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Litigating small and moderate cases without breaking the bank

NOT EVERYONE CAN BE, OR WANTS TO BE, A BIG HITTER. A LOOK AT HOW TO TAKE ON THE SMALLER CASES

This article will discuss "small cases" and "moderate-level cases." I define small cases as those usually worth up to $25,000, and moderate-level cases as those usually worth between $25,000 and $50,000.

Recall the opening credits of the old TV police drama show, Naked City: "There are a million stories in the Naked City and this is just one of them." Over the years, my practice has become the embodiment of this quote. Sometimes, it seems like my phone number is listed in a place where people with the craziest stories and strangest cases go to look for a lawyer. No doubt you've gotten some of these calls too, and we all know there are a million of these out there, but how do you know which ones to take? Remember, as a plaintiffs' lawyer, your most valuable asset is your time and, when you invest your time, it is important to maximize your return.

Decide on your comfort level

Decide what kind of lawyer you want to be, and then spend 99 percent of your time working within the parameters of that goal. Once you decide what type of practice you want to have, it's time to consider how to get the most out of the time and money you put into your cases.

So. What kind of lawyer do you want to be? There is no wrong answer here. Here are two types to consider. There are others. You get the gist. Just remember that whatever you are, be a good one.

Do you want to be a high-volume lawyer with smaller, low-risk cases? Stop snickering. There is nothing wrong with this type of practice. In fact, I have known many lawyers over the years to make an incredibly good living with this model. This type of practice is well suited for those who want to want to stick to pre-litigation and "kissing" (keeping it simple, stupid).

Do you want to be the type of lawyer who only takes moderate-injury cases? These cases are going to require more of an investment. You'll have to spend a lot more time in the beginning documenting the file, and ultimately a lot more money in the end. You'll have to do more to get more. Most of these will have to be fully litigated in order to get their full value. But remember, with great risk can come great reward!

It is important to remember that neither of these example models are slam dunks. Some cases just don't pan out. It's very important to understand that just because a case falls into the small or moderate-value range, doesn't mean it won't require as much time, skill or effort as a larger case. Let's figure out how to avoid wasting your time – your money.

Litigating small cases ($0-25K)

I'll make this easy: the best way to make money litigating cases worth less than $25K is never to litigate them. In today's climate, litigating cases with this potential value is a losing proposition. If you can't get a decent pre-litigation offer, save your time and money: move onto something more lucrative.

Litigating moderate cases ($25K-250K)

Don't get me wrong; I'd prefer to devote all my time to litigating high-value cases where commercial trucks rear-end my clients. But that's not my reality, and for most of the people reading this article, it probably isn't yours either. If you're like me, you have a mixed bag of small to moderate cases with the occasional catastrophic case to keep things interesting. So how do you maximize your time and money when litigating these

See Fiore, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2018 Issue

moderate-value cases? Here are a few things I've learned that will help you do just that.

File cases well before the statute of limitations

When I started practicing, we still had a one-year statute of limitations for personal-injury cases in California. Given the short time to file back then, it seemed like there was a statute running every day. I remember some wild times when I was a sole practitioner – I'd be running through the courthouse at 4:00 p.m. on a Friday to make the cut-off.

But now with the two-year statute, there is really no excuse to be filing cases on or near the date of the statute of limitations. Stressing your staff out with rush filings is a waste of time and money.

Many counties have moved to e-filing, which makes things super convenient. However, there is one major drawback to e-filing: many times, when you e-file, you don't get a confirmation that everything was accepted to confirm when the filing actually occurred. It may not get "filed" until a day or two after it's submitted. This is obviously a big problem when e-filing at or very close to the statute date. If you wait until the last minute, don't e-file. If the filing gets rejected or there is another issue, you run too big of a risk of letting the statute run!

If you must wait until the last minute, spend the money on a rush process server to ensure timely filing. But don't make that a habit, especially for truly moderate-value cases. Spending thousands of dollars a year on rush filings adds up.

Also, if you plan ahead, remember that most counties allow you to mail a lawsuit to the clerk's office – just include a check for the filing fee and a self-addressed stamped envelope so the clerk can mail you back the conformed copy. This is a great, low-cost option, but needs to be done plenty of time before the statute runs to allow for processing and return.

Reconsidering how you file cases may be a simple change in your practice that can result in saving thousands of dollars in the long run. Again, this is all to maximize your return.

Paperless medical records

I'm going to assume by now, most offices have transitioned to some level of being paperless. This is not my preference. I'm old school, and I like paper, but paperless can save money. In fact, the savings I've seen in my office from just converting our clients' medical records to electronic files has been tremendous.

Most, if not all, of the cases that you will move into litigation likely had a pre-litigation demand submitted to the carrier. My office transitions medical records to paperless by uploading the records into our system when the pre-litigation demand and attachments are sent. This way we have our clients' records electronically stored from the get go.

I know this seems elementary to some, but I'm sure some of the people reading this article have resisted converting to paperless in any form. Just think about it. How many times are you going to need those medical records while litigating the case? You'll need them in responding to discovery, working with your experts, determining strateg, etc. Why force your staff to make multiple hard copies every time you need them when you can just click a button and send them on a disc or via email? Less effort. Less time. More profit in the end.

Keep depositions brief by getting to the point

Deposition costs can get very high in litigated cases. You aren't an insurance defense attorney billing in six-minute increments. When you're dealing with straightforward cases, e.g., an uncontested liability auto case, just get to the point. There is no reason to reinvent the wheel.

Over the years, I have had associates take an hour or an hour and a half before they ask a real relevant question. I read these transcripts, and it kills me to see associates asking defendants needless background questions and other irrelevant information before they touch the heart of the issues. Remember that you're paying for every page of every transcript and you're expending resources to take these depositions (your time or your associate's time). Don't get caught up in minutia. Don't try to outthink the room. Leave that to the defense attorneys.

