THE MENTOR ESQ

CLE SERIES EBOOK

VOL. 3

Successfully Litigating a PERSONAL INJURY CASE

By Andrew J. Smiley

Successfully Litigating a PERSONAL INJURY CASE

Volume 3: Your Adversary, the Preliminary Conference, and Initial Discovery

By Andrew J. Smiley, Esq.
Host of the "The Mentor, Esq" podcast

TABLE OF CONTENTS

This ebook is a transcription of a podcast recording.

PROLOGUE

Welcome to part 3 of the "How to Successfully Litigate a Personal Injury Case" series! We have already covered everything from the initial phone call to filing and serving the summons and complaint. In this ebook, we are going to talk about your adversary, the preliminary conference, and initial discovery.

YOUR ADVERSARY

Let's talk about your adversary. In most cases, you will learn the name of your adversary for the first time when you receive the answer to your complaint.

So, it's the first time that we will see who is going to be on the other side of the case, and with that in mind, I want to remind you all that just because we are in an adversarial profession, or an area within our profession that is adversarial litigation, it does not mean we should carry that adversarial nature beyond the courtroom. We may be fighting against each other in court, in papers, in motions, in arguments, in advocacy, but that does not mean that you have to be hostile to each other or difficult with each other as people.

To the contrary, you are much better off being kind and nice to your adversary unless circumstances change. It's important for your reputation as a lawyer to be someone that others can work with, and it's also important that you remember that - regardless of whether you're a plaintiff or a defendant or a claims representative - each of you has a job to do, and it is your responsibility to do it as well as possible.

My philosophy has always been, I don't want to withhold information that I know my adversary is going to discover anyway. I give the insurance company representative and defense counsel the information they need to work up their file. If they want medical records, if they want your theory of the case, if they want information that you can give them: give it to them. It's going to help them set the reserves properly; on the defense side, insurance companies will earmark what they think the case may be worth at the end of the day, at the top dollar. If they don't set it high enough, that can be a problem.

Essentially, you want to make sure you let them know immediately how serious your case is or potentially could be if your client may not have had surgery yet but may be a candidate. This means you need to have an initial conversation that will kick off after you file the summons and complaint or after you receive the summons and complaint.

Now, on the plaintiff side, you will learn who your adversary is either by a phone call from the insurance adjuster when they get your claim letter or summons and complaint, or a

phone call or email from the defense counsel once they receive the file from the carrier or the client. They may see your name on the papers, and you will get that contact by email or phone.

I encourage you to make sure to take that call; respond to the call, respond to the email. Try to have the initial conversation, ask them things like, "I have this case. What can I tell you about it? What about defense? What's going on with coverage? Where do you see this case? How is your relationship with the carrier? Are they going to be difficult?" Have that initial conversation with your adversary. Get off on the right foot; try and establish a rapport and try to work together and cooperate. It will make the litigation process so much better.

There are many of you on this webinar right now who are either currently or have been adversaries of mine, and maybe we've tried cases against each other, or at least litigated and settled cases. And you know from working with me that if push comes to shove, I'm advocating very strongly for my client, but I'm doing it in a nice way and I'm giving you and my adversaries the tools to make you look good to your clients. Whether it's a direct defendant or an insurance company, I try to give them the tools to ultimately help get the case settled.

"Try and establish a rapport, and try to work together and cooperate. It will make the litigation process so much better."

I know in our profession there are some jerks on all sides, in all roles, and if that's the case then that's the case. I've run into some insurance claims reps that just are very difficult from the start for no reason, so once I've filed suit, I'm hopeful that I'll have a defense lawyer that I'll be able to work with. Oftentimes, once you've filed a lawsuit, a new claims representative gets assigned and it is usually much easier to work with them.

Do the best you can; you should always make that first step to show you're going to be willing to work with your adversary. Try to give them what they need, and if they're not returning the favor then unfortunately that's going to be the case; it happens and you'll have to find a way to deal with it. But I recommend trying to be nice until they give you real reason not to be.

As most of you know, I am a plaintiff's lawyer, and once I receive the answer, there are certain things I need to look for. But the first thing is getting that answer. People ask me often, "What should I do? Should I move for a default judgment? Should I make phone calls? Should I send emails? I haven't got an answer in."

I tell them: reach out. Reach out before filing motions. If you know who the defense counsel is, if you know who the carrier or the client is, contact them and remind them that their answer is due, but it hasn't come in. Ask them what's going on and if they're going to get it to you, because in reality, default motions usually are not granted. It takes a lot to get it done, and if someone ultimately shows up to put in an answer, for the most part the default is not going to stick. So again, practically, work it out.

As plaintiffs, we always get a call or an email from the defense counsel or a carrier asking to extend their time to answer. So, what do you do when you get a request for an extension of time to answer?

The first thing you should do is always, always, always grant a defendant an extension, whether it's through a carrier or a counsel. It's a courtesy, and there's no way you can force them to do it in time anyway. Motions are going to take time, so give your adversary the courtesy. A lot of times, defense counsel and even carriers don't get the complaint until the day before it's due, and they haven't had time to do their due diligence in preparing a proper answer, so give them time. It's customary within our industry to give a 30-day extension. Tell them to send the stip and just sign it. You should freely be giving 30-day extensions.

