WHY I SUE LAWYERS

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PERSONAL HISTORY

I have had a love / hate relationship with the practice of law for a very long time. I love playing the white knight for my clients, replaying my childhood fantasies of being Audie Murphy, the hired gun protecting the people who can't protect themselves. I hate, however, all of the b.s. that goes with it. I hate the politics that affect my ability to do a good job and get a good result for my client. I hate the fact that lawsuits often keep the guilty from apologizing when they want to apologize and keep the injured from forgiving when they want to forgive. But most of all, I hate the fact that I am forced to live my life in constant conflict, in an adversarial system, a system that promotes conflict as a means of finding truth. I believe deeply in the system, but I live with a constant awareness of what it does to the people who serve the system. I am always amazed at (and also never trust) lawyers who talk about how much they **love** the practice of law. Ultimately, I made my peace with the practice of law by providing representation to those people who want to sue their lawyers.

Like many young lawyers, I started my legal career with a very large, metropolitan law firm. I left that firm after about 4 years and went to another large law firm and then left that firm after 2 or 3 years and went out on my own. (I learned that all the trouble I was having fitting in was not their fault.) Shortly after I established my own practice, I received a call from my old firm, seeking to refer me a case. This was no surprise, because I fully expected my old firm to refer me lots of cases, since they, better than anyone else, knew what a good lawyer I was. The case they were offering me was against one of the premiere divorce law firms in Dallas. This was happening in1981, a time when in Dallas, real estate developers were offering 3 years free rent on a 5-year lease, as a means of enticing tenants out of old buildings and into their newly built ones. This particular law firm allowed itself to be tempted and left the old building for the new building with 3 years to go on the lease.

The owners of the old building felt compelled to pursue the run-away lawyers for breaking the lease, so they quite naturally called my old law firm, their regular lawyer on numerous multi-million dollar deals all over the state. To their surprise, however, their "go to" law firm, my old law firm, would not represent them because they would not sue another lawyer.

If the truth were known, I suspect there were also numerous undisclosed conflicts because of this divorce firm having consulted with numerous partners in my old firm. In any event, my old law firm referred the case to me.

I told them I would be happy to represent the building owner against the law firm. To me, it was a simple decision: Lawyers had no right to a "Kings X" on contracts they signed and lawyers should be held accountable in the law for the promises they made the same as everyone else. I have always felt a certain **revulsion** at any sort of secret "brotherhood." I never could stand doctors who wouldn't testify against another doctor or police officers who wouldn't ticket another police officer, so I decided I was not going to be a lawyer who wouldn't sue another lawyer.

My old law firm expressed great delight that I was willing to take the case, but then completely deflated the enlarged ego I had acquired as a result of the referral by telling me that they had not been able to find anyone else who would take the case. Apparently, I was their last choice.

I filed the case and got a judgment against the professional corporation that had signed the lease. None of the lawyers had any personal liability on the lease, so they simply set up a new professional corporation and continued to practice law with 3 years free rent. The landlords had their symbolic judgment and I had my baptism into my future practice: I sued lawyers.

Word spread very quickly after filing this lawsuit, I began to be hired in all kinds of situations involving lawyers as parties to litigation. Law firms would hire me when a partner left and took client files. Lawyers would hire me when their clients fired them and signed new contingent fee contracts with other lawyers. My practice was doing fine and I was suing or defending lawyers on every kind of claim imaginable other than a malpractice claim. Tasting a little of my own hypocrisy, I decided that I could not limit my practice in this way, so I decided to take the first good legal malpractice case that was offered to me. I wanted to take one out of Dallas, so if I ended up raising a big stink, maybe they wouldn't be able to smell it all the way back home. A short time later, I filed my first legal malpractice case against a real estate lawyer in Tyler, Texas.

The facts of that first case were not significantly in dispute. A real estate developer had somehow cajoled a group of 10 or 12 doctors to invest with him on the purchase and development of a large track of land around a lake. (Don't you just love doctors as investment

sources?) The plans included golf courses, luxury homes, a landing strip, millions of dollars of tax savings and incredible income for everyone involved.

