

HOW TO MAXIMIZE THE VALUE OF A PLAINTIFF'S CASE

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- I. Building/Working up a case and maximizing the value of the case are intertwined
- II. In-person meeting with the prospective client prior to taking the case
 - a. Need to know who the person is that you will be representing over the next 6 months to 3 years
 - b. Have the prospective client bring to you all documents and things related to his/her claim,
 - i. Review as much evidence as you can prior to meeting with the client, if possible. But,
 - c. Objectively appraise case
 - i. The prospective client will give you the best version of the case possible.
 - ii. Identify the following
 1. type of case
 2. the defendants
 3. legal issues
 4. factual issues
 5. types of damages
 6. estimated cost of litigating the case
 7. estimated time and resources required
 8. need to associate other lawyer(s)
 9. likelihood of success at trial
 10. odds of case being appealed by defendant(s)
 11. estimated net value of the case

- d. Be selective in the cases you take
 - i. Takes time, money and resources to litigate a case. Like in poker, you don't want to be the guy invested in every hand. Choose your cases wisely. Remember, just because you are busy does not mean you are making money. We must be smart about the cases we take, so that we may work up the cases as best we can.
- III. Represent as many plaintiffs from the incident/accident possible
 - a. Explain to each plaintiff how that representation works
 - i. Get written authorization from each plaintiff
 - b. Gives you control over the litigation
 - i. Helps you better develop your case
 - ii. Prevents being harmed by other lawyers' potential mistakes
 - iii. Bring in any additional attorneys, as needed
- IV. Begin managing your client's expectations
- V. Determine if the case may be settled for good value without having to file a lawsuit
 - a. Saves, time, resources, and expenses
 - b. Damages versus available insurance money
 - c. Insurance adjustor willing to agree to meaningful settlement
 - d. If suit is filed, what defense attorney(s) will be assigned the case from the insurance carriers
 - i. How much work are they looking to perform prior to meaningful settlement
- VI. Identify all potential insurance policies
 - a. Cast a wide net—shotgun approach
 - b. Identify all insurance policies that might provide any type of coverage for your case
 - i. Obtain each policy and read it carefully and with an eye toward providing coverage

- c. UM
 - i. Resident Relative Theory
 - 1. See separate part of outline entitled “resident relative theory”
- VII. Get a scheduling order in place with a trial date, if the judge will allow it
 - a. Trial dates lead to faster resolution of the case
 - i. Settlements
 - ii. Verdicts
- VIII. Draft jury instructions early in the process
 - a. This forces you to focus on what you actually need to prove
 - i. What is the critical evidence you need
 - b. For each element of liability and damages, identify the facts that you must establish in order to win
- IX. Preserve evidence for trial
 - a. Identify and talk to witnesses as soon as possible
 - i. Nail down testimony of key witnesses
 - ii. Try to do this before the defendant(s) speak with the witnesses
 - iii. Use affidavits
 - b. Take photographs
 - i. Accident scene
 - ii. Defective premises
 - iii. Defective product
 - iv. Visible injuries
 - c. Reports of incident
 - i. Police

- ii. Internal corporate records
 - 1. Fight for these
 - a. Prepared in the ordinary course of business and not in anticipation of litigation
- iii. Medical records
 - 1. Ambulance personnel's records of client's alleged statements made between the accident site and the hospital or between hospitals
 - 2. Client's medical records
 - a. Speak with doctors
 - i. Obtain helpful letters from doctors clarifying injuries "to a reasonable degree of medical certainty"
- iv. Video surveillance
 - 1. Accident location
 - 2. Dashboard of vehicle(s)
- d. Review social media accounts (Facebook, Twitter, and Instagram) of the plaintiff(s), defendants and key witnesses
 - i. Comments
 - ii. Photographs
 - iii. Videos
- X. Instruct client to stay off of social media: Facebook, Twitter, and Instagram
 - a. Comments
 - b. Photographs
 - c. Videos
- XI. Plaintiff should get all medical treatment related to the injuries
 - a. Follow all treatment recommendations