Now for my friends on the defense side, if you find yourself calling up the plaintiff's lawyer three weeks after the answer was due, don't ask for 30 days. That's not fair to the other lawyer. As plaintiffs, we have an obligation to move our case and tell our clients when they should reasonably expect the answer in, how it works, and when they're going to have a conference.

If you are that far behind, or if you're several weeks late already, when you're calling for an extension, only ask for 2 weeks. Don't ask for a month. I personally get annoyed when that happens, and we are asked for 30 or 45 days to put in an answer when we've been hounding the carrier and everyone else for weeks. You can certainly put an answer

together within 2 weeks if you're running late. That's reasonable. Essentially, try and give those courtesies, but work with them if you can.

You may be thinking, "Why would you want to give up everything right away to your adversary and tell them everything about your case early on?"

The answer: because they're going to know anyway. In litigation, there are no secrets. There are not allowed to be – things are not allowed to be withheld. It is a full and open discovery. You have to give everything over to the other side. You have to share your information. Delaying the giving of information that you may have already is just going to delay resolving your case.

Now strategically, might there be some little tidbits here or there you may now want to share, and that's fine. You can always do that, be strategic. But for the most part, give the medicals, the injuries, the theories. If you don't have all the medicals in yet as a plaintiff, tell your adversary that you don't have them yet. But once you get them in, start sending them; don't make them wait. Just start giving them things to move the case.

"In litigation, there are no secrets. There are not allowed to be....you have to share your information."

Defense counsel, you'll want to start receiving, reviewing, writing your reports, covering yourself, and asking questions. The best types of litigations happen when there's a back and forth between a defense counsel and a plaintiff's counsel.

So, to summarize this first part; try and get off on the right foot and work with your adversary. Most likely, we are all going to need favors from each other during the course of the litigation and what goes around, comes around. If you come across a jerk that's not going to extend you courtesies, of course you're not going to extend courtesies to that person in return. So, it's important that you put out the olive branch early on, whichever side you're on.

Next, when the answer comes in, what you're going to want to do is review it and look through a couple of things that are important right off the bat. Most answers are only going to say admit, admit, deny, deny, and then a bunch of affirmative defenses, and that's fine. But there are some things you want to look for as a plaintiff's lawyer in particular, and as a defense attorney, some things that you want to make sure you get right in your answer.

First of all, when it comes to ownership or specific facts that are alleged in the complaint, you want to look for admissions or denials. When it's a property case involving you suing a building owner or a maintenance company or anything where there's an entity that you're suing, you want to make sure that you sue the right entity; you want to look

and see if they are admitting ownership, if they are admitting maintenance, if they are admitting operation.

Make sure to look through all of that because if they're not admitting it and they are denying ownership, call up defense counsel and inform them that you did a deed search; you had your investigator search, and they are denying ownership. Ask them what's going on, check if it's an error or if they are trying to protect themselves because they don't know, and ask if there is another owner.

This is the first opportunity to work through things that can become big problems later on. If you find out a year into litigation that you've named the wrong party, that's a problem, but if you find out really early on when the answer comes in, it's not. You can amend your complaint, re-serve it, and get amended answers. I encourage you to look for all these admissions and denials of dates, of facts, of ownership, of companies, of properties and make sure that you lock it down pretty early on.

If something is stated in the pleading, it's evidence. If there's an admission in answer of ownership (or anything else), you can put that into evidence at the time of trial as legal proof. It's a pleading. Make sure the answer is verified by somebody with the authority to verify it.

Documents should be verified by a party with knowledge. A lawyer can also verify certain records if they've done their due diligence and they are familiar with the details. Having an attorney verify a document should really only be done if the client is being difficult and you need to get the filings in. But you should always follow it up with a client verifying a document.

Essentially, see if the answer is verified. If it's not, make sure you follow up with your adversary and get it verified. Find out who is signing off on admissions of ownership and everything else; you're going to look for verification, admissions, denials, and then you're going to look at affirmative defenses. In an answer, a defense lawyer is required at the outset to set forth every possible defense that they anticipate raising at any time in the litigation, including up through a trial and even after a jury verdict.

The failure to list a certain defense within the answer as an affirmative defense may prove fatal to the defendant raising that defense later on in the litigation. The CPLR has sections on this. I'm not going to get too much into the weeds on this now - it's easy to research when defenses need to be raised - but feel free to reach out to me if you have questions about it. I've run into cases where I see defense attorneys move for summary judgment to dismiss something, but when you look back through the answer you find that they haven't pled a defense or they haven't done it properly.

Plead them all, especially the affirmative defense of lack of jurisdiction on either personal or subject matter. We talk about preparing the complaint and asserting proper jurisdiction in Part 2; if you have not asserted it properly in your complaint or if you have not served the process properly on the defendant, then you may not have proper jurisdiction. In that

case, there's a chance you could get all the way to verdict and then discover your case can be thrown out because you never obtained jurisdiction.