The structure of the deal was simple: 10 doctors and 1 real estate developer, all equal partners. The day before the deal was signed, the real estate developer went to the lawyer and told the lawyer to change the loan documentation to make him non-recourse on the multi-million dollar loan that was going to secure the purchase, which the lawyer did. The bank didn't care, since it was the doctors who were the money behind the loan anyway. The lawyer then presented the documents the next day to each of the doctors, without explaining this change (and without focusing on the fact that he also represented each one of the doctors individually because of his representation of this general partnership).

Fast-forward a couple of years to the mid 80's. Real estate / tax laws had been changed, banks were refusing to complete the funding of construction loans, the FDIC was taking over banks left and right, and real estate projects were cratering all across the state. This one was no different. The bank (and later the FDIC) sued the doctors and the doctors learned for the first time that their partner, the real estate developer, had no obligation to help them pay the multi-million dollar note. The doctors hired me. I sued the lawyer. The doctors filed bankruptcy (utterly destroying my damage model). The case settled. I came back to Dallas, none the worse for the wear of my first legal malpractice case, not exactly rich from the experience, and ready to evaluate my experience more closely.

I did not make the decision to sue lawyers for malpractice lightly. On the contrary, I stewed over it for a very long time. Ultimately, however, I decided on a business model that I thought would work. It seemed to me that if I took only good cases and then handled them professionally, in the end, the lawyers whom I sued would recognize that a lawsuit against them was inevitable and they would be grateful that I had handled the case in a professional manner, as opposed to being sued by some of the other jerks out there who could have sued them instead of me.

About a year after the case against the real estate lawyer settled, I decided to test the validity of my business model. I contacted opposing counsel and asked permission to talk directly to his former client and, with the blessing of defense counsel, called him up.

I told this lawyer that he was the first lawyer I had ever sued for malpractice and then told him about my business model. I asked him for his perspective on the lawsuit I filed against him.

He graciously replied that he thought I had treated him professionally and courteously, but to my surprise he continued to assert the righteousness of his side of the case: he had not committed malpractice and did not deserve to have been sued at all. I reminded him gently of some of the facts that I thought suggested he had, after all, made a mistake, but he refused to budge from his conviction that the lawsuit against him should have never been filed. He then stated that my suing him had subtracted 10 years from his life. I laughed nervously over the phone and he interrupted my laughter saying, “Randy, I’m serious. You took 10 years off my life.”

I felt like someone had dumped a bucket of cold water on my head. He was not mad at me and didn’t threaten to get even with me; he was simply describing for me the impact my actions had had on his life, in a way that I had never heard before. I nervously ended the call by thanking him for his candor, wishing him well, yada, yada, yada. The truth is, I couldn’t get off the phone fast enough because I had nothing to say in response to his shocking statement.

I was surprised at his continued protestations of innocence, in light of the fact that it no longer mattered. I think I expected him to acknowledge his mistake:

> “Yea, that wasn’t real smart on my part. I made an innocent mistake, and I’ll never make that mistake again.”

And if he just couldn’t admit that he had made a mistake, well then he could have at least acknowledged some ambiguity in his actions and the possibility that others might view it negatively, but he didn’t. Instead, he was attacking me, albeit very politely, for having sued him in the first place. This discussion did not go at all the way I expected, but he did provide me a very valuable lesson. It is one that helps me deal with the regret I sometimes feel for the hurt I cause others as a hired gun for my client: The other guy is never going to think he is wrong, no matter what, so a lawyer can never expect understanding or forgiveness from the opponent. I knew I had done the right thing, and that was going to have to be enough comfort for having sued this lawyer.

But that one statement kept percolating (or perhaps composting) in my brain: “You took 10 years off my life.” I had never considered that what I had chosen to do for a living, playing Audie Murphy to those who needed my hired gun, was having such a devastating impact upon others. I am, I think, fundamentally a nice person. I don’t like hurting people and this lawyer’s

candid statement to me opened a whole new chapter in my love / hate relationship with the practice of law. If I was going to make a living as a hired gun, I was going to spend my life hurting other people. As I think back on that phone call and the days that followed it, I am reminded of that scene in the wonderful Gene Hackman movie, *Class Action*, where his daughter is his opposing counsel and has just cross-examined this elderly engineer in court and made him luck silly even though he was telling the truth. After court, the daughter goes to a bar because of the guilt she feels over what she had just done in furtherance of her client's objectives. While she is nursing a drink, the bartender asks her what she does for a living. She looks at him and says, "I'm a hired killer."

