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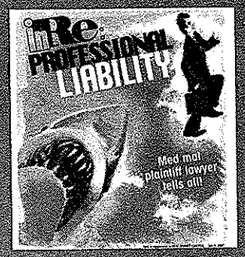


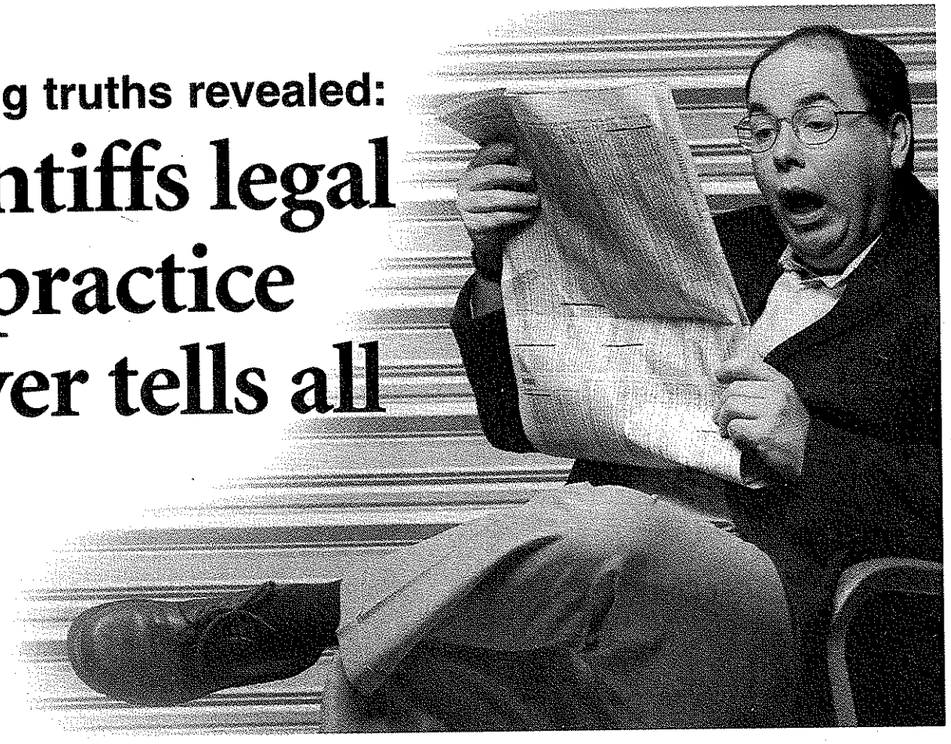
ARTICLES

CASES

DEPARTMENTS

Shocking truths revealed:

Plaintiffs legal malpractice lawyer tells all



Plaintiff's medical malpractice lawyers can be tight-lipped about their strategies for winning cases. Then again — like here — they might tell you everything. And still win.

By Glenn Bergenfield

I have been trying legal malpractice cases for plaintiffs for 15 years. This spring the American Bar Association invited me to address that August body about what I do. *"Plaintiffs legal malpractice lawyers reveal all"* was the title. But in the pre-meeting conference call, the real questions — barely paraphrased to protect the innocent — were these:

- Why would anyone ever sue a lawyer?
- How do you pick the one or two who might have been wronged from the whining, pathetic insincere ones who just won't pay the bill?
- Why isn't a cover-your-ass letter enough?
- What is the matter with you?

What follows is an outline of my attempts to respond, and explain myself: Why I do this for a living, why I agreed to appear and why I spilled my secret guts to such formidable adversaries as Chris Carey and Jim Orr and the rest of the defense jackals.

1. How I pick my cases and expect to win them. And how unwisely they are defended

rule about complaining to the former chief justice about a case, especially one that was poorly reasoned, heedless of affect and utterly contrary to normal tort law principles?" She calmly invited me to speak. So I asked her how the court came to *Puder v. Buechel.* Not one minute into my rant, she was called in to have her teeth cleaned and that was that. I think she and the dental hygienist had a secret signal. As for the court and that decision, we still don't know why they did what they did.

Did I mention huge insurance companies with no sense of proportion and less of humor?

What's in it for me, esteemed members of the Academy, to let you live in my house and read my mail?

Then I realized:

A. I could use this chance to mislead you — not all that follows is "true." Don't pretend you don't know what I mean.

B. Ultimately, there is nothing you can do about it. You can have all the risk management seminars and conferences you want but at the end of the day, lawyers are most excellent defendants and plaintiff's legal malpractice cases are tough to lose.

C. If you understand anything I say about this, then you are hopelessly lost.

2. Plaintiff lawyers in legal malpractice cases: Who we are and what we believe.

We do not hate the law or lawyers or want to defile the temple. We are not anarchists who think the law only oppresses and stifles, nor Marxists who obsess that the law is inherently corrupt, a tool of the ruling class. It is, of course, but just like you we don't care; just get us into the ruling class.