Now, when the answer comes back, you're going to analyze all the affirmative defenses. The jurisdiction of defenses are ones you'll want to deal with right away because if you don't, the defense doesn't have to move on it early. And like I said, you can have a nice verdict and then the defense can move to dismiss the case, citing improper jurisdiction. So, I advise you to deal with those. Look and see if they are asserting it. Sometimes they are asserting improperly, and sometimes they're asserting it properly.

If we see an affirmative defense asserting lack of personal jurisdiction, we immediately send a stipulation to the defense with a copy of our affidavit or service saying, "Here's the stipulation withdrawing your affirmative defense. That's the jurisdiction." Include your affirmative defense number, cite it where it's listed, and you give them the affidavit. That should be signed and returned as a matter of course.

If you are on the defense side and you have the affidavit of service, don't make the plaintiff's lawyer go chasing you down. Sign the stip. The stip gets filed and the issue is done with.

If you are on the plaintiff side, you don't let that go. You, diary it until you get that stipulation signed and filed with the court.

For example, we just had a case against the city, and they did not notice us for a 50-H hearing of our claimants. We waited the appropriate amount of time, and under Rule 50-H or the Municipal Law, if they don't notice you for 50-H hearing within a certain time period, it's considered waived and you can go ahead and file your summons and complaint.

Of course, when we filed our summons and complaint, we got the answer in from the city, and in it they have an affirmative defense that says that we did not comply with 50-H by appearing for a 50-H hearing. That could be fatal, because the 50-H is a municipal statute

that concerns how you can appropriately proceed with the claim, and if you fail to satisfy that, it can become a jurisdictional defense.

In a case like this, or if you come across any defense that you want to call out as not being proper, you should do that when the answer comes in. Prepare a stip, put it under a cover letter, email and mail it to your adversary so they get it both ways, and diary to follow it up so you don't forget about it. Stay on top of those issues.

When the answer comes in, typically there will be demands attached to the answer. Realistically, it's going to be a stack of demands attached to the back of the answer, demands for a bill of particulars, demands for authorization, demands for witnesses, demands for collateral source information.

"Make sure you're responding and serving responses to the right place, otherwise it could be a problem down the road."

If you don't know what collateral source is, that's outside benefits that your claim may be getting. Whether it's Medicare, Medicaid, Worker's Comp, or disability benefits, those are all collateral sources. It's a source of something benefitting the client that's collateral to the case, because it's outside of the case.

Once you receive all these demands, you're going to want to start preparing your responses. There may be notices to depose your client in there, along with dates. Put those dates in your calendar, your diary, your firm calendar, your firm diary, your personal one; although those dates are rarely the actual date for the deposition, it's good to put them in as a control date and as a reminder, and to show they have noticed your client for a deposition.

The defendants get the first shot of serving a notice of a plaintiff for a deposition and their answer before the plaintiffs have the right to serve a notice for a deposition of a defense witness.

Now, everybody assumes in litigation that the plaintiff goes first, followed by the defendants, and they go in the order of the caption. To my understanding, there is no such authority for that. And frankly, whoever notices first gets first bite at the apple. As common sense, it usually makes sense to have the plaintiff go first.

But there are times where the defense side is dragging their heels in taking your client's deposition, and you can push for their client's deposition.

In going in the order of the names of the defendants and of your defense counsel, you put in who you want to notice, whether it's a plaintiff, co-defendant, or anyone else, because that's technically how it's supposed to go.

When lawyers sit back on priority of depositions, that's nonsense. In federal court, I've gotten lawyers frankly called out on it, and we moved ahead without the order of witnesses from the caption, whether that meant the plaintiff going later or defendants taken out of order.

Once you've looked at all those demands, you need to start preparing responses. You don't just write in the file; you have to respond to these demands as part of the litigation. Since you are the one bringing the case, you have to be ready to do it, so start working on it. Put as much information as you can in your responses. If you don't have information, say that it will be provided under separate cover upon receipt.

To recap: initially, you're going to look through the demands, see if they are there, diary to respond to them - within 30 days is a fair period of time to have it completed and sent back. Take a look and see if your adversary is asking for everything to be sent via email or to be sent via mail only. Sometimes – mostly pre-pandemic - I would see something in an answer attachment saying that they do not accept service via fax or email. So that's a way of saying, "Don't think it's proper by emailing me." You have to mail it.

These days, more and more often, I see the contrary, where firms set up instructions to serve all responses via email. Often, these firms have been set up to receive all discovery, demands, and responses through a server, and they set up an email for that. It's important to look for that information. Make sure you're responding and serving responses to the right place, otherwise it could be a problem down the road when someone makes the claim that you didn't serve properly, or they didn't receive it properly.

After we review the answer, the very first thing we do in my office is check off the admissions and denials. We look at the affirmative defenses and address those by way of a stip or a phone call (or both). The next thing we do is file for a preliminary conference, otherwise known as a PC. The preliminary conference can be filed for once the answers arrive from all defendants, so if you only have one defendant and you get the answer in, boom! We file for a PC within 24 hours. If you have a few more defendants, wait for them and the minute they come in, file it.

