

## Federation of Defense and Corporate Counsel Winter Meeting

February 24-28, 2026

The J.W. Marriott Desert Ridge Resort, Scottsdale, AZ

### Psychological Warfare – Positioning Yourself as an “Advocate” for the Plaintiff

Narrative

***“If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer defeat. If you know neither the enemy nor yourself, you will succumb in every battle.” – Sun Tzu, The Art of War***

#### I. Introduction

It is no secret that plaintiffs’ counsel in personal injury cases operate on a contingency-fee basis. Typically, those fees range from 33% to 40% depending on how quickly the case is resolved, including whether the case is resolved pre-suit.<sup>i</sup> This type of fee arrangement entices a wide-range of clientele who may not have the funds to pay a retainer and fees throughout litigation but who have a sound case. While the payoff can be immense, the risk is also great. All of this matters because it helps defense attorneys understand the psyche of a plaintiff’s lawyer.

#### II. Taking a Look into Plaintiff’s Mind: The Pressure Points of Plaintiff’s Counsel

The following summarize the inherent risks in a plaintiffs’ lawyers’ personal injury practice. These risks can be described as “pressure points.”<sup>ii</sup>

- a. **Feed the Firm:** We have to appreciate that plaintiffs’ counsel in personal injury cases have a completely different business model than we do. Because they work on a contingency fee basis, it can lead to feast or famine. Consequently, it is not uncommon for them to encounter issues with consistent cash flow.<sup>iii</sup> Without consistent cash flow, the plaintiff’s firm will not be able to effectively go up against deep-pocket defendants. Therefore, when they do get ahold of a high-value case, which plaintiff’s counsel may refer to as “bet the firm” cases, this triggers a “do or die” response, which often leads to highly contentious and adversarial litigation.
- b. **Client Management:**<sup>iv</sup> Here’s the reality, not all plaintiffs’ lawyers have a handle on their clients. Their clients differ from ours. While our clients tend to be more sophisticated, possessing business acumen and often having experience in the litigation process, plaintiffs’ lawyers often deal with non-

savvy clients who have unrealistic expectations. At times, the lawyers working the files in the plaintiff's firm lack experience in managing the expectations of their client, which can lead to the plaintiff taking the wheel. When this happens, the case may become nearly impossible to resolve without becoming adversarial. After all, the plaintiff's client has nothing to lose if his or her lawyers show up to trial and loses. Plaintiff's counsel on the other hand has everything to lose.

Another very important aspect of client management in plaintiff personal injury cases is the financial toll protracted litigation takes on a plaintiff. The plaintiff is anticipating a large payday (especially if the defendant has deep pockets). However, when settlement is nowhere in sight or it is taking much longer than anticipated, the plaintiff may become desperate to get cash for their claims. Consequently, many of these plaintiffs will seek pre-settlement funding, which is a cash advance given to plaintiffs who are waiting for their personal injury case to resolve.<sup>v</sup>

The problem is, pre-settlement advancements come with very high interest rates, often ranging from 27% to 60% per year.<sup>vi</sup> That means that a plaintiff who receives a cash advancement for \$1,000 a year later, will be responsible for repaying anywhere between \$1,270 and \$1,600 back if the case takes a year to settle.<sup>vii</sup>

Sometimes funding agreements compounds interest, meaning that interest not only accrues on the principal loan amount but also the previously accrued interest.<sup>viii</sup> That means two years later that same \$1,000 loan will cost the plaintiff anywhere from approximately \$1,613 to \$2,560!<sup>ix</sup> No wonder many plaintiffs are in the hole financially taking pre-settlement cash advancements with high interest rates. While these loans do not affect the plaintiffs' attorneys' fees, this amount comes of the plaintiffs' in-pocket payout. Consequently, it matters to us because plaintiff's counsel often feels pressure to get plaintiff a settlement above what he or she may already be in the hole for because of these loans. That means that the plaintiffs' lawyer must now obtain a higher settlement to get the plaintiff his or her in-pocket amount, otherwise, the plaintiff is unhappy, and the lawyer may lose control of the trajectory of the case.

