The Anatomy of a Lawsuit

Andrew J. Rader

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Special Thanks

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  - Howard Weitzner, Esq.
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  - Shauna Cannon, Paralegal Assistant
  - Cheryl Gomez, Dir. of Marketing

- Francisco-Javier P. Digon-Greer, Esq.;
- Karen George, Cole Scott & Kissane (FRP Enrichment CLE Subcommittee Chair);
- Matthew Williams, FRP Enrichment CLE Subcommittee

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Attended George Washington Law School and graduated *cum laude*;
Started as a public defender in the Bronx;
Each of us have been practicing for 30 years;
Handled thousands of injury cases;
Tried cases in federal and state courts;
Extensive trial experience;
AV-Pre-eminent Martindale Hubbell Ratings;
Million and Multimillion Dollar Advocate Forum;
And always the picture of decorum!
Verdicts & Settlements by Rader and/or Cutler

- $4,000,000.00 for a pedestrian;
- $ confidential for failure to follow up cancer;
- $ confidential for an improperly treated stroke;
- $2,975,000.00 unusual complications to steroid injections;
- $2,700,000.00 strangulation in her nursing home;
- $2,000,000.00 pedestrian run over by a truck;
- $1,600,000.00 golf cart accident;
- $1,570,000.00 defective boom lift;
- $1,000,000.00 rear end auto accident;
- $1,000,000.00 slip and fall;
- $1,000,000.00 child eye injury;
- $1,000,000.00 motorcycle accident;
- $880,000.00 rear-end collision;
- $850,000.00 medical malpractice/retained sponge;
- $750,000.00 medical malpractice- ignored acute glaucoma;
- $750,000.00 woman thrown from her wheelchair;
- $700,000.00 rollover MVA;
- $650,000.00 chemotherapy extravasation;
- $582,602.00 male victim of a sexual assault in a stairwell at his workplace;
- $520,000.00 wheelchair bound client injured during transport;
- $505,000.00 negligence passed on by other firms;
- $500,000.00 for child hit by car.

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Do we have a case? What are the **ELEMENTS**?

- **Torts**: Duty, Breach, Causation, Damages
- **Contracts**: Oral, Written, Breach, Damages
- **Statutory**: Legal requirements - eg, FLSA - overtime not paid, exceptions, etc.
Pre-lit considerations: What’s recoverable?

- Breach of contract - economic loss rule
- Torts - economic & noneconomic damages
- Statutory - varies - sometimes treble damages (antitrust, civil theft)

What’s collectible? Insurance company and limits
Sovereign Immunity? $200/300,000
Survivors: lost support & services
Surviving spouse: companionship, P&S;
Minor children: loss of companionship, guidance, P&S
Economic Losses

Question: Dad is 50 years old, divorced. When you, his only child, are 25 years old, a doctor removes the wrong half of dad’s brain, killing him. How much can you recover in the med mal case?
Pre-lit Considerations: Statute of Limitations (the kiss of death)

- Statute of Limitations- is it blown? (95.01, *Fla. Stat.*)
  - Contracts: 5 years
  - Negligence: 4 years
  - Professional malpractice/nursing home: 2 years

- When does the statute start to run?
  - Sometimes, when knew or “shoulda” known (eg, Statute of Repose)
  - After another happening, such as payment for contribution
Attorney payment:
- hourly
- contingency
- statutory fees and costs

Costs
- Client pays
- Attorney pays
Pre-Litigation Considerations

- Who are litigants?
  - What impression do they make?
  - Pre-action investigation (witnesses, autopsy, video)

- Emotional Considerations
  - Long term stress
  - Uncertainty of outcome
  - Possible risk (exp. If there’s a PFS, buy insurance!)
  - Possible death/move/loss of litigant
  - Will the attorney and the client be satisfied in the end?

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Presuit Process?

- Medical Malpractice Cases- 90 day presuit
- Discrimination cases (EEOC 1st refusal)
- Nursing Home- 75 day presuit
- FLSA- 20 days notice
- Statutory or contractual right to cure
- Action against county: 6 months notice
- Civil theft motion- 30 days
Nail down standards, causation and ADD VALUE and MAXIMIZE DAMAGES:

- If there’s sufficient damages and coverage, engage experts:
  - Engineer or other standards experts;
  - Life Care Planner;
  - Vocational Rehabilitation Physician;
  - Economist;
  - Accountant;
  - Physician specialists;
  - At CUTLER RADER, we often spend $15,000 before we make our first demand.
Which Court has jurisdiction?

- Small claims: < $8,000
- County Court: ≥ $30,000; ≥ $50,000 (1/1/23)
- Circuit Court: ≥ $30,000; ≥ $50,000 (1/1/23)
- Federal Court: diversity + $75,000; Federal question

Venue (47.011, Florida Statutes)

- Where event occurs
- Where defendant resides
- Where property located
Plaintiff’s Complaint (Fl. R. Civ. P. 1.110)
- EASY TO AMEND- JUST FILE IF YOU’RE NEAR THE STATUTE!