YOUR ADVERSARY FAQ

Is the defense's jurisdiction waived if the defendant fails to move to dismiss within a certain period?

In my understanding: no. You cannot waive jurisdiction. You can't even stipulate to waive jurisdiction. I had a situation regarding proper venue that I've mentioned before, where my client was incapacitated and lived in the Bronx. It was a diversity case in federal court. His appointed guardian was from Virginia and the other defendants were in New York.

I brought the case in federal court based on diversity of jurisdiction; the location of the guardian being Virginia and the other parties being in

New York. And the judge called us out on it right away. He had us come in for a conference pre-pandemic and said he was not sure we had proper jurisdiction in the federal court, and the defense counsel agreed.

I countered by presenting the research; I gave defense the cases. I was prepared for the issue. After reading our research, the defense counsel agreed that the federal court had jurisdiction and that they were not going to move to dismiss our case.

We reported to the federal judge. Defense counsel agreed to sign a stipulation waiving any jurisdictional defenses. The court reiterated the law and told us, "You cannot waive jurisdiction by a stipulation. There either is jurisdiction or not. Period.

Are there any situations where I wouldn't grant an extension of time?

Nice question, I can't recall not doing it. If it's a situation where I'm getting totally blown off by the insurance company from day one and they are not acknowledging anything from me or have been totally unresponsive from the get-go and it's the same defense lawyer the whole time, I may move for a default. I'm not going to give courtesies when they put me through the mill.

Especially if after the initial contact, I'm sending them letters and they are completely ignoring me for 60 days or so, that's when I may go ahead and move for a default and tell them I'll see them in court. If that's the case, know that the default may not get granted, but unless someone really pushes my buttons - that's usually the only time I won't grant an extension - it's just a matter of courtesy.

Can you have an affirmative defense withdrawn by notice to admit instead of a stip?

In terms of a personal jurisdiction defense, if that is the case, I don't see that as a way to be dealt with by way of a notice to admit. You just need to be sure you're buttoned up. If you've done the research and you yourself feel comfortable that you have proper jurisdiction, that's the best counsel I can give you.

You recommended sending the PC request once answers are received from all defendants. While waiting for all defendants, is it best practice they have to appear for PC before all defendants have appeared?

I don't recommend doing that, because you can appear for a PC but if you have a defense firm show up, they're going to say, "I wasn't there. I didn't even appear yet. I'm not bound by this PC. I'll be ready when I catch up."

It's a practical matter. You really need to wait until you have everybody in, and most defense firms are not going to proceed with depositions and discovery until everybody is involved. They're not going to present at a conference, and as a result you may get a law clerk who is not too happy with you when they say, "Why are we here if you're still waiting on answer? Did you move for default? What's going on with that answer?"

THE PRELIMINARY CONFERENCE

Filing for the preliminary conference is your first real way of getting in front of the court, getting on the court's docket, and being assigned to a part and a judge.

(For those of you who don't know what a part is, a part is a courtroom. If you are going to a courthouse and you're in Judge Silver's part, it will give you the part number. Sometimes the judges change, but the part is the same. There are a lot of well-known parts; for example, many of us know Part 40. Your case will be assigned to a judge and/or part once you file your first request for judicial intervention, which in our cases, is usually a request for preliminary conference.)

A request for judicial intervention is known as an RJI. The RJI is filed. The very first time, you're basically asking to get assigned to a judge or to a part. Only filing your complaint, your affidavits of service, and an answer is usually not going to get you assigned to a judge and a part. It's not going to happen in state courts.

What you want to do is affirmatively say that you want to get this case moving, and to do that, you want a judge, a discovery schedule, and a conference. List what you are looking for. Sometimes early on, you file an RJI in specific circumstances:

- If you need to file an order to show cause before an answer comes in or before preliminary conference happens
- If you need to file an early motion
- If you're filing a motion as a defendant instead of an answer (which you can do)
- Whenever you're filing for a judge to either have a conference, decide something, or render an order

And you attach that when you e-file whatever it is you are filing.

In most cases when we file, the first thing to get on the court's docket is the preliminary conference request, or PC. So, we will file that with an RJI. We want to get this on the calendar. We want a preliminary conference. And since it's our first time asking to get a judge or a court involved, we submit our RJI.

By the way, I explain this process to my clients. You've heard me reiterate this and it will be a theme I'll continue; educate your client, whether your client is the defendant or a plaintiff in a case. I believe good practice is giving your client as much information as possible. And I talked about this in Part 1; when a plaintiff is asking what's involved or if they should start a lawsuit, or they express doubts or questions about how long it will take or what they will have to do, I explain to them the timeline; when I think we will probably file summons and complaint, how long it takes for an answer, that we usually grant an extension, that we then file for a preliminary conference, and that it then takes probably a month or two to get a preliminary conference data and/or order and then that sets forth the discovery schedule. And that way, clients on both sides have an idea of process in advance.

