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Chance

Contingency Fees: Weigh the Odds

by **Kenneth P. Nolan**

Editor's Note: Ken Nolan wrote this article months before September 11, 2001. The introduction was intended to be funny. Now it seems eerily prophetic. Ken is among the many who lost family and friends at the World Trade Center.

"I never win anything," my mother would declare emphatically whenever she was offered a chance to win a TV or a basket of Cheer at the McFadden Bros. American Legion post. Of course she never won—she never bought a chance, never wagered a dime on a number at our parish bazaar. And when I reminded her of this, "I'm just not lucky" always ended the conversation.

My father grew up in relative prosperity, but during the Depression he had to quit school his sophomore year in high school to help his parents and sisters survive. Even though he never complained and was always pleasant, my father was certain that another Depression was inevitable, making everybody all destitute, especially my brothers and me. And you cannot escape. "You'll see; it'll happen."

So I was raised with doom just beyond the front door, with the expectation that, one quiet morn, an inescapable event would ruin my life. Maybe it was the lingering effects of the Irish famine, when a potato blight killed and scattered millions, including my ancestors. Wars can be fought, tyranny opposed—the worst is you die and they sing about you every March 17. That's easy. But in my Brooklyn neighborhood, it was the unseen, unknown force that was not only feared but expected. So we became civil servants—cops, firemen, teachers, nurses—secure jobs with good pensions. Don't go for the gold; the bronze is just fine, thank you.

Somehow I lost my way and became a plaintiff's personal injury lawyer, working on contingency fees—the antithesis of my parents' experiences. I still worry about the future, and when the stock market takes a dive, I think of my dad. But I

have learned that you can win, if you are willing to take a chance. In my practice, that is all I do. And if I do not win, my four kids will probably have to wear out their Nikes before they each buy two more pair.

The fears of my parents are not forgotten, and the sermons of my youth pounded into my buddies and me by a generation who fought and conquered poverty in the 30s and evil in the 40s cannot be erased. So before I spend my time and money on a tort contingency case, I examine all its aspects. I encourage others to do likewise—even those who did not have the privilege of being raised on Sherman Street. You, too, can learn to enhance your prospects of success by analysis and diligence. If you evaluate your cases properly and thoroughly, you will increase your odds of winning so that your kids will never know privation and they can grow up thinking you are a weirdo because you actually shut off the lights when you leave a room.

Whenever you discuss taking a contingency case—personal injury or otherwise—consider these factors before accepting that retainer.

Just say no. A young lawyer's most difficult lesson is not learning how to win a case but how to identify and avoid the tempting yet disastrous one. The worst is falling for the hype, the big damages, the dreams of grandeur—accepting a retainer, promising the client millions, and realizing three months after you commenced suit that there is no liability and the defendants' attorneys—"hearts with one purpose alone"—will never offer you a nickel. Now you are in slash-and-burn litigation with loads of depositions, 20 motions, experts, pretrial orders, research, and then trial, costing more than you imagined and three times what you could afford. And your profitable cases languish, ignored because you are bleeding from the nicks and cuts of the papers you receive daily from the defendants. Every time you open the file, you hear barking.

But you dare not stop, or cry "do over" as we did in the school yard of P.S. 154, because the monster of legal mal-

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practice lurks, waking you at 3:00 a.m. in blackness to recall with anger and despair the words that jumped from your mouth as you promised how the defendants would beg to settle. Your client has told everybody that she will win big. If she does not, some shrewd relative will shout, "How could your lawyer have lost? He must have screwed up!" Only he won't say "screwed."

So get it over with. Take your punishment. Do not let the case linger, do not lose the summary judgment motion because you are too cheap to hire the proper expert. Litigate vigorously and quickly, try it, lose it, and learn an expensive and time-consuming lesson. Keep your client informed orally and in writing. Point out the weaknesses. Send her defendant's expert reports, summarizing their statements, their strategy. Educate your client and her family. Tell the truth, no matter how foolish you look. Admit you were wrong, but vow a total effort. Work weekends and nights. Force the defense attorney to question her confidence. She may have made the same mistake—told her client or partners that this was an easy one, a slam-dunk. Shift the pressure to her, and she will be the one who has to hide if the jury favors you and your client. You have nothing to lose, and she has everything, including a client that pays the firm large fees. If you win, suddenly you are the hero; if she loses, she is disgraced. Maybe, just maybe, a decent settlement will be offered.

Every plaintiff's office has these headaches—the favor you did for your cousin's in-laws: "Just write a letter, get them a few bucks, they don't want much." So you write the letter, send the medical records, write again, try to settle, and try again—and suddenly the statute of limitations appears and you throw it into suit, only to learn that "these people," as you now refer to them, expect real money and do not understand why they could possibly be at fault when the other car was "going like a bat out of hell." Of course, there is the issue of the stop sign, but who cares about such details? And how dare the defendant offer \$15,000? Trial, they scream, trial! "I'd rather get *nothing* from a jury."

