



OAJ Destination CLE: Trial Tactics Seminar

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## **Getting Prepared to File: Pre-Suit Investigation**

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# GETTING PREPARED TO FILE: PRE-SUIT INVESTIGATION

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Over the years, I've tried to develop a system using checklists to take in a new matter and conduct an investigation prior to filing a suit. Most of my work over the years involves products liability claims, as well as aviation accidents and other significant torts, and often on a referral basis from other attorneys. The following checklist, although focused on products for the most part, is adaptable to various types of cases.

1. Initial call screening
  - Non-personal injury matter from a non-attorney
  - Personal injury or an attorney calling – paralegal to screen
  - Paralegal review - summarize
  - Attorney review of paralegal notes
  - Products liability or direct request for attorney - pass to attorney
  - Begin assessment of matter with the following *in this order*:
    - DAMAGES
    - CAUSATION
    - LIABILITY
  
2. Collect basic information - paralegal
  - Police Accident Report and photos; be sure to get all supplemental reports
  - Attorney and Expert photos/reports - collect all taken to date by referring
  - Basic medicals
    - EMT/Transport
    - ER records/Admission/History & Physical
    - Radiology reports – first week
    - Radiological films – first week
    - Operative reports – first week
    - Discharge summary
  - IS THE MATTER ALREADY IN SUIT ? - ADVISE ATTORNEY***
    - Statute date (even if run)
    - Court/judge
    - Trial date ?
    - Expert disclosures made ? Date due ?
  
3. REVIEW IMMEDIATELY AND BE CAUTIOUS ABOUT TAKING:
  - Trial date close (less than 90 days) unless referral can postpone it
  - Statute date less than 90 days from now unless referring attorney files suit
  - Damages less than \$\_\_\_\_\_ (set your own threshold based on case type)

4. Open file – legal assistant
  - Retainer agreement signed and scanned
  - Referring counsel fee split letter signed by client and attorneys, scanned
  - Case management software
    - Statute date – earliest possible with 60 day tickler
    - Note if government claim with short statute
    - Also - Two attorneys review and sign off on SOL's
  - Client and referring attorney information
  - Case cost ledger setup
  - Time keeping software set up if used
  - Outlook entries
    - Referring counsel contact information
    - Calendar SOL, trial if set, expert disclosure with –30 days
  - Set up directory organization or use case management software
  - Set up barcode/Bates index/e-filing
    - Print barcode set and apply to paper file; scan paper file
5. Client background - team
  - Background check on client - firm investigator
  - Client meeting and interview - attorney and investigator
    - Explain investigation
    - Collect their photos, notes, all names
    - Keep diary for damages
    - Explain importance of confidentiality, attorney client privilege
      - No discussions with anyone other than attorney about case
  - Social Media check - Facebook, Twitter, MySpace, others
    - Provide warnings to client(s)
  - Phone and text records - collect if plaintiff is driver
6. Assure evidence is secured - paralegal
  - Vehicle(s) placed in indoor storage - warehouse or mini-storage
  - Chain of custody record created
  - Photos before and after moving wrecks - e-filed
7. Inspections by attorney
  - Vehicle – personal visit - non-destructive inspection
  - Scene - personal visit
8. Perform preliminary reconstruction - by expert or technical paralegal
  - Black box data – Event Data Recorder downloaded?
  - All photos of vehicles collected - reviewed
  - Scene layout from police report
  - Preliminary recon from expert
  - Vehicle stiffness data and calculations [www.neptuneeng.com](http://www.neptuneeng.com)

9. Defect research, place in e-file - paralegal
  - OJA listserves (and other trial lawyer organizations)
  - TrialSmith [www.trialsmith.com](http://www.trialsmith.com) (membership required)
  - AAJ [www.justice.org](http://www.justice.org) (membership required) Exchange records
  - NHTSA [www.nhtsa.dot.gov](http://www.nhtsa.dot.gov) recalls, TSB's, consumer complaints
  - BNA [www.bna.com](http://www.bna.com) records
  - WESTLAW [www.westlaw.com](http://www.westlaw.com) other cases, experts
  - Personal files - global search on network
  - Wikipedia - [www.wikipedia.org](http://www.wikipedia.org) information search
  - Google - Scholar, Maps, general research
  