Complaint is filed- electronic
- With or without discovery demands

You get 120 days to serve

Defendant’s Answer (with affirmative defenses) or respond w/in 20 days (can usu agree to extension)
Cases filed after 4/30/21: Issued w/in 30 days of last deft being served
Cases filed before 4/30/21: Issued later of 30 days after last deft served or 12/3/21;
If there’s already a Trial Order on a 2019-5-Civ case, no new Order Req’d.
New Case Management Order: Circuit Civil- 3 levels of cases

1. **Complex**- disposed w/in 24 months

2. **Streamlined**- disposed in 18 months *(includes usual torts and professional malpractice)*
   - i. Few parties;
   - ii. Non-complex issues related to liability and damages;
   - iii. Few anticipated pretrial motions;
   - iv. Limited need for discovery;
   - v. Few witnesses;
   - vi. Minimal documentary evidence;
   - vii. An anticipated trial length of less than two days.

3. **General**- disposed in 1 year
THE UNIFORM TRIAL DATE LISTED HEREIN IS A FIRM TRIAL DATE AND DEADLINES WILL BE STRICTLY ENFORCED BY THE COURT. STRICT COMPLIANCE MEANS NO CONTINUANCES OR EXTENSIONS WILL BE GRANTED WITHOUT COURT ORDER UPON WRITTEN MOTION SETTING FORTH GOOD CAUSE....

- Civil Trial Pool
- Witness Lists:
  - Fact  120 days before calendar call;
  - Expert  90 days before calendar call;
  - Rebuttal  60 days before calendar call;
- CME  90 days before calendar call;
- Mandatory Mediation  60 days before calendar call;
Discovery Generally
(FL. R. Civ. P. 1.280)

- Anything relevant and not privileged
  - Your opportunity to find out information from the other side to prove your case

  - Written, Deposition, Inspection, Examination of things, places or people, Subpoenas
Discovery- the truth...

- Responses: Expect 60-70% truthfulness *(maybe)*;
- Time is lost or gained in discovery- defendants waste it, good plaintiff attorneys don’t;
- Good discover(ers?) are very tenacious. Wishy-washy answers cannot be tolerated *(but does it really matter?)*;
  - Drag the other side to court as often as necessary. Respond to BS immediately and let the judge know how they’re litigating;
- Slow responses show you to be lazy and/or uninterested;
- Use the 10 day Administrative Order
Interrogatories (questions) (Fl. R. Civ. P. 1.340)

- THINK!!! about what you’re trying to prove. Ask questions that make sense and move you in the direction of proving your case.
  - Who, what, where, when?

- Make sure the answers are sworn!

- 30 days to answer. Extensions are commonly given

- Objections are usually: vague, privileged, overbroad, irrelevant (not usually a proper objection). Go hard at improper objections, including §57.105 sanctions if repeated

- Later in the litigation, there will be expert interrogatories, which are also a waste of time unless you pin the other side down.
### Requests to Produce (Fl. R. Civ. P. 1.340)

- Papers and things (not questions)
  - Photos
  - Inspection logs (lack of maintenance cases)
  - Repair records
  - Personnel files
  - Invoices (do the parts paid for correspond with what they say they did?)
  - Billing records (do the records reflect what they said they did?)
  - Medical records
  - Sometimes can get employment applications or applications for staff privileges
  - Nursing Home records
  - Employee log in sheets (to identify witnesses)- esp’y ones who no longer work there
  - Reports to state agencies (often required by statute: medical events, amusement ride injuries)
  - Office hierarchy sheets (who’s in charge?)
  - Incident reports (usu. privileged)
  - The broken piece of something
  - Testing done on a defective product
  - Tissue samples

- Get copies of everything relied on by the expert in formulating opinions. Then figure out what’s missing, conveniently overlooked or not given proper weight.
Requests to Admissions (Fl. R. Civ. P. 1.370)

- My favorite type of discovery
  - Admit that the signature on Exhibit 1 to these Requests for Admission was that of John Smith.
  - Admit that... the elevator had not been inspected during the 18 months prior to plaintiff’s accident.

- Responding side has 30 days to deny or it is deemed admitted.
**Request to Admit:**
- #3. Admit that the elevator had not been inspected

**Request to Produce:**
- If you denied Request for Admissions #3, provide any and all documents/ invoices evidencing the inspection

**Interrogatory:**
- If you denied Request for Admissions #3, set forth the name and title of the person who inspected;
- Identify any documents generated by such inspection.
Honesty is key especially regarding prior accidents/injuries/actions

Tell client that a good questioner will give the feeling of a casual conversation, causing the client to let down his guard.

Client should know and GENERALLY agree with medical records

If he can’t remember something, ask for help!

Always be respectful (especially if videotaped), but a little righteous indignation is OK.

MOST IMPORTANT:

Client shouldn’t yell “OUCH” when kicked under the table!!