Exactly.

Then there is the temptation to jump into the big time—that med mal case that will put you on the map as an attorney to be feared. You tell yourself, "I can handle it. How hard can it be? The damages are good and they'll have to settle." Then the paper begins to fly, and your expert is just a trifle tentative. And, no, you cannot have an adjournment; go pick a jury. You suddenly realize you need a stronger deodorant, and your suit jacket is soaked just like the time at the Mexican restaurant when, after four margaritas, that blonde with the accent asked you out in front of your wife.

It is a fine line. When clients are shopping for attorneys, as is often the norm, you cannot be too negative or they will look elsewhere. My mantra is: "I can tell you what you want to hear, or I can tell you the truth." You have to be positive and realistic at the same time. I never tell them the value of the case. Too often I have said, "It's worth between \$100,000 and \$250,000 depending on this or that factor." Two years later, when the offer is \$200,000, the response is always, "But you said it was worth \$250,000." No one remembers the lower number.

Be direct and honest. Tell them that you do not know if you can take their case, and tell them the weaknesses as diplomatically as possible. Otherwise, they will believe that you are going to solve their problems and make them financially

secure for life. In a personal injury practice, your clients have usually suffered an injury (physical, psychological, or both), and they are emotional. You can play on these emotions, or you can be a professional. It may not be easy, but taking the easy route eventually leads to disappointment, resentment, and—more importantly—no referrals. Rarely do I have repeat business, but satisfied clients often refer others. And that is how you build a practice.

So before you take the case, investigate the facts, law, and venue, but be prepared to walk away. Some cases are too small, the clients too erratic, the jurisdiction too one-sided, the law too harsh. No matter how tempting, you must be ready to admit that it is not within your expertise, and you do not have the time to learn. Know your limitations. Do not be afraid, but be cautious because losing hurts—you do not get paid, and your client is not happy.

Know your client. On the phone, everyone sounds sincere and looks beautiful. Ever see a celeb in person? They always look better on the screen. Meet the client immediately. Go to their home, their office. Look around. There is a correlation between credibility and home and work environment. Assess them. Who is with them? Who is asking the questions? Who is pulling the strings? In a wrongful death case, is the spouse in charge? Determine who is calling the shots. Often there is a relative or close friend who exerts authority. And for what purpose?

Tragedy brings out various qualities in people—compassion, strength, despair, greed. Some family members look to profit even if they are not entitled to recover. If they are at the first meeting, you will have to deal with them and begin the process of separating your client from the nefarious relative. In one death action involving my client's daughter, all conversations were with a brother who would not allow my client to answer. He controlled the negotiations and had obvious designs on whatever she might recover. Through him, she rejected an amount that would have allowed her to quit her job



as a cleaning woman. Sometimes it is very frustrating.

Other times, the relative is more sophisticated and will want you to hire experts with experience and credentials. They may help you in screening out the wannabes with slick brochures. The only way to evaluate the players is to go in person.

In a nice way, cross-examine your client; look for holes in the narrative. You may as well know the weaknesses and the strengths immediately. In most cases, I eventually learn more about the client's life than 99 percent of their family. So will your opponent. Eventually, the defense will obtain the medical records, the tax returns, the employment file. If your client exaggerates or is a malingerer, it will be discovered. Ask about the skeletons. I hear about the affairs, the arrests, the prior injuries; and most of the time, they are irrelevant. Knowledge helps, ignorance hurts.

Most are wonderful people from *Leave It to Beaver* families. Losing a child in a plane crash devastates a family forever. Your heart aches as the parents cry in silence. You know the jury will love them. Some are angry, while others cannot bear dealing with lawyers and do not want to hear from you. You can assess the level of involvement. Some will make do with compensation for their own losses, while others want more, such as compelling a change in the design or manufacture of a tire, a car, a jet engine. This, too, you should learn at the first meeting.

Over time, people and their goals change. Those who were livid at their treatment may evolve to acceptance. Those who could not deal with tragedy may now insist upon a trial. Meet with your clients regularly. Like a good tailor, you should take their measurements anew at regular intervals. You will learn about the case and about life.

Investigate. Do not hesitate to spend the money and hire an investigator to go to the scene and take photos, witness statements, measurements. No matter how minor a fender bender, if you are going to become involved, do your homework. Of course, you do not hire the top engineer in the field for a simple rear-end collision. But without immediate (and admissible) documentation of conditions at the accident site, cases become more difficult. Witnesses move, cops retire to Florida, and even New York City repaves its streets every millennium.