- b. Plaintiff needs to report to medical providers how his injuries affect his activities of daily living
 - i. Ability to work
 - ii. Sleep
 - iii. Perform daily chores at home (Loss of household services)
 - iv. Perform recreational activities
 - v. How injuries impact your relationships
 - 1. Family
 - a. Including loss of consortium
 - 2. Friends
 - 3. Co-workers
- XII. Things the plaintiff should not do:
- a. Social media: see above
 - b. Talk to anyone from any insurance company
 - c. Talk to medical providers about certain aspects of her case
 - i. “patient is stressed that she will not get a large settlement for her injuries.”
 - d. Talk to anyone about attorney-client conversations or disclose written correspondence to anyone
 - e. Be seen engaging in activities that could be used by defendants to question the veracity of damages claims
 - i. Defendants use surveillance
 - 1. Playing with the kids in the yard
 - 2. Shopping
 - 3. Golf

4. Etc.

XIII. Plaintiff must make a good impression

- a. Plaintiff should be forthright about prior incidents, accidents and injuries
- b. Plaintiff should be honest about the extent of his/her injuries or other damages

XIV. Use depositions in the traditional sense and also as though the deposition is the trial by implementing examination tactics that would be saved for trial

- a. 90% of cases settle before trial
- b. Use depositions as a tool to drive up the value of the settlement

XV. Experts

- a. Identify which ones you need
- b. Take the time and energy and focus to find the best ones for your case

XVI. Negotiate Subrogation Liens

- a. While paying these liens is a legal requirement, getting these liens reduced is a great way to add net value to the client
- b. Prepare for this as early as possible
- c. Gather the necessary information from the 3rd party payor
 - i. Medicare
 - ii. Medicaid
 - iii. Private Payor
 - iv. Make sure that liens are not for anything outside of your client's damages.
 - 1. Obtain itemized list of billing.
 - 2. Be careful not to assert anything that could be harmful to the damages claim, though.

3. When negotiating, speak on the phone to the carriers
 - a. Explain the risks that the client won't prevail at trial, which would result in the 3rd party payor not getting reimbursed anything
 - b. Reasons why the Client won't settle without first obtaining a lien reduction.
- d. Made Whole Rule
 - i. Applies only to private payors
 - ii. In Mississippi (and most other jurisdictions), the "made whole" doctrine prohibits subrogation until a person has been fully compensated, or "made whole", for his total loss. *Hare v. State*, 733 So. 2d 277, 284 (Miss. 1999). And, where either the insurer or the insured must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume. *Id.* at 284. This rule cannot be overridden by contract language. *Id.* The intent of subrogation is to prevent double recovery by the insured. *Id.* Until the insured has been fully compensated, there cannot be a double recovery. *Id.* The precise measure of reimbursement is the amount by which the sum received by the insured from the third party, together with the insurance proceeds, exceeds the loss sustained and the expense incurred by the insured in realizing on his claim. *Hare*, at 283, *citing* FREEDMAN'S RICHARDS ON THE LAW OF INSURANCE, v. 2 section 12.6 (6th ed. 1990).

XVII. Mediation

- a. Most of the time, don't mediate the case until after the discovery period has ended
 - i. Determine whether or not you should mediate before any *Daubert* motions have been ruled upon by the court.
- b. Select a mediator who is suited for your case
- c. Prior to mediation, fully inform the mediator of the case
- d. Know what your client would net, after attorney fees and case expenses are factored into the equation, at various settlement numbers
- e. Manage your client's expectations

XVIII. Trial

XIX. Resident Relative Theory of Recovery in UM Claims

The UM act, Miss. Code Ann. § 83-11-103(b), includes in its definition of “insured” the “named insured, and while resident of the same household, the spouse of any such named insured and the relatives of either”. Under this provision, if UM insurance is purchased by a named insured, the coverage extends to her spouses and to all relatives resident in the named insured’s household.

Looking to the Mississippi courts for a working definition of the term, “resident”, the Mississippi Supreme Court has given broad construction to the term. See *Miss. Ins. Law and Pract. Sec. 610*, citing *Johnson v. Preferred Risk Automobile Ins. Co.*, 659 So. 2d 866, 874 (Miss. 1995). The term, “resident” has no technical or fixed meaning; the term is flexible, elastic, slippery and somewhat ambiguous.” *Johnson v. Preferred Risk Automobile Ins. Co.*, at 872, citing 77 C.P.A.S. *Resident* at 305 (1952). “The term ‘has an evasive way about it, with as many colors as Joseph’s coat.’” *Johnson*, at 872, quoting *Warble v. United States*, 244 F.2d 158, 163 (9th Cir. 1957).