We believe in the rules just as you do. It's just that we expect they will be enforced as to everyone. We are not say-

the belief that the rules apply to everyone. We think the system is greater and bigger and more important than the individuals we're suing. We don't assess the case by the size of the law firm defendant or if the defendant is now or was ever a judge or a governor. Or, for that matter, is a lawyer, former judge or former law professor turned author/legal affair commentator on Fox News. That is neither good nor bad — unless the judge, governor or TV guy didn't buy a tail policy.

RPCs

These are great: they apply to the sole practitioner no more than to the senior partner of a multi-national law firm. We just want to know if your client followed them. If not, let the jury judge him harshly, no matter how high his lofty perch in our crazy birdhouse.

I've made a lot of money with these darn things.

In the old days I'd blow up the RPC at issue on a poster board and keep reading it and knocking on it with my fist during my examination of the lawyer. Now the digital age is upon us and my tech guy just flashes it on the screen, Pavlovian style, every time the lawyer begins to stray off the path claiming somehow his breach of the rule was not … um … a breach of the rule.

Sure, I miss the old days but juries love television and you have to give them what they love. "CSI" is warping expectations: Soon we will be discussing hair fibers and fingerprints in a commercial law case.

My favorite RPCs are 1.8, 1.13, 1.16, 4.2 and 4.3.

RPC 1.8

Has never been followed in the history of the profession. No lawyer has ever told any client she needs to get another lawyer to get legal advice to see if the business deal they have struck is fair to the client and to have him sign off that it is. Every Supreme Court ethics opinion on this issue seems to start with these words:

> "Repeatedly, we have warned attorneys of the dangers of engaging in business transactions with their clients. Attorneys should refrain from engaging in a business transaction with a client who has not obtained independent legal advice on the matter."

The client only wants the attorney as a partner because of the legal advice he or she gives. Most attorneys are not good real estate developers or restaurateurs, just good eaters. Anyone who wants one as a partner is thinking (a) they will give good legal advice and (b) for once, it'll be free and to the point.

If a lawyer ever did comply with RPC 1.8, I'd still take the case and win it. If even a tiny conflict arose, the lawyer would look out for himself and not for his client. It's pointless to deny this: Thousands of years of self-interested human conduct has taught us that. Lawyers are no worse than roofers, stockbrokers and business executives. No better either.

RPC 1.13 – the organization as client

Lawyers, like everyone else, play favorites. Everyone likes the front-runner and despises a loser. No one, it seems, voted for Nixon or was in favor of invading Iraq. They want to back the winner, the one with dough, the one who will stick around. And when the lawyer takes sides we are back to RPC 1.7 (conflict) and a most excellent case.

RPC 1.16 — terminating representation

Sending a letter in lawyerese saying, "Kiss my ass: You are fired and won't get your file until you pay me" does not comply with RPC 1.16. Quitting over an unpaid bill often elicits deep sympathy from the trial judges and your adversary but clients do not understand why you are exulting and they call me.

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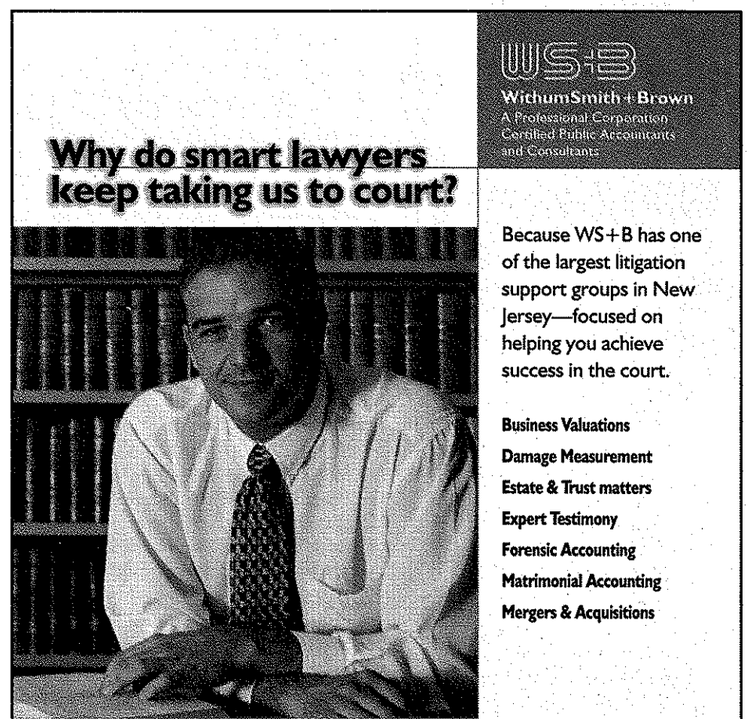

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The New Jersey Supreme Court does not, in its analysis of how to quit a client, side with you.