- c. Competition:** It may go without saying that the market for plaintiff's firms in personal injury is highly saturated. You can throw a stone down the street and hit five plaintiffs' personal injury firms. The highly competitive nature in gaining clients often puts pressure on plaintiff lawyers to fight tooth and nail to win big, leading to contentious litigation. After all, how often do we see commercials of plaintiff's lawyers bragging about the huge verdicts they have won for their clients? The need to beat-out the competition also feeds into the need for plaintiffs lawyers to cater to plaintiffs or else fear being fired, taking their potentially high-value case down the street.

- d. **Reputation:** Often going hand-in-hand with competition, reputation is everything. Plaintiffs are fully aware that a case's valuation may often consider the identity of the plaintiff's lawyer filing suit. Is this a plaintiff's firm that has no problem going to trial? Is this a plaintiff's firm that almost exclusively does pre-suit litigation and if suit is filed, hands the case off to another firm to handle? In many plaintiff's counsel's eyes even if they lose but they fight hard and gain a reputation for not being easy to litigate against, it's the cost of doing business. They would probably spend more in advertisement anyways.
- e. **Out-of-pocket expenses:** Plaintiffs' lawyers front all the costs of litigation.<sup>x</sup> They feel an extreme amount of pressure to recoup these costs. In reality, the out-of-pocket expenses begin before a potential client even signs a retainer agreement. Due to the risks associated with contingency-fee agreements, plaintiffs' firms often spend a good amount of resources on the case-intake process. In fact, there are companies that exist solely to cater to these lawyers' marketing and intake needs.<sup>xi</sup> Frankly, these services are not cheap. This is especially true when dealing with mass tort cases where more viable claims equals more bargaining power.<sup>xii</sup> What plaintiffs' lawyers have already invested into the case will play a role each time in determining how the case is going to be handled.

### III. **How do we appeal to Plaintiff's counsel's pressure points in tangible ways during the litigation process?**

- a. **Pre-Suit Demands:** Just like plaintiffs' attorneys invest monetarily upfront in the intake process, we should invest upfront with our time when assessing a pre-suit demand. Obtaining a more accurate snapshot upfront of the substantive law involved, the likelihood of success in the applicable venue(s) if the case is filed, the type of damages claimed and the applicability of any caps on those damages will allow us to better inform our clients on the reasonableness of plaintiff's initial demand. Understanding of course that there are certain limitations pre-discovery, we should get as complete of a picture as possible before a lawsuit is filed, which will create a better foundation for the relationship with plaintiff's counsel. Many plaintiffs' attorneys will increase their fee once suit is filed. There are situations where it may be advantageous to allow pre-suit discovery or even arrange for an informal meet-and-greet with the plaintiff.

However, often times the plaintiff filing suit is unavoidable when the demand or opposing counsel is unreasonable. Nevertheless, being able to informatively articulate why the pre-suit demand's terms are not accepted may create goodwill and harvest good faith between the parties. Hopefully, it will also enable plaintiffs' counsel to understand the weaknesses in their case and allow them to temper their own expectations. However, when dealing with difficult opposing counsel, that may not always be the case.

- b. Initial Pleadings:** Once suit is filed, strategy pivots. There are multiple courses of action that can be taken at this point but the goal here is to continue good faith interactions with plaintiffs' counsel in a manner that positions us a "advocate" for the plaintiff so that we can serve our clients better. This means perhaps avoiding unnecessary conflict. After all, conflict for conflict's sake may not be in our client's best interests. For example, sometimes it is best to accept service of process.
  
- c. Discovery:** Undoubtedly, discovery is one of the most important components of litigation. Unfortunately, the longer the case goes on the more issues that arise with client management. While initially this can become advantageous, once you go passed the point where plaintiff loses hope that the case will ever resolve and forgets about the money and starts thinking about the "principle") the plaintiff starts to feel like he or she has less to lose and is more willing to go to trial and frankly there is a higher chance that the plaintiff could become unresponsive. Consequently, it may be more strategic to insist on conducting plaintiff's deposition first. Many times, the plaintiff is merely waiting for the opportunity to tell his or her side of the story and is even more so willing to do so earlier in the suit. Engage with plaintiff while plaintiff is still engaged.

