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THE DAMAGES ARE INSUFFICIENT  
CONSIDER THE IMPACTS OF COMORBIDITIES  
THE CAUSATION ARGUMENT IS WEAK  
YOUR CLIENT'S CLAIMS DON'T MATCH THE RECORDS  
FINGER POINTING WILL LIKELY RULE THE CASE  
THERE'S NO CLEAR STANDARD OF CARE  
THE CASE HINGES ENTIRELY ON INFORMED CONSENT

# 7 Signs You Shouldn't Take a Case

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# Introduction

Every lawyer wants a steady stream of cases—not only to grow their practice, but to advocate for more clients. But for personal injury and medical malpractice lawyers, the tricky part can be recognizing the signs for passing on a case.

It's tempting to want to secure justice for every injured prospective client that turns to you for support. It's also easy to become emotionally invested in recovering damages, particularly for those who have suffered traumatic injuries or gross misfortune. But the reality is, not every case is a winner.

Sometimes, the investment will far outweigh the return an attorney can reasonably achieve for their client or their firm. In such cases, it's important to consider these seven telltale signs you should really say no to a case on your desk.



## CHAPTER 1

# The Damages are Insufficient

Injury cases—particularly medical malpractice cases—are expensive. Neither attorneys nor clients want to go through two (or more) years of case workups and court filings to only end up with an insignificant compensatory sum.

Before taking on a case, it's crucial to gauge the potential compensation and make sure pursuing a case is in all parties' best interests.

Imagine a potential client comes to your office and describes an incident where they were wronged. They may have suffered some kind of injury, for instance, from slipping in a grocery store and breaking their fall by landing on their wrists and forearms. They have wrist soreness, but nothing was broken, and the soreness seems to be going away.

Take a breath, and express both sympathy and empathy towards the injured person. Let them know you need to first assess the case so you can advise them on viability and potential damages. Investigate the potential defendant—are they a large chain grocery with deep pockets that might have insurance to settle small cases like this? Or are they a mom-and-pop neighborhood grocery store with inadequate or no insurance that might fight this claim all the way to trial? Based on similar cases in the jurisdiction, what are the potential damages the client might receive for this non-life-threatening injury?

Next, estimate what you'll have to spend in, let's say, two years of case workups, court filings, client meetings, case strategy, and expert consultations. As you do a cost-benefit analysis, ask yourself if this is a worthwhile investment on your part.



## CHAPTER 2

# Consider the Impacts of Comorbidities

When assessing a medical malpractice or personal injury case, you'll want to focus on the client's medical condition prior to the injury.

Uncovering preexisting conditions or comorbidities—any additional ailments that are also present with the client's primary condition—is essential for determining how winnable a case may be. For example, a client who required an emergency amputation after a hospital stay, but also suffered from diabetes for years prior, may pose a significant challenge to proving malpractice.

Similarly, imagine a client wants to sue a gym where they injured their back while using a weight machine.

Before you take the case on, do your research to see if the client had a pre-existing back problem before the incident. If the client has a medical history of treatment for sciatica pain or other back issues, you can bet the defendant will focus their argument here. The defense will likely claim your client already had the injury and assumed the risk of any additional injury via the gym's liability waiver. Both of these scenarios point to the aspects of preexisting conditions you must consider in your case review and may point to a business decision to take a pass.



CHAPTER 3

# The Causation Argument is Weak

In some cases, liability may be easy to prove, but you could fall on your sword with weak causation and a lack of “lost chance” support.

This telltale sign for declining a case may take a little extra effort to delve into, but it's well worth exploring whether causation is feasibly on the table prior to signing on.

Consider a hypothetical case where your client suffered permanent paralysis after a spinal injury. When you examine the facts of the case, you see that there was a delay between the time of injury and the surgical treatment. Oftentimes, this situation screams “loss of chance” theory. On the surface, it seems your client would've had a better outcome had the surgery not been delayed. In such scenarios, clients will see this as a cut and dry case and want to pursue a malpractice case against the treating doctor and surgeon.

With this additional information, “lost chance” no longer looks like a promising causation theory.

But as an attorney, your case theory investigative skills tell you to look deeper. Perhaps you uncover that at the time of the injury, your client had a concerning low white blood cell count. The attending physician and head of surgery determined the risk of infection was too high to undergo

surgery and could result in a lengthy battle with post-surgical infection or even death. With this additional information, “lost chance” no longer looks like a promising causation theory. As tragic as the outcome was for this potential client, your assessment of case theory indicates that winning in court will be unlikely and that you should pass.



#### CHAPTER 4

# Your Client's Claims Don't Match the Records

There are instances where an individual feels so wronged that their memory of the incident in question can become colored or distorted.

A potential client may tell you they entered the intersection after the light turned green and that the other car plowed into them despite their signal being red. The client is quite adamant they're entitled to compensation after they sustained personal injuries and damage to their car in the accident. Before you get too invested in moving ahead with this case, you'll want to verify the story with your own research.