If you fire your client in a way that embarrasses them and seems to harm the case, this is excellent news from my perspective. The examination of you is about all the dreadful things you did and the many things you forgot to do. So I'll ask you about the shameful way you quit the client — that you revealed to the adversary your soon-to-be-not-my-client anymore was not taking your excellent legal advice, was planning to lie to the court and now impoverished. When you quit a client when the case is going bad, it's not a huge leap to prove you just didn't want to be around when your own mistake was evident to everyone.

RPC 4.2 and 4.3 — talking to past and present employees

If they are not represented by an attorney and not in the litigation control group, you probably can talk to them. Just asking some questions beats what you learn at depositions. This is an underutilized method of fact collection.

RPC 8.3 and 8.4 — misconduct and reporting it

I'm about to use these for the first time. It's the whole honor code conundrum: If a lawyer steals fees from his partners but the partners do not report him, how do we judge that behavior?

To understand the cases we like and the cases we bring, you have to understand this is how many of us see the law and the world. It may not be the same way you see it. We don't think the institutions of the law craven or false, just expect everyone should follow the rules.

3. Parameters for case-picking

A. The story

Look for the classics. There are a few that all humans respond to:

1. The torture of one who is powerless — except to tell the truth.
2. A woman lied to and abused by powerful, callous men.
3. The individual of integrity who stands up to the cruel mob.
4. Love that is not returned.
5. Betrayal by those in positions of trust.

feud begins and there is a stabbing. Even then. No matter how closely the story follows some other narrative, every legal malpractice case is about betrayal by one who we expect to act more honorably. Or, as the Honorable Benjamin Cardozo said, almost as eloquently: "Not honesty alone but the punctilio of honor most sensitive."

B. The client

Our best clients are a lot like yours: well-spoken, thoughtful, attractive — though not too much — and patient. We like ones who trust us, believe the system will work its magic and with our brilliant insight things will come out as they should, in due course.

What we get is paranoia, fury and psychosis. And ignorance of legal procedure.

When you quit a client when the case is going bad, it's not a huge leap to prove you just didn't want to be around when your own mistake was evident to everyone.

The great majority of plaintiffs who call us are in this situation: Something awful has happened — a divorce or bankruptcy, a partner who is a thief, an auto accident or medical care calamity. Something shattering. A lawyer has been hired and she promises to fix things, to right the wrong. She not only fails at that, she usually covers up or, at least, does not explain how the loss might have been caused by her. And it does not go unnoticed that she is very courteous and friendly to the victorious adversary's lawyer and he, in turn, seems all too friendly with the judge who tossed the case.

We are seeing them at the worst, most suspicious and angry time of their lives. Half of my clients are convinced they lost their case based on secret agent who will slip the knife between their shoulder blades.

Many of the clients bring their case to me in Tupperware containers. Tupperware is tough and waterproof and may thwart spy cameras. Some put the Tupperware into suitcases and wheel it in to my office. The more relaxed among them use Ziploc bags.

Part of the challenge of representing clients like this is to gradually lower their paranoia and sense of outrage without confronting it directly. Of course a client can't testify at deposition her case was lost because the lawyer was paid off by the defendant. This is, we all know, a losing view of things.

We act as translators of the legal system. We reassure them the legal malpractice case, unlike the case leading up to it, will go according to rational rules and fair play.

If we do our job as plaintiffs malpractice lawyers well, who our client is will have little impact on the case. If the case follows my path, it will be about the lawyer's bad work, with the client just a victim. More on this later.

This is the point: We cannot care if our client is unattractive and a little mentally ill, if they are irritating and broke. We can't even follow the old lawyer's saw that if the client has a bunch of former lawyers, tell them to go away. Our clients are a difficult gang and that is that.

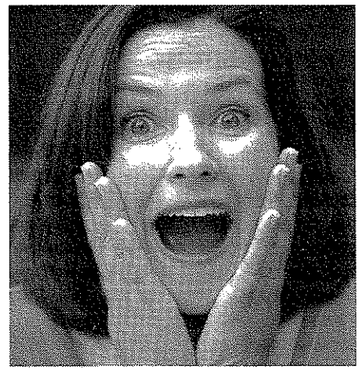
C. Cases we accept and evidence we seek

I'm often asked how we pick cases, implying we must have to be especially wary because the cases are weird and mysterious.

It's simple. Big cases are good, if I think I can win them. Small cases are bad and *Saffer* fee-shifting damages does not change things. That's how I pick them.

Though you think we should be wary, the fact is we apply the same rules as other plaintiffs lawyers: Someone who is mentally ill, very suspicious but has Mesothelioma is very desirable. Those lawyers advertise on the soaps and manage to make a good living. We think the same way.