Next, we file for a preliminary conference in state court. Now, in federal court, you will be assigned to a district judge and typically a magistrate upon the filing of the complaint. Usually, once an answer is filed, all issues joined, and all parties and litigations have appeared with counsel, in federal court the court will send out a notice to the litigants.

You also want to check in when the magistrate and district judge are assigned. You can do this by immediately logging in to the court system and looking up the judge and magistrate. Download their local rules. Check to see who is going to be overseeing discovery. If there's not a referral order to a magistrate, it will oftentimes go right to the district judge until it's referred to a magistrate. Do your homework. Look it up. Find out.

> *"...there's nothing wrong with asking for help."*

Look at the rules and see what the rules are. It may say that within a certain period of time of an answer being received, you need to meet and confer pursuant to Rule 26 of the Federal Rules with each other, generate a case management plan in order, and submit by a certain date and time. Once it's submitted, they may have a conference with you, or you could submit it in the order in lieu of conference. It changes depending on the court and the judge.

But usually, you'll get some notice. If you're not as familiar with the process, reach out to someone who does a lot of work in federal practice. Reach out to me. Reach out to your adversary; they may know. Again, communication is key. Tell your adversary if you're not sure; don't be afraid to ask if you need to generate the case management plan and order because you haven't seen anything from the court yet. But before you make that call, look up the individual judge's rules; there's nothing wrong

with asking for help, but if the information is easily accessible, you don't want to appear ignorant. The rules are very nicely available and downloadable in a federal court.

Now, either in federal court (with that case management plan in order) or in state court (with the preliminary conference), a time will eventually come that you will be filling out a preliminary conference, initial discovery, and/or case management form, which is essentially a discovery schedule.

As far as I know, it's still a mixed bag in terms of whether or not the PC will be in person or over the phone or Zoom. But one way or another, you need to follow up and either prepare, receive, or request one, because the preliminary conference order, once it is so ordered by the judge, gives you the dates when discovery is due and for depositions to be completed.

In general, if you run into any problems, you can never go wrong picking up the phone, calling the court clerk, and asking what the deal is with PCs or preliminary conferences. There's still a lot of confusion even once you get a date. We've got a lot of dates for preliminary conferences or for compliance conferences. The day before, when we were trying to confirm, we were asking, is it on a Zoom? Is it on Microsoft Teams? Is it a phone call? We've got nothing. We called the party and they said, "Oh no, those are just control dates. We submitted an order."

So, if you don't know what's going on, you're not alone. Most of us don't know what's going on. But you need to find a way to work it out because you need to move your case, and the longer you wait to file for and complete a PC, the longer you're going to have end dates.

More so now than I have in the past, I believe defense lawyers really want to move their cases for their clients. And as plaintiff's lawyers, we always want to move our cases because it makes us look good to our clients to get resolution. As you know, on a contingency fee, we don't make any money until our cases get resolved. If you're a plaintiff's lawyer and you've got files sitting around that you haven't filed for a PC on or that you're not pushing for discovery or depositions, I can't imagine for the life of me why you would do that. You need to bring in help. You need to get organized. Push. Push. Push. Move your cases forward. No one is going to come in and do it for you. It's on you.

If it's a case that you don't want anymore and that's why you're not moving it, then step up and reject the case. Reject it early, so a client can get new counsel, or if you've been retained, file a motion to be released.

INITIAL DISCOVERY

Now let's talk about initial discovery. At this stage of the litigation, you're not necessarily sure what exactly you're going to need in discovery and what is available. It's kind of like the process of peeling the layers of the onion away as a plaintiff and as a defendant; you want to get more and more information. And you shouldn't file your note of issue until you are satisfied that you've peeled away every layer within reason and gotten every shred of information that you can to certify discovery is done.

Things pop up at depositions. You follow up with discovery demands. There are lots of demands, and you can keep following up. You can keep requesting information. Lots of great stuff can be done in discovery, but initially, as a defendant and as a plaintiff, you will have initial boilerplate and tailored demands that you want to get out immediately.

As a defendant, you want to get all your boilerplate and general demands out with your answer, your demand for bill of particulars, authorization, statements, witnesses, x-rays; you name it, get those out with the answer. Get it moving.

As a plaintiff, when you receive the answer, not only are you working to respond to demands, but you're working to serve your own demands. Then we do a notice for discovery and inspection where you're asking for videos, photos of your client and of the incident, of the area of accident. It's always an on-going demand.

I advise getting all these demands out early and treat it as an on-going demand. There may come a time where you show up at the time of trial, and when you realize they haven't given you a video; they may claim you never served them with a demand for one. If you got your demands out, you can show that you did, years ago at the start of the litigation.

The same thing is true with experts. You've served the demand; they have to give you their expert's disclosures before trial.

In terms of insurance, it's important to know every insurance policy applicable to your case and not just the limits. You are entitled to full policies, folks. In state and federal court, we will typically only get a disclosure of limits. You are entitled under CPLR and Federal Rule 26 for full insurance policies. You want to get them. Always look and see if there's an umbrella or if there's excess.