I would love to tell you about the way I made my peace with the dilemma of being a hired gun. The truth is, however, I continue to struggle with the morality of what I do for a living almost daily. Remember those lawyers I mentioned earlier, the ones who talk about how much they love every minute of practicing law. How can someone love those minutes when you are hurting other people? Even if they deserve it: How can you love it? I understand the necessity of having legal hired guns. I also understand the pleasure that can come from representing a deserving client well, just as I understand the pleasure that can come from a well-played drama in a court of law. I do not understand, however, "loving" the fact that lawyers (at least trial lawyers) hurt other people for a living.

I knew I had to find a way to make peace with this dilemma or give up the practice of law. My salvation was simple: I decided that I would not sue a lawyer for malpractice unless I genuinely believed that the lawyer had done something wrong. Some people don't recognize what an incredible concession that is. I had, for years, sued doctors or stockbrokers or sign manufacturers because I knew that I could "make it look like" they had done something wrong. My usual analysis consisted of asking these two questions:

(1) Can I make this look so bad that they will want to settle and pay my client (and me) rather than go to court? or

(2) Can I make this look so bad that a jury will believe they have done something wrong and will rule for my client, so my client can pay me?

It was a completely new approach for me to ask, not whether something looked bad, but rather whether something was bad. With this as my working model, I began accepting malpractice cases against lawyers.

All of this happened around 1984 or 1985. My practice grew as more and more people found their way to me because I would sue another member of the legal fraternity (or sorority). Legal malpractice was, however, only about half my docket. I still had a significant number of claims against businessmen, women, and stockbrokers, and the like: people who stole with a fountain pen. It was only a short time after I found my morale compass for handling legal malpractice claims, however, until I again tasted that bitter vial in the back of my mouth generated by my own hypocrisy. I was still taking cases against non-lawyers just because I could make money on them, because it looked bad. Not liking that taste of my own hypocrisy I decided I would use the same moral prerogative on all my cases. I would not take a case just because I could make money on it. Instead, I would have to find some morale justification for the use of my skills as a lawyer in this blood sport of litigation. I continue to use that same moral compass today in the selection of my cases. I obviously know that I am not always right and I also know that even when I am right, a Judge or jury may not agree with me. But, I am aware at every moment that, as a metaphorical hired gun, I'm going to hurt other people.

Shortly after I came to Dallas, I heard the story of a seasoned, grizzly old trial lawyer who kept a sign on his desk that said, "Never hire a gun fighter by the bullet." I never knew exactly what that meant, although it seemed to be a little too cocky, a little too self important. That said, I did envy this lawyer for the fact that he had found a slogan that captured his approach to the practice of law so well. After years of searching I ultimately stumbled on my own slogan. I found it in the words of a song by one of my favorite songwriters, Robert Earl Keen, Jr.:

> "I only use my gun when kindness fails."

I have that quote framed on the wall of my office and I try very hard to practice law in accordance with it.

HOW WE SCREEN OUR CASES

There are a lot of people out there who are upset with lawyers. Without a doubt, the biggest task our firm faces is screening the many people who call our firm upset with their lawyer, to find the few truly good malpractice cases that are worth pursuing. Although I do not actually count them, I have said for years that we probably receive calls from 100 prospective

clients for every case we actually take. My staff, who handle much of the initial intake work, tell me that is no exaggeration. You know the story of the little boy who is dropped in the stall in the barn, neck deep in horse manure. To everyone's shock, the boy grabs a shovel and starts happily cleaning the stall. When asked about his surprising good attitude in response to his bad situation, the little boy says, "With all of this horse manure, there's got to be a pony in here somewhere." Well, that's the perfect attitude for someone whose job is to screen potential clients for a firm that sues lawyers.