I look for a case in which the lawyer's conduct seems impossible to defend,



to juries. Lawyers' double-dealing is not an unfamiliar theme.

I want to see the correspondence from the lawyer to the client. If the tone is abrasive, I am hugely encouraged. If the letters are full of lawyer baloney, are not understandable to any other humans except lawyers, if they don't actually say anything, that also is good news.

I want anything that will force the lawyer to disavow his work done on the underlying case. Saying the case was always a loser is the most obvious and best example. But it also is great when the lawyer has changed direction without memos or letters or normal indicia that he changed his mind. If the lawyer fights for nine years to avoid a certain result — charging a lot for that work — and (1) on Dec. 7 writes to the court a pre-trial memo that the result cannot occur but (2) on the day of trial, Dec. 11, agrees it can, and (3) later at his deposition says it was inevitable, there needs to be a lot of proof how that switch occurred. A jury won't believe that lawyer if he cannot show he discussed it with others, researched, thought it through and asked his client first.

So what I seek in selecting a case is a cover up. I call this "the Nixon Rule." Feel free to rename it the "Clinton Rule." Or the "Gonzalez Rule." The crime can be obscure, hard to grasp, perhaps minor; but if there is a cover up, it's a good case. Juries may not understand the facts of the underlying case, the lawyer's activities or what constitutes the standard of care, but everyone thinks they know a cover up.

in the facts of the lawyer's conduct. If the case is tried on my terms, it will be about the lawyering of the case and not the case that was lost. I'm interested in the underlying case for three main reasons: (1) To see how big the case might have been, for damages; (2) To see if there were other reasons it might have been lost in addition to the lawyer's bad work; and (3) To help me figure out how my case will be defended. Usually it's by attacking the underlying case, not the lawyer's work. The case was a loser; there was no proximate cause or no duty and so on.

Case defense

But this common defense when made to a jury is rarely a good one. It positively has its risks. It will never work if a plaintiff's lawyer is the defendant. The hypocrisy is immense.

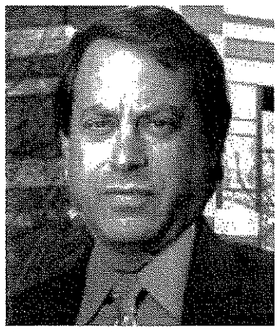
"So, you took this case on a contingency, paid all the costs, worked hundreds of hours on it and sent out this demand letter for millions, right? When did you first decide the case was so horrible?"

The lawyer's file is often the best refutation of this defense. Within it are many arguments for how the case might have been won. The lawyer cannot easily disavow his work, for which he was paid.

Some cases are defended by saying the lawyer exercised his judgment; the "judgment rule" defense. Although this theory sometimes appeals to judges, it never does to juries. If the lawyer made a judgment and the case was lost due to that, it's a nice, tidy explanation for a jury. Besides, in any malpractice case there are usually several instances of bad "judgment" to discuss. So this is a poor explanation, too small for the accusation.

Finally, the best evidence is the lawyer. I use their file and their recollection to tell what the case is about. They are my first witness and when they are done, I usually feel my case is in.

Lawyers as negotiators is a topic worthy of study. All of us will proudly say they were born to do this, to haggle and force their way. A lawyer in New Brunswick always tells me the same story about his Mercedes from Ray Catena Mercedes. "I hate bumping into



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tripled in size since I first heard the story.

I call this "The Mercedes Delusion: Lawyers as Negotiators." So many of my calls about cases concern what your former clients consider your wretched negotiating skills. They think you settled because you were unprepared and weak.

Early on in my career I dreaded this ganging up, but once, a few months after a trial, I ran into a juror in the mall and before I could say don't talk to me she blurted out, "We didn't understand a thing any of you were saying but the judge was so mean to you we decided the case in your favor."

So, may it please the court, you can treat me fairly or shout at me all you like. It makes no difference to me. If you seem to favor the lawyer defendants in front of the jury, you may not be doing them any favors.

Lawyers as witnesses

There has to be a way to sound smart about the law without using lawyer words, but I've never seen a lawyer defendant do that. Non-lawyers don't like lawyer talk. "I would argue," "I urged that," "satisfactorily," "lacking merit," "putative," "agreement in principal," "vitriolic," "in lieu." It conjures up no image and has a meaningless, dead feel to it. Who else says this stuff?

And lose the cufflinks and robust cologne. It's a cliché. Fewer people wear a tie to work; cufflinks are a freaky surprise.

Conclusion

Americans fancy themselves as having all sorts of rights: To smoke, to not be exposed to smoke. Clean water, clean air and cheap gas. The right to healthcare and higher education. The right to being accommodated no matter what. It's no wonder our culture has come to rely on lawyers so very much.

And what follows is our right to sue our lawyers when they disappoint and tell us they will do it but don't.