Get out your demands. Each case you may be handling is going to have different "generic demands" that will give you some initial information on the case. For example, in a premises case where the sidewalk was recently redone in front of a building and someone tripped and fell in front of a building, in addition to asking for photos and videos and incident reports early on in your notice for discovery inspection, you're going to want to ask for sidewalk repair records, invoices for repair, contracts with any sidewalk repair companies, and maintenance and inspection records of the sidewalk.

Keep pushing for those materials; you must have them before you agree to sit down to a deposition.

As a defense counsel, you're not going to want to depose a plaintiff until you've received all the medicals and the information that you need before questioning the plaintiff.

And as a plaintiff's lawyer, you don't want to start questioning defense witnesses without the benefit of all of these invoices and subcontracts and documents, because you will miss things and lose the opportunity to question on probing the discovery in your case.

To sum it up: your initial discovery needs to go out quickly. If you already have experts on board, they're going to tell you things to demand in discovery. It doesn't hurt to get everything out early. Get the ball rolling. You can always supplement your discovery as you go.

INITIAL DISCOVERY FAQ

Do we give medical authorizations if it's an event that took place a year before the date of incident, or is it standard to give a certain timeframe?

You have to give them more than a year because each case is different. Let's say you have a case where your client was in a car accident and had spinal surgery, but their back was bothering them six years ago, way before the accident, and at the time a doctor and an orthopedic surgeon recommended surgery. I would tend to think that that's probably probative and the defendant would have a good argument to say, "I know this was five years ago, but they recommended surgery five years ago to the same exact area that they just had surgery in this case. We are entitled to it."

Each case is going to be different. In general, you're going to have to give a broad timeline for medicals; you will probably have to go pretty far back, or as far back as you can get records. I don't think you're going to find records older than 10 years or so, but if push comes to shove, I think most courts are going to agree that if it's at all related, you're going to have to give up those records. I'd be prepared to give the authorization and give those records.

How do you deal with the city in terms of discovery?

We always have to cut the City a little bit of slack because they've just got so much happening. They're overwhelmed and understaffed. Try and look on the answer and see if there's a specific attorney assigned and try and contact that attorney. Make phone calls. Work it hard. Usually, you'll get to someone that finally gets the case, and they will work with you and ultimately get you the discovery that they have. They have a hard time getting it sometimes as well. But motion practice is usually not going to speed things up and should be used as a last resort.

THE BILL OF PARTICULARS

The last thing I want to touch on is the bill of particulars. Now, there's a relation between a bill of particulars and the preliminary conference. For the 25 years that I've been practicing, if you have not served the bill of particulars, every time you show up to the preliminary conference the defense counsel asks to adjourn the preliminary conference even if they show up there in advance, citing a lack of information. The court agrees, the law clerk agrees. They adjourn the preliminary conference.

There is an element found in every preliminary conference order: a date upon which the bill of particulars or a demand must be served. I'm not aware of any legal requirement that you have to serve a bill of particulars before preliminary conference. However, knowing that in fairness to your adversary, they want some information about the case before showing up to a preliminary conference, I'd advise you to try to get them a BP even if it's the day before.

In terms of personal injury cases, a lot of people ask me what I say about constructive notice and actual notice, and wonder how I respond when my adversary is asking for codes and rules, what I say other than the injuries, and how I list them.

Generally speaking, you want to clearly and concisely list all the injuries. You want to list if there's an aggravation of a preexisting injury or an exacerbation in there. List if there have been any surgeries. Always put the most serious injury in surgeries up first because that's the first thing that your adversary on the defense side is going to look at to gauge the seriousness of the injuries.

On the plaintiff side, the first thing you're going to want to start preparing is the response to the demand for bill of particulars. Work with your client. Get as much information as you can and get that BP out, and get it out first; it doesn't have to go with all of the other responses. I'm sure my defense colleagues attending will agree that they like to get that as soon as they can, even if some of the other material is to follow.

THE BILL OF PARTICULARS FAQ

When should I redact information, and how should I file s ensitive information?

There are lots of restrictions about e-filing in state and federal to prevent filing confidential and personal information, including dates of birth and social security numbers. All of that information has to be redacted. If you start filing documents that have medical records attached, including authorizations or treating providers, you're really walking a dangerous line. Do not file that.

When we are doing depositions and even when we are serving a BP, we don't even give the social security number in the BP that we send to defense counsel. We are not even filing it; often we only use the last four digits. Even in depositions, you never give a full number. You give it to them verbally in a deposition and tell them not to put it on the record. You could even give it to them on the phone, but don't put it down anywhere where it could be a public record.

If the plaintiff needs to give a defendant authorizations to release the plaintiff's records for prior accidents without the defendant laying the ground or the foundations for those demand even if it's different injuries, is this a fishing expedition?

Good question. The answer is you have to release them. Defense lawyers are entitled to that if they become knowledgeable that your client has had prior surgeries, prior medical treatment, or prior hospitalizations, even if it's not for part of the body that you're alleging in this case, you need to prove it; they're going to want proof. They're not going to take your word for it. So, get those records.