One of the first things we have to determine with any prospective client is whether the new business would present a conflict for the firm. Does the prospective client, for example, want us to sue someone whom we just hired as an expert witness in another case? Does he or she want us to sue someone with whom we are close personal friends? (Yes, there are some lawyers with whom we are close personal friends, although admittedly that list is short and shrinking. More on that later.) Is the new lawsuit going to be against a lawyer who is defending one of our other cases and who may, therefore, take out his or her anger over being sued on one of our other clients? Conflicts come in every size, shape, color, and stripe and there is no "one size fits all" screening device that can be used. Our staff takes down the initial information and then runs the names through our computer system, to see if we have had any contact with this lawyer in any context, but in the end, my partner and I have to look at the name and decide on a case by case basis whether we think there is a conflict.

When there is no conflict, the next question my partner and I have to answer is whether we want to sue this lawyer. The reasons for our reluctance can be simple (her daughter plays with my daughter on a soccer team), or complex (referral source, partner is expert witness in another case).

A lot of lawyers out there think they are excluded from the list of lawyers we are likely to sue because of this particular screening device: they think we would elect not to sue them. We know this because they express shock when they find out we have taken a case against them. These are usually lawyers who have never referred us a single bit of business and have, on the contrary, referred business to other attorneys instead of us, but then expect us to turn down a lawsuit against them because of our supposed professional relationship.

The actual screening process is relatively simple. Like professional football, the key is execution. The initial call is forwarded to one of our legal assistants who completes intake form

and clears the names through the computer for conflicts. Our assistants are also trained to secure in this first telephone interview information relevant to limitations, venue, and the actual merits of the claim. Within a day or two, the legal assistants meet with the lawyers and present the claims on which there is no conflict and a decision is made by the office on which ones to invite in for a meeting, to further explore their claims. If the prospective client has a story that my legal assistant can't understand, I am probably not interested in the case.

Another word about our legal assistants is probably appropriate here. There is a group of people out there who get upset when they have to talk to a legal assistant and cannot talk directly to me about their case. They refuse to accept or understand that I do not want to talk to them until I know there is no conflict. I think some of them fear that my assistant will not be a good advocate for their cause: they want to talk directly to me so that they can sell their case. Then, there is another group that is simply insulted at being asked to deal with "underlings" instead of directly with the lawyers. These people may have great cases and some lawyer somewhere may make a fortune representing them, but refusing to discuss your case with my legal assistant pretty much guarantees that our law firm won't represent you.

In addition to refusing to talk about your case to our staff, there are other things you can do to guarantee we will not accept your case. Among the most common guarantees of instant rejection are the following:

(3) Treating my staff rudely;
(4) Using the word "conspiracy" in almost any context;
(5) Telling me that you want to sue the Judge;
(6) Telling me the names of five lawyers you have had and what each one of the five did wrong;
(7) Telling me that you want to sue your opponent's lawyer;
(8) Telling me that your lawyer was bought off by the other side;
(9) Telling me that you have a million dollar case and I can have it all;
(10) Telling me that a decision has to be made quickly, because limitations run in 3 weeks; and
(11) Quoting case law or statutes to me.

In contrast, there are certain traits and characteristics in common with the cases we tend to take. The more your case coincides with these common elements, the more likely we are to represent you. Among these elements are the following:

(1) A clear, concise statement of what the lawyer did wrong (a general complaint that your lawyer committed malpractice and I should go out find out how he did it won't get you very far);

(2) An easy to understand damage model with significant economic losses (most states do not permit recovery of damages for emotional pain and suffering in a legal malpractice case);

(3) A prompt inquiry that minimizes the chances that we will face a limitations defense because of your delay in hiring us (What's that old saying, delay on your part does not constitute an emergency on my part);

(4) A good cover-up by the lawyer (we all make mistakes and lawyers are no exception, but the lawyer who covers up his mistake increases significantly his chances of being sued.

In our meetings with prospective clients, there are things we tell everyone, whether we take their case or not. We tell everyone, for example, that we only take legal malpractice cases on a contingent fee: we will not sue a lawyer on a straight hourly fee basis. We are willing to upset them and burn a referral source, but we have to have the prospect of being well paid for having done it.

We tell them all that a good settlement is better than a great jury verdict. We try to posture all our cases for settlement, recognizing that the amount the defendant will pay in settlement is directly related to whether the defendant thinks you can win at trial and then hold on to the verdict on appeal. Put another way, we prepare the cases for trial in the hope that our preparation will persuade the defendants to settle.