For purposes of insurance, a person may have more than one residence, making that person a resident of more than one locale. *Johnson v. Preferred Risk Automobile Ins. Co.*, at 874, citing *Aetna Cas. And Sur. Co. v. Williams*, 623 So. 2d 1005, 1009-10 (Miss. 1993). For instance, a person may have multiple residences simultaneously. *Johnson*, at 873, citing *Aetna Cas. And Sur. Co. v. Williams*, 623 So. 2d 1005, 1009-10 (Miss. 1993), internal citations omitted.

Further, a dwelling place need not be fixed and permanent in order to qualify as a residence. Even a temporary and transient habitation can qualify. *Johnson*, at 873, citing *Aetna Cas. And Sur. Co. v. Williams*, at 1009-10. “It has been held that ‘the term ‘residence’ imports merely having an abode at a particular place which may be one of any number of such places at which one is, at least from time to time, physically present.’” *Johnson*, at 873, citing *Aetna Cas. And Sur. Co.*, at 1009-10 (Miss. 1993), quoting *In re Brown*, 505 NY’S. 2d 334, 132, Misc. 2d 811 (N.Y. Sur. 1986). Whether a person “resides” at a particular location is a practical question which turns on the degree of one’s attachment to a particular place of abode. *Johnson*, at 873, citing *Aetna Cas. And Sur. Co.*, at 1009-10.

The two concepts most often discussed in defining “resident” are 1) presence; and 2) an intent to remain for some time. However, again, there is no fixed formula for determining how much of any factor (presence, intent, or time) is required. *Johnson*, at 872, citing 77 C.P.A.S. *Resident* at 305 (1952).

Examples of how Mississippi courts have ruled on the issue of residency provide guidance. Where a husband and wife maintained separate households, the husband was considered to be part of both houses for purposes of the homeowners’ liability policy. *Huyett. v. Omni Ins. Co.*, 2013 WL 319225 (S.D. Miss. 2013). Adult children residing temporarily with their parents while planning to move to Arkansas to report a new job were determined to be residents of their parents’ household for purposes of UM coverage. *Johnson*, at 866. In general, college students are considered residents of their parents’ home, although they reside elsewhere for most of the year, and visit their parents only occasionally. *Johnson*, citing *Morgan v. Illinois Farmers Ins. Co.*, 392 N.W. 2d 37 (Minn. App. 1986).

In conducting analysis in determining whether a person is considered to be a resident of a home based upon her attachment to it, the Mississippi Supreme Court has employed the following factors, which are useful, but not, in and of themselves, determinative:

- Having a room in the house;
- Having clothing in the home;
- Staying in the home at least occasionally.

Aetna Cas. And Sur. Co., at 1009-10 (Miss. 1993).

Importantly, the Mississippi Supreme Court ruled in *Aetna Cas. And Sur. Co.* that “a child is a resident of both parents’ households until he or she reaches the age of majority or becomes fully emancipated.” *Id.* at 1009-10.

A definition of resident relative requiring that he primarily reside in the household of its insured shall be disregarded, as such language was declared void by the Mississippi Supreme Court in *T.B. v. Liberty Mut. Ins. Co.*, 2012 LW 3582640 (S.D. Miss. 2012). The Court reasoned that “because inclusion of the term “primarily” would have the effect of narrowing that definition to only one residence—the primary one—it would have the effect of limiting coverage beyond what was intended by the statute. *Id.*, at 3, citing *Bollin v. Progressive Northwestern Ins. Co.*, 2009 WL 1010770 at *8 (E.D. Mo. Apr. 9 2009) (“While a person may reside in two places for purposes of insurance coverage, a person cannot reside ‘primarily’ in two places”).¹ The *T.B. v. Liberty Mut. Ins. Co.* court disregarded that limiting definition and, instead, construed the issue of residence with reference to the definition found in the UM statute. And, as stated heretofore, the UM act, Miss. Code Ann. § 83-11-103(b), includes in its definition of “insured” the “named insured, and while resident of the same household, the spouse of any such named insured and the relatives of either.”