Consider ways to make discovery, and thus claim resolution, more efficient. For example, one tool that may aid in making the time spent conducting discovery more effective in transportation cases is telematics. Telematics effectively harnesses data such as speed, location, and other metrics that provides a more robust picture of the accident or the driver's behavior.<sup>xiii</sup> Utilizing telematics may help reduce liability by showing there was no negligence on the part of the defendants, or it may reveal that an earlier settlement is needed based on the facts.<sup>xiv</sup> At any rate, it is an example of taking full advantage of the time spent in discovery in a more effective manner that leads to efficient claim resolution, which not only benefits the plaintiff but our clients as well.

- d. Mediation:** An effective use of the discovery period makes for a more productive mediation. Productive mediation alleviates plaintiffs' counsel's pressure points and provides for more efficient resolution of the case. However, when to engage in mediation or whether to engage in mediation at all is a decision that requires complete understanding of all the material facts of the case, the jury pool, the judge, the damages, viable affirmative defenses, etc. For example, there may be scenarios where it is more beneficial to offer early settlement of minors. Furthermore, complex and/or difficult cases such as death cases may require more creative solutions, such as setting up a college fund for surviving young family members regardless of the settlement.

#### IV. Conclusion/What's in it for us/our clients?

Understanding and utilizing plaintiffs' pressure points to our benefit is how we not only best serve our clients but also how we position ourselves as an "advocate," for plaintiff when it is time to reach common ground and dispose of the case as quickly as possible.[.....]

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<sup>i</sup> Baumgartner, Greg, *How Do Personal Injury Attorneys in Texas Get Paid* (November 12, 2024), <https://baumgartnerlawyers.com/how-do-personal-injury-attorneys-in-texas-get-paid/#:~:text=How%20do%20personal%20injury%20attorneys%20get%20paid?,%2C%20flat%20fees%2C%20and%20retainers.>

<sup>ii</sup> Och, Justin Sifu, *Pressure Points in Martial Arts Self Defense*, (June 24, 20213), <https://sifuochwingchun.com/summer-camp-martial-arts-pressure-points/>. In self-defense, "pressure points" are known as areas on the body that are sensitive and susceptible to injury.

<sup>iii</sup> Torkzadeh, Reza and Ari Kornhaber, *Fueling Growth: The Power of Capital for Plaintiffs Law Firms*, (October 2, 2023), <https://lawyeriq.esquirebank.com/article/video/fueling-growth-the-power-of-capital-for-plaintiffs-law-firms/>.

<sup>iv</sup> DeFreitas, Hannah, *Personal Injury Case Management Guide & Checklist*, (September 10, 2024), <https://www.casepeer.com/blog/personal-injury-case-management-guide-and-checklist.>

<sup>v</sup> Ward, Lauren and Stephen Sylvester, *Pre-Settlement Funding*, (July 15, 2024), <https://settle4cash.com/pre-settlement-funding/>.

<sup>vi</sup> Tribeca Lawsuit Loans, *What is the Interest Rate on a Lawsuit Settlement?*, (January 10, 2025), <https://tribecalawsuitloans.com/what-is-the-interest-rate-on-a-lawsuit-settlement/#:~:text=27%25%20to%2060%25%20per%20year,2.>

<sup>vii</sup> *See id.*

<sup>viii</sup> *Id.*

<sup>ix</sup> *Id.*

<sup>x</sup> Stout, Hank, *Personal injury attorney fees: How much does hiring us cost?* <https://www.sutliffstout.com/how-lawyers-make-money/#what-are-contingency-fees?>

<sup>xi</sup> Match, Teresa, *Client Intake: A Guide for Law Firms*, (September 2018, updated March 3, 2025), <https://www.clio.com/blog/client-intake-law-firms/>.

<sup>xii</sup> Russo, Anthony, *The Benefits of Joining a Mass Tort Lawsuit*, <https://therussofirm.com/the-benefits-of-joining-a-mass-tort-lawsuit/>.

<sup>xiii</sup> The CLM, *Telematics: A Sword and a Shield*, (September 13, 2023), <https://www.theclm.org/Magazine/articles/telematics-trucking-litigation-sword-shield/2716.>

<sup>xiv</sup> *Id.*