Almost every case demands experts, so find one and hire her right away. Assess the value of the case, and determine whether a quick settlement is possible (usually only in extremely minor damage cases). If not, you might as well pay the money and have the expert educate you on the medicine, the product, the engineering. Meet with the expert yourself. Do not send the young associate whose idea of ancient history is Jimmy Carter. But do take that young associate with you when you meet and explore liability issues. Listen to the associate's opinion on how the expert will sell to a jury that may well include those raised on MTV.

Call me old-fashioned, but in this era of e-mail, voicemail, and cybersex, I prefer bodily contact. I want to see, feel, and hear the clients, the experts, the witnesses. You will not have time to have a doughnut with every witness, but you must do so with those crucial to the litigation. The impeccable expert is worthless if she cannot communicate. Maybe your adversary will be impressed, but the juror from the hog farm thinks bow ties are funny and cannot understand a word from that Princeton big shot.

Litigate for trial, not settlement. The insurer investigates immediately. You do the same, and better. If possible, visit the

scene of the collision yourself. Certainly do so before depositions so that you have a clear picture of where every landmark is. Photos and video are good, but personal experience is better. Know your facts and know them early.

One of my earliest cases involved a call from a friend whose neighbor had died of a heart attack a few hours after he was seen in the emergency room and sent home with a bottle of Mylanta. I immediately visited my friend's office in the Bronx to meet the widow. Because I was young and eager, I then traveled to the emergency room to obtain the records. Of course I was rebuffed since it has to be done through the mail; coming in person, they said, is "not the proper procedure." While I was there, a young doctor approached me and admitted that he had treated the decedent and had not done so properly. "Don't worry," I told him, "if there's a case, I'll only name the hospital since you're an employee. But thank you very much, Dr. Neubauer."

After the suit was filed, I requested the names of all those who saw my client and those who were in the ER while my

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client was there. As with most medical records, the writing was illegible. I received 15 names of nurses, technicians, doctors—but no Dr. Neubauer. I asked again for all employees. Dr. Neubauer was not on the list. After I noticed his deposition, the defense attorney's reaction was "Oh, so sorry, it was just an oversight, you know these municipal hospitals." Speed is imperative. Some people even cheat at golf. And even though I live amid the Gambino crime family, I have not thought about having an adversary whacked for about two years.

Venue. Facts are paramount, but clients and geography win close cases and add zeros to verdicts. Mike Tyson is convicted in Indiana, and a thug who shoots six cops walks in the Bronx. The case you lose in Fairfax County is worth millions in Cook County. In Brooklyn, the verdicts are 50 percent higher than across the bridge in Staten Island. In close cases, a good plaintiff's venue will settle a case, or at least give you a shot at trial. And in plaintiff's jurisdictions, the judges often mirror the jurors.

Don't be shy. Shop for the best jurisdiction possible. The corporations prefer federal court with judges from the Ivy League and white-shoe firms. After all, most federal judges represented defendants. I want a judge who is from the street, who has not forgotten where he was raised and who recalls waiting for hours in an emergency room before receiving a superficial exam. Such judges are usually found in state courts, and they are not in awe of some firm with 300 partners.

Of course, some federal judges are gems who may have been Reagan appointees but are more than fair, even helpful. They do not countenance the typical paper wave of motions, discovery requests, and delays. And those you predict are ter-

rible often prove you wrong. Most are fair, working hard at a difficult job. (If you think I'm going to insult the entire federal judiciary, you're nuts.)

So look at all the procedural maneuvers to start suit in a plaintiff's jurisdiction in front of a plaintiff's judge. Examine all potential parties. Do not just knee-jerk the suit in the county where you have your office. Start it in the most favorable court, whether convenient or not. If you have to hire local counsel, do so. Handling large death actions has taught me that I cannot be as frugal as my mother. My accent sounds funny in most places west of the Hudson River, and I need assistance with the judges and jurors. The defendant will appear at the first conference with the former ABA president or a golfing buddy of the judge. So I spend the money to find a good local lawyer who knows the courthouse. Don't allow your case to be home-towned.