I recently defended an expert's deposition. The defense attorney, who had milked the clock during the entire case, really kicked it up a notch at this deposition. The expert was getting paid $1,000 an hour for his testimony, and the defense attorney acted like he was making more! Over two hours went by before he asked the expert anything about his actual opinions.

Obviously, I can't control how long someone spends on a deposition I'm defending, but I can control how long I spend taking someone's deposition.

Plaintiffs' attorneys aren't getting paid to waste time. We're paid to get to the end – the sooner and less costly we get there, the better the result is for our clients. So ask relevant questions, don't get bogged down in details that don't make any difference and you will see that you'll be able to save significant deposition costs by being efficient.

Using video depositions at trial

While we are on the topic of depositions, here is a great way to save money: videotape expert depositions. The defense is going to set your expert depositions. Sometimes, they'll give notice that they're going to videotape the deposition and sometimes their notice won't specify. If you want to play your own experts' deposition in trial, consider sending a deposition notice for the same date and time that the defense sets your experts' deposition. Include your intention to videotape the deposition.

To use the videotaped deposition of a physician or expert witness at trial, you must do the following:

1. Inform opposing counsel that you plan to video tape the deposition in your notice of deposition. (Code Civ. Proc., § 2025.220.)
2. Inform opposing counsel that you plan on using the video tape in trial, also

See Fiore, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2018 Issue

in the deposition notice. (Code Civ. Proc., § 2025.620.)
3. Send a notice of intent to introduce videotaped testimony to opposing counsel before trial, informing the adverse attorney that you intend to use your previously recorded video at trial. (Code Civ. Proc., § 2025.340(m).)

If you follow those three steps, you can use videotaped deposition at trial. This will save you the expense and inconvenience of arranging live testimony. Before you dismiss this advice, know that plenty of prominent lawyers do this – even on seven-figure cases. Remember, not every expert is crucial and some are just too difficult to get to the courthouse or too expensive.

These days, most juries don't hold it against you if you have the experts on video. As a matter of fact, the opposite may be true. I've read some recent studies concluding that juries actually pay more attention to an expert on video because this is what they are used to doing all the time – jury pools are full of people who stare at little screens all day anyways; why make trial different for them?

When done correctly, this can save you thousands of dollars in expert costs.

The Ned Good Rule

One of the first people I heard speak when I joined CAALA was Ned Good. At the time, he was a top trial lawyer with his firm in Pasadena. He said something at that seminar that I've never forgotten, and that I use every week in my office:

When you're deposing a nonparty witness (e.g., a PMK, an expert, an eyewitness), serve that person with a trial subpoena on the record during their deposition. This way you don't have to ask or beg the defense to bring the nonparty witnesses to court. Also, you don't have to find witnesses you deposed and serve them with a trial subpoena. A good, easy way to save time and money. Thanks Ned!

Don't forget to demand in writing all DME reports

Many people assume that the defense must turn over the Defense Medical Exam report as soon as they receive it from their DME doctor. This is actually not true, unless you demand the report in writing.

"If a party submits to, …, a physical or mental examination in compliance with a demand … that party has the *option of making a written demand* that the party at whose instance the examination was made deliver both of the following to the demanding party: (1) A copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner. (2) A copy of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner." (Code Civ. Proc., § 2032.610(a), emphasis added.) Only after the written demand is made does the 30-day clock start to run on its delivery. (Code Civ. Proc., § 2032.610(b).)

Why is it important to demand the reports? First and foremost, it will help you and your experts understand the defense expert opinions. Secondly, you may not need to depose the DME doctor.

If you have the DME report, and it's a doctor you've deposed before or it's a doctor whose deposition transcripts you can access, consider skipping the expense of deposing that doctor. Obviously, this is a case-by-case decision and not advisable in large-loss cases. But you will probably do just fine with this approach in most moderate-value cases and you will save time and money while prepping for trial.

Jury fees – to post or not to post

As we all know now, California changed the rules on jury fees and requires that they be posted well in advance of the time for trial. Not doing this can waive your client's right to a jury trial. Remember that beyond just posting the $150, you also have to pay each juror a daily rate for the time they are on the jury. This rate is set by the court and must be paid to all 12 jurors and the two alternates. The defense wants a jury trial 99.9 percent of the time, and will post jury fees on almost all cases. If you're dealing with a case on the lower end of the moderate scale, consider letting the defense beat you to the jury fee posting. This could save your client money and costs the defense more to try the case. It may end up being a win-win!

Trial court reporters

Most California courts eliminated court-employed reporters on almost all civil matters. If you want a reporter, you have to bring your own – whether it be for law and motion, or trial. We often waive the reporter on moderate-value cases. This angers the defense. If they want a reporter, they can pay that expense. But you have to be clear that they will be paying 100 percent. In my experience, this works 100 percent of the time and saves a lot of money.

Conclusion

Your practice can be efficient and profitable. It doesn't matter if you litigate small or big cases. All that matters is how you litigate them. I hope this article left you with a few tricks to keep in mind. Maybe you already knew some of them, and maybe you learned something new. Either way, remember – your time is money and don't throw good money after bad!

Mauro Fiore grew up in Southern California and graduated from law school in 1998. Since then he has dedicated himself to representing regular people seeking justice against insurance companies, large corporations and public entities. He has tried cases in both state and federal courts, including wrongful death, premises liability and civil rights trials. He enjoys sharing his knowledge with other lawyers practicing consumer advocacy. He practices in the San Gabriel Valley with two associates.