We tell all prospective clients to treat the lawsuit like an investment opportunity. A lawsuit is a chance to get back some of the money you have lost. You will not be made whole, but you probably will get nothing unless you pursue the lawsuit.

We tell everyone that the purpose of the lawsuit is to get money, not to get them revenge, not to punish the other side, and not to make sure they never do it again to anyone else.

Sometimes those other objectives can come as a by-product, but they cannot be the engine that drives the train.

WHAT YOU NEED TO KNOW TO DO THIS RIGHT?

It seems there are a lot of lawyers out there filing their first legal malpractice case and basing their entire claim upon the fact that the defendant lawyer violated an ethical rule. A violation of the ethical rules is not, however, the same as malpractice. The ethical rules and the comments to the rules inform and help define the standard of care (as such, violations to the rules are usually admissible in a trial), but they do not establish a right of recovery. It is, for example, conceivable that a lawyer would accept representation which, under the ethical rules, should have been turned down, and yet still do a good job for the client. Under that circumstance, the lawyer would have violated an ethical rule, but would not have committed malpractice.

The four elements to a legal malpractice case are no different than the four elements to a car wreck: duty, breach of the duty, proximate cause and negligence. Prospective clients typically focus on element number two: breach of the duty. "Let me tell you what my lawyer did wrong," they say. It is, however, extremely rare that the outcome of a case will turn upon whether the lawyer breached the standard of care.

It is, of course, true that even in the most blatant case, the defendant and his/her insurance company will find a "morally flexible" witness somewhere who will testify that what the lawyer did was not negligence. (I had one case where they found a lawyer to testify that it was not negligence for the defense attorney in a medical malpractice case to fail to call as an expert witness, the doctor who did the autopsy and prepared the death certificate stating that the woman died of natural causes.) The most significant aspect of proving a breach of the standard of care typically is simply the cost associated with it: Only a lawyer can testify against a lawyer, which means my client and I will have to hire a lawyer as an expert witness and pay that lawyer by the hour to read the file and then testify to the conclusion that everyone already knows: the defendant lawyer was negligent. I am convinced that one of the most valuable services we provide our clients is the selection of the right expert witness. This is one of the most important decisions made in the preparation of a legal malpractice case and I am shocked at the number of lawyers handling these cases who simply use the same lawyer time-after-time as an expert, without regard to the type of case involved.

A surprising number of cases turn on the issue of duty. The duty inquiry is relatively simple: did the lawyer represent the person now suing him/her? If so, the lawyer owed the duty to act within the standard of care. It is surprising, however, how many lawyers do not know who their clients are. Take that very first legal malpractice case I filed: the real estate lawyer was convinced that, although he represented a general partnership (in fact, he set up the general partnership), he only owed a duty of disclosure to the real estate developer who hired him. Lawyers who represent business entities are often extremely sloppy about ensuring that they are not representing the individuals who own and manage the business entity. When lawyers discover (by the Judge telling them) that they represented more than one client, the rest of the case is usually easy, since lawyers rarely satisfy their obligation of good representation to people whom they claim they do not represent.

The real battle ground in a legal malpractice case is, however, usually proximate cause. In fact, the battleground is only one-half of the proximate cause element. Proximate cause consists of two separate inquiries, the Foreseeability Test and the "But For" Test. The Foreseeability Test is essentially an inquiry of whether the damages the client is alleging were foreseeable from the negligent act that the client is alleging. For example, was it foreseeable that a hospital will lose a medical malpractice case if the defense lawyer failed to call the doctor who performed the autopsy to testify that the death was natural? Of course, it is foreseeable! I have never had a case yet that turned on the foreseeability element in proximate cause.

Ah, the "But For" Test. That is the battle ground on which I live or die. When I am successful in satisfying the "But For" Test, I am off buying new guitars. When I fail, however, I am going through my trash can to find and reuse my old guitar strings.

The "But For" Test is almost as easy to articulate as the Foreseeability Test: would the plaintiff have been spared his claimed damages, but for the negligence of the lawyer. Put another way, is it the lawyer's negligence that caused the damages or were the damages inevitable.