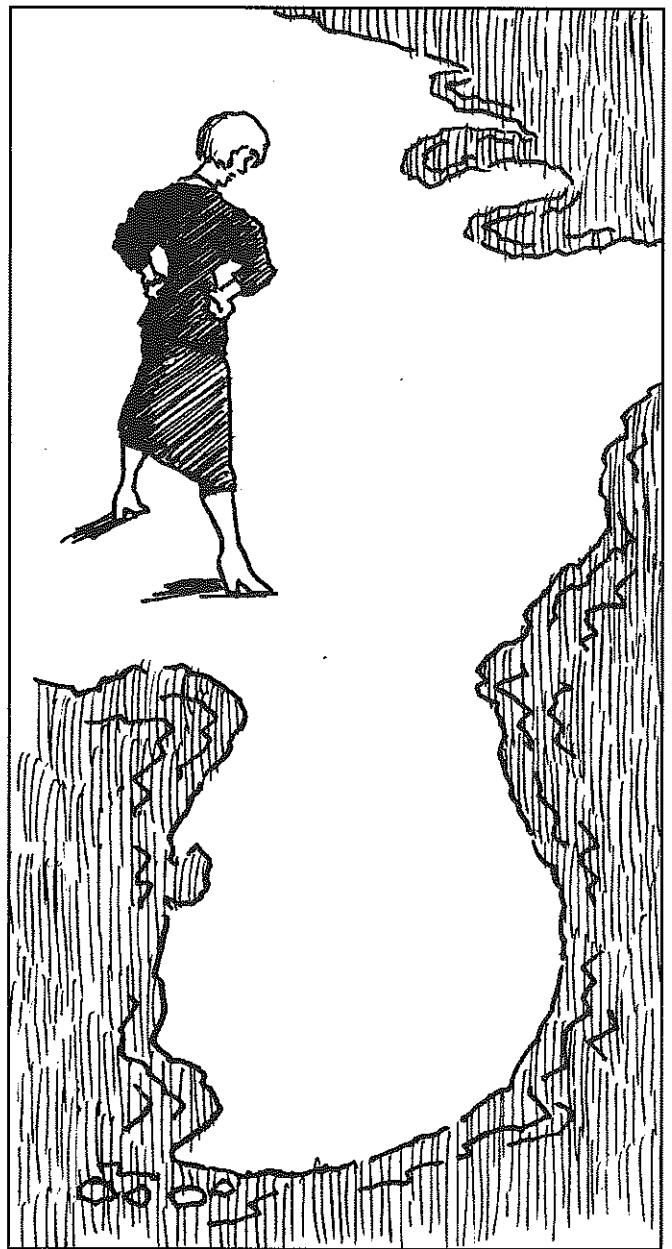
Research all potential venues and judges. Speak to the locals who are there every day. Try to litigate in the court most favorable to your client. It may not always be possible. But if you scoff at the importance of venue, think of *Gore v. Bush*. The result was easily predictable. Just by knowing the judges, you knew Gore would win in Florida and Bush in Washington.

Law. Of course you realize that all these factors are intertwined and must be considered together. How can you determine if Huntsville, Alabama, is a favorable jurisdiction without knowing the law that will be applied? A good jurisdiction using lousy law is useless. In multistate actions, choice-of-law analysis must be done before filing. Is it *lex loci*? What liability law, what elements of damages? Is there vicarious liability? Is it pure comparative negligence, and what are the hurdles in proving a products case? The court may apply one law for liability and another for damages. Who can recover and for what? Is there a non-economic component, and how is it defined? Are punitives permitted? Copy the pattern jury charge, and refer to it during the litigation. It will remind you what you must prove.

We live in a global world, and if you doubt this, just go to multicultural day at P.S. 102, my daughter's school, with the Palestinians, the Russians, the El Salvadorans. Do not limit your analysis to American law. If foreign companies or plaintiffs are involved, research the law of domicile. Hire an expert from France to advise on French law and its application in French courts. Many civil code countries allow broad recoveries for non-economic damages in death actions, so you may wish to argue that foreign law should be applied—but only if you can be sure that it will be applied using American standards of compensation. If the judge insists on telling the jury the range of awards applied in France (they start at low and go down from there), then stay away from foreign law.

Hit the books. Research the law, and update it periodically so that you are aware if an opinion alters your strategy. Read the legal journals, or listen to CLE tapes in your car. Ask your colleagues for their thoughts. Write the briefs, and keep them with you so that you can whip them out when your adversary tries to put one over on the judge. Unless you are Tiger Woods, winning takes effort.

Reward. Even though I deal with unspeakable tragedy, I enjoy my work. I do not fool myself into believing that I am the next Mother Teresa. If I really wanted to go straight to heaven, I could have remained a high school teacher or gone into public service law. But I am proud to represent courageous and decent families who, through no fault of their own,



are thrust into a nightmare. I realize that I cannot obtain what my clients really want—the use of their legs or their wife to appear with the wedding-day smile.

Winning a tort case involves money. My role is to obtain sufficient funds so that the victim's life is financially secure. Almost universally, my clients are motivated not by greed but by fairness and the desire for change. They want to ensure that no other family has to bury their child for the same reason.

Since most are of modest means, the contingency fee allows them to obtain adequate representation. But you do no one a favor by accepting a retainer without thought. Taking that chance can be disastrous if you lose (and we all do). But when you are successful, when you have obtained not only a decent settlement or verdict but also the acknowledgment that your client was not at fault and is entitled to compensation, the experience is richly rewarding. On occasion, a client will say extremely nice words about me. And that makes me proud. □