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Defendant’s Deposition

- Can be videotaped, but notice must be given.
- Confirm location and reporter
- A “duces tecum” instructs the deponent to bring certain items, but you should always bring a copy. Think hard about what you want the deponent to bring—especially when you know he won’t.
- Make sure your attorney has records and a sharpie. Pen doesn’t show up on exhibits.
- Figure out ahead of time what questions will make the case. If your attorney can’t ask good leading questions, he should get additional training. Role playing sometimes helps.

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NOT INDEPENDENT- even the courts call them “compulsory”!

These are adversarial proceedings and make sure your client knows it. Many doctors think nothing of giving bogus, or severely skewed, testimony for $1,000,000/year.

Can be attended by you, with stenographer and videotaped (may keep doctor on better behavior);

Dr. is required to give a report containing his opinions;

THINK about whether you need to take Dr’s deposition- it opens the door for additional opinions at trial.
A cost and attorney fee shifting mechanism that uses a 25% rule.

A party is served with a proposal to settle the case for a particular amount of money. The party has 30 days to accept, or it is deemed rejected. Either side can serve.

1. Plaintiff serves a PFS and receives a jury award more than 25% greater than the PFS, he's entitled to fees and costs from the defendant. For example, plaintiff serves a PFS for $100,000 which is not accepted by the defendant. (25% of $100,000 is $25,000). Plaintiff then gets a $130,000 judgment (including taxable costs), he’s entitled to attorneys fees and costs from the day of service of the PFS from the defendant.

2. Defendant serves a PFS and receives a jury award 25% less than the offered amount, the plaintiff pays fees and costs. The defendant serves a $100,000 PFS which is not accepted by the plaintiff and the plaintiff gets a $60,000 judgment. Even tho the plaintiff won, the defendant is entitled to fees and costs from the date of service to the judgment.
## Proposals for Settlement a/k/a Offers of Judgment

<table>
<thead>
<tr>
<th><strong>DEFT’S PFS TO PLAINTIFF</strong></th>
<th><strong>PLTF’S PFS TO DEFENDANT</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>$100,000 PFS: Plaintiff must get total judgment of &gt;$75,000 (100k $25%=$25K) or must pay defendant’s fees and costs.</td>
<td>$100,000 PFS: Defendant must get total judgment of &lt;$125,000 (100k+ 25% = $125K) or must pay plaintiff’s fees and costs.</td>
</tr>
<tr>
<td><strong>TRIAL</strong></td>
<td><strong>TRIAL</strong></td>
</tr>
<tr>
<td>Jury verdict:</td>
<td>Jury verdict: $120,000</td>
</tr>
<tr>
<td>Taxable costs:</td>
<td>Taxable costs: $10,000</td>
</tr>
<tr>
<td>Total Judgment</td>
<td>Total Judgment $130,000</td>
</tr>
<tr>
<td>Plaintiff is responsible for defense’s fees and costs (gets deducted from judgment)</td>
<td>Defendant is responsible for plaintiff’s fees and costs (gets added to the judgment)</td>
</tr>
</tbody>
</table>

- GET INSURANCE!
Mediation

- Opportunity for both sides to try to hammer out a settlement.
- Use a mediator trusted by the other side.
- Discuss numbers in advance with client, but plenty of time during mediation to discuss more.
- Client should be prepared to walk away.
- Your attorney will need:
  - costs and out of pockets;
  - All outstanding medical bills and liens;
  - Gross pictures.
- What’s the definition of a good settlement?
  - All parties walk away equally unhappy.
Pre-trial stipulation: pretty basic - records are authenticated; issues in dispute;

Exhibit and Witness Lists:
- All witnesses and exhibits you could possibly use
  - For personal injury, exemplars like needles

Motions in Limine - THINK

Photo enlargements, charts, etc. Use Excel for charts, but keep them very simple or the data gets too small for jurors to see.

Premark exhibits per court's rules.
Summary Judgment- FSC- 4/29/21
Rule 1.510

- Applies to any motions filed after 5/1/21
- Aligns Florida rule with federal courts
  - A party who does not have the BoP can win SJ if it can show the BoP party cannot make its burden;
  - the test is whether a reasonable jury could find for the nonmoving party;
  - Judge must state on the record its reasoning
- Deadlines:
  - Motion filed at least 40 days before hearing
  - Response at least 20 days before hearing
Bring a screen (the ones in court are usually in the wrong place) or pre-check courthouse technology.

Have an extra copier /printer at the courthouse.

Kinko’s is a great place to have enlargements made.

Find out about witness unavailability before calendar call.

Get trial subpoenas out but call the witness beforehand.

Pay your expert witnesses. You want them to show up.

Be respectful of witness’s schedules.

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Trial days

- Get the attorney a hotel room suite if the trial isn’t very close by (and to keep a stressed and needy attorney far away)
- Be really nice to your attorney during this time
- Be really available to your attorney
- Expect to be on 24/7.

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If the trial goes well, the attorney gets the credit.

If the trial goes badly, the client gets the blame.
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