I usually illustrate the "But For" Test with a medical example. Suppose a terminally ill cancer patient, with only days to live, comes in to see a doctor and the doctor takes out the patient's appendix. Clear negligence. The patient dies. It was not, however, the doctor's negligence that caused the death, it was the incurable cancer. "But for" the doctor's negligence, the patient would have died anyway.

In the legal malpractice context, I usually ask the client: "What would have happened if your lawyer had called the doctor who did the autopsy?" To win on this point, I have to demonstrate at trial that changing the lawyer's negligent act to a non-negligent act (calling the doctor instead of not calling the doctor), results in a different and better outcome for the client.

When a legal malpractice claim involves litigation, the "But For" Test is described as the "Case Within a Case." To win such a legal malpractice case, I must not only prevail on the four elements of the legal malpractice negligence claim, I also have to retry and prevail on the underlying case: the case within a case. How to win that issue is the magic to handling legal malpractice cases for the plaintiff.

FINAL THOUGHTS AND CONSIDERATIONS

It is impossible to practice law as a plaintiff's legal malpractice lawyer without an intense knowledge of and background in insurance law and insurance issues. There are many differences in legal malpractice policies and traditional insurance policies (claims made policies, consent provisions, cannibalizing provisions, choice of counsel, etc.) and the plaintiff's lawyer should be familiar with all of them. Not only do insurance law considerations inform and sometimes direct the way the legal malpractice case will be conducted, they often also have a similar importance in the underlying case.

Anyone who wants to practice law in this area should give careful consideration to his or her current and future relationship with the Bar. Like that first lawyer I sued, the lawyers you sue are going to remember you and blame you forever. You will feel ripples from each rock you throw in the pond for a very long time. I was at a Bar function a few years back and the daughter of that lawyer who was representing the hospital and failed to call any expert witnesses on behalf of the hospital (including the doctor who performed the autopsy and included that the death was a result of natural causes) came up to me in the presence of lots of other lawyers (and Judges) and challenged me on why I had sued her father. Years later, she wanted to publicly debate the merits of the case against her father, at this cocktail party. She had apparently sought the support of several friends before approaching me, because they all gathered around me in support of her. I knew I would never persuade her that her father had committed malpractice and, in truth, I did not want to persuade her: I respected and did not want to challenge a daughter's loyalty and

defense of her father. If, however, you are unwilling to face such situations, you better not sue lawyers for a living.

If you choose to sue lawyers for a living, you should also be prepared for your relationship with Judges to change. Another of the surprises that waited for me along the road of my chosen professional path was that Judges do not like legal malpractice cases. Their dislike of legal malpractice cases may be because they also know that the lawyers being sued are going to carry a grudge for years if they rule in my favor and against the lawyer on any important issue. Their dislike could also come from the fact that these tend to be complex cases, lots of lawyers, lots of expert witnesses, and strong emotions which make settlement more difficult, trials more lengthy, and appeals more likely. Whatever the reason, you should not go into this area of practice expecting the judiciary to like you because of your role as one of the profession's policemen. Because I have never looked to lawyers or Judges for my social contacts or ratification of my own sense of worth, I've been able to adjust to these consequences of my chosen profession. I will never be elected President of the Dallas Bar (although I have been selected to be President of the Dallas Trial Lawyer's Association and the Dallas Chapter of the American Board of Trial Advocates, two organizations I am very proud to be a member of). I don't hang around Bar headquarters and have drinks with my fellow lawyers after work, like some do. I was told by one local Judge that it took considerable work to get my membership approved for a local Inn of Court because I was opposed by some of the firms I had sued over the years.

While your relationships with other lawyers will pay a price if you sue lawyers for a living, I have to add quickly that some of my most cherished relationships with other lawyers have come from the defense counsel who have defended the cases I have filed. Insurance companies in legal malpractice cases tend to hire some of the best lawyers available for defense counsel and they work extremely hard to kick my butt in every case I file. While there may be some exceptions, none come to mind immediately when I say that these lawyers have been totally ethical, and professional in every way. They fight hard, but they fight fair. I have certainly been stabbed with a knife in close combat with them, but never in the back. My expectation is that these defense lawyers may be among the few who attend my funeral for some reason other than just to be sure that I am dead.