10. Confer with experts, memos to e-file - attorney
  - Reconstruction
  - Defect
  - Biomechanical
  
11. Legal Research, summary to e-file - attorney
  - Statute of limitations – products, death, minor, government claim
  - Statute of repose
  - Jury instructions** for products, causation, damages, negligence
  - Joint and several rules, applicability
  - Enhanced injury
  - Pure crashworthiness
  - Caps on recovery
  - Caps on fees
  - Court rules, evaluate state v fed
  
12. Medical/Damages review and e-file - paralegal
  - Summarize basic medical records
  - Total medical bills to date
  - Estimate past wage loss
  - Estimate future impairment of earning capacity
  - Medical liens?
    - Medicaid
    - Medicare
    - Health Insurers
    - Providers
  
13. Team review – team approach - attorney(s), paralegal, investigator
  - Damages sufficient
  - Defect understood
  - Defect history confirmed
  - Causation
  - Experts available
  
14. **Be cautious about taking a matter involving:**

Alcohol use by plaintiff, especially if > .08 BAC or refusing test  
Marijuana use by driver plaintiff  
Lack of belt use (although may be due to restraint defect)  
Social media statements harmful to liability or damages  
Cell phone or text records near time of accident  
**If declining case, do so IN WRITING**

15. Review file opening – legal assistant
  - All phone numbers
  - All case dates already set
  
16. Interview witnesses who may be deposed once suit is commenced - investigator
  - Scene witnesses – eyewitnesses and EMT's, firefighters
    - belt(s) used
    - speed, direction
    - due care by plaintiff(s)
    - position as found at scene
    - condition of vehicle(s) as found at scene
  - Police officers - investigators and at scene
    - Be sure they have no harmful information or attitudes
    - Confirm belt use, or basis for non-use (only because ejected)
    - Try to get copies of all notes not otherwise in the file
  - Medical providers
    - treatment was reasonable and necessary
    - amount charged was appropriate
    - permanent condition (if plateau reached)
  
17. Draft complaint/petition, if not already in suit – paralegal and attorney
  - Collect exemplar complaints - see sources in #9 above
  - also check e-files for similar matters
  - Check defendants' corporate status and locale
    - Change of name, ownership, prior bankruptcies
    - Confirm entity named is correct with other recent filings
  - If international, contact APS [www.aps.com](http://www.aps.com) for forwarding
  - Review by referring counsel
  
18. Draft discovery requests to be served later – paralegal and attorney
  - Collect exemplar discovery - see sources in #9 above
  - Check e-files for past examples
  
19. Prepare notice/demand letter and contact defendant – attorney
  - Color photos and appropriate exhibits such as medicals
  - Send to OGC
  - Calendar 30 day response
  
20. Collect balance of medical records – paralegal

Confirm complete  
Confirm certified copies  
Barcode and scan  
Distribute applicable records to bio and damage experts

21. Prepare Disclosure statements - in advance of suit - paralegal
  - All meds and bills (barcoded and scanned)
  - Investigation records (barcoded and scanned)
22. Prepare experts for work - goals, time constraints - attorney
  - Outline assignment - when needed
  - Determine if testing needed; if so, plan
  - Assist in obtaining research materials
23. Draft requests for admission for later service - organize case - attorney
  - Case facts
  - Medical condition and bills
  - Damages – permanency and value
  - Liability claims
  - Lack of evidence to contradict plaintiff's claims
24. Research likely Defense experts - paralegal and attorney
  - Review disclosures
  - Research other testimony and reports by the defense experts
  - Go over with your experts in order to be aware of pros/cons of case
25. File petition/complaint - legal assistant
  - E-filing if applicable, soon the norm
  - Serve on all parties (process server, APS, others)
  - Confirm service and file affidavits as per state rules

Following a checklist like this, tailored to your practice, will result in efficiencies, and a possible reduction in malpractice risks. Forms can be created on paper or on your computer network to insure you are following your lists.