As plaintiff's lawyers, our clients don't always tell us everything. They don't always tell us about all their injuries. Sometimes they think a serious injury they may have is not related to the accident and it turns out it is, and they don't want to tell you. You have to make sure you go over all of your clients' treatment with them and let them know that it's fair game. And that generally, if the records can be obtained, you're going to have to give it to the defense counsel. It's not a fishing expedition.

Let's say your case involves a wrist fracture, but a 15-year-old knee surgery record is addressed at the plaintiff's deposition. After they have the wrist fracture records and the knee issues were made clear at deposition, if they start asking for authorizations for other treatment regarding the knee 15 years ago, then you can object. But initially, they have the right to see significant treatment, hospitalizations, surgeries, and the like.

During this discussion, someone made comments about what to do with the stipulation for withdrawing the affirmative defense of lack of jurisdiction. A lot of attorneys are saying they will usually put that stipulation in there when defense counsel is asking for more time, sort of a quid pro quo. "Oh yeah, you want more time. Make sure you stip out this affirmative defense and those other ones that are nonsense that you know don't apply. We will prepare the stip. We will send it to you, or you prepare it and send it to me." And I do that quite often as well. So that's a good quid pro quo. Knock it out all at once. They want more time, and you don't want to have to deal with the nonsense affirmative defense.

GENERAL FAQ

In the situation about the 50-H hearing and serving a notice, does the City have to file that on the New York State ECF?

I think a letter is deemed fine; you can serve with a letter to appear and that's sufficient notice. I do not believe that they need to file that.

Be aware; a lot of us out here have misconceptions on what our obligations are in regard to electronic filing. I see a lot of letters filed on the ECF system and a lot of responses and demands filed on the State ECF, and my understanding is that's not appropriate. I personally don't appreciate it when I've had defense counsel send the letter that they file on ECF saying that we haven't given them something or that we owe them when we have given the files in question. Now that they have filed the letter, it is a public document on a case showing that we were somehow behind in complying when that's not true. Pulling a move like that is not appropriate.

ECF is really for pleadings, motions, court notices, and conference filings. Stay away from discoveries or discovery demand letters on ECF. I think you can get into trouble with that.

Can you give some guidance on a new 202.20-d Deposition of Entities (which is New York's FRCP 30(b)(6) equivalent as of February 1st)?

Wow! That is great news. I'm going to be talking about that in my depositions ebook. The 30(b)(6) tool is amazing and I am thrilled. I did not know that there is an equivalent of it. I'm going to start using it immediately.

Let me give you all a brief, brief, brief primer on Rule 30(b)(6) Depositions.

Instead of a standard notice asking a party to appear for a deposition or produce items, a 30(b)(6) Notice is a list of all the areas that you are curious about for which you need answers from your adversary. Either side can prepare this. You are putting all that information into the 30(b)(6) Notice. For example, your list could include producing a witness or witnesses with knowledge of a specific topic or topics.

In my earlier slip and fall on ice in front of a building case example, I'm going to put in all of those into this notice. Who is in charge of clearing the sidewalk? What materials were given? Under what circumstances are they supposed to be hosed down? What kind of warnings are they supposed to give and put out? List all that information.

If they produce a witness who doesn't fit that knowledge, then they have to produce another witness that can comply and has a knowledge of everything you listed. Either that witness has to have firsthand knowledge, or it has to be a witness who has made reasonable inquiries to get the information.

Even if it's not the person who knows that you're supposed to put out salt and a "Warning" cone on an icy sidewalk, the person they produced for a deposition needs to find out the answer and come to the deposition and say, "I personally didn't know to do this, but I checked with our requirements in the building and this is what they are supposed to do in a situation like this." Sometimes you're going to get multiple witnesses.