After reviewing the traffic camera footage, you see that your client actually made a right turn into the intersection while the light was still green for the opposing driver. It appears your client drove into the lane when the other car had the right of way—revealing that your client is likely at fault. Perhaps they failed to check for oncoming traffic, thought they saw a green light, or misjudged the speed of the other car. Since the collision didn't cause severe damage to the car or your client, you can surmise the other car was driving at a reasonable speed.

Through your independent research and the readily available video evidence, you can conclude this is not a winnable case.

This can present a delicate situation in terms of communicating with your client about why you're choosing to turn down the case. But, it is part of your due diligence as an attorney to explain the evidence at hand and the confounding nature of human memory, particularly after a traumatic event like a car accident. It may feel disappointing to the client, but in the end, you're saving time and money for all parties.



CHAPTER 5

# Finger Pointing Will Likely Rule the Case

## For certain matters, the legal outlook indicates a very long road through the courts.

As an attorney, it's critical to assess whether such a case is worthwhile both for your team and for the client. Consider the possibility that a complex malpractice case could easily end up in the courts months, if not years, due to endless finger-pointing by multiple parties involved. At the end of the day, a jury may not arrive at clarity on who is singularly culpable for the injury and opt to split the difference, netting your client a small award.

Take an example case of a four-year-old who sadly died a year after surgery to remove a brain tumor. Despite instructions from the doctors, unfortunately, the parents never got the child in for post-surgery CAT scans. In this scenario, the neurosurgeon will point the finger at the parents. The neurosurgeon will explain they specifically instructed the parents to bring the child for followup scans to monitor for any potential recurrence.

But as an added layer to the case, medical records with this crucial post-surgery requirement were also sent to the child's pediatrician and the oncologist that made the initial cancerous tumor diagnosis. Issues around standards of care for doctors' responsibilities for patient reminders for post-surgery checkups and diagnostic imaging may be murky. The pediatrician and oncologist may also lay blame on the parents, especially if records show scan reminder voicemail messages or emails sent to them.

In cases like this example, the many involved parties will undoubtedly point fingers at everyone else, making it difficult to pinpoint who is really at fault. Despite heavily insured doctors and hospitals, the potential return for you and your client may not be as rosy as it appears. There may be a case still, but it is up to the savvy attorney to determine whether the effort and investment are worth wading through a classic "finger-pointer" case.



## CHAPTER 6

# There's No Clear Standard of Care

The COVID-19 pandemic is a good example of how a lack of clear standards of care may point to passing on a case.

At first glance, plaintiffs' counsel may imagine strong medical malpractice case potential with the hectic healthcare environment provided through the pandemic. Surely liability cause of actions will be explored against health care providers, testing labs, and test manufacturers for areas such as missed or late COVID-19 diagnoses, failure to ventilate soon enough, or hospital-acquired coronavirus infection. Cases will likely also focus on the implication of faulty test results and inadequate testing procedures prior to hospital admission.

Despite a wealth of potential malpractice areas, the challenge for counsel remains that COVID-19 is a novel virus and a standard of care does not yet exist. Providers who followed the CDC's guidelines and other local, regional, or state public health official guidelines will likely have a strong argument that they complied with the then-known standard of care. Clinical practitioners may testify that the combination of their evolving clinical judgment and public health decrees was the standard of care in this global health crisis.

Perhaps an even bigger “just say no” indicator for COVID-19 cases is the growing state executive orders and state laws that grant immunity to healthcare organizations during the crisis. Gross negligence, of course, is not protected with immunity in these edicts. At the federal level, U.S. Health and Human Services Secretary Alex Azar shielded an expansive range of healthcare providers, suppliers, drug makers and other entities from COVID-19 liability in a February 2020 declaration. He took the action under the Public Readiness and Emergency Preparedness Act, passed after Hurricane Katrina. With all the governmental immunity for healthcare providers, you will want to evaluate the likelihood of prevailing in any COVID-19 cases you consider.



## CHAPTER 7

# The Case Hinges Entirely on Informed Consent

When a client comes to you claiming they did not consent to a medical procedure and requesting your help to sue the medical provider, you may want to think twice.

Lack of informed consent cases tend to be difficult endeavors since nearly all patients sign a consent form before a procedure. That stack of documents we all review and sign when admitted to a hospital or outpatient facility for surgery will include a consent form. A claim that the client didn't know what they were signing is not likely to carry much weight in court. Any astute defense counsel knows how to draw attention to the plaintiff's signature on the consent form entered as evidence, during witness questioning, and in their closing argument.

Even with imperfect doctor-patient communications—patients typically retain only 30% of the information shared in an hour-long doctor's appointment—doctors generally thoroughly discuss any procedures they recommend with patients before the event. A doctor's notes may contain references to this discussion of the procedure and a patient's agreement that they wanted it. This would be hard evidence to overcome at trial or during settlement negotiations with either elective or nonelective procedures. Unless some other particularly compelling evidence accompanies a potential informed consent case, it is wise to consider giving these cases a pass.

