with a way to prove to the jury that your client should receive a fair recovery.

Robert K. Dawson is a partner in the Seattle firm of Pence & Dawson; his practice is limited to plaintiff's personal injury cases.