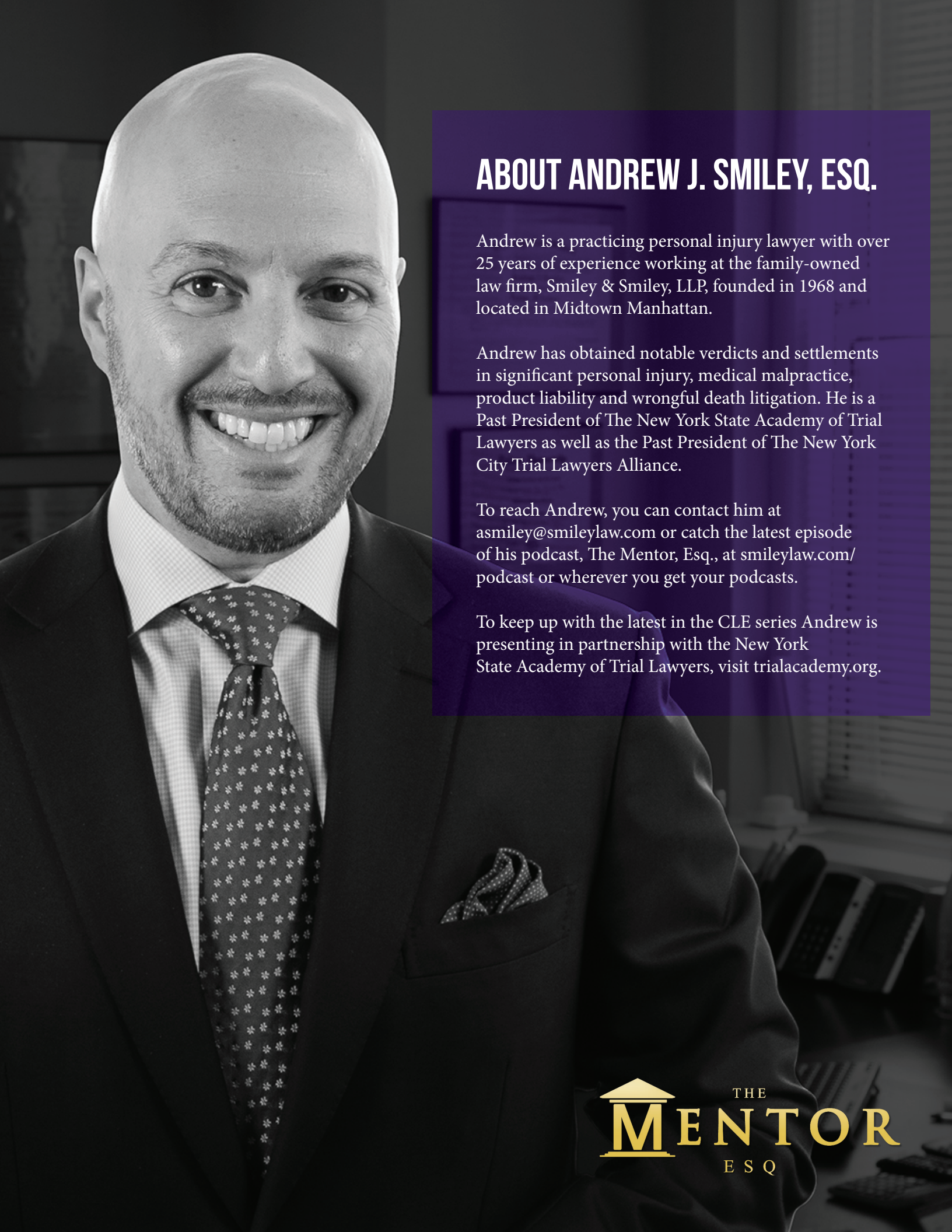
It's a great tool. In federal court, we've even threatened sanctions when they produce a witness who not only knows nothing, but who has failed to take steps to get answers. I've had that happen. I've given very thorough notices on my 30(b)(6) of all the information, and when the witness goes on record saying they don't know the answers, I can ask if they took any steps before this deposition to obtain this information and learn that they didn't.

Defense counsel, if you get hit with the 30(b)(6) Notice, don't blow it off. Make sure you tell your client to find somebody who can provide answers to all of the questions. Tell them to do their homework and investigate, because they're coming for a deposition and you're going to get sanctioned unless they get that information.

Sometimes as plaintiffs we have no idea who the right witness is, and it's only through a series of depositions that you start asking yourself who would know the relevant information. That's where the the 30(b)(6) Notice comes in.

I can't reiterate enough how much of a community that I feel we are creating by sharing, developing, and cooperating throughout this series. I'm really excited about it. I've been having great one-on-one Zooms, emails, phone calls with all of you and I encourage it. We can all learn so much from each other. I've been learning so much. I'm the one giving these CLEs and I keep learning more and more. So please continue to contribute in every way you can, and please continue to reach out to me whenever you want to workshop any issue on any case.

Let's all continue to stay in touch – feel free to reach out to me as you have been doing. The lawyers on these CLEs will acknowledge that I refer cases and have gotten some referrals in return. We will keep workshopping cases, ideas, issues. It's a great thing and I want to keep it going.! So, please, always reach out to me. I can be reached at asmiley@smileylaw.com, and if you liked the CLE, please let others know about it. Come back for more.



ABOUT ANDREW J. SMILEY, ESQ.

Andrew is a practicing personal injury lawyer with over 25 years of experience working at the family-owned law firm, Smiley & Smiley, LLP, founded in 1968 and located in Midtown Manhattan.

Andrew has obtained notable verdicts and settlements in significant personal injury, medical malpractice, product liability and wrongful death litigation. He is a Past President of The New York State Academy of Trial Lawyers as well as the Past President of The New York City Trial Lawyers Alliance.

To reach Andrew, you can contact him at asmiley@smileylaw.com or catch the latest episode of his podcast, The Mentor, Esq., at smileylaw.com/podcast or wherever you get your podcasts.

To keep up with the latest in the CLE series Andrew is presenting in partnership with the New York State Academy of Trial Lawyers, visit trialacademy.org.

THE MENTOR ESQ

CLE SERIES EBOOK

THE MENTOR ESQ